TENNESSEE ASSOCIATION OF PROPERTY TAX PROFESSIONALS

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Ethical Issues for Property Tax Lawyers

Presented by: Steven J. Christopher, Esq.,
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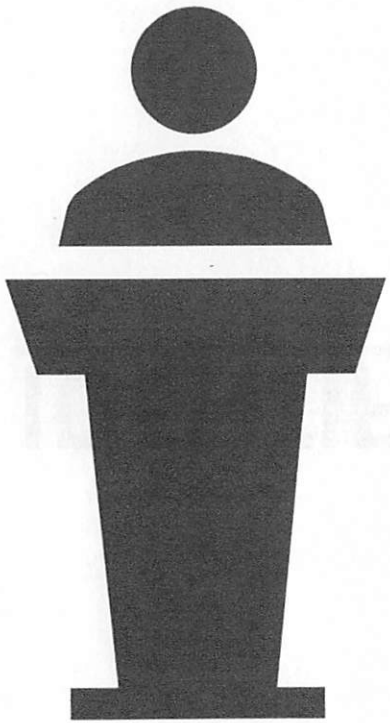
ETHICAL ISSUES FOR PROPERTY TAX LAWYERS

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

TOPICS COVERED

1. Identifying Your Client
2. The Representation of Government Entities
3. Concurrent Conflicts of Interest
4. Conflicts of Interest for Former Clients
5. Imputed Conflicts of Interest
6. Conflicts of Interest for Prospective Clients
7. Duty to Report
8. RPC 4.2 in the Context of Email Communications
9. Responding to Online Criticism



SPEAKER BIOGRAPHY

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1. IDENTIFYING YOUR CLIENT

It is crucial for attorneys to be acutely conscious of the identity of their client.

In most contexts, the identity of the client is self-evident. In other contexts, it is not self-evident. One of these is the representation of government entities.

"Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context."

RPC 1.13, Comment [8].

WHY AWARENESS OF THE CLIENT'S IDENTITY IS FUNDAMENTAL

Awareness of the client's identity is fundamental to an attorney's fulfillment of their ethical obligations.

- Conflicts of Interest
- Attorney-Client Privilege and Confidentiality
- Communication
- Diligence

Disciplinary action may arise from the consequences of an attorney's negligent failure to be acutely conscious of their client's identity, and to communicate this understanding to staff, clients, and nonclients.

Staff, clients, and nonclients are typically not going to be cognizant of this issue.

AN ATTORNEY'S MANAGERIAL OBLIGATIONS

Being acutely conscious of the identity of the client is crucial to an attorney's fulfillment of their managerial obligations.

A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

RPC 5.1.

RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

RPC 5.3(a).

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client and should be responsible for their work product.

RPC 5.3, Comment [2].

A lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the nonlawyer is employed, or has direct supervisory authority over the nonlawyer, and knows of the nonlawyer's conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RPC 5.3(c).

In accordance with these managerial obligations, attorneys are required to create and maintain office protocols consistent with their internal understanding of their client's identity and ensure that subordinate attorneys and support staff are trained regarding these protocols and understandings.

RPC 5.1 and RPC 5.3 confirms that attorneys will be subject to discipline for ethical violations of subordinate attorneys and support staff that arise out of a failure to provide this instruction and training.

2. THE REPRESENTATION OF GOVERNMENT ENTITIES

The representation of organizational clients is governed by RPC 1.13.

The scope of this rule includes governmental organizations. RPC 1.13, Comment [8].

YOUR CLIENT IS THE GOVERNMENTAL ENTITY ITSELF

A lawyer ***employed or retained by an organization*** (including a governmental organization) represents the organization acting through its duly authorized constituents. RPC 1.13(a).

RPC 1.13 applies both to in-house counsel for government entities, and to outside counsel in private practice.

However, while an organizational client is a legal entity, it cannot act except through its officers, directors, employees, shareholders, and other constituents.

RPC 1.13, Comment 1

A lawyer must thereby be intentional to confirm with officers, directors, etc., that the lawyer is not representing them in their individual capacities.

ATTORNEYS IN PRIVATE PRACTICE VS. GOVERNMENT LAWYERS

The conflict-of-interest rules for concurrent conflicts and former conflicts are largely the same for outside counsel and in-house counsel for government entities. However, there are certain differences, which will be pointed out during the presentation. Particularly, RPC 1.11 contains special conflicts of interest for former and current governmental officers and employees.

In dealing with an organization's employees, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the employee(s).

RPC 1.13(e)

There are times when the organization's interest may be or become adverse to the interest of one or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest is adverse of the conflict or potential conflict of interest and refer the constituent to independent counsel.

RPC 1.13, Comment 9

A lawyer representing an organization may also represent any of its directors, officers, employees, and constituents, subject to RPC 1.7 and 2.2.

RPC 1.13(f)

If a lawyer for an organization knows that an employee has engaged in action, intends to engage in action, or refuses to act in a manner related to the representation that is a violation of a legal obligation to the organization, the lawyer shall proceed as reasonably necessary in the best interest of the organization.

RPC 1.13(b)

This normally requires referral of the matter to higher authority in the organization.

RPC 1.13(b)

If the circumstances are not remedied despite the lawyer's efforts, and it is likely to result in substantial harm to the organization, the lawyer may withdraw and may make such disclosures to the extent permitted by RPC 1.6.

RPC 1.13(c)

[redacted]

3. CONCURRENT CONFLICTS OF INTEREST

[redacted]

SCREENING PROCEDURES REQUIRED

To determine whether a conflict of interest exists prior to agreeing to undertake the representation of a client or to pursue an objective for an ongoing client, a lawyer should adopt ***reasonable*** screening procedures, appropriate for the size and type of firm and practice.

RPC 1.7, Comment [3].

The "appearance of impropriety" standard existing under the Code of Professional Responsibility has not been retained in the Tennessee Rules of Professional Conduct.

RPC 1.10, Comment [9].

WHAT IS A CONCURRENT CONFLICT OF INTEREST?

A concurrent conflict of interest arises where the representation of one client is directly adverse to another client; or

Where there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

RPC 1.7

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives ***informed consent, confirmed in writing***. RPC 1.7(b)

WAIVER REQUIREMENTS

Informed waiver requires that the 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.

RPC 1.7, Comment [18]. See also RPC 1.0(e)(definition of informed consent)

HYPOTHETICAL

You are outside counsel for a county, and in this capacity, regularly file suit for collection of delinquent property taxes. You are asked by the county mayor to provide representation to her in her individual capacity in filing a personal injury suit arising out of a motor vehicle accident.

Would this representation create a concurrent conflict of interest? What are the factors that would need to be considered in a conflict analysis?

HYPOTHETICAL

You are outside counsel for a government entity retained to file suits on an ongoing basis for collection of delinquent property taxes. You are provided with a list of hundreds of delinquent taxpayers to sue. After filing suit and facilitating service of process, you are contacted by a present client who you are representing in a contested divorce action, who advises that he was served as one of the delinquent taxpayers in the suit.

Are you required to withdraw from the representation of the client in the divorce action? What factors would be considered in this analysis? Is a conflict waiver feasible?

[redacted]

4. CONFLICTS WITH FORMER CLIENTS

[redacted]

CONFLICT OF INTEREST RULE FOR FORMER CLIENTS

In analyzing a conflict issue regarding a former client pursuant to RPC 1.9, first determine if the matters involving the current and former client are the same or substantially related.

If the matters are the same or substantially related, RPC 1.9(a) applies. Otherwise, RPC 1.9(c) applies.

WHAT IT MEANS FOR MATTERS TO BE "SUBSTANTIALLY RELATED"

Matters are "substantially related" if they involve the same transaction or legal dispute or other work the lawyer performed for the former client, or if there is a substantial risk that confidential factual information that would normally have been obtained would materially advance the client's position in the subsequent matter.

RPC 1.9, Comment [3].

Even where the current matter does not involve the work previously done by the lawyer for the former client, it may still be substantially related if there is a ***substantial risk*** that confidential factual information that would normally be obtained would ***materially advance*** the client's position in the subsequent matter.

RPC 1.9, Comment [3b].

However, information acquired in a prior representation may have been rendered obsolete by the passage of time. Information that might be confidential for some purposes under the Rules of Professional Conduct might nonetheless be so generally, readily observable, or of so little value in the subsequent matter that it should not by itself result in a substantial relationship being found.

RPC 1.9, Comment [3c].

CONFLICT ANALYSIS UNDER RPC 1.9(A)

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

RPC 1.9(a).

ADDITIONAL REQUIREMENT FOR GOVERNMENT LAWYERS

In addition to being subject to RPC 1.9, a government lawyer shall not participate in a manner in which the lawyer participated personally and substantially while in private practice or nongovernmental employment unless the appropriate government agency gives its informed written consent, or under applicable law no one may be authorized to act in the lawyer's stead in the matter.

RPC 1.11(d)(2)(i).

CONFLICT ANALYSIS UNDER RPC 1.9(C)

A lawyer who has formerly represented a client in a matter or whose present or former firm has represented a client in a matter shall not thereafter reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

RPC 1.9(c).

THE MEANING OF "GENERALLY KNOWN"

Whether information is generally known depends upon all the circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories, etc. is generally known if the particular information is obtainable through publicly available indexes and similar methods of access.

RPC 1.9, Comment [8a].

Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty and expense.

RPC 1.9, Comment [8a].

GUIDANCE FROM THE ABA ETHICS COMMITTEE

In ABA Formal Opinion 479, "The Generally Known Exception to Former-Client Confidentiality," the ABA Committee stated that information is generally known for purposes of Model Rule 1.9 if the information is "widely recognized by members of the public in the relevant geographic area; or is widely recognized in the former client's industry, profession, or trade."

Further, the ABA Committee stated that "information that is publicly available is not necessary generally known."

The ABA Committee cited favorably the following definition from Roy Simon in New York Rules of Professional Conduct Annotated (2017):

"[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 worker on a merger with the 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 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."

HYPOTHETICAL

You are an in-house lawyer in the office of the county attorney. You file suit against hundreds of delinquent taxpayers. You are subsequently contacted by one of the delinquent taxpayers who advises you that you represented the delinquent taxpayer 15 years ago in defense of criminal charges. The delinquent taxpayer demands that you withdraw as counsel in the pending lawsuit.

Are you required to withdraw? If not, do you have any ethical obligations with regard to the former client?

HYPOTHETICAL

You are a newly employed in-house lawyer in the office of the county attorney. You were previously a solo practitioner. A month after taking the position, you file suit against hundreds of delinquent taxpayers. Prior to beginning work in the in-house position, you withdrew from your pending cases as a solo practitioner.

One of the clients that you were representing when you took the in-house position contacts you after suit is filed, advising that they have been served with process as one of the delinquent taxpayers. You represented the client in a contested divorce proceeding. What action are you required to take?

[redacted]

5. IMPUTED CONFLICTS OF INTEREST

[redacted]

IMPUTED CONFLICT RULES ARE DIFFERENT FOR PRIVATE AND GOVERNMENT LAWYERS

RPC 1.10 does not apply to government lawyers.

RPC 1.10(f). See also RPC 1.10, Comment [11].

IMPUTED CONFLICTS OF INTEREST FOR PRIVATE ATTORNEYS GENERALLY

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPCs 1.7, 1.9 or 2.2.

RPC 1.10(a)

The imputed conflict rule does not apply if the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

RPC 1.10(a)

"FIRM" DEFINED

A "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government agency, or other organization.

RPC 1.0(c). See also RPC 1.0, Comment [2].

When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless: (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (2) any lawyer remaining in the firm has information protected by RPCs 1.6 and 1.9(c) that is material to the matter.

RPC 1.10(b)

Except with respect to paragraph (d) below, if a lawyer is personally disqualified from representing a person with interests adverse to a client of a law firm with which the lawyer was formerly associated, other lawyers currently associated in a firm with the personally disqualified lawyer may represent the person, notwithstanding paragraph (a) above, if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the firm act reasonably to:

RPC 1.10(c)

(1) identify that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by RPC 1.9(c);

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and

(4) advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

The procedures set forth in paragraph (c) may not be used to avoid imputed disqualification of the firm, if: (1) the disqualified lawyer was substantially involved in the representation of a former client; and (2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and (3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.

RPC 1.10(d)

A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in RPC 1.7.

RPC 1.10(e)

RPC 1.11 APPLICABLE TO PRIVATE ATTORNEYS WHO PREVIOUSLY WORKED AS GOVERNMENT LAWYERS

A lawyer who has formerly served as a public officer or employee of the government is subject to RPC 1.9(c) and shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

RPC 1.11(a)(1)-(2).

SCREENING MECHANISMS FOR FORMER GOVERNMENT LAWYERS

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless both the personally disqualified lawyer and the lawyers who are representing the client in the matter act reasonably to:

(1) ascertain that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the client has acquired any material confidential government information relating to the matter; and

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers in the firm; and

(4) advise the government agency in writing of the circumstances that warranted the utilization of the screening procedures required by this Rule and the actions that have been taken to comply with this Rule. RPC 1.11(b).

HYPOTHETICAL

An attorney is employed as the in-house attorney for a county. One of the attorney's responsibilities is to represent the county in filing suit against delinquent taxpayers. The county attorney decides to resign and establish a practice which specializes in representing delinquent taxpayers in defense of suits filed by the county following the county attorney's departure.

Would the former county attorney violate any ethical rules in proceeding to represent delinquent taxpayers?

6. DUTIES TO PROSPECTIVE CLIENTS

"PROSPECTIVE CLIENT" DEFINED

A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

RPC 1.18(a)

"Whether communications constitute a "consultation" that triggers RPC 1.18 depends upon the circumstances. For example, a consultation has likely occurred if a lawyer specifically requests or invites the submission of information bout a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations."

RPC 1.18, Comment [2].

GENERAL DISQUALIFICATION

Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as RPC 1.9 would permit with respect to information of a former client.

RPC 1.18(b).

In order to avoid acquiring information from a prospective client that could be significantly harmful if used in the matter, a lawyer considering whether or not to undertake a new matter should limit initial consultation to only such information as reasonably appears necessary for that purpose.

RPC 1.18, Comment [4].

A lawyer subject to RPC 1.18(b) shall not represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that prospective client in the matter, except as provided in RPC 1.18(d).

RPC 1.18(c).

IMPUTED DISQUALIFICATION

If a lawyer is disqualified from representation under RPC 1.18, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided at RPC 1.18(d).

RPC 1.18(c)

"FIRM" DEFINED

A "firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law, or lawyers employed in a legal services organization or the legal department of a corporation, government agency, or other organization.

RPC 1.0(c)

Whether two or more lawyers constitute a firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as a firm. ***However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules of Professional Conduct***.

RPC 1.0, Comment [2][emphasis added].

WHEN REPRESENTATION IS STILL POSSIBLE DESPITE RECEIVING DISQUALIFYING INFORMATION

Representation is still possible if both the affected client and the prospective client provide informed consent in writing.

Or, if the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and the disqualified lawyer is timely screened from participation in the matter and written notice is promptly given to the prospective client.

RPC 1.18(d).

LIKLIHOOD OF THE FILING OF A MOTION TO DISQUALIFY

Even when an attorney concludes that representation is possible under RPC 1.18(d), there is a likelihood that the circumstances will trigger the filing of a motion to disqualify.

OBTAINING A CLIENT'S PRIOR INFORMED CONSENT

"With the informed consent of the prospective client, a lawyer and prospective client can agree in advance that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter." However, attorneys considering use of such a waiver should carefully review the requirements for informed waiver defined at RPC 1.0(e).

RPC 1.18, Comment [5].

HYPOTHETICAL

Attorney A practices in a private firm. Attorney A regularly represents the county in filing suit against delinquent taxpayers. Attorney B practices in the firm with Attorney A. Attorney B consults with an individual sued as one of the defendants in a recently filed delinquent taxpayer suit filed by Attorney A. The purpose of the consultation is for the individual to be advised of any applicable defenses to the delinquency suit and/or collection.

Has Attorney B violated any ethical rules? Is Attorney A precluded from proceeding with the representation of the county?

7. DUTY TO REPORT ANOTHER ATTORNEY'S CONDUCT

WHAT TRIGGERS YOUR DUTY TO REPORT

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.

RPC 8.3(a).

DUTY TO REPORT JUDICIAL MISCONDUCT

Additionally, a lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Disciplinary Counsel of the Board of Judicial Conduct.

RPC 8.3(b).

NO DUTY TO SELF-REPORT

There is no duty to self-report, but self-reporting is strongly encouraged. Self-reporting will additionally be considered a mitigating factor if a Board investigation arises out of the conduct.

Merely suspecting, rather than knowing, that the conduct occurred does not trigger your reporting requirements.

Additionally, the ethical violation must raise a ***substantial question*** as to the attorney's ***honesty, trustworthiness, or fitness as a lawyer***. Many ethical violations may not rise to this level.

The rule thereby "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of the reporting requirement."

RPC 8.3, Comment [3].

NO DISCLOSRE REQUIRED WHEN INFORMATION IS PROTECTED BY RPC 1.6

An attorney is not required to report when the information at issue is protected by RPC 1.6, or information gained by a lawyer or judge while serving as a member of a lawyer assistance program.

RPC 8.3(c).

However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

RPC 8.3, Comment [2].

HYPOTHETICAL

At a local bar event, you are told by a lawyer that another member of the bar is suffering from a substance abuse issue and has frequently missing court appearances.

Does this trigger your duty to report?

HYPOTHETICAL

You are representing a client in a civil proceeding. Opposing counsel makes a statement in open court during a hearing regarding the factual subject matter of the civil proceeding that you know is false.

Do you have a duty to report under these circumstances?

[redacted]

8. RPC 4.2 IN THE CONTEXT OF EMAIL COMMUNICATIONS

[redacted]

RPC 4.2 GENERALLY

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

RPC 4.2.

[redacted]

RPC 4.2 is inapplicable to communication concerning matters outside the representation.

RPC 4.2, Comment [4].

The prohibition applies only in circumstances where the lawyer knows that the person is represented in the matter at issue.

This means that the lawyer has actual knowledge of the facts of the representation, but such actual knowledge may be inferred from the circumstances. RPC 1.0(f).

RPC 4.2, Comment [8].

THE POLICY RATIONALE BEHIND RPC 4.2

RPC 4.2 protects persons who have chosen to be represented in a matter against possible overreaching by other lawyers participating in the matter, interference with those lawyers in the attorney-client relationship, and the uncounseled disclosure of information relating to the representation.

RPC 4.2, Comment [1].

RPC 4.2 applies even though the represented person initiates or consents to the communication.

RPC 4.2, Comment [3].

RECURRING ETHICAL ISSUE IN EMAIL COMMUNICATION

Lawyer A emails Lawyer B, copying Lawyer A's client. May Lawyer B "reply to all," copying Lawyer A's client? Has Lawyer A provided consent for Lawyer B to otherwise communicate ex parte with Lawyer A's client?

Jurisdictions consistently have concluded that the fact that a lawyer copies his own client on an email to opposing counsel, standing alone, does not constitute consent for opposing counsel to "reply all" to the email communication, and/or consent to otherwise communicate directly with the represented party.

See, e.g., South Carolina Bar Eth. Adv. Op. 18-04 (2018); N.C. State Bar Formal Eth. Op. 2012-7; Ass'n of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1; Alaska Bar Ass'n Eth. Op. 2018-1; Utah St. Bar Eth. Op. 15-02.

However, these legal authorities have also concluded that express consent by an attorney for a represented party to communicate with their client is not required by RPC 4.2, and that implied consent may be inferred from all the surrounding circumstances, including (1) how the communication is initiated; (2) the nature of the matter; (3) the prior course of conduct of the lawyers and their clients; and (4) the extent to which the communication might interfere with the client-lawyer relationship.

Nevertheless, it is best practice for an attorney to obtain express confirmation from opposing counsel prior to engaging in any communication with a represented party.

Doing so will prevent unnecessary conflict and damage to an attorney's ongoing professional relationships with opposing counsel.

HYPOTHETICAL

Lawyer A and Lawyer B are frequently opposing counsel, as Lawyer A's practice involves representation of persons pursuing consumer protection claims, and Lawyer B represents companies in defense of such claims. Lawyer B's regular practice is to copy his client representative on emails sent to Lawyer A relating to the civil proceeding at issue. Lawyer B has never expressly advised Lawyer A that it is appropriate for Lawyer A to "reply all" in his responses.

Is it a violation of RPC 4.2 for Lawyer A to "reply all" to these emails?

[redacted]

9. RESPONDING TO ONLINE CRITICISM

[redacted]

NEGATIVE CLIENT REVIEWS CAN DAMAGE YOUR LAW PRACTICE

Research reveals that prospective clients increasingly turn to online reviews when searching for a lawyer.

Consequently, negative client reviews can materially impair a lawyer's ability to attract new clients.

YOUR ETHICAL OBLIGATIONS LIMIT THE MANNER OF YOUR RESPONSE

A lawyer's duty of confidentiality limits the way that an attorney may respond to online critics.

There is no legal authority on this issue yet in Tennessee, but the manner in which an attorney may respond to online criticism has been the subject of a number of formal ethics opinions, most notably ABA Formal Ethics Opinion 21-496 (2021).

THE DUTY OF CONFIDENTIALITY

For current clients, lawyers are prohibited from disclosing any information relating to the representation, unless the client gives informed consent to the disclosure, the disclosure is impliedly authorized, or one of the grounds for permissive or mandatory disclosure applies.

RPC 1.6(a).

DISCLOSURE OF INFORMATION FOR FORMER CLIENTS

The disclosure of information relating to the representation of former clients is governed by RPC 1.9.

A lawyer who has formerly represented a client in a matter shall not thereafter reveal information relating to the representation unless the former client gives informed consent in writing, disclosure would otherwise be permissible or required under RPC 1.6, or the information has become generally known.

RPC 1.9.

The confidentiality rule is broadly construed to include any information obtained during the representation, not only information obtained through communication with the client.

RPC 1.6, Comment [3].

Within the context of online reviews, an attorney's duty of confidentiality is therefore implicated by any statement by the lawyer regarding a present or former client that discloses information relating to the representation.

OBTAINING A CLIENT'S INFORMED CONSENT TO DISCLOSURE

RPC 1.6(a) permits disclosure of information if the client provides informed consent. However, prospectively obtaining a client's waiver of confidentiality at the commencement of the representation is not feasible in light of the requirements for obtaining waiver.

INFORMED CONSENT DEFINED

"Informed consent" is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct."

RPC 1.0(e).

A lawyer seeking informed consent is required to provide reasonably sufficient information to the client with regard to their waiver to permit the client to make an informed decision. Ordinarily this will include consultation with the client that explains the advantages and disadvantages of the proposed waiver and a discussion of reasonable alternatives.

RPC 1.0, Comments [6] and [7].

NO PERMISSIVE OR MANDATORY GROUND FOR DISCLOSURE APPLIES

The disclosure of information for purposes of responding to negative online postings does not fall within any grounds for permissive or mandatory disclosure for current clients.

POTENTIAL APPLICABILITY OF RPC 1.6(B)(5)

The only potentially applicable ground for permissive or mandatory disclosure is RPC 1.6(b)(5), which states as follows:

"A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client…or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

ABA ETHICS COMMITTEE CONCLUDES THAT THIS EXCEPTION IS INAPPLICABLE

In its Formal Ethics Opinion 21-496 (2021), analyzing the applicability of the corresponding ABA Model Rule, the ABA Committee reasoned that a negative online review, does not constitute a "controversy" or "proceeding" due to its informal nature.

Formal Ethics Opinions in other jurisdictions have reached the same conclusion on this issue.

See, e.g., Pa. Ethics Op. 2014-200 (2014); State Bar of Tex. Professional Ethics Comm. Op. No. 662 (2016).

DISCLOSURE OF INFORMATION ALSO PROHIBITED FOR FORMER CLIENTS

The ABA Committee and other authorities have concluded that disclosure is also prohibited by RPC 1.9(c).

WHAT RESPONSE IS PERMITTED?

While disclosure of any information relating to the representation of a client in responding to an online review is prohibited, the ABA Ethics Committee and other authorities have provided some guidance.

It is permissible for an attorney to provide the online reader with notice that due to professional constraints, the lawyer is prohibited from responding with specificity.

Authorities have also argued that it is permissible to make a very generalized response that the post is inaccurate, without disclosure of the specific reason(s).

SAMPLE LANGUAGE

The State Texas Bar recommended the following language:

"A lawyer's duty to keep client confidences has few exceptions and out of an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

Tex. Professional Ethics Comm. Op. No. 662 (Aug. 2016).

THE STRATEGY OF DECLINING TO RESPOND

Commentators have argued that as any response will engender further responses in the review thread, an attorney's response will frequently cause the posting to be higher in the search results for a particular attorney. On this basis, it may be the best course of action for an attorney to simply refrain form responding.

CONTACTING THE CLIENT PRIVATELY

Attorneys may also contact the client privately and request that the posting be removed or amended. As internet postings are often made in a state of heightened emotion, there is a possibility that the client may have changed their position, particularly if provided with the attorney's side of the story.

ADDITIONAL INFORMATION

For more information, the presenter wrote an article on this topic for the Board's Spring 2021 publication, available on our website.

https://docs.tbpr.org/pub/spring-2021-board-notes.pdf