130 ONLINE POSTING AND OTHER SHARING OF MATERIALS RELATING TO THE REPRESENTATION OF A CLIENT

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I. INTRODUCTION AND SCOPE

The Internet has made sharing many forms of information easier. It is easy, for example, for lawyers to post video clips from depositions, share responses to common motions or deposition transcripts of often-used experts, or publish recent court orders. The practice of sharing litigation materials, including deposition transcripts, briefs, and discovery responses, allows lawyers to assist one another in representing their respective clients. A comment to Rule 3.6 of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) reminds lawyers that "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." Colo. RPC 3.6, cmt. [3].

Despite the strong interest in allowing the free flow of information, including through various electronic media, lawyers must be mindful of and adhere to various provisions of the Rules when sharing or posting materials online. Lawyers must be particularly vigilant about client confidentiality when revealing information relating to the representation of a client. In addition, lawyers must be mindful of their duty of candor and other obligations flowing from court orders and rules. Although some of the Rules do not apply when a lawyer is not representing a client, most of the Rules relevant to posting or sharing materials obtained or generated during representation apply generally to a lawyer regardless of whether the lawyer posts or shares the materials as part of the representation of a client. These rules also generally apply even after the representation has concluded.

This opinion focuses on posting or sharing materials electronically, through various forms of online media, but the conclusions in this opinion apply to dissemination in any form. For instance, the principles underlying this opinion would apply to a lawyer showing a video deposition to a live audience or distributing written materials at a CLE presentation.

The opinion is limited to ethical considerations when a lawyer posts online or otherwise shares specific documents or other materials (such as videos) related to the lawyer's representation of a client; it does not address potential limitations on a lawyer's use or disclosure (whether online or otherwise) of other information the lawyer learned during the course of representing former clients. For example, during conversations with a current or former client, a lawyer might have learned specific factual information related to the representation. While the Rules would generally prohibit the lawyer from disclosing that information, whether on-line or otherwise, *see* Colo. RPC 1.6(a), 1.9(c)(2), this opinion does not address that circumstance. Or, a lawyer might have accumulated knowledge on an issue, such as how best to negotiate with a governmental agency, based on a history of representing former clients in negotiations with that agency. This opinion does not address the limits, if any, on a lawyer's use and disclosure of that type of information, whether in on-line posts or otherwise.

II. LAWYER'S DUTY TO MAINTAIN CLIENT CONFIDENCES

A. A Lawyer's Broad Duty to Maintain the Confidentiality of Materials Relating to the Representation of Current Clients

A deposition transcript in which an expert admits to lacking certain qualifications might be helpful for other lawyers to review before preparing a response to a summary judgment motion or preparing to examine the same expert in a deposition or at trial. A video of a deposition in which a government official admits to public corruption might be valuable for the public to watch. When a lawyer obtains these materials in connection with

representing a client, however, Colo. RPC 1.6 is implicated.

Colo. RPC 1.6(a) prohibits a lawyer from revealing "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" meets one of a few specific and narrowly drafted exceptions in Colo. RPC 1.6(b). There is no exception for revealing information for educational purposes, to assist another lawyer, or because the information is "newsworthy."

Similarly, Colo. RPC 1.8(b) provides "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Comment 5 to Rule 1.8 explains this prohibition applies even when "information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer." The Comment clarifies, however, that Rule 1.8(b) "does not prohibit uses that do not disadvantage the client."

The scope of what is confidential under Rule 1.6 is much broader than the evidentiary attorney-client privilege. "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Colo. RPC 1.6, cmt. [3]. The Colorado Supreme Court broadly interprets "client information." *People v. Hohertz*, 102 P. 3d 1019, 1022 (Colo. 2004).

Information relating to the representation of a client often exists in public records. Because a client may not understand that many records, like court filings, are available to the public, a lawyer should advise the client that certain tasks necessary to the representation of the client will result in information about the client, including sensitive

information, becoming public.

Information in public records that relates to the representation of a current client is "information related to the representation of a client" that is covered by the Rules. There is no exception for disclosing information in public records or those public records themselves. *In re Anonymous*, 654 N.E.2d 1128, 1129 (Ind. 1995) (disclosure of information related to the representation of a client that "was readily available from public sources and not confidential in nature" violated Rule 1.6); *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850, 860 (W.Va. 1995) ("The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it."). Nor is there an exception for information that is otherwise publicly available. *See* American Bar Association (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 480, "Confidentiality Obligations for Lawyer Blogging and Other Public Commentary" (March 6, 2018) ("Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is *not* exempt from the lawyer's duty of confidentiality under Model Rule 1.6.") (emphasis in original and footnote omitted). For example, without informed consent, a lawyer may not disclose information relating to the representation of a client even if the information has been in the news.

B. A Lawyer's Broad Duty of Non-Disclosure of Information Relating to Representation of Former Clients

Colo. RPC 1.9(c)(2), relating to duties to former clients, provides 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," subject to the same exceptions that apply to representation of a current client, *i.e.*, client consent or the exceptions stated in Colo. RPC 1.6(b). Colo.

RPC 1.9(c)(1), however, permits a lawyer to "use information relating to the representation to the disadvantage of the former client," subject to the same exceptions that would apply to representation of a current client *or* "when the information has become generally known." Comment 8 to Rule 1.9 further provides that "the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client."[1]

Thus, Rule 1.9(c) distinguishes between a lawyer's use and revelation of information relating to the representation of a former client. It permits the *use* of such information, even to the former client's disadvantage, when "the information has become generally known." But the lawyer may not *reveal* information relating to the representation of a former client, even when the information is generally known and will not disadvantage the former client, unless a distinct exception applies. *See, e.g.,* American Bar Association (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 479, "The 'Generally Known' Exception to Former Client Confidentiality" (2017) ("The generally known exception applies only to the "use" of former client confidential information.").

The distinction between a permissible use and an impermissible disclosure, while

[1] Neither Rule 1.9 nor any of its comments addresses a lawyer's use of information relating to the representation of a former client when the use of the information would not disadvantage the former client. The Committee construes this silence as signaling that a lawyer generally may use former client information, regardless of whether it is generally known, so long as the use of that information will not be harmful to the former client. *See, e.g., Marshall Tucker Band, Inc. v. M T Indus., Inc.*, 209 F. Supp. 3d 854, 861–62 (D.S.C. 2016) ("[B]ecause the Court is of the opinion Plaintiffs' counsel's possession of these limited documents containing only general, non-confidential information has in no way been used and in fact could not be used to the disadvantage of MTI in the current lawsuit, nor has any confidential information relating to MTI been revealed to Plaintiffs' advantage during the course of this lawsuit, the Court holds Plaintiffs' counsel are not in violation of Rule 1.9(c) of the RPC."); *but see In re Glauberman*, 586 N.Y.S.2d 601 (N.Y.App.Div.1992) (disciplining lawyer for his use, in insider trading, of information acquired while representing former client, without regard to harm to former client).

important, is academic in the context of the posting or other sharing of information online, because those acts necessarily result in the revelation (as opposed to the use) of former client information. Therefore, unless the disclosure would be permitted under Rule 1.6 or other Rules, a lawyer may not post or otherwise disclose even materials that are generally known relating to the lawyer's representation of a former client.

C. Client Consent to Posting or Other Sharing of Materials Relating to Representation

A current or former client may provide informed consent to a lawyer's posting or other sharing of materials that otherwise would be protected from disclosure under Rules 1.6 and 1.9. "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Colo. RPC 1.0(e). What constitutes "adequate information and explanation" will vary depending on the circumstances, including when the lawyer seeks the client's consent.

At a minimum, the lawyer should ensure that the client understands exactly what materials the lawyer proposes to publish, the manner of publication, to whom the materials will be available, and the material risks of disclosure to the client and the client's matter. A lawyer must consider and advise the client that once the lawyer discloses the materials, other persons may distribute them further. The lawyer also should clarify that the client may withhold or withdraw consent but that, as a practical matter, a later withdrawal of consent will be ineffective to reverse the disclosure. If the lawyer's purpose in posting materials obtained in the course of representing a client is unrelated to the client's legal matter, the lawyer should disclose that unrelated purpose to the client.

Depending on when a lawyer seeks a current or former client's consent, the lawyer

might not know and be able to advise the client of adequate information to obtain an informed consent. For example, in a litigation matter, the engagement letter might include the client's advance consent to the lawyer's eventual posting or other sharing of deposition transcripts created in the lawsuit; however, because it is unlikely that the client, at the engagement's outset, could appreciate the contents of those deposition transcripts and the material risks that their disclosure could create for the client, the advance consent might not be deemed informed. To increase the likelihood of obtaining an informed consent, the lawyer should obtain the client's consent after particular materials have come into existence and the client has had a chance to review them. A lawyer may request consent on an item-by-item basis, or on a broader basis at the end of the engagement.

D. Redaction as a Potential Protective Measure

When a client has not provided informed consent to share or post litigation materials, a lawyer may be able to redact the materials sufficiently to share or post the materials in compliance with Colo. RPC 1.6(a) and 1.9(c). The redactions must be sufficient to ensure that the disclosure no longer provides "information relating to the representation of a client." Colo. RPC 1.6(a).

The Committee agrees with the Alaska Bar Association's Ethics Committee, which opined that Rule 1.6 "does not prohibit informal communication or the exchange of public documents between counsel," but that "a cautious lawyer should delete from documents and discussions all information that might identify the client and that is not relevant for purposes of the disclosure." Alaska Ethics Op. No. 95-1, "Propriety of Shop Talk and Courtesy Copies Under ARPC 1.6" (1994).

Merely redacting the client's name is usually insufficient to comply with Colo. RPC 1.6(a) and 1.9(c). When the client has not given informed consent to the dissemination of

the client's information, the lawyer must, at a minimum, redact all information that identifies the client or connects the non-redacted information to the client. This includes redacting all information that could lead to the identification of the client, such as addresses and other personal details about the client. This also includes redacting all information that, through outside research or otherwise, could connect the non-redacted information to the client or show that the information is related to the client, including dates, locations, and specific descriptions of events. A lawyer also should redact information that would enable a person who knows the client's identity from a different source to connect the non-redacted information to the client. In some circumstances, such as when the facts are highly unusual and involve a public figure, it may be extremely difficult to protect confidentiality with any level of redacting. A comment to Rule 1.6 explains:

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

Colo. RPC 1.6, cmt. [4].

When sharing or posting a summary judgment brief, for example, a lawyer may need to remove paragraphs from the statement of facts, the names of exhibits, and other information specific to the representation of the client. When posting a deposition transcript, a lawyer may need to redact the case caption and all but a few questions and answers that do not reveal information related to the client or the specific matter litigated, depending on the circumstances.

Although a lawyer should broadly interpret the information covered by Colo. RPC

1.6(a) and 1.9(c), the Committee believes that some information never needs to be redacted to comply with these rules. For instance, legal citations, non-legal research from treatises, and curriculum vitae for disclosed experts may generally be shared without obtaining the client's informed consent, as long as the materials do not contain any other information that, if shared without informed consent, would violate these rules.

III. OTHER RESTRICTIONS ON SHARING OR POSTING MATERIALS

In some circumstances, even when sharing or posting the materials does not violate Rule 1.6 or 1.9, other Rules may preclude a lawyer from revealing information relating to the representation of the client.

For example, even if a lawyer has obtained the client's consent to share materials, court orders may prevent disclosure of the information contained in the materials. Colo. RPC 3.4(c) prohibits a lawyer from "knowingly disobey[ing] an obligation under the rules of a tribunal." A lawyer may violate this rule by, for instance, sharing discovery responses or specific documents that are subject to a protective order. In some cases, courts may have entered orders concerning trial publicity, or may have directed that all filings in a case be suppressed. Before posting any materials obtained in the course of litigation, a lawyer must consider the scope of any orders entered in the case. A lawyer who is concerned about the potential that an opposing party or lawyer might widely disseminate sensitive materials concerning the lawyer's client should consider seeking an appropriate protective order.

Additionally, Colo. RPC 3.6 prohibits a "lawyer who is participating or has participated in the investigation or litigation of a matter" from making "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." Colo. RPC 3.6(b) permits a lawyer to make statements or post materials about certain specific subjects and Colo. RPC 3.6(c) permits a lawyer to post materials "that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." Even when the public statements or posting of materials is allowed under Colo. RPC 3.6(b) or (c), a lawyer must comply with Colo. RPC 1.6 and 1.9 when the statements or posting would reveal information related to the representation of a client or former client.

The Committee, like the drafters, recognizes that a lawyer may have an interest in free expression related to these matters. *See* Colo. RPC 3.6, cmt. [1] ("It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression."). Analyzing this balance fully involves consideration of legal issues, including those arising under the First Amendment to the United States Constitution, that are beyond the scope of this opinion.

Even with informed client consent, sharing edited or misleading litigation materials may violate the Rules. Under Colo. RPC 8.4(c), a lawyer may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." A lawyer would likely violate this rule, for example, by posting only an edited portion of a video deposition that presents information in a false or misleading light. Similarly, other discovery materials or recorded information could be misleading if presented out of context or in a manipulated fashion. This is particularly true when an answer to a particular question posed during a deposition or through some other form of discovery is placed immediately after a question to which the answer was not intended to respond.

When "representing a client, a lawyer shall not use means that have no substantial

purpose other than to embarrass, delay, or burden a third person." Colo. RPC 4.4(a). Materials obtained concerning an opposing party in litigation may be of a highly personal and sensitive nature. Sharing such information could be extremely embarrassing to parties involved in the litigation process. Similarly, sensitive information learned during the course of representation can be embarrassing to a lawyer's former client if revealed in connection with a subsequent dispute with the former client. Lawyers who contemplate publishing materials, even when not precluded from doing so by any direct court order, must carefully consider whether there is a legitimate purpose for making the material generally available.

In some circumstances, a lawyer may wish to post materials obtained or generated in the course of representing a client in connection with the lawyer's marketing efforts. Use of such materials in marketing is beyond the scope of this opinion. However, a lawyer contemplating use of materials obtained in the course of representing a client for marketing purposes must carefully consider the Rules discussed in this opinion and any other applicable Rules.

Colo. RPC 8.4(a) prohibits a lawyer from violating the Rules through another and from knowingly assisting or inducing another to violate the Rules. Therefore, a lawyer may not encourage a client to post litigation materials when the lawyer's posting of the same materials would violate the Rules—for instance, by encouraging a client with a large social media following from distributing edited video deposition clips that the lawyer knows will substantially prejudice an upcoming trial. But this rule does not prohibit a lawyer from advising a client regarding action the client is legally entitled to take. Thus, a lawyer may advise a client about posting litigation materials online as long as the lawyer does not assist or induce the client to post the materials if the lawyer would be precluded from

doing so directly.

IV. CONCLUSION

In many situations, making public information obtained in the course of representing a client is helpful, either to other lawyers or to educate the public. But client confidentiality must be respected. When a client gives informed consent to a lawyer's posting or other sharing of materials, or the lawyer redacts client identifying information, a lawyer does not violate Rules 1.6 or 1.9. However, even where the Rules permit a lawyer to post or otherwise share client materials, the lawyer must nevertheless be careful to adhere to other Rules, including those requiring adherence to court orders, prohibiting communications that are dishonest, deceitful, or substantially likely to materially prejudice the administration of justice, and governing advertising.