OREGON RULES OF PROFESSIONAL CONDUCT

(as amended effective March 1, 2022)

CONTENTS

RULE 1.3 DILIGENCE

A lawyer shall not neglect a legal matter entrusted to the lawyer.

Adopted 01/01/05

Defined Terms (see Rule 1.0)

"Matter"

Comparison to Oregon Code

This rule is identical to DR 6-101(B).

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Reasonable"
"Reasonably"

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code, although the duty to communicate with a client may be inferred from other rules and from the law of agency.

RULE 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) A lawyer shall not enter into an arrangement for, charge or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement;

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

Adopted 01/01/05

Amended 12/01/10: Paragraph(c)(3) added.

Defined Terms (see Rule 1.0):

"Firm"
"Informed Consent"
"Matter"
"Reasonable"

Comparison to Oregon Code

Paragraphs (a), (b) and (c)(1) and (2) are taken directly from DR 2-106, except that paragraph (a) is amended to include the Model Rule prohibition against charging a

"clearly excessive amount for expenses." Paragraph (c)(3) had no counterpart in the Code. Paragraph (d) retains the substantive obligations of DR 2-107(A) but is rewritten to accommodate the new concepts of "informed consent" and "clearly excessive." Paragraph (e) is essentially identical to DR 2-107(B).

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 disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) 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;

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) in connection with the sale of a law practice under Rule 1.17 or 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. In those circumstances, a lawyer may disclose with respect to each affected client the client's identity, the identities of any adverse parties, the nature and extent of the legal services involved, and fee and payment information, but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients. The lawyer or lawyers receiving the information shall have the same responsibilities as the disclosing lawyer to preserve the information regardless of the outcome of the contemplated transaction.

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

(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.

Adopted 01/01/05

Amended 12/01/06: Paragraph (b)(6) amended to substitute "information relating to the representation of a client" for "confidences and secrets."

Amended 01/20/09: Paragraph (b)(7) added.

Amended 01/01/14: Paragraph (6) modified to allow certain disclosures to avoid conflicts arising from a change of employment or ownership of a firm. Paragraph (c) added.

Defined Terms (see Rule 1.0):

"Believes"
"Firm"
"Information relating to the representation of a client"
"Informed Consent"
"Reasonable"
"Reasonably"
"Substantial"

Comparison to Oregon Code

This rule replaces DR 4-101(A) through (C). The most significant difference is the substitution of "information relating to the representation of a client" for "confidences and secrets." Paragraph (a) includes the exceptions for client consent found in DR 4-101(C)(1) and allows disclosures "impliedly authorized" to carry out the representation, which is similar to the exception in DR 4-101(C)(2).

The exceptions to the duty of confidentiality set forth in paragraph (b) incorporate those found in DR 4-101(C)(2) through (C)(5). There are also two new exceptions not found in the Oregon Code: disclosures to prevent "reasonably certain death or substantial bodily harm" whether or not the action is a crime, and disclosures to

Paragraph (b) replaces DR 7-110, making ex parte contact subject only to law and court order, without additional notice requirements.

Paragraph (c) is similar to DR 7-108(A)-(F).

Paragraph (d) is similar to DR 7-106(C)(6).

Paragraph (e) retains the DR 7-108(G).

RULE 3.6 TRIAL PUBLICITY

(a) 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.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may:

(1) reply to charges of misconduct publicly made against the lawyer; or

(2) participate in the proceedings of legislative, administrative or other investigative bodies.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Firm"
"Knows"
"Matter"
"Reasonable"
"Reasonably should know"
"Substantial"

Comparison to Oregon Code

Paragraph (a) replaces DR 7-107(A).

Paragraph (b) has no counterpart in the Oregon Code.

Paragraphs (c)(1) and (2) retain the exceptions in DR 7-107(B) and (C).

Paragraph (d) applies the limitation of the rule to other members in the subject lawyer's firm or government agency.

Paragraph (e) retains the requirement of DR 7-107(C).

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer's client unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work a substantial hardship on the client; or

(4) the lawyer is appearing pro se.

(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness on behalf of the lawyer's client.

(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the lawyer's firm may be called as a witness other than on behalf of the lawyer's client, the lawyer may continue the representation until it is apparent that the lawyer's or firm member's testimony is or may be prejudicial to the lawyer's client.

Adopted 01/01/05

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knows"
"Matter"
"Reasonable"
"Reasonably should know"

Comparison to Oregon Code

This rule replaces DR 7-104(B). It is expanded to parallel Rule 4.2 by applying to situations in which the lawyer is representing the lawyer's own interests. The rule is broader than DR 7-104(B) in that it specifically prohibits a lawyer from stating or implying that the lawyer is disinterested. It also imposes an affirmative requirement on the lawyer to correct any misunderstanding an unrepresented person may have about the lawyer's role. The rule continues the prohibition against giving legal advice to an unrepresented person.

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS; INADVERTENTLY SENT DOCUMENTS

(a) In representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person, or knowingly use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Adopted 01/01/05

Amended 12/01/06: Paragraph (a) amended to make applicable to a lawyer acting in the lawyer's own interests.

Amended 01/01/14: Paragraph (b) amended to expand scope to electronically stored information.

Defined Terms (see Rule 1.0):

"Knowingly"
"Knows"
"Reasonably should know"
"Substantial"

Comparison to Oregon Code

This rule had no equivalent in the Oregon Code, although paragraph (a) incorporates aspects of DR 7-102(A)(1).

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:

(a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Adopted 01/01/05

Defined Terms (see Rule 1.0):

"Knowledge"
"Knows"
"Law Firm"
"Partner"
"Reasonable"

Comparison to Oregon Code

This rule is essentially the same as DR 1-102(B) although it specifically applies to partners or others with comparable managerial authority, as well as lawyers with supervisory authority.

RULE 7.3 SOLICITATION OF CLIENTS

A lawyer shall not solicit professional employment by any means when:

(a) the lawyer knows or reasonably should know that the physical, emotional or mental state of the subject of the solicitation is such that the person could not exercise reasonable judgment in employing a lawyer;

(b) the person who is the subject of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(c) the solicitation involves coercion, duress or harassment.

Adopted 01/01/05

Amended 01/01/14: The title is changed and the phrase "target of the solicitation" or the word "anyone" is substituted for "prospective client" to avoid confusion with the use of the latter term in RPC 1.8. The phrase "Advertising Material" is substituted for "Advertising" in paragraph (c).

Amended 01/01/17: Deleting requirement that lawyer place "Advertising Material" on advertising.

Amended 01/11/18: Deleting requirements specific to "in-person, telephone or real-time electronic contact" and deleting exception for prepaid and group legal service plans

Defined Terms (see Rule 1.0):

"Electronic communication"
"Known"
"Knows"
"Matter"
"Reasonable"
"Reasonably should know"
"Written"

Comparison to Oregon Code

This rule incorporates elements of DR 2-101(D) and (H) and DR 2-104.

RULE 7.4 [RESERVED]

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.

(e) A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as partner or associate. A lawyer may be designated as "General Counsel" or by a similar professional reference on stationery of a client if the lawyer of the lawyer's firm devotes a substantial amount of professional time in the representation of the client.

Adopted 01/01/05

Amended 01/01/14: The rule was modified to mirror the ABA Model Rule.

Defined Terms (see Rule 1.0):

"Firm"
"Law firm"
"Partner"
"Substantial"

Comparison to Oregon Code

This rule retains much of the essential content of DR 2-102.

RULE 7.6 [RESERVED]

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

(a) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(1) knowingly make a false statement of material fact; or

(2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 525
December 6, 2012

ETHICAL DUTIES OF LAWYERS IN CONNECTION WITH ADVERSE COMMENTS PUBLISHED BY A FORMER CLIENT

SUMMARY

This Opinion addresses whether, and if so how, an attorney may respond to a former client's adverse public comments about the attorney, when the former client has not disclosed any confidential information and there is no litigation or arbitration pending between the attorney and the former client. The Committee concludes that the attorney may publicly respond to such comments as long as the rebuttal: (1) does not disclose any confidential information; (2) does not injure the former client in any matter involving the prior representation; and (3) is proportionate and restrained.

TABLE OF AUTHORITIES

Cases

Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725

County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839

In the Matter of Dixon (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23

General Dynamics Corp. v. Superior Ct. (1994) 7 Cal.4th 1164

Oasis West Realty v. Goldman (2011) 51 Cal.4th 811

Oxy Res. California LLC v. Superior Court (2004) 115 Cal.App.4th 875

Styles v. Mumbert (2008) 164 Cal.App.4th 1163

Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564

Statutes

California Business and Professions Code section 6068(e)

California Evidence Code section 912

California Evidence Code section 950, *et seq.*

Opinions

Los Angeles County Bar Ass'n Form. Opn. No. 396 (1982)

Los Angeles County Bar Ass'n Form. Opn. No. 452 (1982)

Los Angeles County Bar Ass'n Form. Opn. No. 498 (1999)

Los Angeles County Bar Ass'n Form. Opn. No. 519 (2007)

Cal. State Bar Form. Opn. 1983-71 (1983)

Rules

California Rules of Professional Conduct, Rule 3-100(A)

ABA Model Rules of Professional Conduct, Rule 1.6(b)(5)

Other Authorities

Restatement (Third) of the Law Governing Lawyers, section 64, comment e

FACTS

Attorney previously represented Former Client in a civil proceeding. Attorney no longer represents Former Client in any respect. Subsequent to the conclusion of the representation, Former Client posts a message on a website discussing lawyers, stating that Attorney was incompetent and over-charged him, and others should refrain from using Attorney. This Opinion assumes that no confidential information is disclosed in the message[1] and Former Client's conduct does not constitute a waiver of confidentiality or the attorney-client privilege.[2] There is no litigation or arbitration pending between Attorney and Former Client.

ISSUE

In what manner, if any, may Attorney publicly respond to disparaging public comments by Former Client, whether of malpractice or otherwise?

DISCUSSION

[1] For purposes of this Opinion, "confidential information" is defined to include both privileged information and information which, while not privileged, is nevertheless considered to be confidential under California Business and Professions Code section 6068(e)(1).

[2] This Opinion also assumes that the person making the website posting is a former client. The Opinion does not address those situations where the disparaging comment is posted by an unknown author.

An attorney "may not do anything which will injuriously affect [a] former client in any matter in which [the attorney] formerly represented [the client] …." *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574. *See also Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811, 821; *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1167 ("an attorney is forever forbidden from … acting in a way which will injure the former client in matters involving such former representation." [Citation omitted.]).[3]

An attorney also owes a duty of confidentiality to former clients as well as to current clients. California Business & Professions Code section 6068(e)(1) (it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of, his or her client."); *see also* CRPC, Rule 3-100(A); *Wutchumna Water Co. v. Bailey, supra,* 216 Cal. at 573-574 ("nor may [the attorney] at any time use against [the] former client knowledge or information acquired by virtue of the previous relationship"); *Oasis West Realty v. Goldman, supra,* 51 Cal.4th at 821; *Styles v. Mumbert, supra,* 164 Cal.App.4th at 1167.

The attorney-client privilege under California Evidence Code section 950, *et seq.,* is not subject to the creation of exceptions other than as specified by statute. *See, e.g., Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 739; *OXY Res. California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 889 (courts may not "imply unwritten exceptions to existing statutory privileges." [Internal citations omitted.] "The area of privilege ' "is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme." ' " [Citation omitted.])

In the absence of waiver of confidentiality and the attorney-client privilege by Former Client (*see, e.g.,* Cal. Evid. Code § 912), there is no statutory exception to the duty of confidentiality under Business & Professions Code section 6068(e)(1) or the attorney-client privilege under Evidence Code section 950, *et seq.*, that would permit an attorney to defend himself or herself by disclosing confidences or privileged information.[4] *See General Dynamics Corp. v. Superior Ct.* (1994) 7 Cal.4th 1164, 1190 ("Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client"); *see also* Los Angeles County Bar Ass'n Form. Opn. No. 519 (there is no self-defense exception to the lawyer's duty of confidentiality under Business & Professions Code section 6068(e) that would allow an attorney to disclose confidential client information to defend against a lawsuit brought by a non-client against the attorney).

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[3] It should be noted that, while instructive concerning the duties owed to a former client, none of the holdings of these three cases was based on facts involving an attorney's response to a former client's adverse public comments about the lawyer.

[4] This Committee's opinion in Los Angeles County Bar Ass'n Form. Opn. No. 396 (1982) is not to the contrary. In that opinion, the Committee opined that a lawyer, in a formal legal proceeding involving alleged malpractice by him, could provide a declaration disclosing certain privileged communications in order to rebut claims being made by a former client against the attorney. Unlike the factual scenario underpinning Opn. No. 396, this Opinion does not involve a judicial proceeding based upon a claim of malpractice or otherwise.

This Opinion assumes there has been no waiver of any confidential information Former Client provided to Attorney while Attorney represented Former Client. Thus, absent a statutory exception allowing Attorney to reveal confidential communications in response to Former Client's public statement, Attorney remains obligated to preserve Former Client's confidential information, and Attorney cannot disclose such information in response to that public statement unless authorized to do so by a court's ruling in a judicial proceeding.[5]

The bar on Attorney revealing confidential information in responding to Former Client's internet posting does not mean Attorney cannot respond at all. If Attorney does not disclose confidential or attorney-client privileged information, and does not act in a way that will injure Former Client in a matter involving the prior representation, he/she may respond.

However, the Attorney's response also must be proportionate and restrained. *See* Restatement (Third) of the Law Governing Lawyers, section 64, comment e (referencing a "proportionate and restrained" public response). In other words, not only must Attorney refrain from revealing any confidential information (because it is assumed that there has been no waiver by Former Client), and avoid saying anything that would injure Former Client in a matter related to the prior representation, he/she may say no more than is necessary to rebut the public statement made by Former Client. This rule has been recognized in other contexts where the extent of an attorney's ability to respond to a statement made by a former client has been considered. *See*, *e.g.*, Los Angeles County Bar Ass'n Form. Opn. No. 498 (1999) (lawyer may disclose confidential information in a fee dispute with a former client only if relevant to the dispute, if reasonably necessary due to an issue raised by the former client, and if the lawyer avoids unnecessary disclosure); Los Angeles County Bar Ass'n. Form. Opinion No. 452 (1988) (lawyer may file a creditor's claim in former client's bankruptcy proceeding but may not prosecute objections to discharge); *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 58-59 (former client's malpractice suit against lawyer does not wholly waive lawyer's duties under the lawyer-client privilege, but constitutes waiver only to the extent necessary to resolve the suit; attorney may not disclose more than is essential to preserve the attorney's rights.)

Therefore, under these circumstances, Attorney may respond to Former Client's internet posting, so long as:

(1) Attorney's response does not disclose confidential information;

(2) Attorney does not respond in a manner that will injure Former Client in a matter involving the former representation; and

(3) Attorney's response is proportionate and restrained.

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[5] There are some authorities from outside California that suggest an exemption to an attorney's duties of loyalty and confidentiality may exist in certain circumstances when necessary in "self-defense." *See, e.g.*, Rule 1.6(b)(5) of the ABA Model Rules of Professional Conduct. It is important to bear in mind, however, that California has not adopted the ABA Model Rules, and they may be consulted for guidance only when there is no California rule directly applicable. *See*, *e.g.*, *County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852; Cal. State Bar Formal Opn. 1983-71.

This Opinion is advisory only. The Committee acts on specific questions submitted *ex parte*, and its opinion is based on the facts set forth in the inquiry submitted.

THE BAR ASSOCIATION OF SAN FRANCISCO

Legal Ethics
Ethics Opinions

OPINION 2014-1

[Issue date: January 2014]

ISSUE:

May an attorney respond to a negative online review by a former client alleging incompetence but not disclosing any confidential information where the former client's matter has concluded? If so, may the attorney reveal confidential information in providing such a response? Does the analysis change if the former client's matter has not concluded?

DIGEST:

An attorney is not ethically barred from responding generally to an online review by a former client where the former client's matter has concluded. However, the duty of confidentiality prevents the attorney from disclosing confidential information about the prior representation absent the former client's informed consent or waiver of confidentiality. This Opinion assumes the former client's posting does not disclose any confidential information and does not constitute a waiver of confidentiality or the attorney-client privilege.[1] While the online review could have an impact on the attorney's reputation, absent a consent or waiver, disclosure of otherwise confidential information is not ethically permitted in California unless there is a formal complaint by the client, or an inquiry from a disciplinary authority based on a complaint by the client. Even in situations where disclosure is permitted, disclosure should occur only in the context of the formal proceeding or inquiry, and should be narrowly tailored to the issues raised by the former client. If the matter previously handled for the former client has not concluded, depending on the circumstances, it may be inappropriate for the attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.

AUTHORITIES INTERPRETED:

Business & Professions Code §6068(e); Rules of Professional Conduct, Rule 3-100; Evidence Code §§955, 958; ABA Model Rules, Rule 1.6.

STATEMENT OF FACTS

A former client has posted a review on a free public online forum that rates attorneys. The review does not disclose any confidential information but is negative and contains a discussion in which the former client makes general statements that Attorney mismanaged the client's case, did not communicate appropriately with the former client, provided sub-standard advice and was incompetent. Attorney wishes to respond to the negative review by posting a reply in the electronic forum; and, if permitted, discuss the details of Attorney's management of the case, the frequency and content of communications Attorney had with the former client and the advice Attorney provided to the former client and why Attorney believes the advice was appropriate under the circumstances.

DISCUSSION [2]

A. Duty of Loyalty

As fiduciaries, attorneys owe a duty of loyalty to their clients. *Flatt v. Sup.Ct. (Daniel)* (1994) 9 Cal.4th 275, 289. After conclusion of the attorney-client relationship, an attorney continues to owe a residual duty of loyalty to a former client, which is narrow in scope. *See Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (the duty of loyalty continues after termination of the attorney-client relationship to the extent that a lawyer may not act in a manner that will injure the former client with respect to the matter involved in the prior representation); *see also Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574 ("[A]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything

which will injuriously affect his former client in any matter in which he formerly represented him, nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship.").

If the matter Attorney previously handled has concluded, responding to the former client's review through statements that do not disclose any confidential information would not typically constitute a breach of loyalty, even though Attorney's response might be deemed "adverse" to the former client. Simply responding to the review and denying the veracity or merit of the former client's assertions (without disclosing confidential information) would not be likely to injure the former client with respect to any work Attorney previously did, or to undermine such work. Attorney would not be attacking his or her prior work. To the contrary, Attorney would be supporting the merit of such work.

If, on the other hand, the matter Attorney previously handled has *not* concluded, a response, even one that does not involve the disclosure of any confidential information, may be inappropriate. Attorney should conduct a fact specific analysis, taking into consideration: (1) the status and nature of the on-going proceedings, (2) the content of the Attorney's contemplated response, and (3) any negative impact the response could have on the on-going proceedings. The Committee can foresee the possibility that, at least in some situations, a response, even one not containing confidential information, could potentially undermine the attorney's prior work. For example, a statement by Attorney that his management of the case was reasonable given the former client's likelihood of success (while not disclosing confidential facts) could suggest weakness in the former client's position, and could negatively influence the opposing party's willingness to settle or litigation strategy.

B. The Duty of Confidentiality

The scenario presented also implicates Attorney's duty of confidentiality to his former client. "'One of the principal obligations which bind an attorney is that of fidelity … maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client …. This obligation is a very high and stringent one.'" *Flatt v. Sup.Ct. (Daniel)* (1994) 9 Cal.4th 275, 289, *quoting Anderson v. Eaton* (1930) 211 Cal. 113, 116.

In California, the duty of confidentiality is codified in the State Bar Act (Cal. Bus. & Prof. C. §6000 et seq.) and embodied in the California Rules of Professional Conduct ("CRPC"), Rule 3-100. Pursuant to Bus. & Prof.C. §6068(e) an attorney must "maintain inviolate the confidence, and at every peril to himself or herself [] preserve the secrets, of his or her client." *See also* Rule 3-100(A) ("A member shall not reveal information protected from disclosure by Business & Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.").

Maintaining a client's "confidence" means the lawyer may not do anything to breach the trust reposed in him or her by the client. It is "not confined merely to non communication of facts learned in the course of professional employment; for the section separately imposes the duty to 'preserve the secrets of his client.'" *In re Soale* (1916) 31 Cal. 144, 153; *see also* Cal. State Bar Form. Opns. 1993-133, 1988-96, 1986-87 & 1981-58. "Secrets" refers to other information gained in the professional relationship the client has requested be held inviolate or the disclosure of which would be embarrassing or likely detrimental to the client. Cal. State Bar Form. Opns. 1993-133; Los Angeles Bar Ass'n Form. Opns. 452 (1988). The duty to protect client secrets applies to all information relating to client representation, whatever its source. Los Angeles Bar Ass'n Form.Opn. 436 (1985). It even encompasses matters of public record communicated in confidence that might cause a client or former client public embarrassment. *Matter of Johnson* (Rev.Dept. 2000) 4 Cal. State Bar Ct.Rptr. 179, 189.

"Confidence" also refers to information protected by the attorney-client privilege. *See* Los Angeles Bar Ass'n Form. Opns. 386 (1980), 466 (1991); Cal. State Bar Form. Opns. 1980-52 & 1976-37. However, the duty of confidentiality prohibits disclosure of a much broader body of information than that protected by the attorney-client privilege. *See Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621; *Industrial Indemnity Co. v. Great American Ins. Co.* (1977) 73 Cal.App.3d 529, 536; Cal. State Bar Form. Opns. 2003-161, 1993-133; *see also* CRPC 3-100, Discussion [2] ("The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy."). Thus, in California, whether information is privileged is not dispositive as to whether it is confidential and whether an attorney may voluntarily disclose such information.

The duty of confidentiality survives the conclusion of the attorney-client relationship. *See Wutchumna*, *supra*,216 Cal. 564, 571 ("The relation of attorney and client is one of highest confidence and as to professional information gained while this relation exists, the attorney's lips are forever sealed, and this is true

notwithstanding his subsequent discharge by his client."); *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 891.

The factual information Attorney would like to disclose is information obtained during the course of the prior representation. It includes details regarding the management of the case, the frequency and content of communications with the former client, and advice provided by Attorney. Such information falls within the definition of a "confidence." It also falls within the definition of "secrets," as the former client would not likely want the information publicly disclosed. The proposed disclosure could be particularly detrimental to the client if the former client's action is ongoing.

Attorney's duty of confidentiality to the former client would therefore apply to all information Attorney possesses by virtue of the former representation including, but not limited to, privileged attorney-client communications and attorney work product. Absent consent of the former client, waiver or an exception to the duty of confidentiality and/or attorney-client privilege, Attorney has an affirmative obligation not to disclose otherwise confidential information,[3] and to assert the attorney-client privilege on behalf of the former client. *See* Ev.C. §955*; Glade v. Sup.Ct. (Russell)* (1978) 76 Cal.App.3d 738, 743. Whether an applicable exception to the duty of confidentiality and/or attorney-client privilege exists is discussed in detail below.

C. The Self-Defense Exception

Whether Attorney may disclose otherwise confidential information turns on whether there is an applicable exception to the duty of confidentiality or attorney-client privilege that would permit such disclosure. Unlike the ABA Model Rules of Professional Conduct, and the numerous jurisdictions that have adopted versions of the ABA Model Rules, California's rules of professional conduct do not have an express exception to the duty of confidentiality that permits a lawyer to disclose otherwise confidential information in disputes with a client or former client. *See, e.g.*, ABA Model Rule 1.6(b)(5) (a lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary "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"); *see also* Los Angeles Bar Ass'n Form. Opn. 525 (2012) (absent the client's waiver of confidentiality or privilege, there is no statutory exception to the duty of confidentiality or the attorney-client privilege that would permit an attorney to counter client accusations by disclosing confidential information where no litigation or arbitration is pending between the attorney and former client); Restatement (Third) the Law Governing Lawyers, §64 ("A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer's associate or agent against a charge or threatened charges by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.").

1. Cal. Evidence Code Section 958

To the extent there is a "self-defense" exception in California, it is statutory and its scope and application are defined by case law. California Evidence Code §958 provides: "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." California courts have generally applied this exception to situations where a client or former client asserts a legal claim against a lawyer, or the lawyer asserts a fee claim against the former client. *See, e.g.*, *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal.App.2d 212, 228 (action for fees brought by lawyer); *Smith, Smith & Kring v. Sup. Ct. (Oliver)* (1997) 60 Cal.App.4th 573, 580 (malpractice action by client); *Schlumberger Ltd. v. Sup.Ct. (Kindel & Anderson)* (1981) 115 Cal.App.3d 386, 392 (malpractice action by client); *see also Styles v. Mumbert* (2008) 164 Cal.App.4th

1163, 1168 (refusing to apply exception where no malpractice claim or fee dispute existed).
The rationale behind the "exception" is that when a client or attorney claims the other breached a duty arising out of the professional relationship, it would be "unjust" to allow the claimant to invoke the privilege so as to prevent the other from producing evidence in defense of the claim. *See* Cal. Ev. C. §958, Law Revision Commission Comments; *Glade*, *supra*,76 Cal.App.3d at 746.
In this situation, the former client has made assertions in a public forum suggesting Attorney violated his duty of communication, did not competently handle the case and provided services that were below the standard of care. Although the former client alleged Attorney breached professional duties to the former client, a formal legal claim or proceeding has not been brought against Attorney
The rationale supporting the exception arguably has merit even outside the presentation of a formal

legal claim or proceeding. It is possible, for example, that the harm to Attorney from the online review could be as damaging to Attorney as a formal claim by the client (which might be refuted, dismissed, etc., on substantive legal grounds). The Committee notes that because Ev.C. §958 relates to the admissibility of evidence in the context of a legal proceeding, it is doubtful it would have any lawful application outside a formal legal or administrative proceeding.

2. Model Rule 1.6

The Model Rules, which are instructive, especially where the California rules of professional conduct are silent on a matter, suggest disclosure of otherwise confidential information may be appropriate in certain circumstances outside a formal legal proceeding. *See, e.g.*, ABA Model Rule 1.6, Comment [10] (the exception "does not require the lawyer to await 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."). [4]

At least one federal district court in California has adopted the Model Rule's self-defense exception (1.6(b)(5)) based on the premise that the California Rules of Professional Conduct contain no provision specifically governing self-defense and therefore the Model Rules are an "an appropriate standard to guide the conduct of members of its bar." *See In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 120 FRD 687, 690-91 (C.D. Cal. 1988). The *National Mortgage* decision, however, decided whether a self-defense exception existed based on federal common law.

California state courts have rejected the argument that a privilege exception can exist outside the specific parameters of the Evidence Code. *See McDermott, Will & Emery v. Sup. Ct.*, 83 Cal.App.4th 378, 385 (2000) (rejecting privilege exception for shareholder derivative actions: "longstanding California case authority has rejected this application of the federal doctrine, noting it contravenes the strict principles set forth in the Evidence Code of California which precludes any judicially created exceptions to the attorney-client privilege."); Ev. C. §911 ("Except as otherwise provided by statute … (b) No person has a privilege to refuse to disclose any matter or refuse to produce any writing, object or other thing."). Accordingly, the Committee does not find *In re Nat'l Mortg*. and Model Rule 1.6 dispositive on the issue of whether a disclosure of otherwise confidential information would be permitted in California in a public online forum.

Moreover, comment [10] to Rule 1.6 (even if applicable) implicates a situation in which a "third party" claims an attorney is complicit in the wrongdoing of a client. As explained in detail in Los Angeles Bar Ass'n Form.Opn. 519 (2007), neither California case law nor Ev.C. §958 recognize a self-defense exception for claims made by third parties. Model Rule 1.6(b)(5) is broader than any self-defense exception recognized under California law. Moreover, the comment to Rule 1.6 has been applied only to those situations in which the third party has the authority to take action against the attorney and there is an imminent threat of such action with serious consequences. Here, no third party has made any inquiry, and it is not clear that a formal claim or disciplinary inquiry is imminent.

3. Application of Exception to Ineffective Assistance of Counsel Claims

Section 958 has been held applicable to a criminal defendant's claim of ineffective assistance of counsel in a habeas proceeding: "[a] trial attorney whose competence is assailed by his former client must be able to adequately defend his professional reputation, even if by doing so he relates confidences revealed to him by the client." *In re Gray* (1981) 123 Cal.App.3d 614, 616. This holding tends to support the proposition that Ev.C. §958 could apply outside a formal or direct action between the former client and attorney. However, in *Grey* the claim was still being made by the client in a formal legal proceeding, albeit not a civil or disciplinary proceeding against the attorney himself. Thus, *Grey* is not dispositive as to the issue of whether Ev.C. §958 can be applied outside the context of a formal legal proceeding.

The ABA Standing Committee on Ethics and Professional Responsibility suggests that under Model Rule 1.6(b)(5), disclosure of otherwise confidential information may not be appropriate outside a formal legal proceeding, or an inquiry from a regulatory or disciplinary authority, absent the informed consent of the client. ABA Form. Opn. 10-456. The Committee opines that Comment [10] to Rule 1.6 should be construed narrowly. The Committee addresses whether a former lawyer of a client claiming ineffective assistance of counsel can disclose otherwise confidential information in response to a prosecution request *prior* to a court supervised response by way of testimony or otherwise. The Committee concludes that under Rule 1.6(b)(5), a lawyer may have a reasonable

need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel, but it is highly unlikely that a "non-supervised" disclosure in response to a prosecution request would be justified. ABA Form. Opn. 10-456, p. 1.

The Committee emphasizes:

Outside judicial proceedings, the confidentiality duty is even more stringent. Even if information clearly is not privileged and the lawyer could therefore be compelled to disclose it in legal proceedings, it does not follow that the lawyer may disclose it voluntarily. In general, the lawyer may not voluntarily disclose any information, even non-privileged information, relating to the defendant's representation without the defendant's informed consent …. *A client's express or implied waiver of the attorney-client privilege has the legal effect of foregoing the right to bar disclosure of the client's prior confidential information in a judicial or similar proceeding. Standing alone, however, it does not constitute 'informed consent' to the lawyer's voluntary disclosure of client information outside such a proceeding*.

ABA Form. Opn. 10-456, p. 2 (emphasis added).

The Committee approves of disclosure reasonably necessary in advance of an actual proceeding in response to a party who credibly threatens to bring a civil, criminal or disciplinary claim against the lawyer, such as a prosecuting, regulatory or disciplinary authority, to try to persuade the party not to do so. The Committee cautions, however, that although the self-defense exception has broadened over time, it is a limited exception because "it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages the full and frank disclosure necessary to an effective representation." ABA Form. Opn. 10-456, p. 3. Thus, a lawyer may only act in self-defense under the exception to defend against charges that *imminently* threaten the lawyer with *serious* consequences. *Id*.; *see also* Restatement (Third) of the Law Governing Lawyers §64 cmt. c. A habeas proceeding is not a controversy between the client and lawyer, and the lawyer's disclosure is not necessary to establish a defense to a criminal charge or civil claim against the lawyer. ABA Form. Opn. 10-456, pp. 3-4; *see also* Model Rule 1.6(b)(5).

The Committee further acknowledges that the language of Rule 1.6(b)(5), permitting disclosure "to respond to allegations in any proceeding concerning the lawyer's representation of the client," permits a lawyer to defend him or herself as reasonably necessary against allegations of misconduct in proceedings "comparable to those involving criminal or civil claims against a lawyer." ABA Form. Opn. 10-456, p. 4. The Committee concludes that a voluntary disclosure to the prosecution outside a court-supervised proceeding would not be reasonably necessary: "It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable." *Id*. Here, although Attorney has an interest in his or her reputation, a disclosure of confidential information is not necessary to establish a claim against the former client or to prevent the imposition of liability or some restriction on the Attorney's conduct.

As the Committee notes, the self-defense exception is tempered by a lawyer's obligation to take steps to limit "access to the information to the tribunal or other persons having a need to know it" and to seek "appropriate protective orders or other arrangements … to the fullest extent practicable." Model Rule 1.6.(b)(5), cmt. 14. That obligation is undermined if the disclosure is made in a public forum where there is no adjudicatory oversight: "[T]here would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding. Disclosure of such information might prejudice the defendant in the event of a retrial. Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers." ABA Form. Opn. 10-456, p. 5. A disclosure by Attorney in the online forum, raises similar concerns.

Here, Attorney's disclosure in a public online forum has no judicial supervision and is accessible to anyone. Although the former client's assertion could impact Attorney's reputation, it is the Committee's opinion that such potential impact, by itself, is not of a nature that reasonably requires Attorney to disclose in a public forum what would otherwise be confidential information. Attorney may seek to mitigate any potential impact from the negative review by submitting a response that generally disagrees with the former client's assertions and notes that Attorney is not at liberty to discuss details regarding confidential client matters unless the information comes within Bus. & Prof. C. §6068(e)(2). This approach strikes an appropriate balance between the rationale for the self-defense exception, the need to limit disclosures to information reasonably necessary to defend

the lawyer, and the importance of maintaining a client's confidential information and promoting full and candid disclosure of information by clients to their attorneys.

4. The Restatement Approach

We believe this conclusion is also commensurate with the approach recommended in the Restatement (Third) of the Law Governing Lawyers. The Restatement looks to the concepts of "necessity" and "reasonableness" in determining what disclosure may be appropriate. Section 64, comment e, states:

Use or disclosure of confidential client information … is warranted only if and to the extent that the disclosing lawyer reasonably believes it necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy.

Comment c to section 64 states:

A lawyer may act in self defense … only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification. Imminent threat arises not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or aggrieved potential litigant.

Here, although the former client has asserted that Attorney's conduct fell below the standard of care, the former client has not manifested an affirmative intent to bring a formal claim against Attorney. Even if such a claim were directly threatened, a response in the online forum would not be reasonably necessary to establish a defense or claim on behalf of Attorney. Attorney would have the ability to make an appropriate disclosure in the context of the impending legal proceeding. An additional online disclosure would not have any substantive impact on the issue of the lawyer's potential liability in the legal proceeding.

While comment f to section 64 provides that an attorney may, in appropriate circumstances, respond to an informal but "public" accusation, it appears limited to the context of responding to a letter of grievance to a disciplinary authority. In that context, the charge (albeit informal) has been made to a body that clearly has the authority to formalize and prosecute the charge. It is not clear the Restatement would permit disclosure in response to a public accusation that is not made to or before a body with some ability to impose liability or otherwise restrict the attorney's conduct. Notably, comment e of section 64 provides: "[t]he lawyer may divulge confidential client information only to those persons with whom the lawyer must deal in order to obtain exoneration or mitigation of the charges."

5. Application of Exception to Facts Presented

Here, the assertions against Attorney, albeit general in nature, go beyond casual charges not likely to be taken seriously by others. They have been posted on a forum that is publicly available and dedicated to providing reviews of attorneys. Absent a response from Attorney, it is possible that a party might give the review credence and question Attorney's professional skills, thus impacting his or her potential retention. Notwithstanding this fact, Attorney's proposed response would be in a public forum that has no ability to impose any restriction or liability on Attorney. The Committee does not believe applicable California law permits a lawyer to disclose otherwise confidential information in an online attorney review forum, absent client consent or a waiver.[5]

Disclosure is not, in the Committee's view, reasonably necessary, or sufficiently tailored to establishing a self-defense. The absence of the inclusion of any self-defense exception in California's Rules of Professional Conduct, the longstanding policy in California that precludes judicial exceptions to the attorney-client privilege, and the breadth of California's duty of confidentiality (which goes beyond the evidentiary privilege) is further support for the conclusion that Ev.C. § 958 would not apply under the facts presented.[6]

525. That opinion considered the situation of a former client posting adverse comments about a lawyer, where the client did not disclose any confidential information and no litigation or arbitration was pending between the lawyer and former client. The committee concluded that the attorney

may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject matter of the prior representation, and is "proportionate and restrained."

6. Any Permissible Response Must Be Narrowly Tailored to the Issues Raised by the Former Client

Even where the self-defense exception applies and a response is reasonably necessary to establish a defense or claim on behalf of the attorney, the disclosure of any confidential information must be narrowly tailored to respond to the specific issues raised by the former client. In such situations, disclosure is therefore limited to relevant communications between the client and the attorney whose services gave rise to the breach of duty claim. *See Schlumberger Ltd.*, *supra*, 115 Cal.App.3d at 392; Los Angeles Bar Ass'n Form.Opn. 452 (1988) (on collecting a fee or defending against a malpractice action an attorney may disclose both confidential information and client secrets, but only to the extent necessary to the action"); *In re Rindlisbacher* (9th Cir. BP 1998) 225 B.R. 180, 183 (exception did not permit attorney to disclose in discharge proceeding client's admission that he had lied at dissolution trial; the attorney's disclosure was not relevant to the attorney's protection of his own rights against a breach of a duty by the debtor); *see also* Los Angeles Bar Ass'n Form.Opn. 519 (2007) (disclosure under section 958 must comply with the "relevancy" requirement of the section and the ethical directive that an attorney's disclosure pursuant to the exception be limited to the necessities of the case and its issues). Indeed, in California, disclosing confidential information not bearing on the issues of breach can subject a lawyer to discipline. *See Dixon v. State Bar* (1982) 32 Cal.3d 728, 735 (lawyer's declaration, in response to client lawsuit, that included gratuitous and embarrassing information about the client that "was irrelevant to any issues then pending before the court" and was found to have been made for the purposes of "harassing and embarrassing" the former client was grounds for discipline).

Even assuming Ev.C. §958 could apply in a public, non-legal forum, Attorney would have to limit any response to the general issues raised by the former client. In the Committee's view, disclosing the details and content of communications, the advice provided to the client, and the rationale for such advice, is not reasonably necessary to respond to and defend oneself from generalized assertions of malfeasance.

CONCLUSION

Attorney is not barred from responding generally to an online review by a former client where the former client's matter has concluded. Although the residual duty of loyalty owed to the former client does not prohibit a response, Attorney's on-going duty of confidentiality prohibits Attorney from disclosing any confidential information about the prior representation absent the former client's informed consent or a waiver of confidentiality. California's statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about an attorney), or by an attorney against a client, in the context of a formal or imminent legal proceeding. Even in those circumstances where disclosure of otherwise confidential information is permitted, the disclosure must be narrowly tailored to the issues raised by the former client. If the matter previously handled for the former client has not concluded, it may be inappropriate under the circumstances for Attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.

Footnotes

1. For purposes of this Opinion, "confidential information" is understood to include both attorney-client privileged information and information which, although not privileged, is nonetheless considered confidential under California Business & Professions Code section 6068(e)(1).

2. The Committee recognizes there are First Amendment implications with regard to the scenario presented in this Opinion. The First Amendment's application to this scenario is beyond the purview of this Committee. While not opining on the issue, the Committee does note that California case law has recognized the potential for limitations on an attorney's speech where such speech implicates the attorney's duties of loyalty or confidentiality to an existing or former client. *See, e.g.*, *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811.

The Committee also recognizes that the scenario presented could raise tort issues with regard to the former client's or Attorney's speech. The Committee does not opine on such issues.

3.The Committee assumes the exception in Bus. & Prof. C. §6068(e) does not apply for the purpose of this opinion.

4. *See also* CRPC 1-100(A) ("Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."); *General Dynamics Corp. v. Sup. Ct.* (1994) 7 Cal.4th 1164, 1190, fn. 6; *Cho v. Sup. Ct.* (1995) 39 Cal.App.4th 113, 121, fn. 2.

5. The Los Angeles County Bar Association Professional Responsibility and Ethics Committee reached similar conclusions in Los Angeles Bar Ass'n Form. Opn. 525. That opinion considered the situation of a former client posting adverse comments about a lawyer, where the client did not disclose any confidential information and no litigation or arbitration was pending between the lawyer and former client. The committee concluded that the attorney may publicly respond as long as he or she does not disclose any confidential information, does not injure the client with respect to the subject matter of the prior representation, and is “proportionate and restrained.”

6. The Committee does not find L.A. County Bar Assoc. Formal Opinion 397 (1982) or State Bar of Arizona Opinion 93-02 dispositive.

L.A. County Bar Assoc. Formal Opinion 397 opines that where a former client has indicated that a malpractice action is being contemplated, an attorney may provide opposing counsel with a declaration that includes otherwise confidential information about the former client's knowledge regarding matters affecting a default judgment entered against the former client. The opinion, however, contains little substantive analysis, and is distinguishable since the disclosure was made in the context of a supervised legal proceeding in which the former client was asserting that it was "uninformed" with regard to the legal affairs being handled by the attorney. A finding by the court that the client was not appropriately informed could have a tangible effect on the attorney's potential exposure to the malpractice claim the former client affirmatively indicated he was contemplating.

State Bar of Arizona Opinion 93-02 concludes that an attorney can disclose otherwise confidential and privileged information to the author of a book regarding the murder trial of a former client, in response to assertions made by the former client to the author that the attorney had acted incompetently. The Arizona opinion involved an ethics rule patterned after Model Rule 1.6(d), which has not been adopted in California. The State Bar of Arizona concludes that limiting the exception's application to situations where there is a formal claim or threat of a formal claim would render the language in Rule 1.6(d) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" largely "superfluous." Although Arizona's rule is patterned on Model Rule 1.6, its opinion is inconsistent with the logic of subsequent ABA Formal Opinion 10-456 which prohibited voluntary disclosure of confidential information outside a legal proceeding even though the former client had asserted an ineffective assistance of counsel claim. The Arizona opinion relies, in part, on a tentative draft comment to a section of the Restatement (Third) of the Law Governing Lawyers regarding the use or disclosure of information in a lawyer's self-defense which states: "Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information except in response to a formal client charge of wrongdoing with a tribunal or similar agency. *When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a proportionate and restrained response in order to protect the reputation of the lawyer*." State Bar of Arizona Opn. 93-02, pp. 4-5 (Emphasis added). This language is *not* part of the Restatement as presently adopted.

FORMAL OPINION NO 2013-189

Accessing Information about Third Parties through a Social Networking Website

Facts:

Lawyer wishes to investigate an opposing party, a witness, or a juror by accessing the person's social networking website. While viewing the publicly available information on the website, Lawyer learns that there is additional information that the person has kept from public view through privacy settings and that is available by submitting a request through the person's website.

Questions:

1. May Lawyer review a person's publicly available information on a social networking website?

2. May Lawyer, or an agent on behalf of Lawyer, request access to a person's nonpublic information?

3. May Lawyer, or an agent on behalf of Lawyer, use a computer username or other alias that does not identify Lawyer when requesting permission from the account holder to view nonpublic information?

Conclusions:

1. Yes.

2. Yes, qualified.

3. No, qualified.

Discussion:

1. *Lawyer may access publicly available information on a social networking website*.[1]

Oregon RPC 4.2 provides:

> In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:
>
> (a) the lawyer has the prior consent of a lawyer representing such other person;
>
> (b) the lawyer is authorized by law or by court order to do so; or
>
> (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Accessing the publicly available information on a person's social networking website is not a "communication" prohibited by Oregon RPC 4.2. OSB Formal Ethics Op No 2005-164 discusses the propriety of a lawyer accessing the public portions of an adversary's website and concludes that doing so is not "communicating" with the site owner within the meaning of Oregon RPC 4.2. The Opinion compared accessing a website to reading a magazine article or purchasing a book written by an adversary. The same analysis applies to publicly available information on a person's social networking web pages.[2]

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[1] Although Facebook, MySpace, and Twitter are current popular social networking websites, this opinion is meant to apply to any similar social networking websites.

[2] This analysis is not limited to adversaries in litigation or transactional matters; it applies to a lawyer who is accessing the publicly available information of any person. However, caution must be exercised with regard to jurors. Although a lawyer may review a juror's publicly available information on social networking websites, communication with jurors before, during, and after a proceeding is generally prohibited. Accordingly, a lawyer may not send a request to a juror to access nonpublic personal information on a social networking website, nor may a lawyer ask an agent do to do so. *See* Oregon RPC 3.5(b) (prohibiting *ex parte* communications with a juror during the proceeding unless authorized to do so by

2. *Lawyer may request access to nonpublic information if the person is not represented by counsel in that matter and no actual representation of disinterest is made by Lawyer*.

To access nonpublic information on a social networking website, a lawyer may need to make a specific request to the holder of the account.[3] Typically that is done by clicking a box on the public portion of a person's social networking website, which triggers an automated notification to the holder of the account asking whether he or she would like to accept the request. Absent actual knowledge that the person is represented by counsel, a direct request for access to the person's non-public personal information is permissible. OSB Formal Ethics Op No 2005-164.[4]

In doing so, however, Lawyer must be mindful of Oregon RPC 4.3, which regulates communications with unrepresented persons. Oregon RPC 4.3 provides, in pertinent part:

> In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. . . .

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law or court order); Oregon RPC 3.5(c) (prohibiting communication with a juror after discharge if (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress, or harassment); Oregon RPC 8.4(a)(4) (prohibiting conduct prejudicial to the administration of justice). *See, generally*, ABA/BNA *Lawyers' Manual on Professional Conduct* § 61:808 and cases cited therein.

[3] This is sometimes called "friending," although it may go by different names on different services, including "following" and "subscribing."

[4] See, for example, New York City Bar Formal Ethics Op No 2010-2, which concludes that a lawyer "can—and should—seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful 'friending' of unrepresented parties."

The purpose of the rule is to avoid the possibility that a nonlawyer will believe lawyers "carry special authority" and that a nonlawyer will be "inappropriately deferential" to someone else's lawyer. *Apple Corps Ltd. v. Int'l Collectors Soc.*, 15 F Supp2d 456 (DNJ 1998) (finding no violation of New Jersey RPC 4.3 by lawyers and lawyers' investigators posing as customers to monitor compliance with a consent order).[5] A simple request to access nonpublic information does not imply that Lawyer is "disinterested" in the pending legal matter. On the contrary, it suggests that Lawyer is interested in the person's social networking information, although for an unidentified purpose.

Similarly, Lawyer's request for access to nonpublic information does not in and of itself make a representation about the Lawyer's role. In the context of social networking websites, the holder of the account has full control over who views the information available on his or her pages. The holder of the account may allow access to his or her social network to the general public or may decide to place some, or all, of that information behind "privacy settings," which restrict who has access to that information. The account holder can accept or reject requests for access. Accordingly, the holder's failure to inquire further about the identity or purpose of unknown access requestors is not the equivalent of misunderstanding Lawyer's role in the matter.[6] By contrast, if the holder of the account asks for additional information to identify Lawyer, or if Lawyer has some other reason to believe that the person misunderstands

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[5] *See also* ABA Model RPC 4.3 cmt [1] ("An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client."). *Cf. In re Gatti*, 330 Or 517, 8 P3d 966 (2000), in which the court declined to find an "investigatory exception" and disciplined a lawyer who used false identities to investigate an alleged insurance scheme. Oregon RPC 8.4(b), discussed below, was adopted to address concerns about the *Gatti* decision.

[6] *Cf. Murphy v. Perger* [2007] O.J. No 5511, (S.C.J.) (Ontario, Canada) (requiring personal injury plaintiff to produce contents of Facebook pages, noting that "[t]he plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.")

Lawyer's role, Lawyer must provide the additional information or withdraw the request.

If Lawyer has actual knowledge that the holder of the account is represented by counsel on the subject of the matter, Oregon RPC 4.2 prohibits Lawyer from making the request except through the person's counsel or with the counsel's prior consent.[7] *See* OSB Formal Ethics Op No 2005-80 (rev 2016) (discussing the extent to which certain employees of organizations are deemed represented for purposes of Oregon RPC 4.2).

3. *Lawyer may not advise or supervise the use of deception in obtaining access to nonpublic information unless Oregon RPC 8.4(b) applies*.

Oregon RPC 8.4(a)(3) prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law."[8] *See also* Oregon RPC 4.1(a) (prohibiting a lawyer from knowingly making a false statement of material fact to a third person in the course of representing a client). Accordingly, Lawyer may not engage in subterfuge designed to shield Lawyer's identity from the person when making the request.[9]

As an exception to Oregon RPC 8.4(a)(3), Oregon RPC 8.4(b) allows a lawyer "to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct." For purposes of the rule "covert activity" means:

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[7] *In re Newell*, 348 Or 396, 409, 234 P3d 967 (2010) (reprimanding lawyer who communicated on "subject of the representation").

[8] *See In re Carpenter*, 337 Or 226, 95 P3d 203 (2004) (lawyer received public reprimand after assuming false identity on social media website).

[9] See Oregon RPC 8.4(a), which prohibits a lawyer from violating the Oregon Rules of Professional Conduct (RPCs), from assisting or inducing another to do so, or from violating the RPCs "through the acts of another."

> [A]n effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

In the limited instances allowed by Oregon RPC 8.4(b) (more fully explicated in OSB Formal Ethics Op No 2005-173), Lawyer may advise or supervise another's deception to access a person's nonpublic information on a social networking website.

Approved by Board of Governors, February 2013.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.5-1 to § 8.5-2 (communications with persons other than the client), § 8.11 (conduct prejudicial to the administration of justice), § 21.3-2(a) (prohibition against misleading conduct) (OSB Legal Pubs 2015); and *Restatement (Third) of the Law Governing Lawyers* §§ 11, 98, 99–100, 103 (2000) (supplemented periodically).

FORMAL OPINION NO 2007-179

Trial Publicity

Facts:

1. *The Civil Case*.

Lawyer *P* has filed a civil action against the well-known *XYZ* Corporation alleging negligence and other misconduct resulting in injury to Lawyer *P*'s client. Lawyer *P* reasonably believes the allegations to be true. Before any discovery has been conducted, Lawyer *P* wishes to call a press conference in which he intends to assert as fact the allegations of *XYZ* Corporation's negligence and misconduct.

Later, during discovery, Lawyer *P* obtains documents produced by *XYZ* Corporation that tend to establish negligence and other misconduct by *XYZ* Corporation. Lawyer *P* would like to call another press conference to tout the documents as proof of his case against *XYZ* Corporation.

Lawyer *D*, the lawyer representing *XYZ* Corporation in the action, wishes to advise *XYZ* Corporation to hire a public relations firm to contact local news media in order to publicly dispute or downplay the allegations in the civil action. Based on her own investigation, Lawyer *D* has learned that the allegations of negligence and misconduct are true, but believes *XYZ* Corporation may have an affirmative defense based on the statute of limitations.

2. *The Criminal Cases.*

a. *The Sex Crime.*

A major crimes task force investigating the disappearance of a young woman focuses on a suspect charged with and held for other crimes, after the task force has discovered sexual predilections of the suspect, which it considers highly relevant. A prosecutor is assigned to and is supervising the investigation. Investigators reveal the suspect's sexual predilections to the press. No charging decision is imminent with respect to the young woman's disappearance. The revelation to the press

has a substantial impact on the proceedings in the suspect's other, unrelated cases.

The task force continues investigating and, later, charges a second individual with the young woman's abduction and murder. No body has been located. The trial is contentious. The jury deliberates for a week before returning a guilty verdict. Sentencing is pending. The obviously relieved prosecutor is met by a bank of news cameras as she leaves the courthouse after receipt of the verdict; her comments—including the emotionally delivered charge that the defendant is the most evil man she has encountered in her decade as a prosecutor—are broadcast throughout the state.

b. *The Eco-Terrorists.*

Terrorism task force representatives, including supervising lawyers, hold press conferences announcing the indictment of several individuals for a series of environmental crimes, based on a reopened "cold case" criminal investigation. Some of the individuals are newly arrested; others are in custody for similar charges brought in an earlier case. Government lawyers term the defendants "terrorists" and announce that the government will not stop in its effort to root out terror attacks on U.S. soils.

A defense lawyer allows a reporter to quote him asserting his client's innocence and, also, asserting that his client's actions were justified and in keeping with Oregon values. The defense lawyer casts aspersions on the perceived motives of the government.

The defense lawyer files pretrial motions relating to the admissibility of certain prosecution and defense evidence. After a hearing on the motions but before a ruling is issued, the defense lawyer holds a press conference on the courthouse steps, using stronger language than is used in the official record to characterize the government's action. When called by the media, the defense lawyer responds by telling reporters that his client has passed a polygraph test. Immediately before trial, and still before the evidentiary motions have been decided, the prosecutor uses the occasion of a codefendant's plea bargain to foreshadow evidence the prosecutor intends to attempt to introduce during the trial.

Questions:

1. May Lawyer *P* call a press conference in which he asserts as fact the allegations forming the basis of the civil action?

2. May Lawyer *P* call a second press conference to discuss the documents produced by *XYZ* Corporation?

3. May Lawyer *D* advise *XYZ* Corporation to hire a public relations firm to contact local news media in order to publicly dispute or downplay the allegations forming the basis of the civil action?

4. In the sex-crime case, is the prosecutor subject to discipline for the investigator's statement to the press regarding the suspect's sexual predilections?

5. Is the prosecutor's statement after the verdict but before sentencing, that the defendant is the most evil man she has encountered as a prosecutor, unethical?

6. In the eco-terrorism case, are any of the following statements unethical:

a. The prosecutor's announcement of the indictments?

b. The prosecutor's labeling of the defendants as "terrorists" and the statement that the government will "root out terror attacks on U.S. soils"?

c. The defense lawyer's assertion of his client's innocence and of his defenses?

d. The defense lawyer's aspersions on the government's motives?

e. The defense lawyer's press conference using stronger language than is used in the official record to characterize the government's action?

f. The prosecutor's foreshadowing of evidence that he hopes to use at trial, but which is subject to a pending motion *in limine*?

g. The defense lawyer's statement that his client has passed a polygraph test?

Conclusions:

1. Yes.
2. See discussion.
3. See discussion.
4. See discussion.
5. No, qualified.
6. a. No.
   b. No, qualified.
   c. No.
   d. No, qualified.
   e. See discussion.
   f. See discussion.
   g. See discussion.

Discussion:

Pretrial statements implicate primarily Oregon RPC 3.6. As we shall explain below, Oregon RPC 3.6 is clearer about what it does not prohibit than it is regarding what it does.

Oregon RPC 3.6 provides:

> (a) 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.
>
> (b) Notwithstanding paragraph (a), a lawyer may state:
>
> (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
>
> (2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may:

(1) reply to charges of misconduct publicly made against the lawyer; or

(2) participate in the proceedings of legislative, administrative or other investigative bodies.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

Unless permitted outright by Oregon RPC 3.6(b) or (c), whether a lawyer's statement is prohibited by Oregon RPC 3.6(a) will turn on whether the lawyer knows or reasonably should know that the extrajudicial statement will have a substantial (i.e., highly probable), likelihood of materially (i.e., seriously), prejudicing an imminent fact-finding process in a matter in which the lawyer is involved. This inquiry is

always going to depend on the details of the specific statements and the context in which they are made.

Statements that would otherwise violate Oregon RPC 3.6(a) may nonetheless be permitted under Oregon RPC 3.6(b).[1] We first examine whether, under the factual scenarios posited, there would be any statement that, in the absence of an exception, would subject a lawyer to discipline under Oregon RPC 3.6(a), and then examine whether any of the savings provisions of Oregon RPC 3.6(b) would make the statements permissible.

Oregon RPC 3.6 is matter-specific; it does not directly address the propriety of a statement made by a lawyer in one case that has a tendency to prejudice the fact-finding process in another case. It is possible that a lawyer making such a statement will violate Oregon RPC 8.4(a)(4) (conduct prejudicial to the administration of justice). If both cases are being handled by the same office or firm, a lawyer responsible for a statement in one case that has a strong likelihood of prejudicing the other case may violate Oregon RPC 3.6(d). Some of the hypothetical statements we have been asked to review are made by people other than lawyers. We will explore the lawyer's vicarious liability for those statements under Oregon RPC 3.6(e) and under Oregon RPC 5.3.

Oregon RPC 3.6 is the successor to *former* DR 7-107, which "had its origin in the recommendations made by the American Bar Association's Advisory Committee on Fair Trial and Free Press after *Sheppard v. Maxwell*, 384 US 333 [, 86 S Ct 1507, 16 L Ed 2d 600] (1966)." *In re Richmond*, 285 Or 469, 475, 591 P2d 728 (1979). In *Sheppard*, the United States Supreme Court granted habeas relief to the defendant in a notorious murder case because, in part, of the

[1] None of the hypothetically contemplated statements raises a question about their permissibility under Oregon RPC 3.6(c), which protects statements responding to charges of misconduct on the part of the lawyer or made in the course of participation in a legislative, administrative, or other investigative process.

"deplor[able] manner in which the news media inflamed and prejudiced the public." *Sheppard*, 384 US at 356 (footnote omitted).[2]

The Oregon Supreme Court's most comprehensive treatment of the former rule is in *In re Lasswell*, 296 Or 121, 673 P2d 855 (1983). There, the court attempted to clarify the reach of the former rule (or at least of *former* DR 7-107(B), which specifically applied to prosecutors), in light of its potential conflict with a lawyer's free speech rights under Oregon Constitution article I, section 8. *In re Lasswell*, 296 Or at 124–25. The court held that the rule could be valid only if narrowly applied as a sanction for the abuse of the right of free speech. *In re Lasswell*, 296 Or at 125. The court then attempted to state more precisely the test it had applied in its prior decisions on the scope of the prohibition. *In re Lasswell*, 296 Or at 126:

> The disciplinary rule deals with purposes and prospective effects, not with completed harm. It addresses the prosecutor's professional responsibility at the time he or she chooses what to speak or write. At that time it is incompatible with his or her professional performance in a concrete case to make extrajudicial statements on the matters covered by the rule either with the intent to affect the fact-finding process in the case, or when a lawyer knows or is bound to know that the statements pose a serious and imminent threat to the process and acts with indifference to that effect. In a subsequent disciplinary inquiry, therefore, the question is not whether the tribunal believes that the lawyer's comments impaired the fairness of an actual trial, which may or may not have taken place. The question, rather, is the lawyer's intent or knowledge and indifference when making published statements that were highly likely to have this effect.

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[2] Sheppard was prejudiced both by pretrial publicity and by a "carnival atmosphere" at the trial itself. The Court concluded that, "[s]ince the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition." *Sheppard*, 384 US at 363.

In a footnote, the court said that "the accused's statements must intend or be knowingly indifferent to highly probable serious prejudice to an imminent procedure before lay fact finders." *In re Lasswell*, 296 Or at 126 n 3. Oregon RPC 3.6 largely codifies *In re Laswell*, with one important qualification. Although the language of *Laswell* might be read to permit finding a disciplinary violation under the former rule if the prosecutor intended the proscribed effect, irrespective of whether or not his statements were substantially likely to cause it, there is no violation of Oregon RPC 3.6 unless the statement actually has "a substantial likelihood of materially prejudicing" an imminent fact-finding process.

Oregon RPC 3.6 is a blend of the language of *former* DR 7-107 and the ABA Model Rule of Professional Conduct (RPC). Oregon RPC 3.6(a), subject to certain exceptions, proscribes extrajudicial statements that a "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." Oregon RPC 1.0(o) provides: "'Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance." Although that definition does not transpose gracefully into the usage of the word *substantial* in Oregon RPC 3.6, it is apparent that, in context, "a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" means the same thing as what the Oregon Supreme Court, in *Laswell*, described as "a serious and imminent threat to the [fact-finding] process" or "highly probable serious prejudice to an imminent procedure before lay fact finders." *In re Lasswell*, 296 Or at 126 & n 3.

In order for Oregon RPC 3.6 to pass constitutional muster, it must be read to proscribe only "speech that creates a danger of imminent *and* substantial harm." *Gentile v. State Bar of Nevada*, 501 US 1030, 1036, 111 S Ct 2720, 115 L Ed 2d 888 (1991) (emphasis added); *accord Gentile*, 501 US at 1076 (Rehnquist, C.J., concurring in part and dissenting in part), and 501 US at 1082 (O'Connor, J., concurring).

There can be no violation of Oregon RPC 3.6 unless all of the following are true:

(1) There is an actual matter that is being investigated or litigated;

(2) The lawyer (or someone vicariously bound to the lawyer under Oregon RPC 3.6(d)) is a participant in the investigation or litigation;

(3) At the time the lawyer (or someone whom the lawyer is bound to control under Oregon RPC 3.6(e)) makes it, the lawyer either knows or reasonably should know that the extrajudicial statement will be disseminated by means of public communication;

(4) There is an imminent fact-finding process in the matter; and

(5) At the time the statement is made, the lawyer either knows or reasonably should know that the extrajudicial statement will have a substantial (i.e., "highly probable") likelihood of materially (i.e., "seriously") prejudicing that imminent fact-finding process.

1. *The Civil Case.*

Lawyer *P* contemplates calling press conferences at two separate times: before discovery (presumably early on in the litigation process), "to assert as fact the allegations of [the defendant's] negligence and misconduct"; and, during or after discovery, "to tout the documents as proof of his case against [defendant]." In both events, the first three elements of Oregon RPC 3.6 are met: there is a matter actually being litigated; Lawyer *P* is involved in the litigation; and, by calling a press conference, Lawyer *P* clearly knows and intends that the statements will be disseminated by means of public communication.

A press conference at or near the time of the filing of the lawsuit, at which the plaintiff's lawyer asserts as fact the allegations of his complaint, is unlikely to "pose[ ] a serious and imminent threat to the fair conduct of [the ultimate] trial." *In re Lasswell*, 296 Or at 129. It is not clear from *Lasswell* whether any trial had actually been scheduled at the time the prosecutor there made his comments, but the court concluded that the case did not demonstrate that Lasswell "intended his remarks . . .

to create seriously prejudicial beliefs in potential jurors in an impending trial, or that he was knowingly indifferent to a highly likely risk that they would have this effect." *In re Lasswell*, 296 Or at 130.[3] The cases do not address precisely how close in time the statement must be to the trial before the statement can violate the rule. But *Lasswell* and *Gentile* appear to require the trial or other fact-finding process to be imminent before a lawyer may be disciplined for making such a statement.

On the limited facts posited, the lawyer's stating as fact his allegations against the defendant would not be highly likely to create seriously prejudicial beliefs in potential jurors in an *impending* trial, and would not violate Oregon RPC 3.6.

Moreover, under Oregon RPC 3.6(b)(1), the lawyer may make extrajudicial statements that state "the claim," and, under Oregon RPC 3.6(b)(2), the lawyer may state information contained in the public record. To the extent that the lawyer calls a press conference to describe his claim, and particularly if he limits his comments to the allegations in the complaint, which are a matter of public record, and as long as the lawyer reasonably believes the allegations to be true, Oregon RPC 3.6(b) permits the lawyer to make the extrajudicial statements regardless of the lawyer's knowledge of or disregard for their likely impact.[4]

The propriety of the second contemplated press conference is more problematic. If the trial were "imminent," and the disclosures sufficiently inflammatory, it could well be that Lawyer *P* could either intend to create or be indifferent to a high likelihood of creating seriously prejudicial beliefs in potential jurors in an impending trial, such that the disclosure

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[3] A violation of *former* DR 7-107 required a finding that the lawyer either intended the statement to affect the fact-finding process or reasonably should have known the statement posed such a threat. By contrast, Oregon RPC 3.6 does not require that the lawyer intend to influence the factfinder, only that the lawyer knows or reasonably should know there is substantial likelihood of material prejudice.

[4] As noted above, a lawyer disciplined on the theory that his or her statements concerning the claim or defense exceeded what was permissible under Oregon RPC 3.6(b) would have a potential defense that the rule is unconstitutionally vague. *Gentile*, 501 US at 1036.

would violate Oregon RPC 3.6(a). However, if the documents are in the public record (e.g., if they are proper exhibits in a summary judgment motion), then Lawyer *P* is permitted by Oregon RPC 3.6(b) to state what is in the documents.[5]

Lawyer *D* wants to advise her client to retain a public relations firm to publicly dispute or downplay the allegations forming the basis of the action. Lawyer *D* knows the allegations against her client to be true, but believes the defendant may have a defense based on the statute of limitations.

Lawyer *D* may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law." Oregon RPC 8.4(a)(3).[6] *See* OSB Formal Ethics Op No 2005-170. Lawyer *D* may not counsel her client to hire a public relations firm to make statements that she knows to be false. If "publicly disput[ing] or downplay[ing]" the allegations involves knowingly mis-stating the facts, or denying what Lawyer *D* knows to be true, her participation in such a scheme would not be ethical, irrespective of its likely impact on the adjudicative process.

To the extent Lawyer *D* wishes to counsel the client and its public relations firm only to make truthful statements that "dispute" or "downplay" the allegations, the first question is the extent of Lawyer *D*'s ethical responsibility for the acts of others. Oregon RPC 3.6(a) prohibits statements only by the lawyer; Oregon RPC 3.6(e) makes the lawyer only responsible for exercising "reasonable care to prevent *the lawyer's employees* from making an extrajudicial statement that the lawyer would

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[5] Filing frivolous motions or attaching materials that are clearly not admissible in support of those motions, for the sole purpose of making the discovered materials public record, would be unethical under Oregon RPC 3.1 and Oregon RPC 8.4(a)(4). Even with properly filed documents, it could be appropriate for the court to issue a protective order prohibiting public comment on potentially prejudicial matters.

[6] Depending on the extent to which the lawyer "employed or retained, supervised or directed" the public relations firm, Oregon RPC 5.3 also could be implicated. The rule is discussed more fully below.

be prohibited from making under this rule" (emphasis added). Oregon RPC 5.3 imposes vicarious responsibility on the lawyer for the conduct of "a nonlawyer employed or retained, supervised or directed by [the] lawyer" if "the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved." Oregon RPC 5.3(b)(1).[7]

If Lawyer *D* merely counsels her client to hire a public relations firm, through truthful statements, to dispute or downplay the allegations, but Lawyer *D* does not herself employ, direct, or supervise the firm or ratify its conduct, she will not be responsible for the firm's conduct under Oregon RPC 5.3. If Lawyer *D* counsels her client to hire the firm to do something Lawyer *D* knows, or reasonably should know, that she herself could not do without violating Oregon RPC 3.6(a), she may be guilty of "violat[ing] the Rules of Professional Conduct . . . through the acts of another," in violation of Oregon RPC 8.4(a)(1), or of "conduct that is prejudicial to the administration of justice," in violation of Oregon RPC 8.4(a)(4).

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[7] Oregon RPC 5.3 provides:

> With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:
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> (a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The ultimate question is whether the extrajudicial statements Lawyer *D* wants her client to engage the firm to make would violate Oregon RPC 3.6(a) if Lawyer *D* made them herself. From the facts hypothesized, it is not possible to say with any certainty whether they would, because there is no indication of what specifically will be said or of the point in the process at which these statements will be made. The statements would be improper if, in the context of their nature and their proximity to the trial, they are highly likely to create seriously prejudicial beliefs in potential jurors in the impending trial. Again, to the extent the statements are limited either to statements of the defense or to information contained in a public record, they would be expressly permitted by Oregon RPC 3.6(b). Also, in appropriate circumstances, judges can guard against undue prejudice by crafting orders that limit pretrial publicity.

2. *The Criminal Cases.*

a. *The Sex Crime.*

The hypothetical criminal case involves two extrajudicial statements. The first is made by investigators supervised by a prosecuting attorney, at a time when no charging decision is imminent. The investigators reveal to the press the suspect's sexual predilections, which revelation has a substantial impact on proceedings in an unrelated matter for which the suspect has been charged and is being held.

As discussed above, the prosecutor's responsibility for the investigator's statements depends on the level of the prosecutor's authority over the investigator. In this case, assuming the prosecutor's supervision of the investigation included direct supervisory authority over the investigators, the prosecutor was obligated to "make reasonable efforts to ensure that the [investigator's] conduct is compatible with the professional obligations of the lawyer." Oregon RPC 5.3(a). If the prosecutor failed to do so, and if the statements would have violated Oregon RPC 3.6(a) had the prosecutor made them, then the prosecutor would be subject to discipline. Similarly, Oregon RPC 5.3(b)(1) would subject the prosecutor to discipline if the prosecutor "order[ed] or, with the knowledge of the specific conduct, ratifie[d] the conduct involved" by the

investigator in making statements that would have violated Oregon RPC 3.6(a) had the prosecutor made them.

The question remains whether making the statement would violate Oregon RPC 3.6(a). Again, there is an actual matter being investigated, the prosecutor is participating in the investigation, and the statements are revealed to the press, so that their public dissemination is known or obvious. Although the hypothetical assumes that the revelations in fact have a substantial impact, Oregon RPC 3.6(a), as did its predecessor, "deals with purposes and prospective effects, not with completed harm." *In re Lasswell*, 296 Or at 126. The question is not whether there was actual harm, but whether the prosecutor knew of or was indifferent to the serious risk of prejudice. If the prosecutor knew of the pending matter, then, depending on the precise nature of the "sexual predilections," it is probable that, at a minimum, indifference to a serious risk would be established. But that risk is to the process in a different matter, and, by its terms, Oregon RPC 3.6(a) is matter-specific. Oregon RPC 3.6(a) does not expressly prohibit the making of extrajudicial statements that would have a prejudicial impact on fact-finding in an unrelated matter in which the lawyer (or the lawyer's agency or firm) is not participating.

Oregon RPC 3.6(d), however, provides, "No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a)." Under this rule, if the same agency is investigating and/or prosecuting both cases, and if the prosecutor investigating the first case is responsible for the investigator's statement, and if the statement would violate Oregon RPC 3.6(a) if it had been made by a lawyer in the same prosecutor's office who was prosecuting the other matter, then the prosecutor responsible for the investigator's statement would be guilty of a violation of Oregon RPC 3.6(a).[8]

[8] Furthermore, under Oregon RPC 5.1(b), if both matters are being handled by the same prosecutor's office, the lawyer's supervisor or manager could be vicariously responsible for the statements if the managing or supervising lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

The prosecutor alternatively may be guilty of conduct prejudicial to the administration of justice, in violation of Oregon RPC 8.4(a)(4). A finding of conduct prejudicial to the administration of justice requires

> the existence of each of three elements: (1) the lawyer engaged in "conduct," that is, the lawyer did something that he or she should not have done or failed to do something that the lawyer should have done; (2) the conduct occurred during the "administration of justice," that is, during the course of a judicial proceeding or another proceeding that has the trappings of a judicial proceeding; and (3) the lawyer's conduct resulted in "prejudice," either to the functioning of the proceeding or to a party's substantive interests in the proceeding.

In re Lawrence, 337 Or 450, 465, 98 P3d 366 (2004) (citations omitted). "Prejudice may result from repeated acts that cause some harm to the administration of justice or from a single bad act that causes substantial harm." *In re Lawrence*, 337 Or at 464–65. Conduct in the course of one proceeding that prejudices another proceeding may violate this rule. *In re Gustafson*, 333 Or 468, 484, 41 P3d 1063 (2002) (release of juvenile's records in a bar disciplinary matter resulted in prejudice to the administration of justice in juvenile's expunction proceeding). In the case presented by this hypothetical, it is arguable that the statement was not made in the course of a judicial proceeding, because the statement was made in connection with an investigation that had not led to the commencement of any prosecution. Although the prejudice to the administration of justice is just as substantial as it would have been had the statement been made in connection with the matter that it affected, unless there was some "judicial proceeding" in the course of which the statement was made, Oregon RPC 8.4(a)(4) does not reach that conduct.

The second extrajudicial statement in this scenario occurs after another individual has been convicted of murdering the missing victim. Upon leaving the courthouse after receiving the verdict, and before sentencing, the prosecutor delivers to the press an "emotionally delivered charge that the defendant is the most evil man she has encountered in her decade as a prosecutor."

This statement would violate Oregon RPC 3.6(a) if it is likely to prejudice the sentencing factfinder. If the defendant is going to be sentenced by the same jury that convicted him, and if the lawyer knows or reasonably believes that the jury will follow the judge's admonition against reading, viewing, or listening to news reports regarding the trial, then the statement would not violate the rule. And, if the sentencing is to be decided by the judge, the statement would not violate Oregon RPC 3.6(a). *In re Lasswell*, 296 Or at 126 n 3 (holding that statements would violate *former* DR 7-107 if they posed a substantial risk of "prejudice to an imminent procedure before *lay* factfinders" (emphasis added)). But if a second jury were to be empaneled to sentence the defendant, and if the sentencing hearing was going to be close in time to the conviction, then the statement could have a substantial (i.e., highly probable), likelihood of materially (i.e., seriously), prejudicing an imminent fact-finding process in a matter in which the lawyer is involved, such that it would violate Oregon RPC 3.6(a).

b. *The Eco-Terrorists.*

We are asked to review three hypothetical statements by the prosecutor: the announcement of the indictments; reference to the defendants as "terrorists" while announcing that the government will not stop in its efforts to root out terror attacks in the United States; and a statement just before trial regarding the evidence that the prosecutor hopes to introduce, though rulings on a pending motion may exclude some or all of the evidence.

We also are asked to review statements from a defense lawyer asserting his client's innocence; asserting justification and that the defendant's actions were in keeping with "Oregon values"; casting aspersions on the motives of the government; using "stronger language" than is in the public record to characterize the government's actions; and telling reporters, immediately before trial, that his client has passed a polygraph test.

The prosecutor's announcement of the indictments and the defense lawyer's assertions of his client's innocence and defense of justification are permitted by Oregon RPC 3.6(b)(1). The reference to the defendants

as "terrorists" and the statement that the government will not stop in its efforts to root out terrorism are not substantially likely to have a prejudicial impact on an impending fact-finding proceeding because no trial has yet been scheduled. The same is true of the defense lawyer's statement that the defendants' actions were in keeping with Oregon values.

The cases do not seem to express concern for the possible effect of pretrial publicity on judges, as opposed to on potential jurors. Therefore, the fact that the judge is still considering the motions regarding the defenses is not enough to implicate Oregon RPC 3.6(a). Even if the trial is imminent, and even if the defenses may be disposed of before the trial and might not be considered by the factfinders, Oregon RPC 3.6(b)(2) would permit the lawyer to state information that was contained in the public filings. If, however, the lawyer knows that the "stronger language" will prejudice the ultimate factfinders, or if it were so inflammatory that it was substantially likely to do so, the statement would violate Oregon RPC 3.6(a).

It is not clear from the hypothetical exactly how the prosecutor "uses the occasion of a codefendant's plea bargain to foreshadow evidence the prosecutor intends to attempt to introduce at trial." Presumably, in announcing the plea bargain, the prosecutor makes statements regarding the evidence the prosecutor intends to use against the remaining defendant(s). The evidence is, at this point, subject to a motion *in limine*, and, to the extent it is contained in the public record, the reference to it is permitted by Oregon RPC 3.6(b)(2). If the lawyer's purpose in making the statements is to prejudice the factfinder, the statements could violate Oregon RPC 8.4 (see discussion above). To the extent the evidence is not contained in a public record, if the lawyer knows that public dissemination of it will prejudice the imminent trial, or if it is so inflammatory that it is substantially likely to do so, the statement would violate Oregon RPC 3.6(a).

Finally, there is the question of the defense lawyer's telling the media that his client has passed a polygraph test. This statement would be improper if the lawyer knows or reasonably should know that the extrajudicial statement will have a substantial (i.e., highly probable),

likelihood of materially (i.e., seriously), prejudicing the imminent fact-finding process. It is difficult, without more information regarding the existing climate of publicity regarding the trial and the mood of the community, to gauge what the reasonably predictable effect of this statement would be.

Approved by Board of Governors, September 2007.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 8.8 (trial publicity), § 8.11 (conduct prejudicial to the administration of justice) (OSB Legal Pubs 2015).

FORMAL OPINION NO 2005-164

Communicating with Represented Persons: Contact through Websites and the Internet

Facts:

Lawyer *A* discovers that Lawyer *B*'s client has a public website. Information on the website may be relevant to the litigation pending between the two clients. Lawyer *A* wishes to visit the website and, perhaps, to communicate with representatives of the adverse party via the Internet.

Questions:

1. May Lawyer *A* visit the website of Lawyer *B*'s client?

2. May Lawyer *A* communicate via the website with representatives of Lawyer *B*'s client?

Conclusions:

1. Yes, qualified.

2. See discussion.

Discussion:

1. *Visiting a Public Website.*

Oregon RPC 4.2 provides:

> In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:
>
> (a) the lawyer has the prior consent of a lawyer representing such other person;
>
> (b) the lawyer is authorized by law or by court order to do so; or

> (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

The purpose of the rule is to ensure that represented persons have the benefit of their lawyer's counsel when discussing the subject of the representation with the adverse lawyer. The application of the rule is the same regardless of the form of the communication. *See In re Hedrick*, 312 Or 442, 822 P2d 1187 (1991) (lawyer disciplined for sending original letter to represented person with copy to lawyer); *In re Lewelling*, 296 Or 702, 678 P2d 1229 (1984) (direct communication either in person or by telephone is prohibited). For purposes of this opinion, there is no reason to distinguish between electronic or non-electronic forms of contact. Both are permitted or both are prohibited.

Accessing an adversary's public website is no different from reading a magazine article or purchasing a book written by that adversary. Because the risks that Oregon RPC 4.2 seeks to avoid are not implicated by such activities, no Oregon RPC 4.2 violation would arise from such electronic access. A lawyer who reads information posted for general public consumption simply is not communicating with the represented owner of the website.[1]

2. *Internet Communications.*

On the other hand, written communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus are subject to prohibition pursuant to Oregon RPC 4.2. In effect, and because none of the exceptions to Oregon RPC 4.2 appear to apply here, the question is whether the individual with whom Lawyer *A* may communicate is or is not a represented person within the meaning of OSB Formal Ethics Op No 2005-80 (rev 2016). *Cf.* OSB Formal Ethics Op No 2005-144 (rev 2007) (noting the limited scope of the "authorized by law" exception).

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[1] For purposes of this opinion, a website can be "public" even if an access fee or a subscription fee is charged. We express no opinion concerning access to websites involving or obtained through the use of deception. *Cf.* OSB Formal Ethics Op No 2005-173.

If Lawyer *A* knows[2] that the person with whom Lawyer *A* is communicating is a represented person within the meaning of OSB Formal Ethics Op No 2005-80 (rev 2016) (because, for example, the person is a part of the adverse party's management or is a nonmanagerial employee for whose conduct Lawyer *A* seeks to hold the adverse party responsible), the Internet communication would be prohibited. Similarly, Lawyer *A* could not use Internet communications to invade the adverse party's lawyer-client privilege. If, on the other hand, Lawyer *A* does not invade the adverse party's privilege and communicates only with a nonmanagerial employee who is merely a fact witness, no violation would exist. OSB Formal Ethics Op No 2005-80 (rev 2016).

The remaining question is whether Lawyer *A* may communicate via the Internet (or other means) with someone whom Lawyer *A* does not "know" to be a represented person within the meaning of OSB Formal Ethics Op No 2005-80 (rev 2016) but who is in fact such a person. Given the language of the rule, we conclude that such communications are permissible.

Approved by Board of Governors, August 2005.

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[2] Oregon RPC 1.0(h) provides:

> "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.

COMMENT: For additional information on this general topic, and other related subjects, see *The Ethical Oregon Lawyer* § 5.4 (the no-contact rule in the organizational setting), § 8.5-1 to § 8.5-2 (communicating with persons other than the client) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 98–100 (2000) (supplemented periodically); and ABA Model RPC 4.2.

AMERICAN BAR ASSOCIATION

Formal Opinion 462 **February 21, 2013**
Judge's Use of Electronic Social Networking Media

A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.[1]

In this opinion, the Committee discusses a judge's participation in electronic social networking. The Committee will use the term "electronic social media" ("ESM") to refer to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons. [2]

Judges and Electronic Social Media

In recent years, new and relatively easy-to-use technology and software have been introduced that allow users to share information about themselves and to post information on others' social networking sites. Such technology, which has become an everyday part of worldwide culture, is frequently updated, and different forms undoubtedly will emerge.

Social interactions of all kinds, including ESM, can be beneficial to judges to prevent them from being thought of as isolated or out of touch. This opinion examines to what extent a judge's participation in ESM raises concerns under the Model Code of Judicial Conduct.

Upon assuming the bench, judges accept a duty to "respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."[3] Although judges are full-fledged members of their communities, nevertheless, they "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens…."[4] All of a judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner "that promotes public confidence in the independence, integrity, and impartiality of the judiciary," and must "avoid impropriety and the appearance of impropriety."[5] This requires that the judge be sensitive to the appearance of relationships with others.

The Model Code requires judges to "maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives."[6] Thus judges must be very thoughtful in their interactions with others, particularly when using ESM. Judges must assume that comments posted to an ESM site will not remain within the circle of the judge's connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to

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[1] This opinion is based on the ABA Model Code of Judicial Conduct as amended by the ABA House of Delegates through August 2012. The laws, court rules, regulations, rules of professional and judicial conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] This opinion does not address other activities such as blogging, participation on discussion boards or listserves, and interactive gaming.

[3] Model Code, Preamble [1].

[4] Model Code Rule 1.2 cmt. 2.

[5] Model Code Rule 1.2. *But see* Dahlia Lithwick and Graham Vyse, "Tweet Justice," SLATE (April 30, 2010), (describing how state judge circumvents ethical rules prohibiting ex parte communications between judges and lawyers by asking lawyers to "de-friend" her from their ESM page when they're trying cases before her; judge also used her ESM account to monitor status updates by lawyers who appeared before her), *article available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html.

[6] Model Code, Preamble [2].

compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.[7]

There are obvious differences between in-person and digital social interactions. In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to ESM may be disseminated to thousands of people without the consent or knowledge of the original poster. Such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent. In addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.[8]

A judge who participates in ESM should be mindful of relevant provisions of the Model Code. For example, while sharing comments, photographs, and other information, a judge must keep in mind the requirements of Rule 1.2 that call upon the judge to act in a manner that promotes public confidence in the judiciary, as previously discussed. The judge should not form relationships with persons or organizations that may violate Rule 2.4(C) by conveying an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters in violation of Rule 2.9(A), and avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10, and take care not to offer legal advice in violation of Rule 3.10.

There also may be disclosure or disqualification concerns regarding judges participating on ESM sites used by lawyers and others who may appear before the judge.[9] These concerns have been addressed in judicial ethics advisory opinions in a number of states. The drafting committees have expressed a wide range of views as to whether a judge may "friend" lawyers and others who may appear before the judge, ranging from outright prohibition to permission with appropriate cautions.[10] A judge who has an ESM connection with a lawyer or party who has a pending or impending matter before the court must evaluate that ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court.[11] In this regard, context is significant.[12] Simple

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[7] *See* Model Code Rule 1.2 cmt. 3. *Cf.* New York Jud. Eth. Adv. Op. 08-176 (2009) (judge who uses ESM should exercise appropriate degree of discretion in how to use the social network and should stay abreast of features and new developments that may impact judicial duties). Regarding new ESM website developments, it should be noted that if judges do not log onto their ESM sites on a somewhat regular basis, they are at risk of not knowing the latest update in privacy settings or terms of service that affect how their personal information is shared. They can eliminate this risk by deactivating their accounts.

[8] Jeffrey Rosen, "The Web Means the End of Forgetting", N.Y. TIMES MAGAZINE (July 21, 2010) *accessible at* http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all.

[9] *See, e.g.,* California Judges Ass'n Judicial Ethics Comm. Op. 66 (2010) (judges may not include in social network lawyers who have case pending before judge); Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2009-20 (2009) (judge may not include lawyers who may appear before judge in social network or permit such lawyers to add judge to their social network circle); Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (judges should be mindful of "whether on-line connections alone or in combination with other facts rise to the level of 'a close social relationship'" that should be disclosed and/or require recusal); Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline Op. 2010-7 (2010) (judge may have ESM relationship with lawyer who appears as counsel in case before judge as long as relationship comports with ethics rules); South Carolina Jud. Dep't Advisory Comm. on Standards of Jud. Conduct, Op. No. 17-2009 (magistrate judge may have ESM relationship with lawyers as long as they do not discuss anything related to judge's judicial position). *See also* John Schwartz, "For Judges on Facebook, Friendship Has Limits," N.Y. TIMES, Dec. 11, 2009, at A25. *Cf.* Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-04 (2010) (judge's judicial assistant may add lawyers who may appear before judge to social networking site as long as the activity is conducted entirely independent of judge and without reference to judge or judge's office).

[10] *See* discussion in Geyh, Alfini, Lubet and Shaman, JUDICIAL CONDUCT AND ETHICS (5th Edition, forthcoming), Section 10.05E.

[11] California Judges Assn. Judicial Ethics Comm. Op. 66 (need for disclosure arises from peculiar nature of online social networking sites, where evidence of connection between lawyer and judge is widespread but nature of connection may not be readily apparent). *See also* New York Jud. Eth. Adv. Op. 08-176 (judge must consider whether any online connections, alone or in combination with other facts, rise to level of close social relationship requiring disclosure and/or recusal); Ohio Opinion 2010-7 (same).

[12] Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-06 (2010) (judge who is member of voluntary bar association not required to drop lawyers who are also members of that organization from organization's ESM site; members use the site to communicate among themselves about organization and other non-legal matters). *See also* Raymond McKoski,

designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person. [13]

Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.[14] The judge must remember that personal bias or prejudice concerning a party or lawyer is the sole basis for disqualification under Rule 2.11 that is not waivable by parties in a dispute being adjudicated by that judge. The judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally. [15] A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for the disqualification.[16] For example, a judge may decide to disclose that the judge and a party, a party's lawyer or a witness have an ESM connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification. However, nothing requires a judge to search all of the judge's ESM connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual.

Judges' Use of Electronic Social Media in Election Campaigns

Canon 4 of the Model Code permits a judge or judicial candidate to, with certain enumerated exceptions, engage in political or campaign activity. Comment [1] to Rule 4.1 states that, although the Rule imposes "narrowly tailored restrictions" on judges' political activities, "to the greatest extent possible," judges and judicial candidates must "be free and appear to be free from political influence and political pressure."

Rule 4.1(A)(8) prohibits a judge from personally soliciting or accepting campaign contributions other than through a campaign committee authorized by Rule 4.4. The Code does not address or restrict a judge's or campaign committee's method of communication. In jurisdictions where judges are elected, ESM has become a campaign tool to raise campaign funds and to provide information about the candidate.[17] Websites and ESM promoting the candidacy of a judge or judicial candidate may be

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"Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from 'Big Judge Davis'," 99 KY. L.J. 259, 291 (2010-11) (nineteenth century judge universally recognized as impartial despite off-bench alliances, especially with Abraham Lincoln); Schwartz, *supra* note 9 ("Judges do not drop out of society when they become judges…. The people who were their friends before they went on the bench remained their friends, and many of them were lawyers.") (quoting New York University Prof. Stephen Gillers).

[13] *See* Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (2010) (designation as an ESM follower does not, in and of itself, indicate the degree or intensity of judge's relationship with the person).

[14] *See, e.g.*, New York Judicial Ethics Advisory Opinion 08-176, *supra* n. 8. *See also* Ashby Jones, "Why You Shouldn't Take It Hard If a Judge Rejects Your Friend Request," WALL ST. J. LAW BLOG (Dec. 9, 2009) ("'friending' may be more than say an exchange of business cards but it is well short of any true friendship"); Jennifer Ellis, "Should Judges Recuse Themselves Because of a Facebook Friendship?" (Nov. 2011) (state attorney general requested that judge reverse decision to suppress evidence and recuse himself because he and defendant were ESM, but not actual, friends), *available at* http://www.jlellis.net/blog/should-judges-recuse-themselves-because-of-a-facebook-friendship/.

[15] *See* Jeremy M. Miller, "Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)," 33 PEPPERDINE L. REV. 575, 578 (2012) ("Judges should not, and are not, expected to live isolated lives separate from all potential lawyers and litigants who may appear before them.... However, it is also axiomatic that justice, to be justice, must have the appearance of justice, and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge").

[16] Rule 2.11 cmt. 5.

[17] In a recent survey, for judges who stood for political election, 60.3% used social media sites. 2012 CCPIO New Media and Courts Survey: A Report of the New Media Committee of the Conference of Court Public Information Officers (July 31, 2012), *available at* http://ccpio.org/blog/2010/08/26/judges-and-courts-on-social-media-report-released-on-new-medias-impact-on-the-judiciary/.

established and maintained by campaign committees to obtain public statements of support for the judge's campaign so long as these sites are not started or maintained by the judge or judicial candidate personally.[18]

Sitting judges and judicial candidates are expressly prohibited from "publicly endorsing or opposing a candidate for any public office."[19] Some ESM sites allow users to indicate approval by applying "like" labels to shared messages, photos, and other content. Judges should be aware that clicking such buttons on others' political campaign ESM sites could be perceived as a violation of judicial ethics rules that prohibit judges from publicly endorsing or opposing another candidate for any public office.[20] On the other hand, it is unlikely to raise an ethics issue for a judge if someone "likes" or becomes a "fan" of the judge through the judge's ESM political campaign site if the campaign is not required to accept or reject a request in order for a name to appear on the campaign's page.

Judges may privately express their views on judicial or other candidates for political office, but must take appropriate steps to ensure that their views do not become public.[21] This may require managing privacy settings on ESM sites by restricting the circle of those having access to the judge's ESM page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether.

Conclusion

Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.

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[18] Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-28 (July 23, 2010).
[19] Model Code Rule 4.1(A)(3).
[20] *See* "Kansas judge causes stir with Facebook `like'," The Associated Press, July 29, 2012, *available at* http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook__like_.html.
[21] *See* Nevada Comm'n on Jud. Disc. Op. JE98-006 (Oct. 20, 1998) ("In expressing his or her views about other candidates for judicial or other public office in letters or other recorded forms of communication, the judge should exercise reasonable caution and restraint to ensure that his private endorsement is not, in fact, used as a public endorsement.").

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 466 **April 24, 2014**
Lawyer Reviewing Jurors' Internet Presence

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but a lawyer may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

The Committee has been asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors'[1] presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review.

Juror Internet Presence

Jurors may and often will have an Internet presence through electronic social media or websites. General public access to such will vary. For example, many blogs, websites, and other electronic media are readily accessible by anyone who chooses to access them through the Internet. We will refer to these publicly accessible Internet media as "websites."

For the purposes of this opinion, Internet-based social media sites that readily allow account-owner restrictions on access will be referred to as "electronic social media" or "ESM." Examples of commonly used ESM at the time of this opinion include Facebook, MySpace, LinkedIn, and Twitter. Reference to a request to obtain access to

1. Unless there is reason to make a distinction, we will refer throughout this opinion to jurors as including both potential and prospective jurors and jurors who have been empaneled as members of a jury.

another's ESM will be denoted as an "access request," and a person who creates and maintains ESM will be denoted as a "subscriber."

Depending on the privacy settings chosen by the ESM subscriber, some information posted on ESM sites might be available to the general public, making it similar to a website, while other information is available only to a fellow subscriber of a shared ESM service, or in some cases only to those whom the subscriber has granted access. Privacy settings allow the ESM subscriber to establish different degrees of protection for different categories of information, each of which can require specific permission to access. In general, a person who wishes to obtain access to these protected pages must send a request to the ESM subscriber asking for permission to do so. Access depends on the willingness of the subscriber to grant permission.[2]

This opinion addresses three levels of lawyer review of juror Internet presence:

1. passive lawyer review of a juror's website or ESM that is available without making an access request where the juror is unaware that a website or ESM has been reviewed;

2. active lawyer review where the lawyer requests access to the juror's ESM; and

3. passive lawyer review where the juror becomes aware through a website or ESM feature of the identity of the viewer;

Trial Management and Jury Instructions

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice. There is a related and equally strong public policy in preventing jurors from being approached ex parte by the parties to the case or their agents. Lawyers need to know where the line should be drawn between properly investigating jurors and improperly communicating with them.[3] In today's Internet-saturated world, the line is increasingly blurred.

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2. The capabilities of ESM change frequently. The committee notes that this opinion does not address particular ESM capabilities that exist now or will exist in the future. For purposes of this opinion, key elements like the ability of a subscriber to control access to ESM or to identify third parties who review a subscriber's ESM are considered generically.

3. While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." *See also* Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

For this reason, we strongly encourage judges and lawyers to discuss the court's expectations concerning lawyers reviewing juror presence on the Internet. A court order, whether in the form of a local rule, a standing order, or a case management order in a particular matter, will, in addition to the applicable Rules of Professional Conduct, govern the conduct of counsel.

Equally important, judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds, including review of their ESM and websites.[4] If a judge believes it to be necessary, under the circumstances of a particular matter, to limit lawyers' review of juror websites and ESM, including on ESM networks where it is possible or likely that the jurors will be notified that their ESM is being viewed, the judge should formally instruct the lawyers in the case concerning the court's expectations.

Reviewing Juror Internet Presence

If there is no court order governing lawyers reviewing juror Internet presence, we look to the ABA Model Rules of Professional Conduct for relevant strictures and prohibitions. Model Rule 3.5 addresses communications with jurors before, during, and after trial, stating:

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
>
> (c) communicate with a juror or prospective juror after discharge of the jury if:
>
> (1) the communication is prohibited by law or court order;
>
> (2) the juror has made known to the lawyer a desire not to communicate; or
>
> (3) the communication involves misrepresentation, coercion, duress or harassment . . .

Under Model Rule 3.5(b), a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order. *See, e.g., In re Holman*, 286 S.E.2d 148 (S.C. 1982) (communicating with member of jury selected for trial of lawyer's client was "serious crime" warranting disbarment).

4. Judges also may choose to work with local jury commissioners to ensure that jurors are advised during jury orientation that they may properly be investigated by lawyers in the case to which they are assigned. This investigation may include review of the potential juror's Internet presence.

A lawyer may not do through the acts of another what the lawyer is prohibited from doing directly. Model Rule 8.4(a). *See also In re Myers*, 584 S.E.2d 357 (S.C. 2003) (improper for prosecutor to have a lay member of his "jury selection team" phone venire member's home); *cf.* S.C. Ethics Op. 93-27 (1993) (lawyer "cannot avoid the proscription of the rule by using agents to communicate improperly" with prospective jurors).

Passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b). In the world outside of the Internet, a lawyer or another, acting on the lawyer's behalf, would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions. The mere act of observing that which is open to the public would not constitute a communicative act that violates Rule 3.5(b).[5]

It is the view of the Committee that a lawyer may not personally, or through another, send an access request to a juror. An access request is an active review of the juror's electronic social media by the lawyer and is a communication to a juror asking the juror for information that the juror has not made public. This would be the type of ex parte communication prohibited by Model Rule 3.5(b).[6] This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past.

Some ESM networks have a feature that allows the juror to identify fellow members of the same ESM network who have passively viewed the juror's ESM. The details of how this is accomplished will vary from network to network, but the key feature that is

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5. Or. State Bar Ass'n, Formal Op. 2013-189 ("Lawyer may access publicly available information [about juror, witness, and opposing party] on social networking website"); N.Y. Cnty. Lawyers Ass'n, Formal Op. 743 (2011) (lawyer may search juror's "publicly available" webpages and ESM); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may use social media websites to research jurors); Ky. Bar Ass'n, Op. E-434 (2012) ("If the site is 'public,' and accessible to all, then there does not appear to be any ethics issue."). *See also* N.Y. State Bar Ass'n, Advisory Op. 843 (2010) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation"); Or. State Bar Ass'n, Formal Op. 2005-164 ("Accessing an adversary's public Web [sic] site is no different from reading a magazine or purchasing a book written by that adversary"); N.H. Bar Ass'n, *supra* note 3 (viewing a Facebook user's page or following on Twitter is not communication if pages are open to all members of that social media site); San Diego Cnty. Bar Legal Ethics Op. 2011-2 (opposing party's public Facebook page may be viewed by lawyer).

6. *See* Or. State Bar Ass'n, *supra* note 5, fn. 2, (a "lawyer may not send a request to a juror to access non-public personal information on a social networking website, nor may a lawyer ask an agent to do so"); N.Y. Cnty. Lawyers Ass'n, *supra* note 5 ("Significant ethical concerns would be raised by sending a 'friend request,' attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror's blog, or 'following' a juror's Twitter account"); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra* note 3 (lawyer may not chat, message or send a "friend request" to a juror); Conn. Bar Ass'n, Informal Op. 2011-4 (friend request is a communication); Mo. Bar Ass'n, Informal Op. 2009-0003 (friend request is a communication pursuant to Rule 4.2). *But see* N.H. Bar Ass'n, *supra* note 3 (lawyer may request access to witness's private ESM, but request must "correctly identify the lawyer . . . [and] . . . inform the witness of the lawyer's involvement" in the matter); Phila. Bar Ass'n, Advisory Op. 2009-02 (lawyer may not use deception to secure access to witness's private ESM, but may ask the witness "forthrightly" for access).

relevant to this opinion is that the juror-subscriber is able to determine not only that his ESM is being viewed, but also the identity of the viewer. This capability may be beyond the control of the reviewer because the notice to the subscriber is generated by the ESM network and is based on the identity profile of the subscriber who is a fellow member of the same ESM network.

Two recent ethics opinions have addressed this issue. The Association of the Bar of the City of New York Committee on Professional Ethics, in Formal Opinion 2012-2[7], concluded that a network-generated notice to the juror that the lawyer has reviewed the juror's social media was a communication from the lawyer to a juror, albeit an indirect one generated by the ESM network. Citing the definition of "communication" from Black's Law Dictionary (9th ed.) and other authority, the opinion concluded that the message identifying the ESM viewer was a communication because it entailed "the process of bringing an idea, information or knowledge to another's perception—including the fact that they have been researched." While the ABCNY Committee found that the communication would "constitute a prohibited communication if the attorney was aware that her actions" would send such a notice, the Committee took "no position on whether an inadvertent communication would be a violation of the Rules." The New York County Lawyers' Association Committee on Professional Ethics in Formal Opinion 743 agreed with ABCNY's opinion and went further explaining, "If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an impermissible communication, as it might tend to influence the juror's conduct with respect to the trial."[8]

This Committee concludes that a lawyer who uses a shared ESM platform to passively view juror ESM under these circumstances does not communicate with the juror. The lawyer is not communicating with the juror; the ESM service is communicating with the juror based on a technical feature of the ESM. This is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street.

Discussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.

While this Committee concludes that ESM-generated notice to a juror that a lawyer has reviewed the juror's information is not communication from the lawyer to the juror, the Committee does make two additional recommendations to lawyers who decide to review juror social media. First, the Committee suggests that lawyers be aware of these automatic, subscriber-notification features. By accepting the terms of use, the subscriber-notification feature is not secret. As indicated by Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an ESM network, a lawyer who uses an ESM network in his practice should review the terms and conditions, including privacy

7. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *supra*, note 3.
8. N.Y. Cnty. Lawyers' Ass'n, *supra* note 5.

features – which change frequently – prior to using such a network. And, as noted above, jurisdictions differ on issues that arise when a lawyer uses social media in his practice.

Second, Rule 4.4(a) prohibits lawyers from actions "that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Discovery of Juror Misconduct

Increasingly, courts are instructing jurors in very explicit terms about the prohibition against using ESM to communicate about their jury service or the pending case and the prohibition against conducting personal research about the matter, including research on the Internet. These warnings come because jurors have discussed trial issues on ESM, solicited access to witnesses and litigants on ESM, not revealed relevant ESM connections during jury selection, and conducted personal research on the trial issues using the Internet.[9]

In 2009, the Court Administration and Case Management Committee of the Judicial Conference of the United States recommended a model jury instruction that is very specific about juror use of social media, mentioning many of the popular social media by name.[10] The recommended instruction states in part:

> I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror's violation of these instructions.

These same jury instructions were provided by both a federal district court and state criminal court judge during a three-year study on juries and social media. Their research found that "jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media."[11] As a result, the authors recommend jury instruction on social media "early and often" and daily in lengthy trials.[12]

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9. For a review of recent cases in which a juror used ESM to discuss trial proceedings and/or used the Internet to conduct private research, read Hon. Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke Law & Technology Review no. 1, 69-78 (2014), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1247&context=dltr.

10. Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case*, USCOURTS.GOV (June 2012), http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

11. *Id.* at 66.

12. *Id.* at 87.

Analyzing the approximately 8% of the jurors who admitted to being "tempted" to communicate about the case using social media, the judges found that the jurors chose not to talk or write about the case because of the specific jury instruction not to do so.

While juror misconduct via social media itself is not the subject of this Opinion, lawyers reviewing juror websites and ESM may become aware of misconduct. Model Rule 3.3 and its legislative history make it clear that a lawyer has an obligation to take remedial measures including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding. But the history is muddled concerning whether a lawyer has an affirmative obligation to act upon learning that a juror has engaged in improper conduct that falls short of being criminal or fraudulent.

Rule 3.3 was amended in 2002, pursuant to the ABA Ethics 2000 Commission's proposal, to expand on a lawyer's previous obligation to protect a tribunal from criminal or fraudulent conduct by the lawyer's client to also include such conduct by any person.[13]

Model Rule 3.3(b) reads:

> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional

13. Ethics 2000 Commission, *Model Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33.html (last visited Apr. 18, 2014).

Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

> This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). *Reporter's Explanation of Changes, Model Rule 3.3*.[14]

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venireperson engages in conduct that is *fraudulent or criminal*.[15] While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).[16]

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14. Ethics 2000 Commission, *Model Rule 3.3 Reporter's Explanation of Changes*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule33rem.html (last visited Apr. 18, 2014).

15. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) to N.Y. RULES OF PROF'L CONDUCT, R. 3.5(d) (2013) ("a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror….").

16. *See, e.g.*, U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. U.S. v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Conclusion

In sum, a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Requesting access to a private area on a juror's ESM is communication within this framework.

The fact that a juror or a potential juror may become aware that the lawyer is reviewing his Internet presence when an ESM network setting notifies the juror of such review does not constitute a communication from the lawyer in violation of Rule 3.5(b).

If a lawyer discovers criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

IN BRIEF

OSB Professional Liability Fund

www.osbplf.org

Malpractice Prevention Education for Oregon Lawyers

April 2016

Issue 128

What to Do After a Data Breach

A data breach is a traumatizing event, regardless of how it occurs, and last year was a particularly active summer for thieves and scammers. In 2015, Oregon lawyers reported home and office break-ins, stolen laptops and mobile devices, and malware security intrusions. If you experience a data breach, here are the key steps you must take:

- **Contact the Professional Liability Fund.** Call the PLF immediately and ask to speak to a PLF claims attorney, even if you don't have Excess Coverage. Knowing about cyber liability claims enables the PLF to better assist Oregon attorneys with this expanding area of liability. See sidebar on page 10.

- **Contact the Oregon State Bar.** The OSB General Counsel's office can give you advice about the ethical implications of a data breach.

- **Contact an IT expert NOW before you pass go.** The scope of the intrusion may reach beyond your stolen mobile device or the infected computer. Until you know better, assume that all connected devices are part of the data breach. This might include your desktop computer, your assistant's computer, your server, mobile devices used to access your network, and your home computer if you connect remotely to your office. Fixing security issues will require sleuthing, finding a solution, protecting existing data and devices not affected by the breach, testing security solutions, and potentially preserving forensic evidence. Don't try to fix it yourself!

- **Change user names and passwords.** At the first indication of a data breach, you won't know exactly what went wrong – only that your information, or your clients' information, has been compromised. Using an uninfected computer, change user names and passwords for your online accounts. (If you modify your login credentials while a keylogger (a type of spyware) resides on your system, you've made the situation worse by supplying the hacker with your newly replaced credentials.) If necessary, get help from your IT expert.

- **Freeze or place fraud alerts on credit accounts.** A freeze literally locks down your credit. No credit transactions can be authorized until you lift the freeze, temporarily or permanently. Fraud alerts inform you if someone is attempting to obtain new credit in your name. Learn more about credit freezes and fraud alerts at https://www.consumer.ftc.gov/articles/0497-credit-freeze-faqs.

- **Protect bank accounts, credit cards, and debit cards.** If banking, credit card, or debit card information was exposed in conjunction with the data breach, you may want to freeze your bank accounts (personal, general, IOLTA), arrange for fraud protection services, or close your accounts altogether. Talk to your banks and credit or debit card providers. If you have automated payments tied to former bank accounts, credit cards, or debit cards, be sure to update your information. This includes payment accounts associated with federal or state court eFiling systems. Continue to monitor statements for unauthorized transactions.

- **File a police report.** Realistically, this isn't likely to help. However, it may be required under the Oregon Consumer Identity Theft Protection Act (ORS 646A.600-646A.628) or the terms of your insurance/coverage policy.

- **Report the breach to your property manager.** If the breach occurred in connection with an office break-in, inform the property manager as soon as possible. Broken windows and locks should be fixed immediately to avoid further loss. If you believe inadequate security may have played a role in the break-in, it may be appropriate to assert a claim against the management or building owner. Research the issue or speak to outside counsel. Document your property loss and consider getting a commitment in writing about security improvements.

- **File claims with commercial carriers.** Submit claims to any applicable insurance carriers: cyber liability and data breach, commercial liability, or others.

- **Report identity theft to the Federal Trade Commission.** If you are the victim of identity theft, file a report with the FTC as soon as possible. Review the FTC website for other steps not discussed here (e.g., reporting a misused Social Security number, removing bogus credit charges, replacing government-issued identification cards). See www.identitytheft.gov/#what-to-do-right-away.

- **Notify clients.** This is never easy, but clients must be informed if confidential information has been compromised. A sample notification letter is available on the PLF website at www.osbplf.org. Select Practice Management > Forms > Client Relations > "Notice to Clients re Theft of Computer Equipment." If you have questions about your ethical duties toward clients, speak to OSB General Counsel (see above). Additionally, client notification may be a statutory responsibility under the Oregon Consumer Identity Theft Protection Act (ORS 646A.600-646A.628).

- **Begin reconstructing files if needed.** Lawyers who are straightforward about an office break-in or theft often find that clients are sympathetic, understanding, and more than willing to help. With a bit of luck, you should be able to reconstruct most or all of your files from your backup or documents supplied by clients.

- **Monitor your credit report.** Check your credit reports at www.annualcreditreport.com for signs of fraud. This is the only official source for free credit reports authorized by the Federal Trade Commission.

- **Monitor Craigslist.** If you believe a thief has posted your property for sale, inform the police.

- **Start using encryption.** Read "Encryption Made Simple for Lawyers" as a starter (ABA GPSolo Magazine, November/December 2012), which is now a book: http://www.americanbar.org/publications/gp_solo/2012/november_december2012privacyandconfidentiality/encryption_made_simple_lawyers.html. Then check out www.lawtechnologytoday.org and the resources from the ABA Legal Technology Resource Center at www.americanbar.org/groups/departments_offices/legal_technology_resources/resources.html. For reviews of encryption products, check out http://www.lawsitesblog.com/. If you want an encrypted password manager – a very good idea – see the top picks for 2016 at www.pcmag.com. Shopping for a new laptop? Don't forget that hard drive encryption is automatically built into the Mac OS. Using Windows OS? Sorry, you'll need to buy your own encryption software. If all this seems overwhelming, talk to your IT expert.

- **Backup, backup, backup!** Online backup services are a great way to automatically back up data. Read more about backup protocols and available resources on the PLF website. Select Practice Management > Forms > Technology > "How to Backup Your Computer" and "Online Data Storage."

- **No cyber liability or data breach coverage?** Buy it! If your claims weren't covered, purchase cyber liability and data breach insurance to protect against future loss – privately or through the PLF as part of our Excess Program. Beginning in 2013, the PLF added a Cyber Liability and Breach Response Endorsement to all Excess Coverage plans. The Endorsement covers many claims that otherwise would be excluded. (See sidebar below.)

- **Stay vigilant.** Fixing a data breach does not mean that scammers or hackers will stop. Watch out for phishing attempts. Don't click on suspicious links in emails, texts, or social media messages. I've written over 20 blog posts on the subject of scams. To find the posts, visit my blog's landing page at http://oregonlawpracticemanagement.com/. In the search box in the upper right corner, enter "scam." You'll also find seven *In Brief* articles on the PLF website at www.osbplf.org. Select Practice Management > Publications > In Brief, and enter "scam" in the search by keyword or year box. See also Jennifer Meisberger, "Sophisticated Scams: Protect Your Clients' Money," *Oregon State Bar Bulletin* (June 2015), and the PLF CLE, "Protecting Your Firm and Your Client from Scams, Fraud, and Financial Loss."

Beverly Michaelis
PLF Practice Management Advisor

Originally posted on September 14, 2015, on http://oregonlawpracticemanagement.com.

Cyber Extortion Coverage Added to PLF Excess Coverage!

We are delighted to announce that 2016 PLF Excess Coverage now includes coverage for Cyber Extortion events under the Cyber Liability and Breach Response Endorsement ("Endorsement") (included in all PLF Excess Coverage plans). There is no additional charge for this coverage enhancement.

Cyber extortion occurs when a business's computer system is attacked and data stored on the computers or networks is rendered unusable because it is encrypted by extortionists. The only possibility for release of that data (unless it is otherwise backed up on a non-infected drive) is through satisfying a payment demand. Another term for this type of virus or attack is ransomware. The PLF is aware of at least one cyber extortion attack made against an Oregon law firm in 2015. That claim would not have been covered under prior Endorsements, nor is there coverage for these claims under the PLF Primary Claims Made Plan.

Under the 2016 Endorsement, the limit available to cover Cyber Extortion claims is $10,000, with a $2,000 deductible. Though cyber extortion demands are often quite small (many would not exceed the deductible), it is important that you notify the PLF of these claims so they can be monitored under the Endorsement. This is particularly valuable if additional claims result from the Cyber Extortion event. We believe this added coverage is of great benefit to Oregon law firms and are pleased to include it in our Excess Coverage for this year.

If you have any questions about the Cyber Liability and Breach Response Endorsement or other aspects of PLF Excess Coverage, please contact Emilee Preble at 503.639.6911 or at emileep@osbplf.org.

Continued on page 4

PROTECTING YOURSELF & YOUR LAW FIRM FROM DATA BREACH CHECKLIST

Data breach is the unintended exposure of your data to unauthorized viewers. As lawyers, we are entrusted with confidential data about our clients. This checklist is intended to help you to become more secure. Think of it as a cybersecurity checklist that is helpful for identifying areas of concern for you to discuss with your IT support person. As cybersecurity is an area of ongoing change due to the increasing sophistication of cyber criminals, you should continue to seek information about data security.

Passwords

1. Use passwords to protect all devices connected to the internet. Create strong passwords at least 14 characters or more using upper and lower case letters, numbers, and special characters. Use a passphrase such as a sentence to help you to remember it.

2. Use a password manager program to store your passwords securely in an encrypted vault on your computer or in the cloud. Don't store passwords in files on your computer such as in a Word document or Excel spreadsheet. If you must write down your passwords, secure it in a locked location.

3. Use two-factor authentication, which allows the program or application you're using to verify your identity using two factors: (1) **something you know** (e.g., a password) and (2) **something you have** (e.g., a pin code texted to your phone) or **something you are** (e.g., a fingerprint or retina scan). Authentication devices provide strong two-factor authentication. For example, a YubiKey (www.yubico.com) itself is a two-factor authentication device incorporating a physical key with your fingerprint that plugs into your USB drive and supports one-password public key encryption and authentication. The YubiKey 4C Nano is the world's smallest USB-C authentication device for use with USB-C ports.

4. Keep your password confidential. Don't share it with anyone.

5. Keep your password unique. Don't re-use important passwords for multiple websites, devices, or services.

6. Change your password frequently, such as every 30 or 45 days. Don't recycle passwords!

Hardware and Software

7. Keep your hardware and software current with upgrades from the vendor. Those upgrades will typically include improved security features.

8. Secure your server in a locked room. Some cyber criminals have walked through law firms with clipboards posing as IT service personnel. Verify identities before granting access to your server.

9. Use intrusion detection systems. These systems will alert you to attempts to invade your computer system.

10. Use security software suites that include virus and malware protection and keep them up-to-date.

11. Have your IT support person set up your wireless network to include enabling strong encryption. Disable the WEP and WPA encryption and require WPA2 encryption.

12. Change the default passwords on all wireless routers and servers. Consult your IT support person for any help.

13. Be sure that any device holding client data is password-protected and encrypted, especially if these devices are taken off site. Thumb drives, smart phones, tablets, and laptops continue to be the most frequently stolen or lost devices.

Protocols

14. Back up all data and do regular periodic test restores of the backup. Store your backup securely. Backups taken off site or stored on the internet should be encrypted. If you are storing your backup or any data on the internet, be sure that the vendor does not have access to the decryption key.

15. Be sure that your IT support person sets up your backup system so it cannot be corrupted if your computer is attacked by ransomware. Otherwise, ransomware can travel onto your backup.

16. Develop a protocol for internet usage at work. Employees should not be allowed to download and install programs and apps on devices that connect to your server without prior authorization from your IT support person. Freeware frequently is infected with malware. Train your staff to avoid downloading any attachments sent by email especially if the extension ends in .exe which means it is an executable file.

17. Ensure that all remote access to the office network occur through a VPN, MiFi, smartphone hotspot, or some other encrypted connection. Prohibit connecting to the office network using a public computer (such as at a hotel or library) and unsecured open public Wi-Fi network (such as at an airport, hotel, coffee shop, or library). Obtain guidance from your IT support person for setting up a VPN, MiFi, or smartphone hotspot.

18. Do not allow non-employees to have access to your network. This especially includes terminated employees.

19. Conduct an annual internal network security audit to ensure your network is secure. This is most helpful when it includes a vulnerability assessment.

Education

20. Provide mandatory social engineering awareness training to your staff annually.

21. Provide training to staff for how to respond to a cyber breach incident, including disconnecting the device from the internet and office network immediately if staff suspects the device has been breached and contact IT support immediately.

22. Instruct staff on how to properly dispose of any device or digital media that contains client or law firm data.

23. Instruct staff on proper safeguards if they are allowed to use their own device on your network.

24. Instruct staff on how to scrub documents for metadata.

25. Teach staff how to recognize phishing scams.

26. Teach staff to exercise caution when using social media as cyber criminals could use the same information to assist them in personal identity theft or hacking online accounts.

Resources for Further Study

27. "Data Security," Federal Trade Commission. http://bit.ly/2ZWagyQ

28. "Law Firm Guide to Cybersecurity," American Bar Association. http://bit.ly/3aXAqHG

29. Lawyers Mutual Liability Insurance Company of North Carolina Data Breach Incident Response Plan Toolkit. https://bit.ly/37TWEIN

30. Schneier on Security: Books by Bruce Schneier. https://www.schneier.com/books/

IMPORTANT NOTICES

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 483 **October 17, 2018**

Lawyers' Obligations After an Electronic Data Breach or Cyberattack

Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

Introduction[1]

Data breaches and cyber threats involving or targeting lawyers and law firms are a major professional responsibility and liability threat facing the legal profession. As custodians of highly sensitive information, law firms are inviting targets for hackers.[2] In one highly publicized incident, hackers infiltrated the computer networks at some of the country's most well-known law firms, likely looking for confidential information to exploit through insider trading schemes.[3] Indeed, the data security threat is so high that law enforcement officials regularly divide business entities into two categories: those that have been hacked and those that will be.[4]

In Formal Opinion 477R, this Committee explained a lawyer's ethical responsibility to use reasonable efforts when communicating client confidential information using the Internet.[5] This

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

[2] *See, e.g.*, Dan Steiner, *Hackers Are Aggressively Targeting Law Firms' Data* (Aug. 3, 2017), https://www.cio.com (explaining that "[f]rom patent disputes to employment contracts, law firms have a lot of exposure to sensitive information. Because of their involvement, confidential information is stored on the enterprise systems that law firms use. . . . This makes them a juicy target for hackers that want to steal consumer information and corporate intelligence.")' *See also Criminal-Seeking-Hacker' Requests Network Breach for Insider Trading*, Private Industry Notification 160304-01, FBI, CYBER DIVISION (Mar. 4, 2016).

[3] Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, WALL ST. J. (Mar. 29, 2016), https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504.

[4] Robert S. Mueller, III, *Combatting Threats in the Cyber World Outsmarting Terrorists, Hackers and Spies*, FBI (Mar. 1, 2012), https://archives.fbi.gov/archives/news/speeches/combating-threats-in-the-cyber-world-outsmarting-terrorists-hackers-and-spies.

[5] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) ("Securing Communication of Protected Client Information").

opinion picks up where Opinion 477R left off, and discusses an attorney's ethical obligations when a data breach exposes client confidential information. This opinion focuses on an attorney's ethical obligations after a data breach,[6] and it addresses only data breaches that involve information relating to the representation of a client. It does not address other laws that may impose post-breach obligations, such as privacy laws or other statutory schemes that law firm data breaches might also implicate. Each statutory scheme may have different post-breach obligations, including different notice triggers and different response obligations. Both the triggers and obligations in those statutory schemes may overlap with the ethical obligations discussed in this opinion. And, as a matter of best practices, attorneys who have experienced a data breach should review all potentially applicable legal response obligations. However, compliance with statutes such as state breach notification laws, HIPAA, or the Gramm-Leach-Bliley Act does not necessarily achieve compliance with ethics obligations. Nor does compliance with lawyer regulatory rules *per se* represent compliance with breach response laws. As a matter of best practices, lawyers who have suffered a data breach should analyze compliance separately under every applicable law or rule.

Compliance with the obligations imposed by the Model Rules of Professional Conduct, as set forth in this opinion, depends on the nature of the cyber incident, the ability of the attorney to know about the facts and circumstances surrounding the cyber incident, and the attorney's roles, level of authority, and responsibility in the law firm's operations.[7]

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[6] The Committee recognizes that lawyers provide legal services to clients under a myriad of organizational structures and circumstances. The Model Rules of Professional Conduct refer to the various structures as a "firm." A "firm" is defined in Rule 1.0(c) as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." How a lawyer complies with the obligations discussed in this opinion will vary depending on the size and structure of the firm in which a lawyer is providing client representation and the lawyer's position in the firm. *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 (2018) (Responsibilities of Partners, Managers, and Supervisory Lawyers); MODEL RULES OF PROF'L CONDUCT R. 5.2 (2018) (Responsibility of a Subordinate Lawyers); and MODEL RULES OF PROF'L CONDUCT R. 5.3 (2018) (Responsibility Regarding Nonlawyer Assistance).

[7] In analyzing how to implement the professional responsibility obligations set forth in this opinion, lawyers may wish to consider obtaining technical advice from cyber experts. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) ("Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.") *See also, e.g.*, *Cybersecurity Resources*, ABA Task Force on Cybersecurity, https://www.americanbar.org/groups/cybersecurity/resources.html (last visited Oct. 5, 2018).

I. Analysis

A. Duty of Competence

Model Rule 1.1 requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[8] The scope of this requirement was clarified in 2012, when the ABA recognized the increasing impact of technology on the practice of law and the obligation of lawyers to develop an understanding of that technology. Comment [8] to Rule 1.1 was modified in 2012 to read:

> 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. (Emphasis added.)[9]

In recommending the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

> Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to 'keep abreast of changes in the law and its practice.' The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document. [10]

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[8] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018).

[9] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 43 (Art Garwin ed., 2013).

[10] ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

In the context of a lawyer's post-breach responsibilities, both Comment [8] to Rule 1.1 and the 20/20 Commission's thinking behind it require lawyers to understand technologies that are being used to deliver legal services to their clients. Once those technologies are understood, a competent lawyer must use and maintain those technologies in a manner that will reasonably safeguard property and information that has been entrusted to the lawyer. A lawyer's competency in this regard may be satisfied either through the lawyer's own study and investigation or by employing or retaining qualified lawyer and nonlawyer assistants.[11]

1. Obligation to Monitor for a Data Breach

Not every cyber episode experienced by a lawyer is a data breach that triggers the obligations described in this opinion. A data breach for the purposes of this opinion means a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode.

Many cyber events occur daily in lawyers' offices, but they are not a data breach because they do not result in actual compromise of material client confidential information. Other episodes rise to the level of a data breach, either through exfiltration/theft of client confidential information or through ransomware, where no client information is actually accessed or lost, but where the information is blocked and rendered inaccessible until a ransom is paid. Still other compromises involve an attack on a lawyer's systems, destroying the lawyer's infrastructure on which confidential information resides and incapacitating the attorney's ability to use that infrastructure to perform legal services.

Model Rules 5.1 and 5.3 impose upon lawyers the obligation to ensure that the firm has in effect measures giving reasonable assurance that all lawyers and staff in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2], and Model Rule 5.3 Comment [1] state that lawyers with managerial authority within a firm must make reasonable efforts to establish

[11] MODEL RULES OF PROF'L CONDUCT R. 5.3 (2018); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2018); *See also* JILL D. RHODES & ROBERT S. LITT, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 124 (2d ed. 2018) [hereinafter ABA CYBERSECURITY HANDBOOK].

internal policies and procedures designed to provide reasonable assurance that all lawyers and staff in the firm will conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2] further states that "such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

Applying this reasoning, and based on lawyers' obligations (i) to use technology competently to safeguard confidential information against unauthorized access or loss, and (ii) to supervise lawyers and staff, the Committee concludes that lawyers must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data[12] and the use of data. Without such a requirement, a lawyer's recognition of any data breach could be relegated to happenstance --- and the lawyer might not identify whether a breach has occurred,[13] whether further action is warranted,[14] whether employees are adhering to the law firm's cybersecurity policies and procedures so that the lawyers and the firm are in compliance with their ethical duties,[15] and how and when the lawyer must take further action under other regulatory and legal provisions.[16] Thus, just as lawyers must safeguard and monitor the security of paper files and actual client property, lawyers utilizing technology have the same obligation to safeguard and monitor the security of electronically stored client property and information.[17]

While lawyers must make reasonable efforts to monitor their technology resources to detect a breach, an ethical violation does not necessarily occur if a cyber-intrusion or loss of electronic information is not immediately detected, because cyber criminals might successfully hide their

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[12] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008).
[13] Fredric Greene, *Cybersecurity Detective Controls—Monitoring to Identify and Respond to Threats*, ISACA J., Vol. 5, 1025 (2015), *available at* https://www.isaca.org/Journal/archives/2015/Volume-5/Pages/cybersecurity-detective-controls.aspx (noting that "[d]etective controls are a key component of a cybersecurity program in providing visibility into malicious activity, breaches and attacks on an organization's IT environment.").
[14] MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2018); MODEL RULES OF PROF'L CONDUCT R. 1.15 (2018).
[15] *See also* MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3 (2018).
[16] The importance of monitoring to successful cybersecurity efforts is so critical that in 2015, Congress passed the Cybersecurity Information Sharing Act of 2015 (CISA) to authorize companies to monitor and implement defensive measures on their information systems, and to foreclose liability for such monitoring under CISA. AUTOMATED INDICATOR SHARING, https://www.us-cert.gov/ais (last visited Oct. 5, 2018); *See also* National Cyber Security Centre "Ten Steps to Cyber Security" [Step 8: Monitoring] (Aug. 9, 2016), https://www.ncsc.gov.uk/guidance/10-steps-cyber-security.
[17] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).

intrusion despite reasonable or even extraordinary efforts by the lawyer. Thus, as is more fully explained below, the potential for an ethical violation occurs when a lawyer does not undertake reasonable efforts to avoid data loss or to detect cyber-intrusion, and that lack of reasonable effort is the cause of the breach.

2. Stopping the Breach and Restoring Systems

When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach. How a lawyer does so in any particular circumstance is beyond the scope of this opinion. As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach.[18] The decision whether to adopt a plan, the content of any plan, and actions taken to train and prepare for implementation of the plan, should be made before a lawyer is swept up in an actual breach. "One of the benefits of having an incident response capability is that it supports responding to incidents systematically (i.e., following a consistent incident handling methodology) so that the appropriate actions are taken. Incident response plans help personnel to minimize loss or theft of information and disruption of services caused by incidents."[19] While every lawyer's response plan should be tailored to the lawyer's or the law firm's specific practice, as a general matter incident response plans share common features:

> The primary goal of any incident response plan is to have a process in place that will allow the firm to promptly respond in a coordinated manner to any type of security incident or cyber intrusion. The incident response process should promptly: identify and evaluate any potential network anomaly or intrusion; assess its nature and scope; determine if any data or information may have been accessed or compromised; quarantine the threat or malware; prevent the exfiltration of information from the firm; eradicate the malware, and restore the integrity of the firm's network.
>
> Incident response plans should identify the team members and their backups; provide the means to reach team members at any time an intrusion is reported, and

[18] *See* ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 202 (explaining the utility of large law firms adopting "an incident response plan that details who has ownership of key decisions and the process to follow in the event of an incident.").

[19] *NIST Computer Security Incident Handling Guide*, at 6 (2012), https://nvlpubs.nist.gov/nistpubs/specialpublications/nist.sp.800-61r2.pdf.

> define the roles of each team member. The plan should outline the steps to be taken at each stage of the process, designate the team member(s) responsible for each of those steps, as well as the team member charged with overall responsibility for the response.[20]

Whether or not the lawyer impacted by a data breach has an incident response plan in place, after taking prompt action to stop the breach, a competent lawyer must make all reasonable efforts to restore computer operations to be able again to service the needs of the lawyer's clients. The lawyer may do so either on her own, if qualified, or through association with experts. This restoration process provides the lawyer with an opportunity to evaluate what occurred and how to prevent a reoccurrence consistent with the obligation under Model Rule 1.6(c) that lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[21] These reasonable efforts could include (i) restoring the technology systems as practical, (ii) the implementation of new technology or new systems, or (iii) the use of no technology at all if the task does not require it, depending on the circumstances.

3. Determining What Occurred

The Model Rules do not impose greater or different obligations on a lawyer as a result of a breach involving client information, regardless of whether the breach occurs through electronic or physical means. Just as a lawyer would need to assess which paper files were stolen from the lawyer's office, so too lawyers must make reasonable attempts to determine whether electronic files were accessed, and if so, which ones. A competent attorney must make reasonable efforts to determine what occurred during the data breach. A post-breach investigation requires that the lawyer gather sufficient information to ensure the intrusion has been stopped and then, to the extent reasonably possible, evaluate the data lost or accessed. The information gathered in a post-breach investigation is necessary to understand the scope of the intrusion and to allow for accurate disclosure to the client consistent with the lawyer's duty of communication and honesty under

[20] Steven M. Puiszis, *Prevention and Response: A Two-Pronged Approach to Cyber Security and Incident Response Planning*, THE PROF'L LAWYER, Vol. 24, No. 3 (Nov. 2017).

[21] We discuss Model Rule 1.6(c) further below. But in restoring computer operations, lawyers should consider whether the lawyer's computer systems need to be upgraded or otherwise modified to address vulnerabilities, and further, whether some information is too sensitive to continue to be stored electronically.

Model Rules 1.4 and 8.4(c).[22] Again, how a lawyer actually makes this determination is beyond the scope of this opinion. Such protocols may be a part of an incident response plan.

B. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the Rule and the commentary about a lawyer's efforts that are required to preserve the confidentiality of information relating to the representation of a client. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.[23] The 2012 modification added a duty in paragraph (c) that: "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."[24]

Amended Comment [18] explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1 and 5.3. 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.

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- 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

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[22] The rules against dishonesty and deceit may apply, for example, where the lawyer's failure to make an adequate disclosure --- or any disclosure at all --- amounts to deceit by silence. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. [1] (2018) ("Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.").

[23] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2018).

[24] *Id.* at (c).

- 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).[25]

As this Committee recognized in ABA Formal Opinion 477R:

> At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors.

As discussed above and in Formal Opinion 477R, an attorney's competence in preserving a client's confidentiality is not a strict liability standard and does not require the lawyer to be invulnerable or impenetrable.[26] Rather, the obligation is one of reasonable efforts. Rule 1.6 is not violated even if data is lost or accessed if the lawyer has made reasonable efforts to prevent the loss or access.[27] As noted above, this obligation includes efforts to monitor for breaches of client confidentiality. The nature and scope of this standard is addressed in the ABA Cybersecurity Handbook:

> Although security is relative, a legal standard for "reasonable" security is emerging. That standard rejects requirements for specific security measures (such as firewalls, passwords, or the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that the measures are effectively implemented, and ensure that they are continually updated in response to new developments.[28]

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[25] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2018). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 9, at 5.

[26] ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 122.

[27] MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [18] (2018) ("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.")

[28] ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 73.

Finally, Model Rule 1.6 permits a lawyer to reveal information relating to the representation of a client if the disclosure is impliedly authorized in order to carry out the representation. Such disclosures are permitted if the lawyer reasonably believes that disclosure: (1) is impliedly authorized and will advance the interests of the client in the representation, and (2) will not affect a material interest of the client adversely.[29] In exercising this discretion to disclose information to law enforcement about the data breach, the lawyer must consider: (i) whether the client would object to the disclosure; (ii) whether the client would be harmed by the disclosure; and (iii) whether reporting the theft would benefit the client by assisting in ending the breach or recovering stolen information. Even then, without consent, the lawyer may disclose only such information as is reasonably necessary to assist in stopping the breach or recovering the stolen information.

C. Lawyer's Obligations to Provide Notice of Data Breach

When a lawyer knows or reasonably should know a data breach has occurred, the lawyer must evaluate notice obligations. Due to record retention requirements of Model Rule 1.15, information compromised by the data breach may belong or relate to the representation of a current client or former client.[30] We address each below.

1. Current Client

Communications between a lawyer and current client are addressed generally in Model Rule 1.4. Rule 1.4(a)(3) provides that a lawyer must "keep the client reasonably informed about the status of the matter." Rule 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Under these provisions, an obligation exists for a lawyer to communicate with current clients about a data breach.[31]

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[29] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421(2001) (disclosures to insurer in bills when lawyer representing insured).

[30] This opinion addresses only obligations to clients and former clients. Data breach, as used in this opinion, is limited to client confidential information. We do not address ethical duties, if any, to third parties.

[31] Relying on Rule 1.4 generally, the New York State Bar Committee on Professional Ethics concluded that a lawyer must notify affected clients of information lost through an online data storage provider. N.Y. State Bar Ass'n Op. 842 (2010) (Question 10: "If the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients' confidential information,

Our conclusion here is consistent with ABA Formal Ethics Opinion 95-398 where this Committee said that notice must be given to clients if a breach of confidentiality was committed by or through a third-party computer vendor or other service provider. There, the Committee concluded notice to the client of the breach may be required under 1.4(b) for a "serious breach."[32] The Committee advised:

> Where the unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation, for example where it is likely to affect the position of the client or the outcome of the client's legal matter, disclosure of the breach would be required under Rule 1.4(b).[33]

A data breach under this opinion involves the misappropriation, destruction or compromise of client confidential information, or a situation where a lawyer's ability to perform the legal services for which the lawyer was hired is significantly impaired by the event. Each of these scenarios is one where a client's interests have a reasonable possibility of being negatively impacted. When a data breach occurs involving, or having a substantial likelihood of involving, material client confidential information a lawyer has a duty to notify the client of the breach. As noted in ABA Formal Opinion 95-398, a data breach requires notice to the client because such notice is an integral part of keeping a "client reasonably informed about the status of the matter" and the lawyer should provide information as would be "reasonably necessary to permit the client to make informed decisions regarding the representation" within the meaning of Model Rule 1.4.[34]

The strong client protections mandated by Model Rule 1.1, 1.6, 5.1 and 5.3, particularly as they were amended in 2012 to account for risks associated with the use of technology, would be compromised if a lawyer who experiences a data breach that impacts client confidential information is permitted to hide those events from their clients. And in view of the duties imposed by these other Model Rules, Model Rule 1.4's requirement to keep clients "reasonably informed about the status" of a matter would ring hollow if a data breach was somehow excepted from this responsibility to communicate.

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notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated.") (*citations omitted*).

[32] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-398 (1995).

[33] *Id.*

[34] MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2018).

Model Rule 1.15(a) provides that a lawyer shall hold "property" of clients "in connection with a representation separate from the lawyer's own property." Funds must be kept in a separate account, and "[o]ther property shall be identified as such and appropriately safeguarded." Model Rule 1.15(a) also provides that, "Complete records of such account funds and other property shall be kept by the lawyer . . . ." Comment [1] to Model Rule 1.15 states:

> A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property.

An open question exists whether Model Rule 1.15's reference to "property" includes information stored in electronic form. Comment [1] uses as examples "securities" and "property" that should be kept separate from the lawyer's "business and personal property." That language suggests Rule 1.15 is limited to tangible property which can be physically segregated. On the other hand, many courts have moved to electronic filing and law firms routinely use email and electronic document formats to image or transfer information. Reading Rule 1.15's safeguarding obligation to apply to hard copy client files but not electronic client files is not a reasonable reading of the Rule.

Jurisdictions that have addressed the issue are in agreement. For example, Arizona Ethics Opinion 07-02 concluded that client files may be maintained in electronic form, with client consent, but that lawyers must take reasonable precautions to safeguard the data under the duty imposed in Rule 1.15. The District of Columbia Formal Ethics Opinion 357 concluded that, "Lawyers who maintain client records solely in electronic form should take reasonable steps (1) to ensure the continued availability of the electronic records in an accessible form during the period for which they must be retained and (2) to guard against the risk of unauthorized disclosure of client information."

The Committee has engaged in considerable discussion over whether Model Rule 1.15 and, taken together, the technology amendments to Rules 1.1, 1.6, and 5.3 impliedly impose an obligation on a lawyer to notify a current client of a data breach. We do not have to decide that question in the absence of concrete facts. We reiterate, however, the obligation to inform the client does exist under Model Rule 1.4.

2. Former Client

Model Rule 1.9(c) requires that "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client."[35] When electronic "information relating to the representation" of a former client is subject to unauthorized access, disclosure, or destruction, the Model Rules provide no direct guidance on a lawyer's obligation to notify the former client. Rule 1.9(c) provides that a lawyer "shall not . . . reveal" the former client's information. It does not describe what steps, if any, a lawyer should take if such information is revealed. The Committee is unwilling to require notice to a former client as a matter of legal ethics in the absence of a black letter provision requiring such notice.[36]

Nevertheless, we note that clients can make an informed waiver of the protections in Rule 1.9.[37] We also note that Rule 1.16(d) directs that lawyers should return "papers and property" to clients at the conclusion of the representation, which has commonly been understood to include the client's file, in whatever form it is held. Rule 1.16(d) also has been interpreted as permitting lawyers to establish appropriate data destruction policies to avoid retaining client files and property indefinitely.[38] Therefore, as a matter of best practices, lawyers are encouraged to reach agreement with clients before conclusion, or at the termination, of the relationship about how to handle the client's electronic information that is in the lawyer's possession.

Absent an agreement with the former client lawyers are encouraged to adopt and follow a paper and electronic document retention schedule, which meets all applicable laws and rules, to reduce the amount of information relating to the representation of former clients that the lawyers retain. In addition, lawyers should recognize that in the event of a data breach involving former client information, data privacy laws, common law duties of care, or contractual arrangements with

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[35] MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(2) (2018).
[36] *See* Discipline of Feland, 2012 ND 174, ¶ 19, 820 N.W.2d 672 (Rejecting respondent's argument that the court should engraft an additional element of proof in a disciplinary charge because "such a result would go beyond the clear language of the rule and constitute amendatory rulemaking within an ongoing disciplinary proceeding.").
[37] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9, cmt. [9] (2018).
[38] *See* ABA Ethics Search Materials on Client File Retention, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/piles_of_files_2008.pdf (last visited Oct.15, 2018).

the former client relating to records retention, may mandate notice to former clients of a data breach. A prudent lawyer will consider such issues in evaluating the response to the data breach in relation to former clients.[39]

3. Breach Notification Requirements

The nature and extent of the lawyer's communication will depend on the type of breach that occurs and the nature of the data compromised by the breach. Unlike the "safe harbor" provisions of Comment [18] to Model Rule 1.6, if a post-breach obligation to notify is triggered, a lawyer must make the disclosure irrespective of what type of security efforts were implemented prior to the breach. For example, no notification is required if the lawyer's office file server was subject to a ransomware attack but no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or disclosed to unauthorized persons. Conversely, disclosure will be required if material client information was actually or reasonably suspected to have been accessed, disclosed or lost in a breach.

The disclosure must be sufficient to provide enough information for the client to make an informed decision as to what to do next, if anything. In a data breach scenario, the minimum disclosure required to all affected clients under Rule 1.4 is that there has been unauthorized access to or disclosure of their information, or that unauthorized access or disclosure is reasonably suspected of having occurred. Lawyers must advise clients of the known or reasonably ascertainable extent to which client information was accessed or disclosed. If the lawyer has made reasonable efforts to ascertain the extent of information affected by the breach but cannot do so, the client must be advised of that fact.

In addition, and as a matter of best practices, a lawyer also should inform the client of the lawyer's plan to respond to the data breach, from efforts to recover information (if feasible) to steps being taken to increase data security.

The Committee concludes that lawyers have a continuing duty to keep clients reasonably apprised of material developments in post-breach investigations affecting the clients'

[39] *Cf.* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018), at 8-10 (discussing obligations regarding client files lost or destroyed during disasters like hurricanes, floods, tornadoes, and fires).

information.[40] Again, specific advice on the nature and extent of follow up communications cannot be provided in this opinion due to the infinite number of variable scenarios.

If personally identifiable information of clients or others is compromised as a result of a data beach, the lawyer should evaluate the lawyer's obligations under state and federal law. All fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have statutory breach notification laws.[41] Those statutes require that private or governmental entities notify individuals of breaches involving loss or disclosure of personally identifiable information.[42] Most breach notification laws specify who must comply with the law, define "personal information," define what constitutes a breach, and provide requirements for notice.[43] Many federal and state agencies also have confidentiality and breach notification requirements.[44] These regulatory schemes have the potential to cover individuals who meet particular statutory notice triggers, irrespective of the individual's relationship with the lawyer. Thus, beyond a Rule 1.4 obligation, lawyers should evaluate whether they must provide a statutory or regulatory data breach notification to clients or others based upon the nature of the information in the lawyer's possession that was accessed by an unauthorized user.[45]

III. Conclusion

Even lawyers who, (i) under Model Rule 1.6(c), make "reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data

[40] State Bar of Mich. Op. RI-09 (1991).
[41] National Conference of State Legislatures, *Security Breach Notification Laws* (Sept. 29, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.
[42] *Id.*
[43] *Id.*
[44] ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 65.
[45] Given the broad scope of statutory duties to notify, lawyers would be well served to actively manage the amount of confidential and or personally identifiable information they store beyond any ethical, statutory, or other legal obligation to do so. Lawyers should implement, and follow, a document retention policy that comports with Model Rule 1.15 and evaluate ways to limit receipt, possession and/or retention of confidential or personally identifiable information during or after an engagement.

breach under Model Rule 1.4 in sufficient detail to keep clients "reasonably informed" and with an explanation "to the extent necessary to permit the client to make informed decisions regarding the representation."