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## Advocate's VIEW

### Year's end guidance: What Ethics Opinions say about confidentiality

I am reminded of New York State Bar Association past President Steven Krane's advice that attorneys spend a part of New Year's Day reviewing the Rules of Professional Conduct. On the chance that your New Year's Day plans do not include any such activity, allow me to provide a snapshot review by reference to two ethics opinions issued by the NYSBA in 2015 that are particularly relevant to litigators. They cover joint representation and the ever problematic issue of withdrawal from representation under RPC Rule 1.16. The two opinions offer valuable insights on the contours of the Rules of Professional Conduct relative to confidential information and the disclosure of confidential information.

The recognized potential benefits of joint representation include reduced legal fees, avoidance of future conflicts and, particularly in litigation, the opportunity to present a united front. Realizing the united front objective starts at the point consent to joint representation is under consideration and it is at this point that the attorney and the clients should recognize and understand the concept of confidential information.

When undertaking joint representation the attorney has an equal duty of loyalty to each client and each client possesses an expectation, namely the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use the information to the client's benefit. Thus, unless agreed to otherwise, there exists the presumed intent that there should be no confidentiality between co-clients.

What then when one of the joint clients in a litigated matter causes his/her own attorney to request that the attorney engaged in joint representation provide copies of



By **MARY JO S. KORONA**  
Daily Record  
Columnist

the file created on the basis of joint representation along with a directive that the request be kept in confidence?

The analysis in NYSBA *Ethics Opinion 1070* (10/9/2015) provides useful guidance about matters that should be covered by potential co-clients as part of the process of seeking consent to joint representation.

For instance, at the outset of common representation and as part of the process of obtaining each client's informed consent, the lawyer should advise each potential client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to representation should be kept from the other.

In *Ethics Opinion 1070* the inquiring attorney had not warned the clients, either orally or in writing, that all confidences would be shared. Also, the inquiring attorney had not accepted information from the co-client on the condition of non-disclosure to other co-clients. Under such circumstances, the inquiring attorney's good faith belief became an important analysis factor "... if the requesting client asked the lawyer not to disclose the request that a copy of the file be sent to another lawyer and the lawyer in *good faith believes* that the request for the file is information that would be material to the co-clients (so that not disclosing the request to them would entail a breach of the duty of loyalty to those clients), then the requesting client is no longer entitled to a copy of the file. Complying with the request would entail a breach of the duty to the other joint clients

to keep them informed of material developments." (Emphasis added).

The opinion recommended that the inquiring attorney inform the requesting client that absent a withdrawal of the request for confidentiality, he/she would not be able to provide a copy of the file, but that if the client were to authorize disclosure of the request for the file to the co-clients, the lawyer could provide the file.

At the other end of the spectrum there is the thorny issue of withdrawal from representation and the confidentiality issues that arise when withdrawal cannot be accomplished on the basis of the attorney's representation that "professional considerations require termination of the representation." The analysis depends upon multiple factors including whether withdrawal is mandatory or permissive; withdrawal may be accomplished without significant disclosure to the court; disclosure is court ordered; the client consents to the disclosure and the circumstances under which the information is to be disclosed (open court or *in camera*).

In *Ethics Opinion 1057* (6/5/2015), the inquiring attorney requested advice responsive to a client demand that the attorney file what the attorney considered to be frivolous petitions in litigation pending in state court, based upon allegations made in other litigation filed by the client in federal court against members of the judiciary and another lawyer. The information was gained during representation of the client and the inquiring attorney believed that its disclosure would be embarrassing or detrimental to the client. Thus, the information was to be considered confidential under Rule 1.6 (a), which provides that "Confidential Information" consists of information gained during or relating to

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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.....).

Because the inquiring attorney believed disclosure would be embarrassing or detrimental, disclosure was not permitted under RPC 1.6. Thus, the inquiring attorney could not disclose that the client had requested that he file the papers considered frivolous. Also considered confidential

were the copies of the client's prior frivolous filings.

These opinions show that representing clients in litigated matters will often present challenging issues concerning confidentiality of information. The RPC provides the frame work but at the end of the day, the attorney will be called upon to resolve confidentiality issues through the exercise independent judgment based upon his or her good faith belief and an accurate and honest acknowledgement of the facts. If annual review of the RPC is not on your agenda, at least consider review of key provisions such as

the nature and treatment of confidential information along with recently opinions issued by the New York State Bar Association because the coming year will likely present you with an opportunity to apply the RPC in your litigation practice. Happy New Year!

*Mary Jo S. Korona is a founding partner in the law firm of Leclair Korona Giordano Cole LLP. She concentrates primarily in the area of commercial litigation in state and federal courts and she is a certified federal court mediator serving the U.S. District Court-Western District of New York.*