

Be Careful What You Reveal

Model Rule of Professional Conduct 1.6

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Two lawyers walk into a bar. That may sound like the beginning of a joke. In fact, it may be the beginning of an ethical violation. If the two lawyers are not in the same firm, and they casually drink and swap war stories, they almost certainly will violate ABA Model Rule of Professional Conduct 1.6(a), even if what they discuss is neither privileged nor something the client would consider a confidence.

My attention to this rule was focused last year because the Illinois version of Rule 1.6(a) was broadened to conform to the Model Rule. Having examined the Model Rule, I daresay that most lawyers in the many states using Model Rule 1.6(a) do not fully grasp the breadth of the rule and unwittingly violate it regularly.

Imagine that our two hypothetical lawyers are law school classmates who meet occasionally over drinks to catch up. One became a litigator, the other a transactional lawyer. Nevertheless, they remain friends.

The litigator begins. He takes care not to reveal privileged communications or violate any protective order. But he freely names clients and recounts facts about two of his cases that were previously revealed in filed pleadings, in statements made in open court, and in nonconfidential discovery materials. He has not asked for or obtained client consent to talk about this information, and it never occurred to him that he needed to do so.

After feigning interest in the litigator's stories, the

transactional lawyer describes a pair of matters she is handling. (The litigator nods as if he finds transactional practice fascinating.) She takes care not to reveal any privileged communications or information that the companies are keeping secret. She reveals that her client, XYZ Corp., has notified 200 employees that they are being terminated via a reduction in force, and her firm has prepared the severance documents. She also reveals that another client, ABC Corp., had just hired a new chief executive officer, Ned Profitt, and she had negotiated the contract with Profitt's attorney. She describes several of the contract terms, including Profitt's compensation package, all of which were revealed in documents filed with the Securities and Exchange Commission (SEC). She has not asked for or obtained client consent to have such discussions, and it never occurred to her that such consent would be needed.

Did either lawyer violate Model Rule 1.6? Most lawyers would say no. Most lawyers would admit that they have had many conversations not unlike the one above. And most would be surprised to learn that a straightforward, literal reading of Rule 1.6 says that both lawyers violated the rule.

Titled "Confidentiality of Information," the purpose of Rule 1.6 is to define the scope of a lawyer's obligations to preserve the confidentiality of client information. This duty, which encompasses but is broader than the attorney-client privilege, "contributes to the trust that is the hallmark of the client-lawyer relationship." ABA Model Rule 1.6 cmt. [2].



Misunderstanding the Rule

Most lawyers know that they owe a duty of confidentiality to their clients, and they think about the duty as encompassing two concepts. They have a good working knowledge of the attorney-client privilege, and they know that they are not supposed to reveal privileged communications. They also understand, but in a vaguer way, that a client may have confidences or secrets that are not privileged but that a lawyer should not reveal. For example, a lawyer may learn via a non-privileged communication that a client is quietly working on an invention or planning to leave her employment. The lawyer would understand that the client may not want to reveal such nonpublic information, and the lawyer would guard the secret.

Most lawyers think that their duties end with such confidences and secrets. If you were to ask lawyers if they could talk freely about the identities of clients they are publicly representing (e.g., in a lawsuit) or about the facts of a case as described in open court or published opinions, most would say they could share anything that was in the public record without violating Rule 1.6. Our two tipsy lawyers in the bar would be off the ethical hook.

But the Model Rule, which governs lawyers in a majority of states, is not limited to confidences or secrets of clients. In their stead is the expansive phrase “information relating to the representation”: “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).”

Ignore the exceptions for the moment (we’ll return to them) and focus on the “exceedingly broad” restraint, as it has been called. Geoffrey C. Hazard Jr. & W. William Hodes, *The Law of Lawyering* § 9.15 (3d ed. Supp. 2012). Under the Model Rule, not only are lawyers barred from revealing a “confidence or secret” absent informed consent, but also, unless an exception applies, lawyers may not reveal any information relating to the representation of a client, regardless of its confidentiality. And while most lawyers think that the information they need to safeguard would be of or about the client, the Model Rule is broader. It covers “information relating to the representation of a client,” regardless of whether the information is even specifically about the client at all. “Model Rule 1.6(a) creates a genuine presumption of confidentiality. It operates automatically, in all cases, without any signal from the client, and without the vague qualifiers of the [old] Code.” Hazard & Hodes, *supra*, § 9.15.

Your initial reaction to this might be similar to mine: The Model Rule can’t possibly mean what it says. Read literally, it seems boundless. What is “information relating to the representation of a client”? Or, more aptly, what isn’t? Is it not at least any

information in the lawyer’s entire file, including pleadings, correspondence, and the full range of non-privileged material that makes its way into a file? In most instances, the information would not be in the file if it did not relate to the representation.

A recent informal ethics opinion posed the question and answer like this: “What types of information about a client does Rule 1.6 restrict the lawyer from revealing? . . . **ALL** information relating to the representation of the client.” State Bar of Nevada, Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 41 (June 24, 2009) (emphasis in original). This opinion lists “three remarkable omissions” in the rule compared with prior law: the removal of the qualifier “confidential,” the lack of any requirement of harm or adversity to the client, and the lack of any exception for information already in the public domain. *Id.* at 2–3.

If “relating to” is as broad as it sounds, then under the broad Model Rule language, our two lawyers in the bar could not talk about what was filed in court or with the SEC without wondering whether they had crossed the line.

Fencing in “Reveal”

You might think that the word “reveal” fences in the rule, but the fence, if it exists at all, is rickety. “Reveal” arguably is a binary term: Something either has or has not been revealed. Under this interpretation, information once revealed cannot be re-revealed. This interpretation reads “revealed” as akin to the proverbial rung bell that cannot be unrung. Does our transactional friend reveal anything when 200 employees had already been fired?

While one might plausibly interpret the rule that way, the term “reveal” is probably broader. Information revealed to a court and buried in a court file is not thereby revealed to friends, relatives, or others. Most people are ignorant of what appears in court records. Disclosure of the information to people outside the lawsuit reveals it to them regardless of whether it can be found in a filed pleading or transcript. Likewise, thousands of people might know about the layoffs at XYZ Corp., but they may not be known to most people. A leading treatise interprets “reveal” as synonymous with “volunteering.” “Rule 1.6 applies most insistently to prevent lawyers from volunteering information about a client (to anyone).” Hazard & Hodes, *supra*, §9.2.

Maybe there should be a Google-exception to the rule under which a lawyer may reveal information readily accessible via the Internet. But the rule does not say that. And Comment [3] to the rule states that it “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” “The range of protected information is extremely broad, covering information

received from the client or any other source, even public sources, and even information that is not itself protected but may lead to the discovery of protected information by a third party.” *Annotated Model Rules of Prof’l Conduct* 97 (7th ed. 2011).

And lest you think that this broad reading would be narrowed by courts, beware: It is well-supported. See *Iowa Supreme Court Att’y Discipline Bd. v. Marzen*, 779 N.W.2d 757, 765–67 (Iowa 2010) (lawyer violated Rule 1.6 by disclosing information that was publicly available); *In re Bryan*, 61 P.3d 641 (Kan. 2003) (same); *Okla. Bar Ass’n v. Chappell*, 93 P.3d 25, 31–32 (Okla. 2004) (Rule 1.6 duty “not only includes matters communicated in confidence by the client, but also applies to all information that relates to the representation, whatever its source may be”); *In re Harman*, 628 N.W.2d 351 (Wis. 2001) (attorney violated Rule 1.6 by revealing former client’s medical records even though they had been publicly filed in a prior lawsuit); *Sealed Party v. Sealed Party*, No. Civ. A. H-04-2229, 2006 WL 1207732, *13–14 (S.D. Tex. May 4, 2006).

The Restatement (Third) of the Law Governing Lawyers takes a more relaxed approach, in line with what most lawyers assume. It would find no violation if the revealed information is already “generally known” or harmless to the client.

The Restatement excepts from the duty of confidentiality “information that is generally known.” Restatement (Third) of the Law Governing Lawyers § 59 (2001). What counts as “generally known” depends on all circumstances relevant in obtaining the information,” *id.* cmt. d, an unhelpful formulation. If the information is publicly available through electronic searches of public databases or in government offices or public libraries, the Restatement would consider it “generally known” unless it can be obtained only by means of “special knowledge or substantial difficulty or expense.” *Id.*

The Restatement further restricts Model Rule 1.6(a) by reading a harm requirement into the rule. *Id.* § 60(1)(a). The comments acknowledge that this “adverse effect” formulation contradicts “a literal reading of” Model Rule 1.6(a). *Id.* cmt. (c)(i). It opines that “[s]uch a strict interpretation goes beyond the proper interpretation of the rule.” *Id.* But the Reporter’s Note cites nothing to support this conclusion.

While the Restatement’s approach—creating “general knowledge” and “no-harm-no-foul” qualifications—seems sensible, it is nonbinding. Model Rule 1.6 itself—which is binding in a majority of states—contains neither restriction. Moreover, “generally known” and “material harm” qualifications do appear elsewhere in the Model Rules, but not in a fashion helpful to someone wanting to corral the Rule 1.6 duty of confidentiality. See Model Rule 1.9(c)(1) (lawyer may “use” “generally known” information relating to former client); see also *Sealed Party*, 2006 WL 1207732, at *15 (collecting authorities holding that the “generally known” exception applies merely to “use” of a former

client’s confidences but not to “revelation” of such information under Rule 1.6); Model Rule 1.6(b)(1)–(2) (lawyer may reveal information to prevent crime, fraud, or serious bodily harm, but not harmless information).

“Wait,” you say, “wait!” Does the Model Rule cover client identities even when the representation itself is not confidential, such as when counsel appears in a lawsuit or negotiates a not otherwise confidential transaction? Under the above authorities and a literal reading of the rule, the answer, in a word, is “yes,” notwithstanding the protestations of the Restatement to the contrary. “Even the mere identity of a client is protected by Rule 1.6.” Nevada Formal Op. 41 at 3.

To be sure, some qualifications are necessary to avoid complete absurdity. For example, if a relevant fact to a case was that water boils at 100 degrees Celsius, it would not violate the rule to utter that fact in other contexts. Likewise, if a new prospective client called a lawyer and asked, “Are you the lawyer handling the Acme case pending before Judge Furrowbrow?” the lawyer could not reasonably be expected to place the new client on hold while calling Acme to get permission to answer the question.

The fact that we are even considering such absurdities, however, illustrates the extraordinary breadth of the rule. That brings us to the exceptions, which loosen the muzzle a bit but not as much as you might think (or hope).

Exceptions

Several of the exceptions are uncommon and would not help our two inebriated colleagues or address other common situations where a lawyer might want to reveal nonsensitive or public information about a representation. These include crime or fraud exceptions as well as exceptions allowing a lawyer to secure legal advice, defend himself or herself against an accusation of wrongdoing, or comply with other law or a court order. Model Rule 1.6(b)(1)–(6).

The broader, though by no means capacious, exceptions are within Model Rule 1.6(a) itself, and they rest on the fundamental notion of client consent, actual and implied. A lawyer may reveal information relating to the representation of a client if “the client gives informed consent” or “the disclosure is impliedly authorized in order to carry out the representation.” In other words, the rule is structured to place the client, not the lawyer, in control of the disclosure of information relating to the representation.

That does not help our two friends. Casual shop talk would not normally be a matter about which a lawyer would seek informed consent from a client, and it would usually not be “impliedly authorized in order to carry out the representation.” One might argue that the transactional lawyer’s filing of a document

with the SEC carried with it a type of “informed consent,” but that seems to be a stretch.

The implied-authorization exception does give lawyers the necessary breathing room to handle their cases. To represent clients competently, lawyers frequently must reveal client-related information to opposing counsel, judges, or third parties, and cannot practically seek informed consent for every such revelation. Most such ordinary disclosures would be “impliedly authorized.”

In addition, the gag is looser regarding the use of Rule 1.6 information, and the rules differentiate current from former clients. Rule 1.8(b) prohibits the use of information relating to representation of a client “to the disadvantage of the client.” The clear implication is that such use (as opposed to “revelation”) is permissible if not harmful to the client.

Thus, for example, if a lawyer learns through representation of Client A information about an opposing lawyer’s style and tactics, or a particular judge’s proclivities, the lawyer may surely use that knowledge on behalf of Client B unless the use were somehow harmful to A. Yet, oddly, Rules 1.8(b) and 1.9(c)(2), read literally and together with Rule 1.6(a), would bar revealing the information about the lawyer or judge to the second client, illustrating again some of the anomalies resulting from the “drafting oversight” leading to the expansive Rule 1.6. It is hard to think of a sound rationale for this distinction. “[N]either the Rules nor their Comments explain why information that is in the public domain or has become generally known should be protected at all, whether from disclosure or use, and whether in the case of former or current clients.” Hazard & Hodes, *supra*, § 13.12. But railing against the rule does not change it.

Lawyers often find themselves in delicate situations in which they want or are asked to reveal Rule 1.6 information. Here are a few of the scenarios one can imagine.

Responding to Discovery

Lawyers often receive third-party subpoenas for client-related information of current or former clients. Lawyers commonly stand ready to assert objections based on attorney-client privilege or work-product doctrine or to seek a protective order regarding non-privileged yet otherwise sensitive or confidential information. But under the broad Rule 1.6, it is likely that most or all of the requested documents will consist of “information relating to the representation” regardless of its privileged or confidential nature. The Model Rule, in the first instance, commands the lawyer not to produce anything. In essence, it erects a stop sign. The lawyer must not produce anything relating to the client representation before at least attempting communication with the client.

The rule and comments imply a protocol for a lawyer to respond to such a subpoena, involving client communication and possibly judicial order. Most clients will consent to the lawyer’s production of non-privileged, nonconfidential documents. Also, Model Rule 1.6(b)(6) permits a lawyer to reveal information relating to the representation of a client “to the extent the lawyer reasonably believes necessary . . . to comply with other law or court order.” Comment [13] says that in the absence of informed client consent, “the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.” The comment goes on to say that the lawyer may then comply with the court’s order if the ruling is adverse and the client does not want to appeal.

The implied-authorization exception does give lawyers necessary breathing room.

Given the centrality of client consent, a lawyer receiving a subpoena should always contact the client and seek to secure informed consent as to the scope of any production to be made or privilege objections to assert. If the client relationship is ongoing, this is not difficult and would ordinarily happen.

If the client is a former client, securing informed consent may be more problematic, especially if the relationship did not end cordially. Nevertheless, it would be prudent for, if not incumbent upon, the lawyer to contact the former client and either secure informed consent or at least make a record of what non-privileged information the lawyer intends to produce in response to the subpoena if the client does not assert an objection. The lawyer should never produce information arguably subject to attorney-client privilege absent either an express waiver from the client or a court order.

Advertising and Marketing

Lawyers try to raise their profiles through various media. Whether through websites, brochures, or casual networking, it is not unusual for lawyers to reveal client identities or information about matters the lawyers have handled. They want to

highlight their big-name clients and tout their victories. A prudent lawyer would be well advised to ask for client consent to use the client's identity in the lawyer's promotional materials. Model Rule 1.6 has no horn-tooting exception.

Moving Your Practice

Particularly sensitive Rule 1.6 questions are raised in the context of lawyer mobility. It is now commonplace for lawyers to relocate from one firm to another, or for firms to merge. Both sides to a potential relocation will perform due diligence, which implicates Rule 1.6. The moving lawyer or group and the new firm will each want to see the client and matter list of the other, not only to evaluate the book of business but also to explore whether there are conflicts that might complicate or weigh against the affiliation. Such lists will not only include clients who want their identities to remain confidential, but they also may lead to the revelation of information that one client might not want revealed. For example, the firm may learn that the relocating lawyer has a client who was exploring a potential lawsuit against a client of the firm.

The details of the protections lawyers and law firms may put in place in such circumstances, such as agreeing to confidentiality regarding the due diligence process and limiting the flow of information under such agreements, could fill a separate article. For present purposes, suffice it to say that lawyers seeking to relocate their practices need to make sure they are cognizant of the Rule 1.6 issue and take steps, perhaps through engaging their own counsel, to ensure that they do not violate Rule 1.6 or any fiduciary duties to their existing firms.

Even if a sound confidentiality agreement is entered into, the Rule 1.6 question of client consent remains. It is not practical to expect that either the law firm or the relocating lawyers will seek and obtain informed consent from hundreds or thousands of clients. For the relocating lawyers, consent is not merely a question of practicality. It may well be prohibited by fiduciary duties they owe to their current firms not to solicit firm clients before they resign. (It would be hard to solicit a client's informed consent without being vulnerable to an accusation of soliciting the client's business as well.)

The text of the rule and comments does not provide a definitive answer. A draft proposed rule and comment would create a new exception to cover expressly the lawyer-relocation scenario. (See www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_confidentiality_and_lawyers_moving_firms_initial_resolution_report.authcheckdam.pdf.) But even under the current Model Rule, it is likely that some limited disclosure, subject to strong confidentiality and dissemination restraints, "is

impliedly authorized in order to carry out the representation" of the relocating lawyers' (and target law firms') clients.

Clients understand that lawyers do not practice in a vacuum. They know that lawyers are subject to ethical constraints and that lawyers sometimes relocate their practices and must always be cognizant of a potential for conflicts of interest. When lawyers relocate, clients retain their fundamental right to choose counsel: whether to continue with the lawyer at the new firm, to stick with the old firm, or to select a third firm. To "carry out the representation" of those clients who wish to continue to engage them, lawyers seeking to relocate must determine whether there are conflicts of interest or other impediments to client representation at the new firm. And the new firm must determine whether the relocating lawyers' matters would generate conflicts with the firm's existing clients. In other words, a lawyer's duty to represent clients competently (Model Rule 1.1) and to do so without prohibited conflicts of interest (Model Rules 1.7–1.10), combined with the client's right to choose counsel, necessarily imply that a lawyer may conduct reasonable due diligence (subject to reasonable confidentiality restraints) to determine whether a different law firm provides a suitable platform for the lawyer to continue to represent the client. *Cf.* Model Rule 1.9 cmt. [4] (citing lawyer mobility between firms and principle of client choice of counsel as reasons to restrict circumstances under which lawyers could be disqualified under Model Rule 1.9(b)).

The ABA Committee on Ethics and Professional Responsibility, in Formal Op. 09-455 (2009), reached that conclusion (via different analysis). It noted that the ethical rules are rules of reason and made the following observation:

Interpreting Rule 1.6(a) to prohibit any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest. Such an interpretation would preclude lawyers moving between firms from conforming with the conflicts rules.

Engagement Letters

It may be possible to address some of the concerns discussed above in engagement letters with clients. The rule permits revealing information if the client gives "informed consent," a defined term that "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 and reasonably available alternatives to the proposed course of conduct." Model Rule 1.0(e). Procuring such informed consent may be easier said than done.

Suppose, for example, a lawyer tried to write a Restatement-like version of Rule 1.6(a) in the engagement letter, with a provision stating that “Law Firm will not, during or after termination of the representation, use or reveal a confidence or secret of Client known to the Firm unless Client consents to disclosure, but Law Firm may use or reveal nonconfidential information relating to the representation of Client so long as it is not prejudicial to Client’s interests.” Such a provision may not be specific enough to satisfy the definition of “informed consent” and may serve only to trigger questions from the new client.

Alternatively, the firm might simply try an informed consent provision that is narrow and targeted, including one or more of the following clauses:

- Law Firm may identify Client and nonconfidential information relating to the representation of Client in Law Firm’s marketing and promotional materials.
- Law Firm may produce non-privileged, nonconfidential information relating to the representation of Client in response to a lawful subpoena.
- Law Firm may reveal information relating to the representation of Client, subject to an agreement to preserve the confidentiality of such information if reasonably required for the conduct of due diligence in connection with the potential affiliation of the Firm with another firm or lawyer(s).

However, once again, such general language may not be detailed enough to satisfy the stringent standards under the Model Rules for “informed consent.” Model Rule 1.0(e).

Casual Conversation. None of the express or implied exceptions to Rule 1.6 embraces casual conversation. Nor is it advisable to include language in an engagement letter that would give advance “informed consent” specifically to engage in casual war stories, which, when you think about it, is precisely the point of the rule. If you were to ask your clients’ consent to talk about the nonconfidential parts of the clients’ cases with your relatives and friends, many would say no and others would think about hiring a different lawyer.

This leaves our two bar patrons in a quandary. Model Rule 1.6 gives lawyers little leeway to talk about their cases with other lawyers, friends, or family. It is probably highly unlikely that casual violations of Model Rule 1.6 will lead to formal disciplinary charges, but the rule sweeps broadly, and lawyers reveal case or client information at their peril.

So tight a muzzle comes at a cost. A reasonable amount of “shop talk” should be permitted “as part of professional collegueship and consultation.” Hazard & Hodes, *supra*, § 9.15. War stories foster professional growth. Lawyers learn about practice tips, tactics, law, and judges through their shop talk.

Professors Hazard and Hodes conclude that “it is probably appropriate to read in to Rule 1.6 an exception that permits” such shop talk “so long as the information disclosed cannot readily be linked to a particular client.” *Id.* Even so, the requirement of anonymity would still preclude a large amount of shop talk, because client identities might easily be discerned from the mere telling of a story.

So tight a muzzle comes at a cost.

The Nevada ethics opinion cited earlier tries to be a bit more pragmatic. It advocates “common sense” and no discipline of lawyers for “harmless disclosure,” Nevada Formal Op. 41, at 4–5, but it concludes with an admonition to “pause and think” before revealing anything without informed consent. *Id.* at 7.

“Stop, think, and use common sense” is hardly a clear standard. But the advice highlights how the breadth of the rule bumps into the natural gregariousness of lawyers. They want to share their stories, both to learn and to socialize. As a practical matter, it is unlikely that most such stories would lead to discipline unless the lawyer revealed some secret or other information that led to harm to a client (essentially the position of the Restatement). Yet, most lawyers want to comport with governing ethical standards and steer clear of violations, even ones that fly below the disciplinary radar. Individual lawyers will need to make their own decisions about how much information they feel comfortable “revealing” about their cases.

In the end, there is a benefit to increasing circumspection within the profession. If lawyers spend less time talking about their cases and more time talking about subjects like politics, art, or sports, Model Rule 1.6 might have the unintended consequence of making lawyers more interesting to their friends and relatives, and maybe even to one another. ■