speaking of ethics

By Heather Bupp-Habuda

Confidentiality Revisited

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The D.C. Bar Legal Ethics Committee and its staff are regularly asked for ethics advice about confidentiality issues. Most often the inquiry centers on whether the D.C. Rules of Professional Conduct protect certain information from disclosure or require its disclosure.

An attorney wondering about disclosing client confidences or secrets is well advised to review D.C. Rule 1.6 and its comments. According to comment 4, "A fundamental principle in the client–lawyer relationship is that the lawyer holds inviolate the client's secrets and confidences."

Because of the wide array of scenarios for which the rules are devoid of guidance, the Legal Ethics Committee has issued more than 60 opinions interpreting Rule 1.6 and its predecessor Code of Professional Responsibility provision, DR 4-101. (Rule 1.6 continues DR 4-101 nearly verbatim and significantly expands the rule and its accompanying commentary.)

Six committee opinions addressing confidentiality questions have been issued in the past few years. A summary of the inquiries and the committee's conclusions follows. (For a review of earlier committee opinions relating to confidentiality, see "Speaking of Ethics" in the January and March 2001 issues.)

Three committee opinions, 302, 316, and 330, demonstrate the way in which the cyberspace communications revolution has affected the practice of law. A recurring theme is preservation of confidentiality in communicating with clients over the Internet.

Opinion 302 (2000) states that lawyers must ensure that the web sites they use to bid on legal projects have taken adequate steps to protect against confidentiality and conflict-of-interest problems. Opinion 302 reiterates Opinion 281 (1998), deciding that the transmission of information from a lawyer to a client by unencrypted electronic mail will not violate Rule 1.6, unless special circumstances require greater means of security.

Opinion 316 (2002) found that an attorney providing tailored legal advice rather than general legal information through an Internet chat room may create an attorney–client relationship and, in doing so, incurs the same duties of confidentiality and avoidance of conflicts as an attorney providing face-to-face legal counseling.

Likewise Opinion 330 (2005) concluded that attorneys participating in unbundled service arrangements owe the duties of diligence, promptness, loyalty, and communication within the defined scope of the representation, along with the duties of confidentiality and avoidance of conflicts of interest under Rules 1.6, 1.7, and 1.9. "Once the provision of even limited legal services gives rise to a client–attorney relationship, all the usual duties of the D.C. Rules of Professional Conduct attach to that relationship."

In Opinions 305, 318, and 327, Rule 1.6 is discussed in relation to privileged information and current representation issues.

Opinion 305 (2001) responded to a query about a lawyer's ethical responsibilities to the trade associations she represented and to the associations' individual members. The threshold question was whether and to what extent the individual member had become a client of the lawyer and whether that individual member had disclosed confidential information to the association's lawyer. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 365 (1992). The committee concluded, "Information obtained from a member while the lawyer is acting for the trade association is protected by the attorney–client privilege and subject to the confidentiality requirements of Rule 1.6; however, it is the trade association that holds the privilege, not the member." D.C. Bar Legal Ethics Comm. Op. 305 n.3 (2001) (interpreting comment 3 to Rule 1.13). As such, only particular circumstances may create an attorney–client relationship with an individual member during representation of the trade association.

Opinion 318 (2002) is directed to counsel in an adversary proceeding who receives a privileged document from a client or third party that may have been stolen or taken without authority. Responding to a similar inquiry, in Opinion 256 (1995) the committee opined that a lawyer engages in no ethical violation by retaining and using privileged materials if the materials are reviewed in good faith before the inadvertence of the disclosure or their confidential status is brought to light.

According to Opinion 318, if the unauthorized source or the privileged status of the materials does not become apparent until after the document has been reviewed, a receiving lawyer would not violate the Rules of Professional Conduct. Conversely, counsel having the responsibility for protecting privileged documents that are subsequently disclosed may violate Rule 1.6(a) and (e), inter alia, by failing to exercise reasonable care to prevent unauthorized disclosure of client confidences and secrets, which can waive the privilege.

Similarly, while focusing on joint representation, Opinion 327 (2005) reaffirms the conclusion in Opinion 296 (2000), and then goes a step further. Where one client has given consent to the disclosure of confidential information by the lawyer to another client, the committee found that the lawyer must reveal the information if it is relevant or material to the lawyer's representation. In short, "a lawyer violates the D.C. Rules of Professional Conduct when he or she withholds" such relevant or material confidential information. *See* D.C. Rules of Prof'l Conduct R. 1.6(d)(1).

Opinions of the D.C. Bar Legal Ethics Committee can be found online at www.dcbar.org/ethics.

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