

# OHIO BOARD OF PROFESSIONAL CONDUCT

## OPINION 2016-10

Issued December 9, 2016

### **Duty to Preserve Confidential Information of a Prospective Client**

#### *Syllabus of Opinion:*

A lawyer owes a duty of confidentiality under Prof.Cond.R. 1.18, to a prospective client regarding information learned in a preliminary conference between the prospective client and the lawyer. Prof.Cond.R. 1.18 extends the protections of confidentiality and attorney-client privilege to a person who consults with a lawyer for legal representation, even if the lawyer is not retained to represent the prospective client. Thus, a lawyer may not reveal information learned in a consultation unless the prospective client gives informed consent. If a client voluntarily testifies concerning a communication made by him, as a prospective client, to a lawyer or concerning the lawyer's advice to him, and then the lawyer is compelled to testify on the same subject under R.C. 2317.02, the lawyer is allowed, under Prof.Cond.R. 1.6, to reveal only those confidences to which the prospective client voluntarily testified or as otherwise ordered by the court.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.

# OHIO BOARD OF PROFESSIONAL CONDUCT

65 SOUTH FRONT STREET, 5<sup>TH</sup> FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

[www.supremecourt.ohio.gov/boards/boc](http://www.supremecourt.ohio.gov/boards/boc)

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SENIOR COUNSEL

HEIDI WAGNER DORN

COUNSEL

## OPINION 2016-10

Issued December 9, 2016

Withdraws Opinion 91-15

### Duty to Preserve Confidential Information of a Prospective Client

**SYLLABUS:** A lawyer owes a duty of confidentiality under Prof.Cond.R. 1.18, to a prospective client regarding information learned in a preliminary conference between the prospective client and the lawyer. Prof.Cond.R. 1.18 extends the protections of confidentiality and attorney-client privilege to a person who consults with a lawyer for legal representation, even if the lawyer is not retained to represent the prospective client. Thus, a lawyer may not reveal information learned in a consultation unless the prospective client gives informed consent. If a client voluntarily testifies concerning a communication made by him, as a prospective client, to a lawyer or concerning the lawyer's advice to him, and then the lawyer is compelled to testify on the same subject under R.C. 2317.02, the lawyer is allowed, under Prof.Cond.R. 1.6, to reveal only those confidences to which the prospective client voluntarily testified or as otherwise ordered by the court.

**QUESTION PRESENTED:** What ethical obligation does a lawyer have to preserve a prospective client's confidential information when the lawyer is called to testify as an impeachment witness? The facts presented are as follows: a lawyer discusses possible representation in a criminal matter with X in the presence of Y and Z, during which time all of the facts of the case are discussed; X does not retain that lawyer, but instead retains another lawyer; X is convicted; Y is subsequently indicted on a similar charge arising out of the same facts as X's case; X's story is now different from that told to the lawyer he did not hire. The question is whether the lawyer whom X consulted, but did not hire, can testify as an impeachment witness regarding their conversation which took place in the

presence of Y and Z, assuming that at Y's trial X denies telling the lawyer a different story than X now tells.<sup>1</sup>

**APPLICABLE RULES:** Prof.Cond.R. 1.6, 1.9, 1.18, R.C. 2317.02(A).

**OPINION:** The Rules of Professional Conduct are clear regarding a lawyer's duty to preserve the confidentiality of information related to the representation of a client:

A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (d) of this rule.

Prof.Cond.R. 1.6(a).

The duty of confidentiality applies not only to a lawyer's current clients, but also to a lawyer's former and prospective clients. Prof.Cond.R. 1.6, Cmt [1], 1.9(c)(2), 1.18. A "prospective client" is defined as "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." Prof.Cond.R. 1.18(a). Even if a lawyer-client relationship does not form after a consultation, a lawyer is prohibited from using or revealing information learned in the consultation with the prospective client, except as permitted by Rule 1.9. Prof.Cond.R. 1.18(b). This duty exists regardless of the length of the initial consultation. Prof.Cond.R. 1.18, Cmt. [3]. Additionally, the Supreme Court of Ohio has held that a lawyer owes a prospective client a reasonable expectation of confidentiality, and therefore, must not reveal confidential information disclosed to the lawyer by a prospective client. *Disciplinary Counsel v. Cicero*, 134 Ohio St.3d 311, 2012-Ohio-5457, 982 N.E.2d 650, ¶¶ 13, 15.

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<sup>1</sup> The questions presented in this advisory opinion are the same or substantially similar to the questions presented in Adv.Op. 91-15.

Under Prof.Cond.R. 1.9, which prescribes a lawyer's duties to former clients, a lawyer is prohibited from using information relating to a representation to the disadvantage of a former client, except if the former client gives informed consent, or if the information has become generally known. Prof.Cond.R. 1.9(c). The presence of information "in the public record does not necessarily mean that the information is *generally known* within the meaning of Rule 1.9(c)." See Bennett, Cohen & Whittaker, *Annotated Model Rules of Professional Conduct*, 175 (7<sup>th</sup> Ed. 2011), citing *Pallon v. Roggio*, D.N.J. Nos. 04-3625 (JAP) and 06-1068 (FLW), 2006 WL 2466854 (Aug. 24, 2006); *Steel v. Gen. Motors Corp.*, 912 F.Supp. 724 (D.N.J. 1995); *In re Anonymous*, 932 N.E.2d 671 (Ind. 2010). "[T]he fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public." Adv. Op. 2013-04., citing 1 Restatement, Section 59, Comment d. As a result, a lawyer may only reveal information related to a prospective client if the client provides informed consent confirmed in writing or if the information is generally known.

A prudent lawyer should take adequate measures to limit the information initially imparted by a prospective client. Prof.Cond.R. 1.18, Cmt. [4]. This not only ensures that the lawyer will have fewer confidences to preserve, but also prevents potential conflicts of interest involving the prospective client and other clients or prospective clients of the lawyer. *Id.*

Similarly, the ABA has concluded that a lawyer has a duty under Model Rule 1.6 to preserve the confidentiality of information received in a consultation with a prospective client even if no legal services are provided and the representation is declined. Absent client consent, a lawyer may be precluded from a current or future representation if that representation would be materially limited by the lawyer's duty to protect the prospective client's information. ABA Formal Opinion 90-358 (1990).

Other jurisdictions have found that a lawyer must preserve the confidentiality of information imparted by someone who consults him but does not retain him. Utah State Bar Op. 05-04 (9/8/05); State Bar of Wisconsin Op. EF-10-03 (12/17/10); Pennsylvania Bar Assn. Op. 96-55 (4/8/96). At least one jurisdiction has concluded that a lawyer who receives an e-mail from a prospective client through a link on the firm web site, which contains no disclaimers warning that the e-mailed information may not be confidential

and will not impede adverse representation, must keep the information confidential. Massachusetts Bar Assn. Op. 07-01 (5/23/07). Even if the lawyer declines the representation, both he and the other lawyers in the firm are disqualified from representing an adversary of the prospective client if maintaining the confidentiality of the information in the e-mail would materially limit the representation. *Id.*

Similar to the duty of confidentiality, the statutory attorney-client privilege extends to a person's communication with an attorney made during a preliminary conference prior to the actual acceptance or rejection by the attorney of the employment. *Taylor v. Sheldon*, 172 Ohio St. 118, 173 NE 2d 892 (1961). However, it is not within the Board's authority to answer the evidentiary question of whether or not the presence of Y and Z in this scenario constitute a waiver of the statutory and common law attorney-client privilege, as it is a question of law for the court to determine.

**ANALYSIS:** The duty of confidentiality under the Rules of Professional Conduct provides protection to a wider scope of client information than is afforded by the attorney-client evidentiary privilege. Prof.Cond.R. 1.6, 1.9, 1.18; *see also*, ABA Formal Op. 90-358. Rule 1.6(a) extends the general protection to *all* "information relating to representation" of the client no matter how or when obtained. Confidentiality under Prof.Cond.R. 1.6 applies to protect information imparted by a prospective client seeking to engage the lawyer's services even though no legal services are performed and the representation is declined. Prof.Cond.R. 1.18.

Under some circumstances, the provisions of the Rules of Professional Conduct prohibit the lawyer from revealing the identity of the prospective client and the nature of the matter for which representation is sought. The protected information could under some circumstances be more significant than the mere identity of the client, which is not usually protected by the attorney-client evidentiary privilege. *See, e.g., In re Grand Jury Proceeding*, 680 F.2d 1026, 1027 (C.A. 5 1982). Unless the prospective client is represented by the lawyer in other ongoing matters, however, the Rules of Professional Conduct do not prohibit the use, to the disadvantage of the prospective client, of information relating to the representation once the information becomes generally known. Prof.Cond.R. 1.9, 1.18. This includes information that may be publicly available. *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision*, 81 Ohio St.3d 58, 62-63, 689 N.E.2d 32 (1998) ("common-law

privileges, such as the attorney-client privilege, are state laws that prohibit release of public records” under Ohio's Public Records Act); *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶ 18; see e.g., *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998); *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 383, 1998-Ohio-290; *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision*, 81 Ohio St.3d 58, 1998-Ohio-445; *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 2000-Ohio-475; *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 1994-Ohio-261.

In answering the questions raised, the lawyer would be bound by the Rules of Professional Conduct to protect the confidences and secrets of X and could not reveal them unless an exception applies or consent is given. Under Prof.Cond.R. 1.18, a lawyer only may reveal information if the client gives informed consent, confirmed in writing, or if the information is generally known. Prof.Cond.R. 1.9, 1.18. Under the exception created within R.C. 2317.02(A), if a client voluntarily testifies concerning a communication made by him to his lawyer in that relationship or the lawyer's advice to him, then the lawyer may be compelled to testify on the same subject. Thus, if X voluntarily testifies concerning a communication made by him, as a prospective client, to a lawyer or concerning the lawyer's advice to him, and then the lawyer is compelled to testify on the same subject under R.C. 2317.02, the lawyer is allowed, under Prof.Cond.R. 1.6, to reveal only those confidences to which the prospective client voluntarily testified or as otherwise ordered by the court.

**CONCLUSION:** The protection of confidentiality under Prof.Cond.R. 1.6, as well as the statutory attorney-client privilege, extend to communications in a preliminary conference between a prospective client and a lawyer. Prof.Cond.R. 1.18. Lawyers owe a prospective client a reasonable expectation of confidentiality, and therefore, must not reveal confidential information disclosed to the lawyer by a prospective client. *Disciplinary Counsel v. Cicero*, 2012-Ohio-5457, ¶¶ 13, 15. Accordingly, the protections of the Rules of Professional Conduct's confidentiality and prospective client rules and the attorney-client privilege extend to a person who consults with a lawyer regarding legal representation even though the lawyer is not hired to represent the prospective client. If a client voluntarily testifies concerning a communication made by him, as a prospective client, to a lawyer or concerning the lawyer's advice to him, and then the lawyer is compelled to testify on the same subject under R.C. 2317.02, the lawyer is permitted,

under Prof.Cond.R. 1.6, to reveal only those confidences to which the prospective client voluntarily testified or as otherwise ordered by the court.