# *CONFLICTS OF INTEREST: Prior Work Conflicts and Client Consents*

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Connecticut Bar Association
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Marcy Tench Stovall

# *Prior Work Conflicts*

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- A “prior work” conflict arises when a lawyer makes an error and there is a significant risk that his continued representation of the affected client will be materially limited by the lawyer's personal interests, usually the lawyer’s desire to mitigate malpractice exposure.
  - See, CBA Informal Opinion 14-05, which provides guidance on how to address a prior work conflict

# *Prior Work Conflicts*

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- Examples:
  - Your partner handled a corporate transaction that results in later litigation. Can you take on the litigation?
  - Your firm represented a client at trial. Can you handle the appeal?
  - You represent a criminal defendant who is convicted. Can you handle the later habeas litigation?

# *Prior Work Conflicts*

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- Will your prior work affect the representation:
  - Will a firm attorney be a necessary witness?
  - Do you have an incentive to avoid or minimize issues involving your conduct (or the conduct of another attorney at your firm)?
  - Is there an increased likelihood that you would advocate for, or dissuade client from, settling?

# *Prior Work Conflicts*

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- Prior work may be at issue in dispute
  - Discuss potential prior work conflict with client
  - Obtain client's informed consent to continue representation
- Prior work is unrelated to the issues in dispute
  - Proceeding with work probably acceptable without more
  - Document consent
- If serious issues involved, consider referring client to another counsel to provide advice on the conflicts decision

# *Former Client Conflict*

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- Under Rule 1.9:
  - Representation of client in a matter that is *the same or substantially related* to a matter in which the client's interests are materially adverse to the interests of a *former* client requires informed consent of former client

# *Current Client or Former Client?*

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- "Different standards govern the analysis of concurrent and successive conflicts. If the conflict is successive, the court determines whether the representations are substantially related. . . . If the representations are substantially related, an attorney's access to adverse confidential information is presumed and he or she must be disqualified. . . . *The rule against concurrent conflicts is less forgiving.* An attorney will be automatically disqualified from simultaneously representing two clients with adverse interests without both clients' informed, written consent, even if the two matters have nothing in common."

    - *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp.3d 1100 (E.D. Cal. 2015) (emphasis added)

# *When Is a Client a Former Client?*

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- Formal termination when:
  - the attorney is discharged by the client;
  - the matter for which the attorney was hired comes to a conclusion; or
  - a court grants the attorney's motion to withdraw from the representation.
- De facto termination when:
  - the client takes a step that unequivocally indicates that he has ceased relying on his attorney's professional judgment in protecting his legal interests, such as hiring a second attorney to consider a possible malpractice claim or filing a grievance against the attorney.

    - *DeLeo v. Nusbaum*, 263 Conn. 588, 596-98 (2003)

# *When Is a Client a Former Client?*

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- Use the engagement letter to establish, at the beginning of the representation, an end point for the representation:
  - Identify the scope of the representation;
  - Indicate when the representation will be deemed to come to an end (at the end of trial; closing on the transaction):

- Send a termination letter when work on the matter is complete:
  - "This letter confirms that in the matter referenced above, my firm has concluded its work for you. My firm considers the matter now closed."

# *Client Consent to Conflict: Is the Conflict Consentable?*

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- Under Rule 1.7:
  - Conflict does not involve direct adversity between clients in the same litigation or proceeding;
  - Lawyer "reasonably believes" that he or she will be able to provide competent and diligent representation to each affected client; ***and***
  - The representation is not prohibited by law.

# *Is the Conflict Consentable? Common Scenarios on New Client Intake*

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- You currently represent an adverse party in an unrelated matter against an unrelated party.
- You currently represent an adverse party in a related matter.
- You will jointly represent two or more clients in the same matter
  - Formation of a business entity
  - Purchase of real estate
  - Defending both employer and employee in litigation
  - Drafting will for wife and husband

# *Is the Client's Consent "Informed"?*

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*Rule 1.7 Commentary:*

*Informed consent requires that each affected client be aware of the* ***relevant circumstances*** *and of the* ***material and reasonably foreseeable ways*** *that the conflict could have adverse effects on the interests of that client. . . The information required depends on the nature and the risks involved.*

**Consents Must Be Confirmed in Writing**

Preferably Signed by the Client

# *Writing an Enforceable Consent: Joint Representation*

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- Include a warning about shared information, especially sensitive information
  - *You acknowledge and agree that communication between the firm and any or all of you relating to this matter will be treated as confidential and will not be disclosed outside your group without your informed consent or as otherwise permitted by the applicable rules of professional conduct or other law.*
  - *You also acknowledge and agree that whatever relevant or material communications or information that we receive from any one or more of you concerning this matter will be shared with each of you as we consider appropriate.*

# *Writing an Enforceable Consent: Joint Representation*

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RPC Rule 1.16 (Declining or Terminating Representation):

(a) . . . a lawyer shall withdraw from the representation of a client if:

(1) . . . [T]he representation will result in a violation of the Rules of Professional Conduct . . .

# *Writing an Enforceable Consent: Joint Representation*

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- Consent should provide for what will happen in the event a conflict develops in the future (or one client withdraws from the joint representation):
  - Firm will ask clients to resolve differences between themselves
  - Firm has option of withdrawing altogether or continuing to represent one more of the clients in the matter
  - Confidential information firm has obtained may be used to the advantage of the client the firm continues to represent and adversely to the client it no longer represents

# *Joint Representation Warning: When a Conflict Arises*

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*You each acknowledge and agree that, despite your current consensus on all material issues, it is possible that disagreements and other differences may arise in the future between and among the two of you. In that event, my firm will request that you resolve any such differences between or among yourselves without our involvement or assistance. If you cannot resolve your differences, and those differences result in a conflict of interest that would materially limit my firm's ability to provide competent and diligent representation to each of you in the above-referenced matter, then you each agree my firm may withdraw from the representation of one of you as necessary to resolve the conflict of interest.*

*In such event, you agree my firm may continue to represent the other, even if, as a result of such withdrawal, my firm may take positions adverse to your interests in any subsequent negotiation or proceeding relating to this matter.*

# *Joint Representation Warning: Possible Withdrawal By Firm*

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*You further acknowledge and agree that in the event of a dispute between or among one or more of you, and you are no longer represented by us in this matter, as the result of a conflict of interest or other cause, we may nevertheless use any confidential information we have concerning this matter adversely to you or to the advantage of those we continue to represent in any subsequent negotiation or proceeding relating to this matter.*

# *Joint Representation Warning: Withdrawal by Client*

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*Either of your may withdraw from the joint representation at any time for any reason, upon written notice to the firm. You each acknowledge and agree, however, that: (1) you will remain responsible for your share of the firm's fees and expenses incurred to and including the date on which notice is received by the firm; (2) you will be responsible to retain and pay for separate legal representation; and (3) my firm may continue to represent the other client consistent with the other provisions of this letter, even if my firm takes positions adverse to your interests in any subsequent negotiation or proceeding relating to this matter.*

# *Consent to Future Conflicts*

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*Rule 1.7 Commentary:*

*Informed consent requires that each affected client be aware of the* ***relevant circumstances*** *and of the* ***material and reasonably foreseeable ways*** *that the conflict could have adverse effects on the interests of that client. . . The information required depends on the nature and the risks involved.*

## Consents Must Be Confirmed in Writing

Preferably Signed by the Client

# *Advanced Conflicts Waiver: Blanket Consent to Future Conflicts, Foreseen and Unforeseen?*

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When a law firm agrees to represent a client in a particular matter, it may ethically request that the client waive future conflicts of interest, including that the client consent to allow the law firm to bring adverse litigation on behalf of another current client, **if**

(a) the law firm appropriately discloses the implications, advantages, and risks involved and if the client can make an informed decision whether to consent; **and**

(b) a disinterested lawyer would believe that the lawyer can competently represent the interests of all affected clients.

New York City Bar Association Formal Opinion 2006-1 (Feb. 17, 2006) (emphasis added)

# *Advance Conflict Waivers: Example of Client Consent To A Future Dispute Deemed Ineffective*

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We are accepting this engagement with the Company's understanding and express consent that our representation of the Company will not preclude us from accepting an engagement from a new or existing client, including litigation or other matters that may involve the Company. However, we will not accept an engagement that is directly adverse to the Company or any of its subsidiaries if either: (1) it would be substantially related to the subject matter of our representation of the Company or representation of Anthrogenesis Corp.; or (2) would impair the confidentiality of proprietary, sensitive or otherwise confidential communications made to us by the Company or Anthrogenesis Corp.

*Colgene Corporation v. KV Pharmaceutical Company,* 2008 WL 2937415 (D. N.J. July 29,2008) (consent provision held unenforceable as non-specific and therefore not informed)

# *Advance Conflict Waivers: Example of Client Consent To A Future Dispute Deemed Effective*

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- We recognize that we shall be disqualified from representing any other client with interest materially and directly adverse to yours (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnished to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with yours in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.

*Galderma Laboratories, LP v. Actavis Mid Atlantic LLC*, 927 F. Supp.2d 390 (N.D. Tex. 2013)

# *Writing an Enforceable Consent to Future Conflict*

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- Best suited to situations where client providing consent has business and legal sophistication.
- At a minimum, advise client to seek independent counsel.
- Better: client actually consults with independent counsel.
- Discuss the consent before presenting to client and don't hide the consent in boilerplate.
- Agree to set up mechanism for screening lawyers working on conflicting matters (and make sure that happens).

# *Writing an Enforceable Consent to Future Conflict*

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- Don't make it over broad, don't ask for more than you actually need.
- Identify specific conflicts that you can foresee.
- Describe in as much detail as possible the type of adverse clients that may be involved; the possible nature of the adverse representations (e.g., litigation), and the material risks entailed (e.g., possible use of confidential information).
- Identify what will and will not be considered a related matter.
- Client signature on consent

# *Advance Conflict Waiver: Client Consent to An Identified Future Dispute*

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The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.

- ABA Model (and Connecticut) Rules of Professional Conduct, Comment [22] to Rule 1.7

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CONNECTICUT
SUPREME COURT 2014

# Showing Remorse and Statutes of Limitations

BEYOND THE HEADLINES, KEY DECISIONS AFFECTED THE PRACTICE OF LAW

By DAVID P. ATKINS and MARCY TENCH STOVALL

The headline news in the Connecticut law of lawyering in 2013-14 came not in the form of Supreme Court decisions, but in revisions to the Connecticut Rules of Professional Conduct and Rules of Court.

## Medical Marijuana

After approval by the Superior Court Rules Committee in June 2014, Connecticut became the third state in the nation (after Colorado and Nevada) to tweak its Rules of Professional Conduct in light of state statutes authorizing the sale, use and possession of medical cannabis.

Rule 1.2(d) prohibits "counsel[ing]" or "assist[ing]" a client to engage in "conduct the lawyer knows is criminal." As Dwight Merriam observed in his land use contribution to the Law Tribune's 2013 "Supreme Court Year in Review," those lawyers asked to advise clients entering the regulated medical marijuana trade plainly would face possible disciplinary charges for one obvious reason: notwithstanding legislation in over 30 states permitting marijuana for medical (or recreational) use, the cultivation, sale and possession of marijuana remain felonies under the federal Controlled Substances Act.

But as of Jan. 1, 2015, Connecticut lawyers may "counsel or assist a client regarding conduct expressly permitted by Connecticut law." The rule makers do impose a condition for invoking this safe-harbor provision: The lawyer must "counsel the client about the legal consequences, under other applicable law, of the client's proposed course of conduct." In the medical marijuana context, this obviously means affirmatively advising the client that notwithstanding the blessing of its medical marijuana business under state law, the same activities likely are crimes under federal law.

## Limited Scope

In January 2014, the Connecticut judges launched the long anticipated program authorizing the filing of "limited scope" appearances on behalf of litigants in family cases. By doing so, the Connecticut courts tentatively have adopted the concept of "unbundled" legal services. The idea is that a litigant in a dissolution or custody dispute who has been acting pro se may engage counsel not for the entire case, but for a discrete task or for "a specific event or proceeding." In amending the "appearance" provisions of Practice Book §§3-3(b), 3-8(b) and 3-9(c), the judges now authorize the filing of a preprinted "limited appearance" form. The form itself sets out a menu of the specific court "events or proceedings" to which the filing attorney intends to "limit" his or her work on the client's behalf.

Significantly, the amended rules permit the attorney to bow out of the case—and do so without first seeking leave of the court or the client—merely by filing a "certificate of completion of limited appearance." In amending Practice Book §3-8(b), the judges have adopted one express restriction to any limited appearance: It must be task related and "may not be limited to a particular length of time or the exhaustion of a fee."

The Practice Book changes respond to the judges' concern over the dramatic increase in recent years in the number of family cases in Connecticut; at least one of the litigants is self-represented in about 80 percent of all such cases, state officials say.

Now on to recent Connecticut Supreme Court decisions addressing the law of lawyering.

DAVID P. ATKINS

MARCY TENCH STOVALL

LEGAL PRACTICE

## Sufficient "Remorse"?

In *Statewide Grievance Committee v. Ganim*, 311 Conn. 430 (2014), the court ruled against former Bridgeport Mayor Joe Ganim, who wanted his bar license restored after he served seven years in prison on municipal corruption charges. The court addressed questions about applications for reinstatement by attorneys whose licenses have been suspended following a criminal conviction: What deference, if any, should the courts afford to the recommendation of a local Standing Committee on Bar Admissions? And what level of remorse is sufficient to establish the applicant's "present moral fitness" for restoring his law license?

On the first question, the court, in an opinion penned by Chief Justice Chase Rogers, rejected Ganim's argument that the trial court (the special three-judge panel required for bar reinstatement applications) should have deferred to the Standing Committee, which had recommended the court grant Ganim's reinstatement request. The Supreme Court, noting that the function of the Standing Committee is limited to making a "recommendation" to the three-judge court, held that "it is the court, and not the bar, or a committee which takes the final and decision action on attorney admission."

With respect to the substantive standards governing bar readmission, the court pointed to what it said was the lack of evidence of Ganim's actual acceptance of responsibility for his criminal conduct. Indeed, the court concluded that failure to demonstrate genuine "remorse" was the primary obstacle to Ganim returning to practice. As the court explained, Ganim "did not admit his transgressions, explain how they had occurred, express contrition therefor, or assure the standing committee that he had changed and would not reoffend."

In addition, the court adopted a type of "sliding scale" analysis for addressing a reinstatement applicant's present moral fitness: the more serious the underlying criminal conduct, the "more time required to meet the burden of moral trustworthiness" as well as "the need for greater proof of moral character and trustworthiness."

Ganim had requested permission to file his reinstatement application before completing his three-year period of post-prison supervised release. The court, in effect, deemed the application to have been filed too early to make a determination of whether his "exemplary behavior [has] persist[ed] for a sufficient period of time to offset his transgressions."

Without defining exactly how the standing committees or three-judge courts should determine what is a "sufficient period of time," the court implied that in Connecticut—which unlike other states does not authorize permanent disbarment—there may come a time in which even a rejected readmission applicant "may once again be entrusted with the practice of law."

## Claims Against Fiduciaries

This past year saw two significant decisions addressing the application of the tort law statute of limitations to professional liability claims.

In *Flannery v. Singer Asset Finance*, 312 Conn. 286 (2014), the court provided a perfect illustration of how important it is for a law firm to have in place a mechanism for clearly marking the end of the representation. In a split decision, the court affirmed summary judgment in favor of a defendant on statute of limitations grounds. It did so principally on the basis of language in a law firm's engagement agreement that prospectively identified the events that would be deemed to end the representation.

The defendant was not a lawyer or law firm, but a financial company accused of aiding and abetting the misconduct of a lawyer and law firm. Therefore, the limitations period applicable to the claim against the law firm was deemed applicable to the non-law firm defendant. Luckily for the defendant, the terms of the law firm's engagement agreement with the plaintiff made it easy for the court to determine the precise date on which the representation ended, and, therefore, the day the limitations period began to run.

In 1988, John Flannery won $3 million in the Iowa state lottery, to be paid in 20 annual installments of $150,000. In 1999, he sold his remaining installment payments to the defendant, accepting a discounted lump sum of $868,500 for the $1.2 million in remaining payments

The attorney that Flannery retained for the transaction advised him that the sale proceeds were taxable at the capital gains rate, not as ordinary income. Time passed, and in 2002, when the Internal Revenue Service assessed substantial additional taxes, Flannery learned that the attorney's advice was incorrect. In 2005, Flannery sued the attorney, his firm and the defendant, claiming, among other things, that the defendant had aided and abetted law firm's breach of its fiduciary duty of loyalty to the client.

The trial court granted summary judgment for the defendant on the ground that the aiding and abetting claim was time-barred (the lawyer and law firm having already gotten out of the case). Any breach of fiduciary duty owed by the law firm to the plaintiff "ceased to exist" when the law firm sent its final bill in September 1999, well over three years before the commencement of the action.

Contrary to the decisions of the trial court and the Appellate Court, the Supreme Court held that Flannery had adequately pleaded the continuing course of conduct doctrine in avoidance of the statute of limitations defense. But the court then turned its attention to whether the doctrine was applicable. Flannery's novel theory was that where a claimant alleges any breach of fiduciary duty, the limitations period never ends, or at least does not end until such time as the law firm confesses to the client that its failure of undivided client loyalty tainted the representation.

The court rejected that argument as inconsistent with the rationale of the continuing course of conduct doctrine—that the limitations period is tolled for so long as the attorney is in a position to correct the harm his wrongful conduct has caused. This meant that the attorney's alleged breach of his fiduciary duty ended, at the latest, when the lottery proceeds were sold and the attorney relationship ended in 1999. Notwithstanding the plaintiff's characterization of the underlying conduct, to permit tolling past the end of the representation would have been inconsistent with the strong public policy underlying statutes of limitations: avoiding stale claims.

In the *Flannery* case, the court could readily determine when law firm's representation of Flannery ended. The engagement agreement between Flannery and the law firm not only identified the agreed-upon scope of representation, it also expressly identified the event that would demarcate the end of the representation. The exact language of the agreement and attached standard terms was as follows:

"The scope of the legal engagement is to represent you in negotiating a lottery sale contract, to help you evaluate the tax and other legal consequences of such a transaction, and to draft or review all the legal and court documents needed to execute such a transaction ... It is also our policy that the attorney-client relationship will be considered terminated upon our completion of any services that you have retained us to perform ... Unless previously terminated, our representation of you with respect to the agreed upon scope of representation will terminate upon sending you our final statement for services rendered."

(The authors' law firm appeared as counsel for Singer Asset Finance)

## Duty of Loyalty Complaint

The Supreme Court addressed another limitations related issue in professional liability cases: when a client sues its law firm for failing to adequately perform legal services, are the claims necessarily subject to the three-year limitations period for tort, or may they fall within the more generous six year limitations period for a contract based claim?

In *Meyers v. Livingston, Adler, Pulda, Meiklejohn & Kelly*, 311 Conn. 282 (2014), the client sought damages from her former law firm on the following theories: (1) the firm had breached its duty of loyalty to her by allegedly advancing the interest of a different, but similarly situated, client in "derogation of" her interests; and (2) the firm allegedly had failed to follow her instructions in connection with an agreement to settle the claims in the underlying action the firm had prosecuted on her behalf.

The Supreme Court affirmed the trial court's granting of summary judgment for the law firm on the basis that the claims were time-barred. Like the trial court, the Supreme Court rejected the plaintiff's contention that her theories of recovery sounded in contract, rather than in tort thereby permitting the more lenient, six-year limitations period. In doing so the court

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# The Unfinished Business Doctrine: Law Firm Dissolutions Bring Risks

## LATERAL HIRING CAN EXPOSE LAW FIRMS TO HIDDEN EXPENSE

By DAVID P. ATKINS and MARCY TENCH STOVALL

Based on the efforts of a highly paid legal industry consultant, your firm has been in confidential negotiations with a practice group looking to leave a prominent, nationally known law firm. One of the attractions of the group is the expectation its lawyers will generate significant fees for your firm on the client matters you anticipate they will bring with them.

On the eve of reaching the final terms of the group's move comes dramatic news: the group's firm, citing a significant downturn in revenue due to recent departures of other partners, announces it is insolvent and will be dissolving, with rumors swirling of an imminent bankruptcy filing. Should your firm now consider terminating the negotiations? If the laterals do join your firm, is there a risk that fees collected for work performed after the clients transfer their files might not actually "belong" to your firm? Might a receiver or bankruptcy trustee for the defunct law firm have authority to a "claw back"

**If the laterals do join your firm, is there a risk that fees collected for work performed after the clients transfer their files might not actually "belong" to your firm?**

those fees from your firm? Is there a way to protect your firm from exposure to such claims?

While this issue appears not to have been addressed by any Connecticut court, other jurisdictions have answered these questions by applying a 1984 California appeals court decision, Jewel v. Boxer. That decision generally stands for the proposition that the "unfinished business" of a dissolved law firm remains an asset of the firm. Thus if a partner of the defunct firm takes "unfinished business" to a new firm and completes the work there, the fees generated from the completion of that "unfinished business" belong to the dissolved firm and not to the new firm even if it is the new firm which performed the work.

Two recent decisions, both from bankruptcy cases in the Southern District of New York, but reaching diametrically opposed conclusions about the applicability of the Jewel doctrine under New York law, have drawn new attention to an increasingly common dilemma: lateral lawyers who move from dissolved law firms exposing their new firms to "unfinished business" claims of a receiver, a bankruptcy trustee or a former partner.

### Jewel v. Boxer

Jewel v. Boxer arose from a dispute between former partners over contingency fees earned matters that originated with their dissolved rm, but that two of the four partners had andled to conclusion after the dissolution. he California court decided the case under the Uniform Partnership Act (then in effect in California), and held that the contingency fee was not subject to a quantum meruit division between the former partners.

Because partners of a dissolved partnership owe each other a duty to account for fees generated in carrying out the "unfinished business" of the dissolved firm, all profits earned on ongoing matters pending on the date the former firm shut down belong to the dissolved firm and must be distributed in accordance with the agreement between its partners.

This is required regardless of which of the former partners did the work that earned the post-dissolution fee, and with no special compensation for the post-dissolution efforts, skill and diligence of the partner who actually completed the work. The court expressly held that "[t]he fact that the client substitutes one of the former partners as attorney of record in place of the former partnership does not affect this result."

### The Jewel Doctrine And Law Firm Bankruptcy Claims

Courts from around the country subsequently have applied the Jewel doctrine, and its "no compensation" rule, to dissolved law firms whether the firms operate as partnerships, professional corporations or limited liability companies; under the Revised Uniform Partnership Act, as well as under the UPA; and in hourly fee matters as well as in contingency fee matters. Though sometimes arising in disputes between former partners, the doctrine more frequently is invoked when a receiver or bankruptcy trustee — looking to recover funds to pay the creditors of the dissolved firm — seeks to claw back post-dissolution fees collected by those firms which took on partners of the defunct firm.

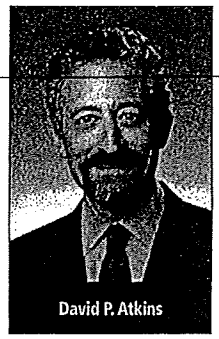
When Jewel was decided in 1984, dissolutions and bankruptcy filings by major national firms were almost unheard of. In recent years, however, the Jewel doctrine has been invoked with increasing frequency in high profile law firm bankruptcies. And when the former partners of a dissolved firm take the "unfinished business" to new firms, the exposure for the new firms can be significant. For example, in the Dewey LeBoeuf bankruptcy, filed in May, 2012, the Chapter 11 trustee has hinted he intends to pursue firms at which Dewey partners landed for approximately $60 million in unfinished business claims. In 2004, it was reported the firm of Morgan, Lewis & Bockius, which had taken on a practice group exiting the soon-to-be dissolved firm of Brobeck, Phleger & Harrison, agreed to pay $10.2 million to settle the bankruptcy trustee's unfinished business claims.

### Competing Decisions From The Southern District

In the recent decisions from the Southern District of New York, Judge Colleen McMahon and Judge William H. Pauley, III have come to two opposite conclusions about who is entitled to the fees generated from the unfinished business of a dissolved law firm.

In a decision issued on May 24, 2012, in Development Specialists, Inc. v. Akin Gump Strauss, Hauer & Feld LLP, involving the bankruptcy of the venerable Coudert Brothers firm, Judge McMahon concluded that such fees belong to the estate of the bankrupt firm, and therefore are subject to claw back by the Chapter 11 trustee. But less than four months later, in Geron v. Robinson & Cole LLP, arising out of the bankruptcy of the Thelen Reid firm, Judge Pauley concluded that the dissolved firm has no interest in any hourly fees earned after dissolution, even for matters that could be characterized as "unfinished business."

Both decisions turned on interpretations of New York law, but each judge considered different aspects of New York law. Judge McMahon saw the question as one of property and partnership law. She concluded that the general rule of partnership law applied, holding that "the business of a partnership that is unfinished on the date the partnership dissolves is an asset of the partnership , and must be concluded for the benefit of the dissolved partnership." A pending hourly fee matter should be treated as an asset of the dissolved firm, as if it were a "Jackson Pollack [sic] painting [a departing partner] ripped off the wall of the reception area" as he abandoned the failing firm.



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Judge Pauley, on the other hand, framed the issue as one implicating the particular nature of the attorney-client relationship and the public policy considerations — reflected in the Rules of Professional Conduct — promoting unfettered client choice in both the selection, and termination, of counsel. These actions arise from an alarming phenomenon — the bankruptcy of a major law firm. The pursuit of pending hourly fee matters as assets of the estate has become a recurring feature of such bankruptcies. But this concept of law firm 'property' collides with the essence of the attorney-client relationship. That relationship springs from agency law, not property law. The client is the principal, the attorney is the agent, and the relationship is terminable at will."

His answer to the question was that, at least under New York law, hourly fee matters are not the "property" of the dissolved firm. Judge Pauley expressly rejected Judge McMahon's comparison of a law firm's client matters to its reception area art work: "The client, not the attorney, moves a matter to a new firm." Quoting the 1989 decision in Cohen v. Lord, Day & Lord, he explained the difference between client matters and law firm property: "'Clients are not merchandise. Lawyers are not tradesmen.'"

### Likely Resolution By The New York State Court

On July 18 Judge McMahon certified her ruling for interlocutory appeal to the U.S. Court of Appeals for the Second Circuit. Judge Pauley did the same when he issued his decision in September. It is likely the Second Circuit will, in turn, certify the state law questions to the New York State Court of Appeals for an advisory opinion. Judge Pauley's decision also included an analysis under California law, which may be certified to the California Supreme Court, to resolve whether Jewel remains good law in light of California's 1994 adoption of the Revised Uniform Partnership Act to replace the UPA.

A New York Court of Appeals decision may resolve the split between the two competing Southern District decisions — whether adopting the Jewel doctrine or recognizing, in effect, an exception for law firms based on the special nature of the attorney-client relationship. Such a ruling would likely become the new standard for determining whether unfinished client matters are in fact "assets" of a shuttered law firm and therefore whether the firms which took on exiting partners must remit to a receiver or a bankruptcy trustee the post-dissolution profits earned from such matters. And if the answer is yes, the New York court may also provide guidance on a related question: how to calculate the profit portion of the "unfinished business" fees.

### Some Practical Advice

It is obvious that, until the split is resolved, law firms must pay careful attention in taking on laterals seeking to affiliate with them. Among other things, they should try to get assurance from lateral candidates that their current firm is not on the brink of insolvency or dissolution, and investigate that firm's economic health to the extent possible from publicly available information. The hiring firm should not, of course, ask the potential hire for internal law firm information that is confidential.

Any law firm has the ability to include in its partnership or operating agreement a provision in which it, and its partners, prospectively waive Jewel claims in the event of a dissolution. Thus a hiring firm should ask a lateral candidate if his or her current firm has such a provision in its agreement. But this suggestion comes with a significant caveat: as the Thelan Reid partners learned in the Geron case, any such "unfinished business" waiver may be set aside as an insider preference or fraudulent conveyance if the failed firm adopted it either after the firm began its downhill slide or within the bankruptcy preference period. *Accordingly, any inquiry about* a Jewel waiver should include a question about when it was adopted. ■

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# Law Firm Breakups and Lawyer Departures: The Ethical Dos and Dont's

By David P. Atkins

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**Like warring spouses bickering over custody of their children after their marriage breaks up, warring law partners who have separated routinely fight over custody of their own perceived "offspring": the clients.**

Co-owners of any business venture are subject to a variety of contractual, common law (fiduciary), and statutory obligations when one owner leaves the business, whether to retire or to join a competing enterprise. But lawyers are subject to additional duties imposed by the Rules of Professional Conduct. Those duties run not only between the lawyers and the clients, but between the lawyers themselves. Here is a summary of the dos and dont's—for the departing lawyer and for the law firm she is leaving as well as the law firm she is joining.

## Consult the Law Firm's Agreement

Whether organized as a general partnership, PC, LLP, or LLC, most law firms are governed by some form of written operating agreement. Step one in any lawyer departure: review those provisions of the operative agreement addressing the rights and obligations of individual partners and employees on one side, and the entity on the other, in the event of a lawyer's withdrawal or the firm's dissolution.

A partnership or LLC operating agreement should, at a minimum, contain provisions addressing the rights and obligations of the withdrawing partner or member; the valuation of the withdrawing partner's equity stake (or capital account) in the firm; and the timing of the firm's payment obligation to its former partner for both undistributed income and equity. In addition, a comprehensive law firm agreement will address what firm property, if any, a departing lawyer is authorized to take.

## Pre-Departure Notice to Clients

Virtually all courts and ethics bodies have concluded that a departing lawyer is permitted—prior to departure—to notify his or her clients of an imminent move from the firm. Indeed, a lawyer may be ethically *required* to timely notify each client for whom he or she is then actively working of the planned moved. This requirement arises from the obligations under Rule 1.4 of the Rules of Professional Conduct ("Communication"). That Rule requires a lawyer to "keep" a client both "reasonably informed about the status of" the client's matter, and provide the client with enough information "to permit the client to make informed decisions regarding the representation."[1]

The ABA Ethics Committee concluded that Rule 1.4 *requires* pre-departure notification to affected clients in all circumstances. However, the CBA's Committee on Professional Ethics slightly parted company with the ABA. It concluded that a pre-departure notice to a client "is ethically permissible, but not mandated . . . ."[2]

Whether mandated or permitted, the better practice is for the departing lawyer who contacts clients prior to departure to do so *after* first notifying the firm of the decision to leave. Indeed, a lawyer who departs with little or no advance notice to his or her colleagues, or deliberately conceals his or her plans to depart, is exposed to a claim by the firm for, among other things, breach of fiduciary duty.

## Pre-Departure Solicitation of Clients

Although the departing lawyer may properly *notify* clients of planned departure, the lawyer may not, prior to departure, *solicit* or otherwise lure firm clients. This is particularly true if the luring is concealed from firm colleagues or involves a less than honest description to those colleagues of pre-departure contacts with clients.

The content of the pre-departure notice to clients should, therefore, be neutral and free from pitches promoting either the lawyer or her new law firm or denigrating

the old firm. It also should expressly confirm that the right to "stay or go" belongs to the client alone.

## Pre-Departure Solicitation of Colleagues or Staff Members

As in any business venture, a law firm partner's fiduciary obligations prohibit the lawyer, prior to departure, from recruiting other owners or employees to join or follow him in leaving the firm. The standard may be less strict for firm lawyers who are not partners.

But, by far, the best practice is not to solicit any firm professional or staff member until *after* the lawyer lands at his or her new firm.

## The Joint Notice and the "Ballot" to the Client

As noted, the departing lawyer is most likely to cross fiduciary or ethical boundaries when pre-departure preparations are surreptitious and/or dishonest.

By the same token, upon learning of a lawyer's planned departure, the firm may not ethically block the lawyer's efforts to notify clients of the planned departure. This is because a law firm's clients and the clients' files are not the "property" of either the departing lawyer or the firm.

Departing lawyers and their firms should negotiate, prior to the lawyer's departure, the wording of a jointly delivered letter to each affected client. Such a joint notice not only complies with the ethical duty to keep each client informed. It also is the best way to minimize the suspicion and resentment triggered by unilateral efforts by each side to "grab" the client.

The joint letter should, at a minimum, contain the following information:

1. The effective departure date
2. The identity of the departing lawyer's new firm
3. An express statement of the client's unfettered right of choice. This should include within the notice a written "ballot," to be completed by the client and then returned to the firm, in which the client registers his or her "vote" as follows:
   - I direct the firm to keep my file and continue its representation of me with the understanding that [name of firm lawyer] will be responsible for handling my matter
   - I direct the firm to transfer my file and the balance of my unapplied retainer deposit to [departing lawyer's new firm]
   - I direct the firm to transfer my file and unapplied deposit amount to [a different firm]
   - I direct the firm to transfer my file and unapplied deposit amount to me
4. A reminder that, in the event the client elects to transfer his or her file, the client remains obligated to pay the firm for fees and costs previously incurred, but not yet billed, by the firm

## Conflict Checking by the Departing Lawyer's New Firm

Normally a lawyer is prohibited, absent client consent, from revealing to anyone outside his or her firm *any* "information relating to the representation of [the] client."[3] But in negotiating to leave firm A to join firm B, both the lawyer and firm B are required to conduct a conflicts check for those clients the lawyer anticipates are likely to transfer their files to his new firm.

This obviously requires the departing lawyer to disclose to the outside firm information that plainly is confidential within the meaning of the Rules of Professional Conduct (RPC): the identity of clients and, either directly or by implication, the nature of the representation.

Under an amendment to RPC 1.6 effective in Connecticut in 2014, a lawyer now is expressly permitted to disclose to an outside firm such information "to the extent reasonably necessary to detect and resolve conflicts of interests arising from" the lawyer's change of employment.[4] The exception does not apply if the disclosed conflict-checking information would "... compromise the attorney-client privilege or otherwise prejudice the client."[5]

So how do the departing lawyer and the new firm meet the competing ethical demands for both client confidentiality and a meaningful conflict check? The authors of the RPC instruct as follows:

1. The lawyer may disclose the identity of clients to the new firm only *after* "substantial discussions regarding the new relationship have occurred";
2. The revealed client information should "include no more than the identity of [the client] and the [other] persons and entities involved in a matter, a brief summary of the general issues involved in a matter, and information about whether the matter has terminated"; and
3. The transferring lawyer should not reveal even that limited amount of information if doing so would likely prejudice the client. The authors provide three examples: (a) a client considering a corporate takeover not yet publicly announced; (b) a client consulting about a possible divorce before the other spouse is aware of it; or (c) a client under a criminal investigation that has not yet resulted in publicly filed charges.

## The Departing Lawyer's Removal of Documents and Files

In packing up his or her office for the move to a new firm, what documents—outside of the files clients have authorized to be transferred—is the departing lawyer entitled to keep? The ABA ethics committee concluded that the lawyer may properly take copies of research or CLE materials, pleadings, and form or template documents "to the extent they are prepared by the lawyer" and/or could be "considered in the public domain."[6] Even if the "title" to such documents might technically belong to the firm, it generally serves no goal other than spitefulness for a firm to prevent a departing lawyer to take such documents.

With respect to the potentially sensitive matter of client lists, the departing lawyer may, in preparation of his or her move, create such a list. The departing lawyer may even do so for the purpose of obtaining financing for the new practice. But, whatever the purpose of the client list, he or she can create it based only on information either already known to the

lawyer about each client in question, or available publicly.

As in the case of pre-departing solicitation of clients or staff, secretive or devious removal of the firm's records could amount to a breach of the departing lawyer's fiduciary duties to the firm.

And there is a dividing line between documents arguably related to professional practice—research memos and forms—and those reflecting the firm's internal operations, compensation and personnel policies, or business development or expansion plans.[7]

### Contingency Fee Cases: The Departing Lawyer's Duty to Protect the Firm's Interest in Any Recovery

Both the departing lawyer and the firm have particular obligations where the transferred client matter is subject to a contingency fee arrangement. In Revised Formal Opinion 31 (1988), the CBA's Committee on Professional Ethics addressed the limits on a Connecticut law firm's common law right to a "retaining" lien—to secure fees—on the file of a contingency fee client who has discharged the firm in favor of another firm. The committee sensibly concluded that if the replacement counsel—whether a lawyer who has departed the firm or a lawyer without any previous affiliation with the firm—has delivered a "letter of protection" to the client's prior firm promising to safeguard the prior firm's interest in the fee generated in the case from any settlement or verdict, the prior firm is obligated to transfer the file to the lawyer.

The Connecticut RPC specifically recognize such a "letter of protection" as among the lien-like instruments that are "directly related to the property held by the lawyer" and which thereby trigger the lawyer's obligation to segregate and hold any recovery at which the protection letter is targeted.[8]

And as with its other obligations to facilitate a prompt transition of the client's matter to meet the client's wishes, the prior law firm may not delay or impede the transfer of the client's file once it receives (whether solicited or not) the successor lawyer's "letter of protection."

### Conclusion

Whenever a law firm breaks up or a colleague takes up a new affiliation (even with a competitor), both the firm and the departing lawyer are best served by avoiding the impulse for retribution. As mentioned, both the firm and the departing lawyer have ethical duties to ensure a smooth transition of client files in recognition of the paramount interest at stake: the client's unrestricted right to the counsel of its choosing. Neither the firm nor the lawyer should delay or obstruct the other in meeting the other's obligations. A full exchange of information and a coordinated notice to each affected client is the best way to minimize or avoid the distrust that all too often triggers a wasteful, and unseemly, lawyer vs. lawyer battle over which clients "belong" to which side.

After all, like divorcing parents urged to compromise "for the sake of the children," lawyers who are splitting up should act "for the sake of" the clients. **CL**

## Notes

1. *See* ABA Formal Opinion 99-414 (Sept. 8, 1999) ("Ethical Obligations When A Lawyer Changes Firms").
2. CBA Informal Opinion 00-25 (Dec. 29, 2000) ("Notification of Clients of Lawyer's Upcoming Departure From Firm").
3. RPC 1.6 ("Confidentiality of Information").
4. RPC 1.6(a) commentary.
5. RPC 1.6(c)(5).
6. ABA Formal Op. 99-414.
7. *See Pepe & Hazard v. Jones*, 2002 WL 31255522 *5 (Conn. Super. Ct. Sept. 11, 2002) (damages claims against departing law firm partner based on allegations that, among other things, he disclosed to his new firm, without the old firm's consent, records of the "financial data," including billing rates, "receipts and expenses," "forecasts for future growth," "strategic plans," "past financial history" and "realization rates on billings").
8. RPC 1.15(f), Official Commentary Connecticut.

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 473** **February 17, 2016**

## Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information

*A lawyer receiving a subpoena or other compulsory process for documents or information relating to the representation of a client has several obligations. If the client is available, the lawyer must consult the client. If instructed by the client or if the client is unavailable, the lawyer must assert all reasonable claims against disclosure and seek to limit the subpoena or other initial demand on any reasonable ground. If ordered to disclose confidential or privileged information and the client is available, a lawyer must consult with the client about whether to produce the information or appeal. If the client and the lawyer disagree about how to respond to the initial demand or to an order requiring disclosure, the lawyer should consider withdrawing from the representation pursuant to Model Rule 1.16. If disclosure is ordered and the client is unavailable for consultation, the lawyer is not ethically required to appeal. When disclosing documents and information—whether in response to an initial demand or to an order, and whether or not the client is available—the lawyer may reveal information only to the extent reasonably necessary. The lawyer should seek appropriate protective orders or other protective arrangements so that access to the information is limited to the court or other tribunal ordering its disclosure and to persons having a need to know.*

### I. Introduction

Recently the Committee was asked to revisit Formal Opinion 94-385 (July 5, 1994) regarding subpoena of a lawyer's files because Model Rule 1.6(b)(6) was adopted in 2002, more than a decade ago (at that time as 1.6(b)(4)). Model Rule 1.6(b)(6) provides: "A lawyer may 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.*"[1]

When Formal Opinion 94-385 was issued, Model Rule 1.6(b) permitted a lawyer to disclose confidential information *in only two circumstances*: (i) to prevent certain crimes,

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1. ABA MODEL RULE 1.6(b)(6) (2015) (emphasis added). The phrase "other law" refers, generally, to statutory or regulatory requirements. *See, e.g.*, State Bar of Michigan Advisory Op. RI-311 (1999) (regulation requiring lawyer to report the names and addresses of clients to the Legal Services Corporation); State Bar of Michigan Advisory Op. RI-54 (1990) (Internal Revenue Code requirement that cash transactions exceeding $10,000.00 be reported to the Internal Revenue Service). Although there is overlap in the two phrases, this opinion addresses principally the obligations of a lawyer who receives a subpoena or other initial demand that is or may be enforced by a court or other tribunal. Throughout this opinion, "subpoena," "demand," "compulsory process," and similar terms are used interchangeably to refer to any initial demand by an entity or person or government agency seeking information protected by Model Rule 1.6(a) that is or may be enforced by compulsory process. "Court" or "tribunal" refers to a court, an arbitrator in a binding arbitration proceeding or a legislative body, and an administrative agency or other body acting in an adjudicative capacity and includes any other "tribunal" within the meaning of Model Rule 1.0(m).

and (ii) to establish certain claims or defenses on behalf of the lawyer.[2] Relying in part on then Comment [20], Formal Opinion 94-385 advised that the lawyer "must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about a client."[3] The Opinion explained that this "does not mean that the lawyer should be a passive bystander to attempts by a governmental agency—or by any other person or entity for that matter—to examine her files or records."[4] Rather,

> [W]here a government agency serves on the lawyer a subpoena or court order directing the lawyer to turn over to the agency the lawyer's files relating to her representation of the client—the lawyer has a professional responsibility to seek to limit the subpoena, or court order, on any legitimate available ground (such as the attorney-client privilege, work product immunity, relevance or burden), so as to protect documents as to which the lawyer's obligation under Rule 1.6 apply. Only if the lawyer's efforts [at limiting the subpoena or order] are unsuccessful, either in the trial court or in the appellate court (in those jurisdictions where an interlocutory appeal on this issue is permitted), and she is specifically ordered by the court to turn over to the governmental agency documents which, in the lawyer's opinion, are privileged, may the lawyer do so.[5]

In the twenty-one years since publication of Formal Opinion 94-385 and the fourteen years since the Ethics 2000 amendments, additional questions have arisen regarding how a lawyer should respond to subpoenas, demands, or other compulsory process for client information and documents. These questions include: If disclosure is to be made, how extensive should it be? What, if any, protective measures should or must the lawyer seek? Are the obligations different when the client is not available for consultation? When the client is available for consultation but responding to the demand is outside the scope of a current representation, how should the lawyer handle retention and fee arrangements? If the client and the lawyer disagree about how to respond—either to the initial demand or after disclosure is ordered—what are the lawyer's obligations? Must the lawyer appeal an adverse decision for a client who is unavailable? Should or may the lawyer provide for these contingencies in retainer letters? This opinion provides guidance on these and related questions. The advice offered here updates and extends the advice offered in Formal Opinion 94-385.

## II. Discussion

Rule 1.6(b) permits but does not require a lawyer to disclose information relating to the representation of a client ("[a] lawyer may reveal information") that the lawyer would

2. *Compare* ABA MODEL RULE 1.6(b) (1994), *with* ABA MODEL RULE 1.6(b) (2015).
3. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-385 (1994), at 2.
4. *Id.*
5. *Id.* at 3 (footnotes omitted).

otherwise be barred from disclosure under Rule 1.6(a).[6] Each of the seven 1.6(b) provisions specifies an exception to the 1.6(a) prohibition, and under each provision disclosure is permitted.[7]

For example, Rule 1.6(b)(6) makes clear that a lawyer cannot argue 1.6(a) bars compliance with a court order. Rule 1.6(a) permits disclosure of information relating to the representation, "if such disclosure is permitted by paragraph (b)," and subparagraph (b)(6) permits the lawyer to disclose information "to comply with other law or court order." A lawyer must obey a court order, subject to any right to move the court to withdraw or modify the order or to appeal the order.[8] But a lawyer facing a court order requiring the disclosure of client confidential information still is faced with complex, critical and fact-intensive questions on how to respond—e.g., what challenges should be considered, what specific information should be disclosed, and what protective measures should be sought. In making these judgments the lawyer must balance obligations inherent in the lawyer's dual role as an advocate for the client and an officer of the court.[9] In doing so, the lawyer should disclose client confidential information only to the extent "the lawyer reasonably believes necessary" to comply with the order.[10] Provision (b)(6) enables—indeed calls upon—the lawyer to make these delicate judgments.

### A. Notice and Consultation

The lawyer's obligations of notice and consultation upon receiving a demand for client files and information are essentially the same for current and former clients. First,

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6. ABA MODEL RULE 1.6(a) (2015) provides: "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)."

7. *See, e.g.*, ABA MODEL RULE 1.6(b)(1) (2015) (a lawyer *may* reveal confidential information "to prevent reasonably certain death or substantial bodily harm") (emphasis added); ABA MODEL RULE 1.6(b)(2) (2015) (a lawyer *may* reveal confidential information "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services") (emphasis added). ABA MODEL RULE 1.6(b)(6) is, by its terms, and consistent with (b)(1) through (b)(5), also permissive. *See* ABA MODEL RULE 1.6(b)(6) (2015) ("[a] lawyer *may* reveal information . . . to comply with . . . a court order") (emphasis added). *See also* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 130 (Art Garwin ed., 2013); Margaret Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 451 (2002).

8. *See, e.g.*, ABA MODEL RULE 3.4(c) (2015) ("A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal"); ABA MODEL RULE 8.4(d) (2015) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice"); ABA MODEL RULE 8.4(a) (2015) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct"). *See also* RESTATEMENT OF THE LAW GOVERNING LAWYERS (3d) § 105 (2000) ("In representing a client in a matter before a tribunal, a lawyer must comply with applicable law, including rules of procedure and evidence and specific tribunal rulings.").

9. *See* Dike v. Dike, 448 P.2d 490, 493 (Wash. 1968) (discussing whether a lawyer should be ordered to disclose confidential information the court said, "[I]t is important to recognize that an attorney has a dual role [in this context] — he is both an advocate for his client and an officer of the court . . . . Neither duty can be meaningfully considered independent from the other.").

10. ABA MODEL RULE 1.6 cmt. [16] (2015).

the lawyer must notify—or attempt to notify—the client.[11] For former clients, the lawyer must make reasonable efforts to reach the client by, for example, internet search, phone call, fax, email or other electronic communications, and letter to the client's last known address. The specific efforts required to reach particular clients will depend on the circumstances existing when the lawyer receives the demand. But these efforts must be reasonable within the meaning of Model Rule 1.0(h), and should be documented in the lawyer's files.

The lawyer's obligations to the client will differ depending on whether the client is available for consultation. Where the client is available, the lawyer must consult the client about how to respond to the demand.[12] Model Rule 1.4 should guide this consultation.

Rule 1.4 directs the lawyer to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required and to "explain [the] matter to the extent reasonably necessary to permit the client to make informed decisions."[13] Rule 1.6(a) allows the lawyer to disclose information relating to the representation with the client's informed consent.[14] "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated

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11. *See, e.g.*, State Bar of Michigan Advisory Op. CI-925 (1983) (lawyer must notify client upon receipt of a subpoena for documents relating to the lawyer's representation of the client) (citations omitted); Alaska Bar Ass'n Op. 96-3 (1996) (upon receiving a demand for confidential information or documents, the lawyer should attempt to contact the client concerning the request). *See also* Linda G. Bauer, *Subpoena Savvy: What To Do When Your Client's File is Subpoenaed* (Nov. 2002), www.mass.gov/obcbbo/subpoena.htm (". . . [T]he lawyer should first attempt to contact the former client to determine whether the client consents to the disclosure."); D.C. Bar Op. 14 (1976), at 2 ("an attorney should promptly notify his former client when he receives a subpoena asking for documents that came into his possession during the course of the representation of that former client or documents that affect or may affect that former client"); Pennsylvania Legal Ethics & Prof'l Responsibility Comm. Op. 2002-106 (2003) ("a lawyer may comply with an order issued in a private arbitration to reveal confidential client information, but must first raise the confidentiality issue with the arbitration panel and notify any clients whose confidences are implicated. The lawyer should try to limit the scope and impact of the disclosure.").

12. *See* ABA MODEL RULE 1.6 cmt. [15] (2015) (client consultation is required by Rule 1.4 before responding to an order or demand for information relating to a representation by "a court or by another tribunal or governmental entity"). The protection of 1.6 is provided to former clients through Model Rule 1.9(c)(1) and (2), which provide: "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: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client . . . or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client." *See also* Swidler & Berlin v. U.S., 524 U.S. 399 (1998) (obligations of confidentiality continue even after the death of a client); Jamaica Pub. Serv. Co. v AIU Ins. Co., 684 N.Y.S.2d 459, 462 (N.Y. 1998) (an attorney owes a "continuing duty" to a former client not to reveal confidences learned in the course of a professional relationship). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 fn8 ("[t]he lawyer's obligation to protect the attorney-client privilege ordinarily applies when the lawyer is called to testify or provide documents regarding a former client no less than a current client"); Rhode Island Supreme Ct. Ethics Advisory Panel Op. 2013-05, at 3 (2013) (obligations under 1.6 continue even after death of client; even then a "lawyer has a professional responsibility to seek to limit [a] subpoena or court order on any legitimate grounds such as attorney-client privilege, work product immunity, burden or relevance, to protect information to which obligations under Rule 1.6 apply") (citing ABA Formal Opinion 94-385).

13. ABA MODEL RULE 1.4 (2015).

14. *See* ABA MODEL RULE 1.6(a) (2015) (prohibiting a lawyer from revealing confidential information unless the client gives "informed consent").

adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[15]

The content of the consultation will depend on the circumstances. It should include, at a minimum, (i) a description of the protections afforded by Rule 1.6(a) and (b), (ii) whether and to what extent the attorney-client privilege or work product doctrine or other protections or immunities apply, and (iii) any other relevant matter. Other relevant matters include, for example, "to the extent that the disclosure of confidential client information in a civil proceeding may raise potential criminal liability for the client, the consequences should be explained to the client during the consultation process."[16] The lawyer also may need to discuss whether the subpoena or other demand is valid and whether the requested document contains self-incriminatory information that might form the basis of a Fifth Amendment privilege claim against disclosure.

If, after consultation, the client wishes to challenge the demand, the lawyer should, as appropriate and consistent with the client's instructions, challenge the demand on any reasonable ground. If, after making the challenge, the court or other tribunal rules against the motion to withdraw or modify the order or demand for production, "the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4."[17] If the client decides not to appeal and gives informed consent to disclosure, the lawyer must produce the documents and information consistent with the client's instructions and as described in Part IIC of this opinion.

The lawyer has several options and some obligations if the lawyer and client disagree about how to respond to the initial demand or to an adverse ruling, or if the client wishes to retain new counsel. For a current client, where the initial demand or the appeal is within the scope of the retention, for example, the lawyer may seek to withdraw in compliance with Model Rule 1.16.[18] Where the initial demand or the appeal constitutes a new matter for a current client or relates to a former client and the client wishes to seek other counsel, the lawyer should take reasonable steps to protect the client's interest during the client's search for other counsel.[19]

### B. Fee Arrangements

When responding to a demand that is outside the scope of a current retention, or when the demand relates to information and documents of a former client, the lawyer may need to discuss fee and retention arrangements during the consultation. In doing so, however, the lawyer must comply with the relevant rules. For example, under Model Rule 1.5(b) "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in

15. ABA MODEL RULE 1.0(e) (2015).
16. *See* Bauer, *supra* note 11.
17. ABA MODEL RULE 1.6 cmt. [15] (2015).
18. *See* ABA MODEL RULE 1.16(b)(1), (4), (7) & 1.16(c) (2015).
19. *See* ABA MODEL RULE 1.16(d) (2015).

writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate."[20]

Lawyers also may consider providing for these situations in initial retainer letters by including provisions that (i) the client will keep the lawyer informed on how to reach the client, even after the representation has ended, (ii) in the event the lawyer receives a subpoena or other demand for information protected by Model Rule 1.6, the client will promptly respond to the lawyer's request for instructions, and (iii) the client agrees to pay all reasonable fees and costs associated with any production or judicial proceedings in response to a subpoena or other demand. Even if no fee agreement is reached—either in the initial retainer letter or during a consultation following the lawyer's receipt of the demand—the lawyer nevertheless may be required to challenge the initial demand, as discussed below.[21]

### C. Where the Client is Unavailable for Consultation

Where the client is unavailable for consultation after the lawyer has made reasonable efforts to notify the client, the lawyer "*should* assert on behalf of the client all non-frivolous claims that . . . the information sought is protected against disclosure by the attorney-client privilege or other applicable law."[22] The lawyer has this obligation to assert all reasonable objections and claims when the lawyer receives the initial demand.[23] During

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20. ABA MODEL RULE 1.5(b) (2015).

21. *See, e.g.*, D.C. Bar Op. 288 fn4 (1999) (" . . . [even] if no agreement on fees and expenses is reached regarding the efforts to protect the confidential information [demanded by a subpoena], the lawyer must nevertheless take all ethically required steps to protect the privilege even if not compensated for the services by the client."). A later suit in *quantum meruit* for the services rendered may be available to the lawyer but that is an issue of law beyond the jurisdiction of this Committee. Alternatively, a lawyer may seek to withdraw as appropriate under Rule 1.16.

22. ABA MODEL RULE 1.6 cmt. [15] (2015) (emphasis added). *See* RESTATEMENT OF THE LAW, *supra* note 8, § 63 cmt. b ("A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information . . . from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented . . ."); Bd. of Prof'l Responsibility of the Supreme Ct. of Tennessee Formal Op. 2014-F-158 (2014) ("[i]n the absence of informed consent of the client, the lawyer must reveal the information or document if ordered to [do] so by the tribunal, but only after the lawyer has raised all non-frivolous objections that the information sought is protected against disclosure by the attorney-client privilege or other applicable law"); D.C. Bar Op. 288 (1999) (" . . . . A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential information . . . , unless disclosure would serve the client's interests . . . ." (citations omitted); D.C. Bar Op. 14 (1976) (". . . [W]hen documents are subpoenaed or an effort is otherwise made to compel their disclosure, it is the lawyer's ethical duty to a former client to assert on the former client's behalf every objection or claim of privilege available to him when to fail to do so might be prejudicial to the client"); Kentucky Bar Ass'n Op. E-315 (1987) (upon receiving a grand jury subpoena for client documents a lawyer "must respond by asserting any privilege (i.e., the attorney-client privilege) . . . .") (citations omitted); New Jersey Advisory Comm. on Prof'l Ethics Op. 145 (1969) (". . . if the client fails to respond to the attorney's letter his silence cannot be construed as consent and it would be improper to turn over copies of the [client's documents absent a court order] . . . .").

23. Appropriate objections and claims may vary with the jurisdiction. In some states, e.g., California, a lawyer may be *required* to raise certain claims or objections. *See, e.g.*, CAL. EVIDENCE CODE § 955 (1965) (lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim

the proceeding before the court or other tribunal, the lawyer should explain the lawyer's diligent but unsuccessful efforts to reach the client. If the lawyer is ordered to produce the documents and records, paragraph (b)(6) permits the lawyer to comply with the court order, as discussed below.

### D. Complying With the Court Order

As noted, relying in part on then Comment [20], Formal Opinion 94-385 declared that a "lawyer must comply with the *final* orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client."[24] Other authorities also direct a lawyer to comply with "final" orders of a court or other tribunal.[25] Questions have arisen as to whether the reference to "final order" in Formal Opinion 94-385 and elsewhere requires a lawyer to appeal an adverse ruling when the client cannot be located or is unavailable for consultation.

Model Rule 1.6(b)(6) makes no reference to a "final" order. The comments adopted in 2002 make no reference to "final" orders. Comment [15] reads simply, "In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order."[26] The text thus suggests that omitting the reference to "final" orders was meant to relieve the lawyer from the added burden of pursuing an appeal or other "final" disposition, unless appropriate arrangements are made with an available client. The obligation of the lawyer with regard to an appeal is particularly relevant if the client or former client is unavailable.[27]

Requiring a lawyer to take an appeal when the client is unavailable places significant and undue burdens on the lawyer. An appeal costs money and takes time away from other clients. Taking an appeal on behalf of an unavailable client forces the lawyer to act without consultation and direction. While such clients need and deserve protection in

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the privilege under subdivision (c) of § 954). In other states, by contrast, a lawyer may be *forbidden* from raising certain objections or claims.

24. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-385, at 2 (emphasis added). Prior to the adoption of the amendments in 2002, Comment [20] to Model Rule 1.6 also said, a "lawyer must comply with the *final* orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." *See* A LEGISLATIVE HISTORY, *supra* note 7, at 129 (emphasis added).

25. *See, e.g.*, Rhode Island Supreme Ct. Ethics Advisory Panel Op. 98-02 (1998) (upon receiving a demand for confidential information a lawyer "has professional responsibility to seek to limit subpoena [sic] or court order on any legitimate ground, such as attorney-client privilege, work product immunity, burden or relevance . . . . The . . . attorney must comply, however, with the *final* orders of a court requiring him/her to produce the documents sought or to give information about the former client" (emphasis added) (citing ABA Formal Opinion 94-385)). *See also* State Bar of Arizona Op. 00-11 (2000) (discussing, *inter alia*, a comment to Arizona RPC 1.6, which says, ""The lawyer must comply with the *final* orders of a court or other tribunal . . . [requiring disclosure]" but noting that "[w]hat constitutes a 'final order' is problematic. Criminal attorneys might well argue that before revealing any such confidential information . . . the lawyer must await a final order by the highest court of appellate review and the mandate is spread relative thereto, if the original order of the lower court is appealed") (emphasis added).

26. ABA MODEL RULE 1.6 cmt. [15] (2015).

27. *See* the Reporter's comment in A LEGISLATIVE HISTORY, *supra* note 7, at 132.

response to an initial demand—to avoid improper and unjustified access to information and documents that the rules protect even after the client's death[28]—the balance changes once a court or other tribunal has ruled on the lawyer's initial objection. In the absence of instructions from the client to appeal, the ethics rules do not require a lawyer to shoulder further burdens. Accordingly, a lawyer is not ethically required to take an appeal on behalf of a client whom the lawyer cannot locate after due diligence.[29]

Once a lawyer determines disclosure is appropriate—in response to an initial demand or to an order and whether or not the client is available—the lawyer may produce documents and information "only to the extent the lawyer reasonably believes . . . is necessary . . . ."[30] The lawyer should seek appropriate protective orders and similar arrangements "to the fullest extent practicable."[31] "[D]isclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it . . . ."[32]

## III. Conclusion

A lawyer receiving a subpoena or other compulsory process for information or documents relating to the representation of a client has several obligations. If the client is available, the lawyer must consult the client. If instructed by the client or if the client is unavailable, the lawyer must assert all reasonable claims against disclosure and seek to limit the subpoena or other demand on any reasonable ground.

If ordered to disclose confidential or privileged information and the client is available, a lawyer must consult with the client about whether to produce the information or to appeal. If the client and the lawyer disagree about how to respond to the initial demand or to an order requiring disclosure, the lawyer should consider withdrawing pursuant to Model Rule 1.16. If disclosure is ordered and the client is unavailable for consultation, the lawyer is not ethically required to appeal.

When disclosing documents and information—whether in response to an initial demand or to a court order and whether or not the client is available—the lawyer may reveal information only to the extent reasonably necessary. The lawyer should seek appropriate protective orders or other protective arrangements so that access to the information is limited to the tribunal ordering its disclosure and to persons having a need to know.

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28. Swidler & Berlin v. U.S., 524 U.S. 399 (1998) (obligations of confidentiality continue even after the death of a client); Jamaica Pub. Serv. Co. v. AIU Ins. Co., 684 N.Y.S.2d 459, 462 (N.Y. 1998) (an attorney owes a "continuing duty" to a former client not to reveal confidences learned in the course of a professional relationship).

29. When challenging the subpoena or other demand in the first instance the lawyer should explain to the court or other tribunal the lawyer's efforts to locate the client and the client's unavailability.

30. ABA MODEL RULE 1.6 cmt. [16] (2015).

31. *Id.*

32. *Id.*

Where the client is available, the lawyer is not required to act without a fee but arrangements regarding the scope of the work and fee arrangements must conform to the relevant rules.[33] Where the client is unavailable to make retention and fee arrangements, the lawyer is nevertheless required to challenge the demand in the first instance. Lawyers should consider providing for these situations in retainer agreements.

33. *See, e.g.*, ABA MODEL RULE 1.5 (2015).