Reprinted with permission from New York State Bar Association Journal, Vol. 91, No. 1 | January / February 2019

**The Attorney Professionalism Committee** invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

This column is made possible through the efforts of the NYSBA's Committee on Attorney Professionalism. Fact patterns, names, characters and locations presented in this column are fictitious, and any resemblance to actual events or to actual persons, living or dead, is entirely coincidental. These columns are intended to stimulate thought and discussion on the subject of attorney professionalism. The views expressed are those of the authors, and not those of the Attorney Professionalism Committee or the NYSBA. They are not official opinions on ethical or professional matters, nor should they be cited as such.

## DEAR FORUM:

I represent lenders in foreclosure actions and have access to a lot of information about real estate that is regularly advertised for sale to the public either through auctions or through short sales from borrowers in default. A few of my friends started buying distressed properties, doing some construction, and then flipping them for a profit. When they learned that I was dealing with properties in foreclosure every day, they started peppering me with questions about the properties and asking for tips on upcoming sales. My initial reaction was that I may not be permitted to disclose any information on the properties to my friends because it would be a violation of my confidentiality obligations to my clients. I know one of my clients likes to discuss the status of the properties in detail but then say, "That info is just between you and me. Just put the bare bones in the papers unless you think it is really necessary. Then you can feel free to use it."

But then I started to think about it more and I realized that the information that is most important to my friends, such as addresses, prices, and dates for auctions, is all in publicly filed court documents or is information that I talked about in open court and on the record. In other words, all the really important information is already available to the public. Does this clear me of any confidentiality issues permitting me to discuss the properties with my friends? What if I e-filed court documents with that information? While they haven't offered me any money yet, I suspect that if my friends acquire and flip a property I tell them about, they will give me a small portion of their profit as a thank you. Does this affect my ability to discuss the properties and can I accept such a gift?

Sincerely,

Luce Lips

## DEAR LUCE LIPS:

The maintenance of client confidences is one of our most important obligations as lawyers. Our duty of confidentiality encourages clients to seek legal assistance and to communicate fully and honestly with their lawyers, even when discussing a legally detrimental or embarrassing subject matter. *See* New York Rules of Professional Conduct (RPC) 1.6 Comment [1]. Clients must be free to communicate openly and frankly with their lawyers; effective representation is dependent on confidentiality. *See id.* With client's information and documents regularly available to the public on court websites today, some attorneys may think that they no longer have an obligation to consider the information disclosed in those filings as confidential. As we discuss below, however, attorneys still need to be careful to preserve client confidentiality even *after* such information is made available to the public.

RPC 1.6(a) tells us that a lawyer shall not 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, unless: (1) the client gives informed consent; (2) the disclosure is impliedly authorized to advance the best interests of the client and is reasonable under the circumstances or customary in the professional community; or (3) the disclosure is permitted pursuant to 1.6(b). The rule prohibits lawyers from using information gained during the representation of a client for the lawyer's benefit or a third party, such as another client, absent informed consent. *See* RPC 1.6 Comment [4B]. For example, if a lawyer learns that a client intends to develop real estate, the lawyer is prohibited from using the information concerning the real estate development to purchase their own neighboring land or to recommend to other clients that they purchase neighboring land (with the assumption that property values will increase because of the real estate development by the client) without the client's informed consent. *See id.* Impliedly authorized disclosures contemplated by RPC 1.6(a)(2) include disclosure

to associated lawyers at a lawyer's firm. *See* RPC 1.6 Comment [5]. A client may, however, specifically direct that certain information should be confined to particular lawyers if they do not want the information shared amongst associated lawyers. *See id.*

Disclosure of a client's confidential information is permitted under RPC 1.6(b) only under the following circumstances: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent a client from committing a crime; (3) to withdraw a written or oral representation or opinion given by a lawyer and believed by the lawyer to still be relied upon by a third person, where the lawyer discovered that the opinion or representation was based upon inaccurate information or is being used to further a crime or fraud; (4) to obtain legal advice about compliance with the RPC or other law by the lawyer; or (5) to defend the lawyer, lawyer's employees or associates against an accusation of wrongful conduct or to establish or collect a fee. *See* RPC 1.6(b). Under your circumstances, it appears that informed consent for "confidential information" would be necessary under RPC 1.6(a)(1). So we must turn to whether the information you want to disclose is considered "confidential information."

"Confidential information" is defined as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." *See* RPC 1.6(a). RPC 1.6(a) protects factual information "gained during or relating to the representation of a client." *See* RPC 1.6 Comment [4A]. The prohibitions in RPC 1.6(a) not only prohibit a lawyer from knowingly revealing confidential information, but they also apply to any disclosure that could reasonably lead to the discovery of confidential information by a third person. *See* RPC 1.6 Comment [4]. For example,

sharing a hypothetical to discuss issues relating to a representation is acceptable as long as there is no reasonable likelihood that the identity of the client can be ascertained from the facts provided. *See id.* Information "relates to" the representation of a client if it has any possible relation to the representation or is received as a result of the representation. *See* RPC 1.6 Comment [4A]. Legal knowledge that a lawyer acquires or legal research that a lawyer performs in the ordinary course of practice, however, is not usually considered client information protected by RPC 1.6(a). *See id.*

The duty of confidentiality also extends to former clients and is governed by RPC 1.9(c). We briefly discussed the duty of confidentiality to former clients in last month's *Forum. See* Vincent J. Syracuse, Carl F. Regelmann, and Alexandra Kamenetsky Shea, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2018, Vol. 90, No. 9. RPC 1.9(c) generally prohibits a lawyer from using or revealing the confidential information of a former client, protected by RPC 1.6, without an expiration date. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 676-80 (2016 ed.), citing NYSBA Comm. on Prof'l Ethics, Op. 1032 (2014). RPC 1.9(c), however, carves out an exception to revealing a former client's confidential information when the information is "generally known." *See* RPC 1.9 (c)(1).

With regard to your concern about sharing publicly available client information with your friends, it is not unreasonable for you to question where the line of client confidences ends and the realm of "generally known" information begins. This is an issue many attorneys face routinely. Confidential information does not usually include a lawyer's legal research or "information that is generally known in the local community or in the trade, field or profession to which the information relates." *See* RPC 1.6(a). While it may not seem intuitive, information is not considered "generally known" merely because it is available in the public domain. *See* RPC 1.6 Comment [4A]. RPC 1.0(k) defines "known" as having actual knowledge "of the fact in question," but a person's knowledge may be inferred from the circumstances. *See* RPC 1.0(k). "Generally known," therefore, means more than publicly available, "[i]t means that the information has already received widespread publicity." *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 679. Professor Roy Simon, in his discussion of what constitutes "generally known," gives an example that once a corporation's merger is reported by the *Wall Street Journal* that means it is generally known and the lawyer then may tell the world. *See id.* If a client was once convicted of a crime or fired from a public job, however, the lawyer is not permitted to share that information even though it may be available in public records. *See id.*

The N.Y. Court of Appeals has taken a more expansive view of the "generally known" exception with respect to corporations in *Jamaica Public Service Co. v. Aiu Insurance Co.,* 92 N.Y.2d 631 (1998). *See id.* The Court held that information about the corporate structure of a business was generally known because it was available in trade periodicals and filings with state and federal regulators. *See Jamaica Public Service,* 92 N.Y.2d at 637–38. Professor Roy Simon opines that in his view, information is not generally known unless it has gained considerable public notoriety. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 679.

The New York State Bar Association Committee on Professional Ethics has also addressed the "generally known" exception to client confidences in its opinions. In one such opinion, an inquiring lawyer asked the Committee if he would be permitted, in his request to withdraw as counsel to the court, to submit documents filed by his client in a separate federal court action, even if the documents may reveal his client to be incompetent or unstable and thereby prejudice his client. *See* NYSBA Comm. on Prof'l Ethics, Op. 1057 (2015). The Committee opined that the lawyer would not be permitted to use the documents filed in the federal court action, unless the federal lawsuit was reported in the public media, or the client himself widely publicized the other lawsuit. *See id.* The Committee reasoned that if the matter was not widely publicized, the documents would not be considered "generally known" and the lawyer would be prohibited from disclosing or using such information pursuant to RPC 1.6. *See id.* It is noted that the Committee cited *Jamaica Public Service*, but did not follow its expansive view of the phrase "generally known." *See id.*

The Committee also addressed a situation similar to the issue you are presenting to the *Forum* where the lawyer represented lenders in foreclosure matters and some of the lawyer's friends had a business where they would invest in properties facing foreclosure. *See* NYSBA Comm. on Prof'l Ethics, Op. 991 (2013). Friends of a lawyer asked that information acquired during representation of the lenders be used to provide leads on properties facing foreclosure as possible business targets. *See id.* The Committee opined that the information gained by the lawyer in representing the lender concerning the potential profitability of the properties at issue is not "generally known" because given the number of homes that are in foreclosure in any locale at any one time, the identity of certain properties that would make profitable investments would not be "generally known."

*See id.*, citing RPC 1.6 Comment [4A]. Since the information would not be generally known, the lawyer would not be permitted to share the information with anyone without his client's informed consent. *See id.* The Committee emphasized a 2011 change to RPC 1.6 Comment [4A], due to criticism that it was inaccurate. *See id.* The comment previously stated, "[i]nformation that is in the public domain is not protected unless the information is difficult or expensive to discover." *See id.* In 2017, the American Bar Association's Committee on Ethics and Professional Responsibility followed the NYSBA's Committee on Professional Ethics Opinion 991 and noted, "[u]nless 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." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 479 (2017).

Your instinct that you may not be permitted to disclose information on the properties to your friends is, in our view, correct especially in light of your client's comment that the information is just between you and him. The information about the properties you have acquired or gained during or relating to your representation of the lenders in the foreclosure action cannot be disclosed or used to help further your friends' business without your client's informed consent since the information is not "generally known," even if such information is available to your friends in public records. Since your client may be happy to have additional potential buyers for property, you could advise your client of your situation and ask for his informed consent. But, even here, we suggest extreme caution as asking for consent may very well create a "client relations" problem as there are many clients who believe that information gained during the course of a representation is something that should be kept private and get sensitive when their lawyers want to use that information for purposes unrelated to the client.

Disclosure of confidential information aside, acceptance of "gifts" from your friends may be problematic and subject to the RPC. If you are advising your friends concerning profitable investments and providing them with general advice, you may be viewed as acting as a lawyer creating an attorney-client relationship. Although RPC 1.8(c)(1) prohibits a lawyer from soliciting any gifts from clients, a lawyer is permitted to accept a gift from a client "if the transaction meets general standards of fairness." *See* RPC 1.8(c); RPC 1.8 Comment [6]. Before accepting such a gift, however, you should urge your clients to get disinterested advice about whether the gift is appropriate from an independent person familiar with the circumstances. *See* RPC 1.8 Comment [6]. A lawyer is prohibited from suggesting that a gift be made to the lawyer or for the lawyer's benefit because of concerns about overreaching and imposition on clients. *See id.* Therefore, in a situation where a client offers you a gift, it is important to ensure that you have not requested this gift and that it meets the general standards of fairness. However, if you believe that the funds provided by your friends are really a "fee" or a "bonus" in exchange for your advice, we note that you should be guided by RPC 1.5, which governs these types of payments. *See* RPC 1.8 Comment [6A].

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Carl F. Regelmann, Esq.
(regelmann@thsh.com)
Alexandra Kamenetsky Shea
(shea@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I am a patent attorney at a large firm with a background in chemical engineering. Although I enjoy practicing law, I would prefer to spend more of my time on traditional engineering work. My firm, however, only wants me to focus on my legal work and they have no interest in me doing any non-legal engineering work for clients. So I decided that I am going to leave the firm and start my own practice where I could advise clients not only on legal matters, but also provide engineering consulting services. In forming this practice, I realized there were some ethics issues that I needed to iron out before I open my new practice.

For instance, do I need to form separate business entities for my engineering work and legal work or can I have one business entity to operate both? If I am able to create a single entity, which I would prefer to do, can I reference my engineering services in the name of the company? When I am performing work for my clients, do I have to delineate which work is legal work and which work is solely non-legal engineering work? Are there any other issues I should be wary of in operating this practice to ensure that I am complying with my ethical obligations as well as protecting my clients?

Sincerely,
Molly Cule