SHOP TALK – BE CAREFUL WHAT YOU SAY

NANCY L. RIPPERGER[1]

Scenario One

Late Friday afternoon, Attorney Smith joins fellow attorneys at the local bar to discuss sports, his weekend plans, and his work week in general. While discussing his week, Attorney Smith mentions that he is upset with a certain client because the client is claiming an inability to pay Attorney Smith's fees. Attorney Smith goes on to tell his buddies the client is a liar because the client has a six-figure income and the client recently received a large inheritance. Attorney Smith never mentions the name of his client but does mention that the client's case involves a real estate dispute and the case is currently on appeal.

Scenario Two

On Monday morning, a colleague calls Attorney Smith wanting to bounce ideas off him regarding the colleague's new case. While talking with the colleague, Attorney Smith mentions that he handled a similar case last year. Attorney Smith freely discusses the facts that were revealed in his pleadings and in open court. None of these facts were detrimental or harmful to the client in any way. Attorney Smith also reveals that he settled the case before going to trial because his client had a prior fraud conviction which would not have played well to a jury. Attorney Smith never mentions the name of his client when speaking with his colleague.

The Ins and Outs of Rule 4-1.6

These conversations seem pretty typical for many attorneys and at first glance seem very innocuous. However, in both scenarios, Attorney Smith may have unwittingly violated Rule 4-1.6. Rule 4-1.6 addresses the confidentiality of client information. The basic premise of Rule 4-1.6 is that an attorney should not reveal information relating to the representation of a client unless the client consents to the disclosure or the disclosure is impliedly authorized in order to carry out the representation.[2] On its face the rule seems pretty simple, but on closer examination it contains several pitfalls for unknowing attorneys.

What If The Information Came from a Source Other Than The Client?

In Scenario One, assume that Attorney Smith learned of the client's large inheritance from a source other than the client but as part of his representation of the client. Likewise, in Scenario Two, assume that Attorney Smith learned of the client's prior fraud conviction from running a criminal background check on the client. Are these "facts" covered by Rule 4-1.6? Yes, they are. Rule 4-1.6 is much broader than the attorney-client privilege in that it not only includes information communicated by the client in confidence **but also includes all information relating to the representation, obtained from whatever source.** See Comment 3 to Rule 4-1.6.

Does The Client Have to Invoke Rule 4-1.6?

Is a client required to inform his attorneys that he wants his information kept confidential? No, **Rule 4-1.6 operates automatically, in all cases, without any action or request from the client**.

What If You Don't Disclose the Name of the Client?

What about the fact that, in both scenarios, Attorney Smith did not disclose the name of either of his clients? Does this remove Attorney Smith's statements from the purview of Rule 4-1.6? Well, probably not. Comment 5 to the Rule allows the use of hypotheticals to discuss issues related to the representation of a client as long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved. Thus, in both scenarios the question is whether Attorney Smith disclosed enough information for his friends to determine the identity of the clients. Arguably in both scenarios, Attorney Smith's colleagues could determine who Attorney Smith's clients were by searching Case.net or local court records.

What If the Information Disclosed Can Be Ascertained From Public Sources?

What about the fact that some of the information Attorney Smith disclosed about his clients could be ascertained from public sources? Does this affect Attorney Smith's duty to keep the information confidential? For example, in Scenario One someone might be able to obtain information on the client's inheritance by searching probate cases on Case.net if one knew the name of the relative. In the second scenario, Attorney Smith discussed pleadings filed in the case. The pleading could easily be pulled and reviewed by the public. Furthermore, in Scenario Two even the prior fraud conviction might be accessible via a Case.net search depending upon the age of the conviction.

Surely, one would think there must be an exception to Rule 4-1.6 for information easily available via the Internet or other public source. However, the Rule does not provide for such and the Courts who have looked at the issue have interpreted Rule 4-1.6 literally.[3] For example, in *In re Marzen,* 779 N.W.2d 757 (Iowa 2010), during a television interview an attorney disclosed that a former client had sued a probation officer for sexual misconduct. The lawsuit could be accessed via court records for anyone who took the time to look. The Iowa Supreme Court found that the attorney had, in fact, violated Rule 4-1.6 because confidentiality must apply to all communications between the

lawyer and the client, even if the information is otherwise publicly available. *See also In re Bryan,* 61 P.3d 641 (Kan. 2003) (information previously disclosed in court pleadings retains confidentiality). It is worth noting that in the cases where the courts have found a violation of Rule 4-1.6 for disclosure of "public information," the disclosure was harmful to the client in some way.

While case law generally supports a literal reading of Rule 4-1.6, many commentators advocate a more relaxed approach.[4] In addition, the Restatement (Third) of the Law Governing Lawyers Sections 59 and 60(1) (a) (2001) find no violation of the duty of confidentiality if the information is generally known or is harmless to the client.

With Scenario Two, it seems unlikely that the Supreme Court of Missouri would find a violation of Rule 4-1.6 based upon Attorney Smith disclosing to his colleague "facts" that were set forth in Attorney Smith's pleadings. These "facts" were easily accessible from a public source and, more importantly, were not harmful or detrimental to the client in anyway. However, it is possible that the Court might take a dim view of Attorney Smith disclosing the fraud conviction in Scenario Two and disclosing the negative information about the client in Scenario One.

Is it Permissible To Express a Negative Opinion About Your Client?

Does Rule 4-1.6 allow an attorney to express a negative opinion about a current or former client? Current Supreme Court of Missouri case law says yes. In *In re Lim,* 210 S.W.3d 199 (Mo. banc 2007), the attorney took retaliatory action against former clients who failed to pay the attorney's fees. The attorney sent a letter to the United States Immigration and Naturalization Service advising that the clients lacked the good moral character needed to obtain immigration benefits because the clients had lied, deceived the attorney and failed to pay their bill. The majority of the Court found that the attorney was merely expressing his personal opinions about the clients and "opinions" were not covered by Rule 4-1.6. While *Lim* does have precedential value, this was a split opinion. Three of the four judges who made up the majority opinion are no longer on the Court. Thus, if this issue was presented to the Court today, the result could be very different. Accordingly, an attorney should be very wary of expressing negative opinions in public about his clients or former clients.

So What Precautions Should an Attorney Take When Discussing Clients or Former Clients?

To be on the safe side, an attorney should refrain from discussing clients or former clients unless there is some very good reason to do so. If an attorney is going to discuss a client or former client, it is imperative that the attorney limit his disclosure so that others cannot identify the client. Withholding the name of the client, is not enough necessarily. The attorney should consider whether others can ascertain the identity of the client from the facts the attorney discloses. It is also imperative that the attorney not disclose anything that is harmful to the client or former client. Simply put, when considering client confidences, the less said about the client or former client the better.

Endnotes

1 Nancy L. Ripperger is staff counsel with the Office of Chief Disciplinary Counsel in Jefferson City.

2 There are limited exceptions to the rule. These exceptions allow an attorney to disclose confidential information: (a) to prevent death or substantial bodily harm that is reasonably certain to occur; (b) to secure legal advice about the lawyer's compliance with the Rules of Professional Conduct; (c) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; (d) to establish a defense to a criminal charge or civil claim against the lawyer; (e) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (f) to comply with other law or court order.

3 Interestingly Rule 4-1.9, which addresses an attorney's duties to former clients, provides an exception to the confidentiality rule for information which has become generally known. Rule 4-1.9 provides that a lawyer who has formerly represented a client in a matter shall not use information relating to the representation to the disadvantage of the former client except when, among other instances, the information has become generally known. In *In re Lim,* 210 S.W.3d 199 (Mo. banc 2007), the Supreme Court of Missouri interpreted "generally known" to include anything in a public pleading. See discussion set forth below regarding the likelihood this ruling might be different if addressed by the current members of the Court.

Rule 4-1.9 would not be applicable to Scenario One because the client in question is a current client. Furthermore, arguably it would not be applicable to Scenario Two as Attorney Smith was not using the information to the disadvantage of his client.

4 See for example, Michael D. Cicchini, *On the Absurdity of Model Rule 1.9*, 40 Vt. L. Rev. 69 (2015).