Law Firm Risk Management Alert

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ABA ETHICS OPINION CLARIFIES CONFIDENTIALITY DUTIES TO A FORMER CLIENT

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by Marcy Tench Stovall

One of the most commonly misunderstood terms in the Rules of Professional Conduct is contained in the admonition of Rule 1.9(c)(1) ("Duties to Former Clients") that a lawyer may not "use information relating to the representation of [a former client] to the disadvantage of the former client except . . . when the information has become *generally known.*" (emphasis added). The Rules do not contain a definition of the term "generally known," but now the American Bar Association's Standing Committee on Ethics and Professional Responsibility has clarified the confusion around the term with its recently issued Formal Opinion 479, *The "Generally Known" Exception to Former Client Confidentiality.*

A copy of the Opinion is at the link at the bottom of this alert.

As an initial matter, the Committee, with support of multiple citations in a lengthy footnote, notes that numerous courts and commentators have agreed "that information is *not* generally known to the public merely because it is publicly available or might qualify as a public record or as a matter of public record." (emphasis in original). Put another way: just because information could be discovered in the public record, this does not mean that it may be considered generally known, within the meaning of Rule 1.9(c).

The more difficult question, then, is when *is* information considered to be generally known. The short answer seems to be that information may be considered "generally known" only when it becomes "common knowledge in the community."

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Examples would be when an event has “gained considerable public notoriety,” the information “has become widely recognized by the public,” or “constitutes ‘common knowledge in the community.’”

The Committee points out that the scope of such public awareness can vary. In some instances, information may be generally known if it is widely recognized in a geographical area as result of publicity in new or traditional media sources. In other instances, information may not be something the general public knows about, but may nevertheless be properly characterized as generally known if it is “widely recognized in the former client’s industry, profession or trade” because it has been “announced, discussed, or identified” in published “resources in the particular field.”

Cautionary Lesson:

Formal Opinion 429 is a useful reminder that a lawyer’s duties of confidentiality and loyalty continue after the representation ends. And while a former client may, with informed consent, waive the protections of the Rule, lawyers must be mindful that the end of a representation does not mean the end of the lawyer’s continuing duties to the client. Including honoring the prohibition on “using” information “relating to the representation of” a former client.

To view the ABA Formal Opinion, please click here.