AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 479 **December 15, 2017**

The "Generally Known" Exception to Former-Client Confidentiality

A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

Introduction

Confidentiality is essential to the attorney-client relationship. The duty to protect the confidentiality of client information has been enforced in rules governing lawyers since the Canons of Ethics were adopted in 1908.

The focus of this opinion is a lawyer's duty of confidentiality to former clients under Model Rule of Professional Conduct 1.9(c). More particularly, this opinion explains when information relating to the representation of a former client has become generally known, such that the lawyer may use it to the disadvantage of the former client without violating Model Rule 1.9(c)(1).

The Relevant Model Rules of Professional Conduct

Model Rule 1.6(a) prohibits a lawyer from revealing information related to a client's representation unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Model Rule 1.6(b).[1] Model Rule 1.9 extends lawyers' duty of confidentiality to former clients. Model Rules 1.9(a) and (b) govern situations in which a lawyer's knowledge of a former client's confidential information would create a conflict of interest in a subsequent representation. Model Rule 1.9(c) "separately regulates the use and disclosure of confidential information" regardless of "whether or not a subsequent

[1] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2017) [hereinafter MODEL RULES].

representation is involved."[2]

Model Rule 1.9(c)(2) governs the *revelation* of former client confidential information. Under Model Rule 1.9(c)(2), a lawyer who formerly represented a client in a matter, or whose present or former firm formerly represented a client in a matter, may not reveal information relating to the representation except as the Model Rules "would permit or require with respect to a [current] client." Lawyers thus have the same duties not to *reveal* former client confidences under Model Rule 1.9(c)(2) as they have with regard to current clients under Model Rule 1.6.

In contrast, Model Rule 1.9(c)(1) addresses the *use* of former client confidential information. Model Rule 1.9(c)(1) provides that a lawyer shall not use information relating to a former client's representation "to the disadvantage of the former client except as [the Model] Rules would permit or require with respect to a [current] client, or when the information has become *generally known*."[3] The terms "reveal" or "disclose" on the one hand and "use" on the other describe different activities or types of conduct even though they may—but need not—occur at the same time. The generally known exception applies only to the "use" of former client confidential information. This opinion provides guidance on when information is generally known within the meaning of Model Rule 1.9(c)(1).[4]

The Generally Known Exception

The generally known exception to the use of former-client information was introduced in the 1983 Model Rules.[5] The term is not defined in Model Rule 1.0 or in official Comments to Model Rule 1.9. A number of courts and other authorities conclude that information is *not* generally known merely because it is publicly available or might qualify as a public record or as a matter of public record.[6] Agreement on when information *is* generally known has been harder to achieve.

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[2] ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 190 (8th ed. 2015).

[3] MODEL RULES R. 1.9(c)(1) (2017) (emphasis added).

[4] *See id.* at cmt. 9 (explaining that "[t]he provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent").

[5] *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.9, at 534 (2017–2018) (explaining that the language was originally part of Model Rule 1.9(b), and was moved to Model Rule 1.9(c) in 1989).

[6] *See, e.g.*, Pallon v. Roggio, Civ. A. Nos. 04-3625(JAP), 06-1068(FLW), 2006 WL 2466854, at *7 (D. N.J. Aug. 24, 2006) ("'Generally known' does not only mean that the information is of public record. . . . The information must be within the basic understanding and knowledge of the public. The content of form pleadings, interrogatories and other discovery materials, as well as general litigation techniques that were widely available to the public through the internet or another source, such as continuing legal education classes, does not make that information 'generally known' within the meaning of Rule 1.9(c)." (citations omitted)); Steel v. Gen. Motors Corp., 912 F. Supp. 724, 739 (D. N.J. 1995) (in a discussion of Rule 1.9(c)(2), stating that the fact that information is publicly available does not make it 'generally known'); *In re* Gordon Props., LLC, 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) ("'Generally known' does not mean information that someone can find."); *In re* Anonymous, 932 N.E.2d 671, 674 (Ind. 2010) (stating in connection with a discussion of Rule 1.9(c)(2) that "the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources" (footnote omitted); *In re* Tennant, 392 P.3d 143, 148 (Mont. 2017) (explaining that with respect to the Rule 1.9(c) analysis of

A leading dictionary suggests that information is generally known when it is "popularly" or "widely" known.[7] Commentators have essentially endorsed this understanding of generally known by analogizing to an original comment in New York's version of Rule 1.6(a) governing the protection of a client's confidential information. The original comment distinguished "generally known" from "publicly available."[8] Commentators find this construct "a good and valid guide"[9] to when information is generally known for Rule 1.9(c)(1) purposes:

> [T]he phrase "generally known" means much more than publicly available or accessible. It means that the information has already received widespread publicity. For example, a lawyer working on a merger with a Fortune 500 company could not whisper a word about it during the pre-offer stages, but once the offer is made—for example, once AOL and Time Warner have announced their merger, and the Wall Street Journal has reported it on the

when information is considered to be generally known, the fact that "the information at issue is generally available does not suffice; the information must be within the basic knowledge and understanding of the public;" protection of the client's information "'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources'") (citations omitted)); Turner v. Commonwealth, 726 S.E.2d 325, 333 (Va. 2012) (Lemons, J., concurring) ("While testimony in a court proceeding may become a matter of public record even in a court denominated as a 'court not of record,' and may have been within the knowledge of anyone at the preliminary hearing, it does not mean that such testimony is 'generally known.' There is a significant difference between something being a public record and it also being 'generally known.'"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1125, 2017 WL 2639716, at *1 (2017) (discussing lawyers' duty of confidentiality and stating that "information is not 'generally known' simply because it is in the public domain or available in a public file" (reference omitted)); Tex. Comm. on Prof'l Ethics Op. 595, 2010 WL 2480777, at *1 (2010) ("Information that is a matter of public record may not be information that is 'generally known.' A matter may be of public record simply by being included in a government record . . . whether or not there is any general public awareness of the matter. Information that 'has become generally known' is information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found."); ROTUNDA & DZIENKOWSKI, *supra* note 5, § 1.9-3, at 554 (stating that Model Rule 1.9 "deals with what has become generally known, not what is publicly available if you know exactly where to look"); *see also* Dougherty v. Pepper Hamilton LLP, 133 A.3d 792, 800 (Pa. Super. Ct. 2016) (questioning whether an FBI affidavit that was accidentally attached to a document in an unrelated proceeding and was thus publicly available through PACER was "actually 'generally known,'" since "a person interested in the FBI affidavit 'could obtain it only by means of special knowledge'" (citing Restatement (Third) of the Law Governing Lawyers § 59, cmt. d). *But see* State v. Mark, 231 P.3d 478, 511 (Haw. 2010) (treating a former client's criminal conviction as "generally known" when discussing a former client conflict and whether matters were related); Jamaica Pub. Serv. Co. v. AIU Ins. Co., 707 N.E.2d 414, 417 (N.Y. 1998) (applying former DR 5-108(a)(2) and stating that because information regarding the defendant's relationship with its sister companies "was readily available in such public materials as trade periodicals and filings with State and Federal regulators," it was "generally known"); State ex rel. Youngblood v. Sanders, 575 S.E.2d 864, 872 (W. Va. 2002) (stating that because information was contained in police reports it was "generally known" for Rule 1.9 purposes); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (2000) ("Information contained in books or records in public libraries, public-record depositories such as government offices, or publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access.").

[7] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 732 (4th ed. 2009).

[8] *See* ROY D. SIMON & NICOLE HYLAND, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 685 (2017) (discussing former comment 4A to New York Rule 1.6).

[9] *Id.*

> front page, and the client has become a former client—then the lawyer may tell the world. After all, most of the world already knows. . . .
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> [O]nly if an event gained considerable public notoriety should information about it ordinarily be considered "generally known."[10]

Similarly, in discussing confidentiality issues under Rules 1.6 and 1.9, the New York State Bar Association's Committee on Professional Ethics ("NYSBA Committee") opined that "information is generally known only if it is known to a sizeable percentage of people in 'the local community or in the trade, field or profession to which the information relates.'"[11] By contrast, "[I]nformation is not 'generally known' simply because it is in the public domain or available in a public file."[12] The Illinois State Bar Association likewise reasoned that information is generally known within the meaning of Rule 1.9 if it constitutes "'common knowledge in the community.'"[13]

As the NYSBA Committee concluded, information should be treated differently if it is widely recognized in a client's industry, trade, or profession even if it is not known to the public at large. For example, under Massachusetts Rule of Professional Conduct 1.6(a), a lawyer generally is obligated to protect "confidential information relating to the representation of a client."[14] Confidential information, however, does not ordinarily include "information that is generally known in the local community or in the trade, field or profession to which the information relates."[15] Similarly, under New York Rule of Professional Conduct 1.6(a), a lawyer generally cannot "knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person,"[16] but "confidential information" does not include "information that is generally known in the local community or in the trade, field or profession to which the information relates."[17] Returning to Model Rule 1.9(c)(1), allowing information that is generally known in the former client's industry, profession, or trade to be used pursuant to Model Rule 1.9(c)(1) makes sense if, as some scholars have urged, the drafters of the rule contemplated that situation.[18]

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[10] *Id.*

[11] N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 991, at ¶ 20 (2013).

[12] *Id.* at ¶ 17.

[13] Ill. State Bar Ass'n. Advisory Op. 05-01, 2006 WL 4584283, at *3 (2006) (quoting RESTATEMENT (SECOND) OF AGENCY § 395 cmt. b (1958)). The Illinois State Bar borrowed this definition from section 395 of the Restatement (Second) of Agency, which excludes such information from confidential information belonging to a principal that an agent may not use "in violation of his duties as agent, in competition with or to the injury of the principal," whether "on his own account or on behalf of another." RESTATEMENT (SECOND) OF AGENCY § 395 & cmt. b (1958).

[14] MASS. RULES OF PROF'L CONDUCT R. 1.6(a) (2017).

[15] *Id.* at cmt. 3A.

[16] N.Y. RULES OF PROF'L CONDUCT R. 1.6(a) (2017).

[17] *Id.* at cmt. [4A] ("Information is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not 'generally known' simply because it is in the public domain or available in a public file").

[18] *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 14.16, at 14-48 (2016) (discussing generally known and saying, "It seems likely that both the Kutak Commission and the Ethics 2000 Commission . . .

A Workable Definition of Generally Known under Model Rule 1.9(c)(1)

Consistent with the foregoing, the Committee's view is that information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field. Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.

Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes.[19] Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known within the meaning of Model Rule 1.9(c)(1).[20]

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had in mind situations in which a lawyer has worked with a company in various legal contexts, learned considerable information about its products and practices, and later seeks to use this information in connection with [the] representation of an adverse party in an unrelated lawsuit or transaction of some kind").

[19] *See In re* Gordon Props., LLC, 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) ("'Generally known' does not mean information that someone can find. It means information that is already generally known. For example, a lawyer may have drafted a property settlement agreement in a divorce case and it may [be] in a case file in the courthouse where anyone could go, find it and read it. It is not 'generally known.' In some divorce cases, the property settlement agreement may become generally known, for example, in a case involving a celebrity, because the terms appear on the front page of the tabloids. 'Generally known' does not require publication on the front page of a tabloid, but it is more than merely sitting in a file in the courthouse."); *In re* Tennant, 392 P.3d 143, 148 (Mont. 2017) (holding that a lawyer who learned the information in question during his former clients' representation could not take advantage of his former clients "by retroactively relying on public records of their information for self-dealing"); ROTUNDA & DZIENKOWSKI, *supra* note 5, § 1.9-3, at 554 (explaining that Model Rule 1.9(c)(1) "deals with what has become generally known, not what is publicly available if you know exactly where to look"); *see also supra* note 6 (citing additional cases and materials).

[20] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (2000) (stating, *inter alia,* that information is not generally known "when a person interested in knowing the information could obtain it only by means of special knowledge").

Conclusion

A lawyer may use information that is generally known to a former client's disadvantage without the former client's informed consent. Information is generally known within the meaning of Model Rule 1.9(c)(1) if it is widely recognized by members of the public in the relevant geographic area or it is widely recognized in the former client's industry, profession, or trade. For information to be generally known it must previously have been revealed by some source other than the lawyer or the lawyer's agents. Information that is publicly available is not necessarily generally known.