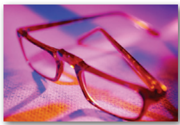

Information Learned in the Representation of a Current Client

Arizona's Rules of Professional Conduct[1] regulate the "revealing" of client information relating to a representation and the "use" of that information if it's to the disadvantage of that client. We see this in ER 1.9 (Duties to Former Clients), where the two situations are treated in subsection (c) thereof. While constraints on the use and revealing of client information appear together in the rule concerning former clients, they appear in different rules for current clients. Thus, prohibitions against revealing client information appear in ER 1.6 (Confidentiality of Information), while restrictions on the use thereof to the disadvantage of a client appear in ER 1.8 (Conflict of Interest: Current Clients: Specific Rules) at subsection (b).

While these distinctions may be of some interest to those of us who spend most of our time trying to understand the ethics rules, there is no reason why the busy practitioner should be concerned—as long as the rules are understood and their injunctions, wherever they may be found, are followed. It might help to remember that the situations described in ER 1.8 are meant as specific descriptions of conflicts, which are only generally covered in ER 1.7 (Conflict of Interest: Current Clients), and that the revealing of information relating to a representation is covered generally by ER 1.6. Viewed in this context, the distinctions are easier to understand.

This column discusses a lawyer's "use" of information relating to a representation that may be regarded as being to the "disadvantage" of the affected client.[2] ER 1.8(b) prohibits such use "except as permitted or required by these Rules." An example of such a requirement would be that found in ER 3.3 (Candor Toward the Tribunal), providing that a lawyer must take remedial measures upon discovery that a client is committing, or has committed, or plans to commit, perjury in a court proceeding. These measures include, if necessary, disclosure to the tribunal. Although this seems to fall under the "reveal" category, it can also be regarded as "use" of a client's confidences against him.[3]

Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics

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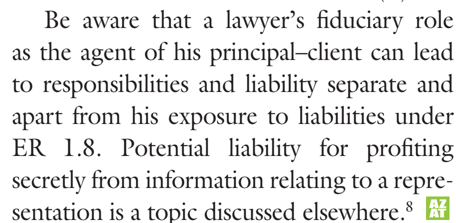
So what are some examples of what the rule is intended to prevent? There aren't many reported cases. One frequently cited case on point is from Kansas,[4] where a lawyer used his knowledge concerning money in a client's estate and about a marginally competent trustee thereof (a former client) to acquire an unsecured loan, which he then failed to repay. Cases involving the use of information about former clients and involving ER 1.9(c) are just as instructive, like the case where a general counsel was prevented from being the relator in a *qui tam* action against his employer,[5] or where a lawyer for the City of Sioux Falls was not allowed to represent a city employee in a contested employment matter.[6] In these cases, it was determined that the knowledge gained from the lawyers' employment could be used to the disadvantage of the defendant in each of the cases, each of them having been a client.

Remember that what the rule is intended to prevent is the use of information to the disadvantage of the affected client. The fact that its use might incidentally benefit the lawyer or another one of the lawyer's clients is not a factor in determining the single issue of whether ER 1.8(b) has been violated—although benefit to the lawyer may implicate the lawyer's responsibilities as a fiduciary, especially if the client was not aware or had not approved of the lawyer's actions. An example of a lawyer using information relating to the representation for the lawyer's benefit without it disadvantaging the client would be the case where the lawyer learns that his client, a municipal corporation, is planning to build an airport on land it has contracted to purchase. The lawyer then buys up property several miles from the proposed site, thinking that it would increase in value after the airport is built. The lawyer's purchase of the property in no way disadvantages his client, who has already agreed on the price of its acquisition. There is thus no violation of ER 1.8(b).[7]

Be aware that a lawyer's fiduciary role as the agent of his principal–client can lead to responsibilities and liability separate and apart from his exposure to liabilities under ER 1.8. Potential liability for profiting secretly from information relating to a representation is a topic discussed elsewhere.[8]



endnotes

1. Rule 42, Ariz.R.S.Ct.
2. ER 1.8(b) provides that "[a] lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."
3. *See* discussion in Geoffrey Hazard et al., The Law of Lawyering §13.10 (4th ed. 2014)
4. *In re Coggs*, 14 P.3d 1123 (Kan. 2000).
5. *U.S. v. Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013).
6. *Hulzebos v. City of Sioux Falls*, 2013 WL 5297152 (D.S.D.S.D. Sept. 19, 2013).
7. This is the example used by the authors in Hazard et al., *supra* note 3, at § 13.11. For other examples on this point, *see* Comment [5] to ER 1.8.
8. *See* Restatement (Third) The Law Governing Lawyers § 60 (A Lawyer's Duty to Safeguard Confidential Client Information).