

LAWYERING AND ETHICS FOR THE BUSINESS ATTORNEY

Third Edition

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Scenario I

WHO'S THE CLIENT?

When an individual visits a lawyer's office and asks to be represented in a particular matter, the attorney normally has little difficulty identifying who is the client. Entity representation, however, renders the attorney's client-identification process more complex. The importance of ascertaining the identity of the client is underscored by the American Bar Association's (ABA) Model Rules of Professional Conduct. These Rules impose certain obligations that run from the attorney to the client.¹ For example, Model Rule 1.7 focuses on the loyalty owed by the attorney to each client.² Similarly, Model Rule 1.6, with certain exceptions, requires the attorney to maintain confidentiality with respect to information relating to the representation of a client.³ This confidentiality is premised on two separate, but related, legal doctrines.⁴

The principle of confidentiality under the Model Rules is based first on the attorney-client privilege and the work product doctrine.⁵ The second principle premised on lawyer-client confidentiality is found in the

1. See, e.g., ABA Model Rules of Prof. Conduct, Rules 1.3-1.8.

2. As comment 1 to Model Rule 1.7 states: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."

3. See Rule 1.6 of the Model Rules.

4. *Id.* Rule 1.6 cmt. 3.

5. *Id.* See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

Model Rules themselves.⁶ Lawyer-client confidentiality is more encompassing than the attorney-client privilege: Regardless whether the information is protected from disclosure under the attorney-client privilege, Rule 1.6 mandates (with certain exceptions) that all information relating to the representation of that client, regardless of its source, be kept confidential.⁷

Both the privilege and the attorney's confidentiality obligation contain certain exceptions. For example, when the client gives informed consent to the disclosure of the otherwise protected information, such information is no longer within the scope of Rule 1.6.⁸ As a second example, "lawyers within the same firm are generally deemed to have implied authorization to share client information with each other, to the extent necessary to carry out the representation."⁹ As a last example, a lawyer under the Model Rules may reveal client information to the extent necessary "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."¹⁰

Model Rule 1.6's obligations encompass communications between an attorney and a client.¹¹ An entity, such as a corporation, clearly cannot speak for itself; rather, it must rely on and speak through its representatives. Under the Model Rules, these corporate representatives are defined as constituents.¹² Constituents include directors, officers, employees, members, and sharehold-

6. See Model Rule 1.6.

7. *Id.* Rule 1.6 cmt. 3.

8. *Id.* Rule 1.6(a).

9. *Id.* Rule 1.6 cmt. 5.

10. Rule 1.6(b)(2). A lawyer also may reveal client information to the extent necessary to establish a claim or defense on behalf of the lawyer in the event

a controversy arises between the client and the lawyer. Rule 1.6(b)(5). For other exceptions to the principle of confidentiality, see Rule 1.6(b)(1), (3), (4), (6), Rule 1.13(c) & cmt. 6.

11. *Id.* Rule 1.6(a).

12. *Id.* Rule 1.13.

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