**6.1: The Duty of Confidentiality**

*I don’t know where you heard it. Don't know who’s spreading it round. All I know is, I’m clean as a whistle, baby. I didn't utter a sound. I never said nothing.*[[1]](#footnote-0)

Attorneys have a fiduciary duty of confidentiality to their clients. The duty of confidentiality provides that attorneys may not disclose confidential information provided to them by their clients, unless their clients consent to disclosure, or an exception to the duty of confidentiality permits disclosure. The duty of confidentiality applies to both current and former clients. Clients disclose confidential information to their attorneys in order to obtain legal advice. Generally, clients are entitled to assume that their attorney has a duty to maintain the confidentiality of any information disclosed in private. However, the duty of confidentiality does not apply to information that is “generally known” to the public.

The duty of confidentiality is broader in scope than the attorney-client privilege and the work product doctrine. Information that is not privileged or protected from disclosure as attorney work product may still be protected by the duty of confidentiality. Attorneys may not disclose confidential information about their clients without informed consent, unless one of the exceptions to confidentiality applies. Accordingly, the duty of confidentiality provides less protection to confidential client information than the attorney-client privilege or the work product doctrine, which may preclude the disclosure of confidential information when the duty of confidentiality alone would not.

[**Model Rule 1.6: Confidentiality of Information**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/)

1. A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
2. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
   1. to prevent reasonably certain death or substantial bodily harm;
   2. 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;
   3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
   4. to secure legal advice about the lawyer’s compliance with these Rules;
   5. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
   6. to comply with other law or a court order; or
   7. to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
3. A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

[**Model Rule 1.6: Confidentiality of Information, Comment [2]**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6/)

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

**Restatement (Third) of the Law Governing Lawyers § 59 (2000): Definition of “Confidential Client Information”**

Confidential client information consists of information relating to representation of a client, other than information that is generally known.

**Restatement (Third) of the Law Governing Lawyers § 59 (2000): Comment b, Kinds of confidential client information**

A client’s approach to a lawyer for legal assistance implies that the client trusts the lawyer to advance and protect the interests of the client. The resulting duty of loyalty is the predicate of the duty of confidentiality. The information that a lawyer is obliged to protect and safeguard is called confidential client information in this Restatement.

This definition covers all information relating to representation of a client, whether in oral, documentary, electronic, photographic, or other forms. It covers information gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege. It includes work product that the lawyer develops in representing the client, such as the lawyer’s notes to a personal file, whether or not the information is immune from discovery as lawyer work product. It includes information acquired by a lawyer in all client-lawyer relationships, including functioning as inside or outside legal counsel, government or private-practice lawyer, counselor or litigator, advocate or intermediary. It applies whether or not the client paid a fee, and whether a lawyer learns the information personally or through an agent, for example information acquired by a lawyer's partners or associate lawyers or by an investigator, paralegal, or secretary. Information acquired by an agent is protected even if it was not thereafter communicated to the lawyer, such as material acquired by an investigator and kept in the investigator's files.

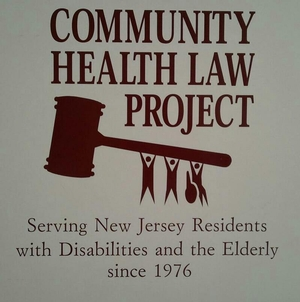
The definition includes information that becomes known by others, so long as the information does not become generally known. The fact that information falls outside the attorney-client privilege or work-product immunity does not determine its confidentiality under this Section.

A lawyer may learn information relevant to representation of a client in the course of representing another client, from casual reading or in other accidental ways. In the course of representation, a lawyer may learn confidential information about the client that is not necessary for the representation but which is of a personal or proprietary nature or other character such that the client evidently would not wish it disclosed. Such information is confidential under this Section.

**Restatement (Third) of the Law Governing Lawyers § 60 (2000): A Lawyer's Duty to Safeguard Confidential Client Information**

1. Except as provided in §§ 61- 67, during and after representation of a client:
   1. the lawyer may not use or disclose confidential client information as defined in § 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information;
   2. the lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.
2. Except as stated in § 62, a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made.

**Confidential & Privileged Information**

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[***In re Advisory Opinion No. 544 of NJ Sup. Court*, 511 A. 2d 609 (N.J. 1986)**](https://scholar.google.com/scholar_case?case=11610199668438618095)

**Summary:** The Community Health Law Project represented indigent and disabled clients in New Jersey. Organizations providing funding requested client-identifying information, but the Law Project provided only anonymized information. Some of the funders objected, and the Advisory Committee on Professional Ethics found that disclosure would not violate client confidence. The Law Project appealed, and the court held that the attorney-client privilege and duty of confidentiality precluded the Law Project from disclosing identifying information about its clients without informed consent or a reasonable regulatory obligation.

We are called to consider in this case the application of attorney-client protections to the relationship between a public legal services organization and the individuals whom it assists. The issue posed is whether certain information relating to the clients of a legal services organization, which provides legal assistance to mentally impaired or disabled and indigent persons, may be disclosed to the private and governmental entities that provide funds to the organization, without violating the protections of confidentiality accorded attorney-client communications and relationships.

The legal services organization resisting such disclosure is the Community Health Law Project. It is a non-profit organization providing legal services to indigent, mentally disabled and retarded persons in Essex, Mercer, Union, and Camden counties. Its legal services are funded by private and public sources. Various contracts with the funding entities obligate the Law Project to make periodic reports relating to the services provided, including in some instances information about the individual clients served.

Under the funding plans of several community mental health centers, identifying, descriptive information, such as a client's name, address, and date of birth, have been sought by the entities providing funds. The Law Project has chosen not to reveal the identity of individual clients by furnishing such information. Rather, it has attempted to accommodate these requests by providing data that have been aggregated and by disclosing information on individual clients only to the extent and in a manner that the revelation would not serve to identify the clients directly or indirectly. However, several funding entities expressed their dissatisfaction with the generalized nature of the information received from the Law Project and have insisted upon obtaining individual client-identifying information.

In the face of these more particularized demands, the Law Project has taken the position that such identifying information is or may be protected from disclosure under the strictures governing the professional conduct of lawyers. However, confronted by this genuine ethical dilemma, the Law Project sought guidance from the Advisory Committee on Professional Ethics in January 1984 to ensure that disclosure would not violate any ethical precepts.

In Opinion No. 544, the ACPE ruled that the disclosure of the information requested by private and public funding entities does not violate the confidences of the Law Project’s clients and that the information requested would not violate client secrets or confidences within the meaning of then-applicable ethics standards. The Law Project then filed a petition with this Court to review the determination of the ACPE, which was originally denied. A motion for reconsideration of the denial was then granted by this Court.

We must initially consider the applicability of the attorney-client privilege to the relationships that exist between the Law Project and its clientele. The Law Project, as we have noted, is an organization that provides legal services to a particular class of persons, consisting of indigent, mentally-retarded, or disabled individuals. These persons are in need of legal assistance but cannot otherwise afford to retain an attorney and hence turn to the Law Project for legal help. The Law Project engages licensed attorneys of the State, who furnish legal advice and counselling to the individuals eligible for such services.

As licensed attorneys, the Law Project’s lawyers are subject in every respect to the rules governing the professional conduct of lawyers. Accordingly, lawyers employed by governmental or public interest organizations are bound by the same ethical mandates of the Supreme Court's Rules of Professional Conduct, as well as other standards governing the professional activities of licensed attorneys.

Further, the persons who receive the legal services of the Law Project through its individual staff attorney are “clients.” A client, in the context of the attorney-client privilege, is a person who “consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity.” Consequently, it is not questioned that there exists between the Law Project and its attorneys who render legal services and the persons who receive those services an attorney-client relationship to which the attorney-client privilege fully applies.

It is also beyond question that indigent, needy, or otherwise eligible clients, assisted by attorneys without fees, are entitled to the same protections as clients who retain private counsel. Because the status of clients in every sense is ascribed to these persons, we must accordingly consider in this case the extent of these client-protections, particularly as to matters falling within the ambit of the attorney-client privilege.

The major focus of the attorney-client privilege has historically and traditionally been upon the communications that occur or information that is exchanged between an attorney and his or her client relating to the special attorney-client relationship. The attorney-client privilege is recognized as one of “the oldest of the privileges for confidential communications.” While the attorney-client privilege has evolved and changed in terms of its emphasis and applications, the primary justification and dominant rationale for the privilege has come to be the encouragement of free and full disclosure of information from the client to the attorney. This has led to the recognition that the privilege belongs to the client, rather than the attorney.

The extent of the protection accorded communications and other information arising in the course of any attorney-client relationship is governed by the attorney-client privilege as well as several ethics standards. The attorney-client privilege itself, while rooted in the common law, has acquired a basis in both statute and rule. This codification provides that communications between a lawyer and his or her client in the course of that relationship and in professional confidence are privileged; a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his or her lawyer from disclosing it. While in a sense the privilege belongs to the client, the lawyer is obligated to claim the privilege unless otherwise instructed by the client or the client's representative.

The scope of the attorney-client privilege or protections is also subject to ethics rules governing attorney conduct. In this case, the ACPE determined the issue posed by the Law Project under the former Disciplinary Rules. It applied Disciplinary Rule 4-101(A), entitled “Preservation of Confidences and Secrets of a Client.” Under this rule, confidences are defined as information protected by the attorney-client privilege under applicable law. Ibid. The rule also deals with “secrets,” which are defined as other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or detrimental to the client.

The Disciplinary Rules have been superseded by the Rules of Professional Conduct. The relevant rule now provides that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation except for disclosures that are impliedly authorized in order to carry out the representation. In comparison to the provisions of the former Disciplinary Rule, this Rule expands the scope of protected information to include all information relating to the representation, regardless of the source or whether the client has requested it be kept confidential or whether disclosure of the information would be embarrassing or detrimental to the client. Thus, the definition of confidential information under Rules of Professional Conduct 1.6(a) is broader and more inclusive than that of Disciplinary Rule 4-101(A).

The ethics rules generally forbid disclosure of client information, without the client's consent, unless one of the exceptions to the rule is available. Disclosure of client information is permissible if the client consents after consultation. In this case no one urges the possible applicability of this provision dealing with consent. In situations such as this where the clients receiving legal services are indigent as well as mentally impaired or disabled, they may not be able to appreciate the nature or importance of their own interests or their ability to resist or decline consent or disclosure.

The appropriate analysis must therefore focus upon whether the revelation of client information to someone other than the lawyer amounts to the impermissible disclosure of a privileged communication or a secret or information relating to the relationship. That inquiry is here particularized in terms of whether certain information that identifies the disabled and indigent persons receiving legal services from a legal services project may be disclosed to funding sources without violating the attorney-client privilege as defined by both statute and the Court's ethics strictures governing professional conduct.

Arguably “information gained in the course of an attorney-client relationship,” as provided under the former Disciplinary Rule 4-101(A), might not include information that consists of only the identity of the client. The thrust of this definitional standard appears to be directed to information in the nature of communications. While a client’s identity per se might not be necessarily considered a privileged communication as such, in some instances disclosure of identity may indirectly reveal other information about the client. Hence, depending upon the nature of such additional or collateral information that is revealed by the disclosure of a client's identity, the need for confidentiality could appropriately cloak even identity. In this case, for example, disclosure of the identity of clients of the Law Project would be tantamount to the revelation of the mental and financial status of the individuals, as well as the fact that he or she has a legal problem that required the services of an attorney.

Furthermore, under the former Disciplinary Rules, it would appear that matters such as the identification or address of a client could still be considered to be a “secret” entitled to non-disclosure. In *Fellerman v. Bradley*, an attorney refused to disclose the address of his client, thereby thwarting the enforcement of a divorce judgment against the client. The Court concluded that this information could be considered a confidence or in the nature of a protected secret covered by the attorney-client privilege and the Disciplinary Rule, holding nonetheless that, in the circumstances, the fraud exception to the privilege applied to preclude non-disclosure of the client's address.

The dilemma posed by requests for client-identity information has been addressed by the American Bar Association Committee on Professional Ethics and various state advisory committees. In an opinion issued in 1969, the Committee ruled that a legal services office could allow the accounting office to examine its intake and disposition forms provided all identifying data were deleted. Similarly, in 1974, the Committee determined that a legal services organization could reveal client information to its Board of Directors if anonymity was preserved, the information was reasonably required by the board for a legitimate purpose, and the client expressed an informed consent.

The Board of Professional Responsibility of the Supreme Court of Tennessee reached a similar result. It determined that a client's name, address, zip code, sex, race, age, social security number, phone number, source of referral, and the dates representation began were all secrets within the meaning of Disciplinary Rule 4-101 and could not be disclosed to funding sources unless the client consented.

We are persuaded by the soundness of these opinions. Also highly relevant to our analysis is the fact that client information that serves to identify the client would clearly be protected under the current Rules of Professional Conduct, RPC 1.6. As noted, this rule accords confidentiality to any information relating to the representation of a client. Manifestly this would include a client's identity.

Accordingly, we hold that under current standards governing attorney conduct, client-identity may not be disclosed to any private or public funding agency in the absence of appropriate consent or other legal justification. In so ruling, we determine that a client's identity constitutes information relating to the representation of a client under the current Rules of Professional Conduct and a secret entitled to non-disclosure, if not a protected confidential communication, under the attorney-client privilege and former Disciplinary Rule 4-101(A), which was relied upon by the ACPE in this case.

It is further suggested that even though this information might otherwise be subject to a privilege against disclosure, there may be a legal justification that would allow such disclosure. Disclosure of such information is permissible because, it is contended, the information sought is required to be furnished by law. The Division of Mental Health and Hospitals has promulgated regulations requiring reporting for all agencies receiving financial assistance through the Division, to aid in monitoring compliance and for program planning and development. Also, under N.J.A.C. 10:37-6.84 information such as client services and fiscal reports are to be submitted to the Division. Further, the Divisions of Mental Health and Hospitals and Developmental Disabilities and the various county mental health agencies are required to maintain the confidentiality of any client information it receives from the Law Project. It is contended that the reporting of information is needed to comply with these regulations and that this would not constitute either impermissible disclosure or public disclosure of client information violative of applicable ethics restrictions.

Under the Rules of Professional Conduct a lawyer may reveal such information to the extent the lawyer reasonably believes necessary to comply with the law. However, the regulations promulgated by the Division that provide for reporting as related to the persons assisted by the Law Project do not specifically require client-identifying information. Moreover, there is no legal requirement that client-identifying information be disclosed to private funding agencies. In the absence of such requirements, we may not infer that this client-identifying information is necessary to be disclosed as a matter of law. Hence, it may remain privileged under the Rules of Professional Conduct.

This result, we point out, would not be different under the former ethics rules. In *Fellerman v. Bradley*, the compliance-with-law exception of Disciplinary Rule 4-101(C)(3), was deemed to prohibit disclosure of attorney-client information except in a situation in which the client was attempting through non-disclosure to evade an order of a court. We expressed the view that the policies underlying the privilege would not be advanced by allowing the client through his attorney to perpetrate a fraud on the court or to thwart justice by consenting to and subsequently ignoring a judgment of the court by refusing to disclose the client's address.

We acknowledge that if by statute or valid rule or regulation information concerning the identity of clients of a legal services organization were clearly required to be reported for legitimate governmental purposes, the analysis and result could well be different. A different conclusion as to the propriety of disclosure might also obtain in the event private funding sources sought client information under enforceable rules or regulations. It can reasonably be assumed that in such a context, the welfare and interests of clients would remain a paramount concern and that the disclosure occasioned by such necessary reporting would be attended by suitable protections reflecting needs for confidentiality and privacy.

II.

We conclude that client-identifying data with respect to persons receiving legal assistance through the Law Project constitute matters clearly covered by the Rules of Professional Conduct as “information relating to representation.” Such material is also covered under the attorney-client privilege and the former Disciplinary Rule as information in the nature of client secrets that could be embarrassing or detrimental to the client if revealed. Under these strictures we are satisfied that it would be improper to reveal such information to either public or private funding sources in the absence of valid consent or reasonable rules clearly requiring such disclosure for legitimate purposes.

Accordingly, we reverse Opinion No. 544.

**Questions:**

1. Why did the court hold that the Law Project could not produce identifying information?
2. What is the difference between confidential information and privileged information? When can an attorney disclose confidential information? When can an attorney disclose privileged information?
3. When should attorneys address the disclosure of confidential information, if their clients cannot provide informed consent?

**“Generally Known” Information**

The duty of confidentiality prevents attorneys from using information about their current or former clients only if the information is “confidential.” Accordingly, the duty of confidentiality does not apply to information that is “generally known.” Of course, whether information is “generally known” may be unclear.

**Restatement (Third) of the Law Governing Lawyers § 59 (2000): Comment d, Generally Known Information**

The “generally known” standard of this Section is the standard of ABA Model Rules of Professional Conduct, Rule 1.9(b), which is not further elaborated upon in its Comment. The ABA Model Code of Professional Responsibility (1969) included in DR 4-101(A) all information, without regard to its public or private nature, within its definition of “confidences and secrets.” ABA Model Rule 1.9(b), on the other hand, excepts from its requirement of confidentiality information that “has become generally known.” No similar exception is contained, however, in the general-purpose analog to ABA Model Rule 1.9(b), ABA Model Rule 1.8(b) Commentators have differed over the wisdom of the ABA Model Rule approach. Case law is sparse, but extant authority agrees with the position taken in the Section and Comment.

The law generally provides that a client communication cannot become public and still remain protected by the attorney-client privilege. The general law of agency also permits a former agent to compete with a former principal so long as the agent employs only information about the principal that is “a matter of general knowledge.” The scant case authority is divided on the question whether the definition of confidential client information includes publicly available information.

The position taken in the Section and Comment—that “generally known” information is not part of the definition of confidential client information for either present or past clients—adheres to ABA Model Rule 1.9(b). The absence of a similarly limiting provision in ABA Model Rule 1.8(b), which applies to ongoing representations, is not inconsistent. Any such lawyer use would be impermissible on the broad ground that a lawyer may not use even publicly known information to the detriment of a current client, whether to further a personal interest of the lawyer or to further the interest of another client. Revealing client information adversely in a way that is gratuitous or negligent would violate the duty to take all reasonably available steps to advance the client's lawful objectives.

[***Dougherty v. Pepper Hamilton LLP*, 133 A. 3d 792 (Pa. Super. Ct. 2016)**](https://scholar.google.com/scholar_case?case=8310048835394560093)

**Summary:** Pepper Hamilton LLP represented John J. Dougherty in a federal grand jury investigation, which included a search of his house. The search warrant affidavit was filed under seal, but the FBI later attached it to an unrelated public document by accident. When Dougherty ran for public office, the Philadelphia Inquirer published several articles stating that he had committed crimes. Daugherty filed a defamation action against the Inquirer, which hired Pepper Hamilton. When Pepper Hamilton threatened to submit the affidavit and other information, Daugherty filed a motion to disqualify, as well as a malpractice action. The trial court granted the Inquirer’s motion for summary judgment, but the appellate court reversed, holding that the affidavit was still “confidential,” despite being attached to a public document, because it was not “generally known.”

OPINION BY SHOGAN, J.:

Appellant, John J. Dougherty, appeals from the order granting summary judgment in favor of Pepper Hamilton LLP and its attorneys Amy B. Ginensky, Michael E. Baughman, Peter M. Smith, and Raphael Cunniff, in this civil action alleging breach of fiduciary duty and breach of contract. For the reasons that follow, we reverse and remand for further proceedings.

We summarize the protracted history of this case as follows. On October 30, 2003, Appellant retained Pepper Hamilton to represent him in relation to a federal matter involving a grand jury subpoena he received. Although Appellant was not the target of the grand jury investigation, an FBI Affidavit was filed to secure a search of Appellant’s residence. Appellant has alleged that he provided Pepper Hamilton unfettered access to documents during the firm's representation of Appellant. Also, counsel from Pepper Hamilton was present during the execution of the search warrant at Appellant’s home in November of 2006.

Initially, the FBI Affidavit securing the search warrant was under seal, but, somehow, the FBI Affidavit inadvertently became attached to a document presented in an unrelated criminal matter involving an unrelated person named “Donald Dougherty, Jr.” According to Appellant, on January 30, 2008, the federal government filed a response to Donald Dougherty Jr.’s motion to suppress evidence, which was entered as Document No. 27 on the federal criminal docket for the prosecution of Donald Dougherty, Jr. This filing was allegedly made under “restricted status.”[[2]](#footnote-1) Document No. 27 referenced, as Exhibit “A,” a copy of an affidavit by an FBI agent in support of the issuance of a search warrant for Donald Dougherty, Jr.'s premises. However, the affidavit that was attached to Document No. 27 as Exhibit “A” was actually the FBI Affidavit in support of the search of Appellant's premises.

At least some of the documents in Donald Dougherty Jr.’s case were filed under seal and, thus, not accessible to the public. Subsequently, however, in April of 2008, certain documents in Donald Dougherty Jr.’s case were unsealed by Judge Robreno of the United States District Court for the Eastern District of Pennsylvania. More specifically, Judge Robreno's April 11, 2008 order authorized the eastern district Clerk of Court to lift the seal on Documents 31, 32, 48 and 38. Appellant alleges that Document No. 27 was also, albeit mistakenly, removed from “restrictive status” around this time.

When Appellant was running for a vacant seat in the Pennsylvania Senate in April of 2008, the Philadelphia Inquirer published several articles about Appellant. The articles implied that Appellant had engaged in criminal conduct in the past and was likely to do so again if elected to the Pennsylvania Senate. In March of 2009, Appellant initiated a defamation suit against the Inquirer in state court. In 2011, Pepper Hamilton assumed representation of the defense for the Inquirer in the defamation suit filed by Appellant. In 2012, Pepper Hamilton informed the trial court that the defense of the defamation action would rely on information relating to the federal investigation in which Pepper Hamilton had previously represented Appellant. In 2013, Appellant moved to have Pepper Hamilton removed as defense counsel in his defamation action against the Inquirer. The trial court denied the motion to disqualify Pepper Hamilton. On appeal this Court reversed the decision of the trial court and remanded the matter for the entry of an order barring Pepper Hamilton and its attorneys from representing the Inquirer.

On December 10, 2012, while Pepper Hamilton and its attorneys were still representing the Inquirer, the firm filed a motion for summary judgment in the defamation suit and included in the attached exhibits a copy of the FBI Affidavit. On December 12, 2012, the Inquirer then published a front-page article, which included detailed references to the FBI Affidavit.

On February 11, 2013, Appellant initiated the instant action by filing a complaint against Appellees alleging breach of fiduciary duty and breach of contract. Appellant alleged that, in representing the Inquirer in the defamation suit, Pepper Hamilton acted against the interests of Appellant, its former client. The trial court has summarized the subsequent procedural history of this case as follows:

Appellees filed Preliminary Objections on April 3, 2013. These Preliminary Objections were overruled by this Court by Order dated June 18, 2013. An Answer was filed by Appellees on July 8, 2013. On May 27, 2014, after some discovery was conducted and a Revised Case Management Order entered, Appellees filed a Motion for Summary Judgment. An Answer in response to the Motion for Summary Judgment was filed by Appellant on June 27, 2014. A Reply in Support of the Motion for Summary Judgment was filed by Appellees on July 2, 2014. A Supplemental Memorandum in Support of the Motion for Summary Judgment was filed by Appellees on July 25, 2014, and a Supplemental Memorandum in Opposition was filed by Appellant on July 29, 2014. By Order dated July 29, 2014, and entered on the docket on July 30, 2014, Summary Judgment was granted.

This timely appeal followed.

Appellant presents the following issues for our review:

A. Whether the Trial Court erred in granting Appellees’ motion for summary judgment on the mistaken basis that, because Pepper’s breach of fiduciary duty was also a violation of the Pennsylvania Rules of Professional Conduct, Appellant cannot assert a claim against Pepper as a matter of law.

B. Whether the Trial Court erred in holding that Appellees were entitled to summary judgment because, although they used information against Appellant that is substantially related to their former representation of him, that information is publicly available and thus cannot form the basis of a disloyalty claim.

C. Whether the Trial Court prematurely granted Appellees motion for summary judgment where the parties had exchanged limited written discovery and taken no depositions.

Each of Appellant’s issues challenges the propriety of the trial court’s determination granting summary judgment.

A legal malpractice claim based on breach of contract, “involves (1) the existence of a contract, (2) a breach of a duty imposed by the contract, and (3) damages.” With respect to a legal malpractice claim based on breach of contract, this Court has stated the following:

The attorney’s liability must be assessed under the terms of the contract. Thus, if the attorney agrees to provide her best efforts and fails to do so, an action in assumpsit will accrue. An attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large.

With respect to a breach of fiduciary duty claim, “a confidential relationship and the resulting fiduciary duty may attach wherever one occupies toward another such a position of advisor or counsellor as reasonably to inspire confidence that he will act in good faith for the other's interest.” The leading case in Pennsylvania discussing breach of a fiduciary duty by an attorney with regard to a conflict of interest is *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*. In *Maritrans*, our Supreme Court upheld the trial court’s issuance of a preliminary injunction preventing Pepper Hamilton from representing its former clients’ competitors. The Court found that a cause of action for breach of a fiduciary duty against a law firm was actionable where the firm acquired confidential information during the course of its representation. In discussing actionability for breach of a fiduciary duty, our Supreme Court reiterated the following long-standing principles:

Activity is actionable if it constitutes breach of a duty imposed by statute or by common law. Our common law imposes on attorneys the status of fiduciaries vis a vis their clients; that is, attorneys are bound, at law, to perform their fiduciary duties properly. Failure to so perform gives rise to a cause of action. It is “actionable.”

At common law, an attorney owes a fiduciary duty to his client; such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest, and breach of such duty is actionable.

The *Maritrans* Court highlighted that Pepper Hamilton “was furnished with substantial confidential commercial information” and “came to know the complete inner-workings of the company along with Maritrans’ longterm objectives, and competitive strategies.” As explained by the Court, adherence to a fiduciary duty “ensures that clients will feel secure that everything they discuss with counsel will be kept in confidence” and that Pepper Hamilton “had a duty to administer properly their responsibilities to respect the confidences of Maritrans.” It further explained that the rationale behind this policy is to prevent an attorney from taking “undue advantage of the confidential communications of such client.”

In reaching its determination, the Court in *Maritrans* emphasized the confidential information that Pepper Hamilton garnered during the course of its representations.

Pennsylvania Rule of Professional Conduct 1.9 further addresses attorney duties to former clients and provides, in relevant part, as follows:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

The explanatory comment to Rule 1.9(c) offers the following pertinent insight:

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

In addition, section 59 of the Restatement (Third) of the Law Governing Lawyers defines the term “Confidential Client Information” as “Confidential client information consists of information relating to representation of a client, other than information that is generally known.” Comment b to the above definition explains that “the definition includes information that becomes known by others, so long as the information does not become generally known.” Furthermore, comment d states the following:

d. *Generally known information*. Confidential client information does not include information that is generally known. Such information may be employed by a lawyer who possesses it in permissibly representing other clients and in other contexts where there is a specific justification for doing so. Information might be generally known at the time it is conveyed to the lawyer or might become generally known thereafter. At the same time, the 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.

Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

A lawyer may not justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known. Moreover, if a current client specifically requests that information of any kind not be used or disclosed in ways otherwise permissible, the lawyer must either honor that request or withdraw from the representation.

We further observe that there is no Pennsylvania case law directly on point. However, as the Supreme Court of Ohio aptly stated in *Akron Bar Association v. Holder*, “An attorney is not free to disclose embarrassing or harmful features of a client’s life just because they are documented in public records or the attorney learned of them in some other way.” Likewise, in *Lawyer Disciplinary Board v. McGraw*, the Supreme Court of West Virginia observed that “the ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it.”

Here, the trial court concluded that because the FBI Affidavit was inadvertently appended to a document in an unrelated criminal matter, the information contained therein was public. Specifically, the trial court stated that “the fact that the FBI Affidavit in question was publicly available for many years precludes a determination that the receipt of the improperly filed FBI Affidavit through a breach by Appellees of the attorney-client relationship and duty of fidelity is actionable.”

Our review of the record, in the light most favorable to Appellant as the non-moving party, reflects that the trial court erred in granting summary judgment in this case. Indeed, this case presents genuine issues of fact. The record reveals that the FBI Affidavit in question became part of another criminal matter through inadvertence. Even accepting that the FBI Affidavit was publicly available through PACER prior to December 10, 2012, we are left to ponder whether the FBI Affidavit was actually “generally known.” All that is acknowledged at this point in the proceedings is that the FBI Affidavit was inadvertently appended to a document in a case that did not involve Appellant as a party. Therefore, it appears that such document was not “indexed” under Appellant's name and that a person interested in the FBI Affidavit “could obtain it only by means of special knowledge.” Furthermore, it is unknown exactly how and when the FBI Affidavit came into the possession of the Inquirer and eventually became the subject of an article in the Inquirer during Pepper Hamilton’s representation of the Inquirer. Whether Pepper Hamilton committed a breach of its duties to Appellant depends on the answers to these questions. Thus, these questions are sufficient to establish genuine issues of material fact regarding Pepper Hamilton's conduct. Contrary to the trial court’s conclusion, in the event that the FBI Affidavit was not generally known information, it appears that Pepper Hamilton breached its duty to Appellant as a former client and such breach was actionable. Accordingly, we reverse the order granting summary judgment.

**Questions:**

1. Why did the court hold that the information about Daugherty was protected by the duty of confidentiality, even though it was publicly available?
2. How well-known does information have to be before it becomes “generally known”? Why didn’t the Inquirer’s articles make the information at issue “generally known”?
3. If the FBI affidavit was not “generally known,” should Pepper Hamilton be disqualified from representing the Inquirer in this action?

[***Matter of Tennant*, 392 P. 3d 143 (Mont. 2017)**](https://scholar.google.com/scholar_case?case=9045079919187615542)

**Summary:** Attorney David G. Tennant was the subject of a disciplinary complaint based on his representation of Richard and Debbie Harshman. When the Harshmans did not pay Tennant’s bill, he filed an attorney’s lien on their property and purchased it at the Sheriff’s sale. The Harshmans filed a complaint against Tennant with the Office of Disciplinary Counsel, claiming that Tennant improperly used confidential client information to their detriment. The Commission on Practice found no violation of the duty of confidentiality, but the Montana Supreme Court reversed, because the information was not “generally known.”

Justice Beth Baker delivered the Opinion and Order of the Court.

These consolidated proceedings include two formal disciplinary complaints filed against Montana attorney David G. Tennant. The complaints, which arise from Tennant’s debt collection practices against clients and former clients, will be referenced in this Opinion and Order as the Ray complaint and the Harshman complaint.

BACKGROUND

Tennant represented Richard and Debbie Harshman in an action for eviction of tenants from, and possession of, real property in Hungry Horse, Montana. The Harshmans obtained a default judgment against their tenants for damages to the property, including attorney fees of $3,063.54. When he was unable to collect the attorney fees through execution on the tenants and the Harshmans did not pay their bill to Tennant’s firm, Tennant filed an attorney’s lien on the property. He later filed a complaint against the Harshmans alleging breach of contract, account stated, and foreclosure of the attorney's lien, in which action he was granted a default judgment of $8,148.68. Tennant assigned the judgment to a collection agency, which obtained a writ of execution on the Harshmans’ property. A sheriff's sale was held, at which the collection agency was the successful bidder. The Harshmans later redeemed their property.

Both Ray and the Harshmans filed complaints against Tennant with the Office of Disciplinary Counsel, and ODC filed formal disciplinary complaints in both matters. On August 31, 2016, Tennant filed conditional admissions and an affidavit of consent to discipline in these consolidated proceedings, pursuant to Rule 26, Montana Rules for Lawyer Disciplinary Enforcement. ODC objected to Tennant’s conditional admissions. On October 20, 2016, the Commission on Practice held a hearing on the complaints and to consider Tennant’s conditional admissions. Tennant was present with counsel and testified on his own behalf.

On January 5, 2017, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for Discipline. The Commission rejected Tennant’s conditional admissions. The Commission concluded that ODC failed to carry its burden of proving by clear and convincing evidence any MRPC violations alleged in the Harshman complaint.

The Commission recommends that, as a result of his violations of the Montana Rules of Professional Conduct, Tennant be disciplined by public censure by this Court. The Commission recommends that, in the future, Tennant be required to provide to clients and former clients copies of any attorney's liens he or his firm files against them. In addition, the Commission recommends that, for a period of three years, Tennant be required to provide to ODC copies of any attorney's liens filed by him or his firm, copies of all complaints filed by him or his firm and served against former clients for unpaid fees, and copies of judgments or assignments of judgments obtained by him or his firm against former clients.

ODC has filed written objections to the Commission's findings, conclusions, and recommendation, and Tennant has filed a response.

DISCUSSION

ODC argues that the Commission erred in concluding that it failed to prove violation of Rule 1.9, MRPC, in relation to the Harshmans. Rule 1.9(c) provides:

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known.

ODC alleged Tennant violated this Rule when he bid on the Harshmans’ Hungry Horse property at the sheriff’s sale, because Tennant's knowledge of the property derived from his representation of the Harshmans. The Commission determined that because Tennant could have found out that the Harshmans owned property in Hungry Horse via public record and then foreclosed his fee lien and bid at the sheriff’s sale, no violation of Rule 1.9 occurred.

As ODC emphasizes, Rule 1.9’s language requires that, in order for the attorney to be free from the prohibition against using representation-related information to the disadvantage of a former client, the information at issue must be “generally known.”

Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense.

A lawyer may not justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known.

Some courts have applied a strict definition of “generally known” in the context of a Rule 1.9 analysis. That the information at issue is generally available does not suffice; the information must be within the basic understanding and knowledge of the public. “The client's privilege in confidential information disclosed to his attorney is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources.”

In this case, although it would have been possible for Tennant to discover the existence of the Harshmans’ property through searches of public records, he undisputedly learned of the property as part of his representation of the Harshmans. Tennant used that information to the Harshmans’ disadvantage. We will not interpret the “generally known” provision of Rule 1.9(c) to allow Tennant to take advantage of his former clients by retroactively relying on public records of their information for self-dealing. The Commission erred in concluding that Tennant did not violate Rule 1.9, MRPC.

ODC further claims that, absent the Harshmans’ redemption of their property, Tennant would have exceeded his fee claim and lien by receiving a windfall from the sheriff's sale of upwards of $80,000 — his former clients’ equity in their property. ODC submits that this is a clear violation of Rule 1.9(c), MRPC. However, the Harshmans did redeem their property, and ODC's assumptions do not satisfy its burden of proof.

Sanctions

Finally, ODC argues that the Commission's recommended sanctions are inadequate given Tennant’s unethical conduct and will not deter the same type of conduct by other Montana attorneys. ODC had recommended that Tennant be suspended from the practice of law for at least seven months and that he be required to retake and pass the Multistate Professional Responsibility Exam.

We have concluded that ODC established one ethical violation in addition to those recognized by the Commission. However, that violation ultimately did not harm Tennant's clients — the Harshmans redeemed their property. Further, the additional violation does not undermine the Commission’s overall conclusions on the evidence presented, and on this record we are not inclined to deviate from the discipline recommended by the Commission.

**Questions:**

1. A Sheriff’s sale is a public event. Why did the court hold that the duty of confidentiality protected this information about the Harshmans?
2. What would have happened if someone other than Tennant had purchased the Harshmans’ property?

**Stanley A. Kaplan, *The Case of the Unwanted Will*, 65 ABA J. 484 (1979)**

John Smith and his wife Mary go to a lawyer who has handled some minor legal matters for John to make their wills prior to going on a trip abroad.

John tells his lawyer what disposition he and his wife desire to make of their estates, and the lawyer prepares separate wills for them to sign prior to their departure. After John has signed his will, the lawyer suggests to John that he would like to be alone with Mary before she signs. John withdraws to another office. The lawyer asks Mary if the will is as she would have made it had her husband not been present at the conference and if the will were to be secret from her husband.

She says no, that the will as drawn contains several provisions that are contrary to her wishes, and that she would change if her husband were not to know the ultimate disposition of her estate. However, she says that she would not be willing to precipitate the domestic discord and confrontation that would occur if her husband were to learn that she had drawn a will contrary to his wishes and in accordance with her own desires.

Mary asks the lawyer if he will write one page of her will to provide that certain persons benefiting by her will as drawn will be replaced by certain other persons. The lawyer states that under the circumstances he does not think that he can in fairness represent her in making these changes but suggests that she go ahead and sign this will and then, as soon as possible, go to some other lawyer and have her will rewritten in accordance with her true wishes.

The departure time for the trip comes on Mary before she is able to make arrangements to have her will rewritten. John and Mary are involved in an airplane accident and both are killed while on the trip. Their son, Tom, who is named as executor in each of their wills, comes to the lawyer who drew the wills and asks him to represent him as executor in connection with probating the wills and distributing the estate.

What are the ethical problems the lawyer faces in connection with probate and distribution in accordance with the wills as drawn? Did the lawyer have any obligation to speak to Mary separately, as he did, about her will? When the lawyer learned from Mary that she had other wishes that were being suppressed, what were his obligations? What, if anything, should the lawyer have done and, did not do after learning Mary's true wishes? Do Mary's true but unfulfilled wishes concerning the revision of her will have any legal effect? Does the lawyer have any right or obligation to disclose what Mary told him about her testamentary desires?

**Comments from George W. Overton**

The first question to be asked in all problems involving professional responsibility or ethics is “Who is the client?” Not “Who brought Mary to my office?” Not even “Who is paying my bill?" And emphatically not “Whose anger will cost me the most business?” In facts given, John probably presumes that the lawyer is his and that he is the lawyer’s client, and that's all that need be said. The lawyer probably accepted this notion without clarification.

The problem is that in the drafting of Mary’s will Mary is the client, no matter who pays the bill and no matter what chain of events brought Mary to the lawyer's office. The first issue that has to be disposed of is: Can the lawyer continue to serve Mary in the preparation of any will other than the one first drafted? Can he do so without John’s knowledge? I suggest that he cannot.

The lawyer must explain to Mary her three alternatives:

1. To execute the will, and she and the lawyer remain silent unless questioned. Presumably this won't work, because the lawyer, if questioned by John, cannot lie to him, although I do not believe the lawyer has a duty to volunteer any information. It is enough that he says, in response to a question, either “John, I cannot answer your question” or “Mary did not execute the will I drafted" and the lawyer should refuse to answer further questions.
2. To execute the will as drafted, hoping to replace it soon. In this case he must explain to Mary that it is unquestionably her will, until revoked, and that even if all their conversation were reproduced in court, it would not affect the validity of the will, since it could easily be proved that she had testamentary capacity, and contemporaneous inconsistent statements are admissable only as to capacity.
3. To have a new will drawn (or a new insertion) but let the lawyer tell John: “Mary changed her will.” The lawyer need not say more to John.

If, as we presuppose in 2, the lawyer explains to Mary her alternatives and the conclusiveness of the execution of the will, he is out of trouble at the time of execution.

However, he should reflect, for the future, on how to avoid this awkward box. First of all, the custom of separating spouses at execution of wills, although not uncommon, is an anachronism, based on the notion that one spouse, presumably the husband, could coerce the other into an unintended result? or someone could so claim. The time to elicit separate responses is at the first meeting or immediately there after. Probably a letter, following the first meeting, could state something like the following:

“I will proceed as instructed to draft both your wills, on the assumption that each of you has given me your wishes. If there is anything on this subject that either of you wishes to discuss this subject with me separately, please let me know and I will then decide if I can go further.”

As stated above, in preparing Mary’s will the lawyer can only be Mary’s lawyer, but has he made this clear to John? Has he been guilty of any implied communication to John inducing John to execute a will based on John’s presuppositions of Mary’s will that is misleading or false? In the technical sense, he has not. If John wanted his will to be conditioned on certain dispositions by Mary, legal mechanisms existed (conditional bequests, or mutual wills, or a joint will) to effectuate those purposes. But the lawyer has undoubtedly not outlined these alternatives.

On the other hand, it should not be said that there is an inherent conflict of interest in representing both husband and wife in estate planning. Obviously, most couples would be appalled at the notion of having to pay two lawyers’ fees for this service. What is necessary is that the lawyer identify the possibility of disagreements at the earliest possible stage.

After Mary's death the lawyer’s responsibility is to file the will and assist, as necessary, in its probate. For the reasons stated, Mary’s inconsistent comments made at the time of execution are relevant only to the issue of capacity, and I do not see that the lawyer has a duty to anyone to raise that issue if he has no doubts on that score.

The intricate ramifications of the ethical problem emerge, however, if the question of capacity is raised. Let us suppose that her will excluded some heir by intestacy who attacks the will on this ground. Probably in this event the lawyer should inform Tom of the facts, and Tom can decide as the personal representative of Mary whether to attempt to assert privilege as to the testimony involved. He is not likely to succeed in that endeavor. I cannot see that the lawyer has any duty to Mary’s heirs at law to volunteer any information.

**Comments from John C. Williams**

The problems the lawyer faces concerning John and Mary and their wills are essentially problems involving the interests of multiple clients. The special problems are these:

1. How do the general principles of multiple representation apply to estate planning work for a married couple?
2. When a lawyer represents two clients on a common project, what are his responsibilities in preserving the confidences of one client from the other?
3. When a lawyer who represents two clients learns that their interests are in fact conflicting, what does the lawyer do about it, particularly in a case in which the conflict is known to one of the clients but not the other?

Surprisingly, neither the Code of Professional Responsibility nor published opinions of the American Bar Association Committee on Ethics and Professional Responsibility nor *Drinker* offers much guidance, yet the second two questions presumably arise frequently in the practice of, say, a lawyer who represents codefendants in criminal cases or coplaintiffs in personal injury cases.

Who is the client? That’s the first question. There may be lawyers who suppose that the husband and wife have such a community of interest or that the wife is so subservient to her husband that they are, collectively, one client. Mr. Bumble would advise that if the lawyer supposes that, the lawyer is “a ass - a idiot” and probably a bachelor. Clearly, both must be considered clients.

As was suggested in the first “Legal Ethics Forum,” there are many good, perhaps compelling, reasons to avoid bringing multiple lawyers into an amicable situation. Expense may be a prohibitive factor, and one must consider the risk that multiple lawyers will create problems where none existed. These considerations are important enough when the clients are two business partners. They are even more important when the clients are a happily married husband and wife whose interest in the continuity and development of their marital relationship may be more important than the outcome of a particularly legal negotiation.

Most married couples probably never consider consulting separate lawyers for the preparation of their wills. They assume that their mutual interests will be served by working co-operatively toward a co-ordinated estate plan and by confiding in one another in seeking to understand and reconcile what differences may exist between them.

This assumption is so prevalent, on behalf of both clients and lawyers, that in most cases the “multiple representation” problem is never discussed. Ethical Consideration 5-16 requires that before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. I believe this is rarely done when the clients are husband and wife who retain a lawyer for the preparation of wills. In my judgment it is unnecessary for a lawyer formally to seek an express consent to multiple representation when the clients are a married couple who want wills drawn, unless the lawyer knows of special circumstances that lead to the belief that there is a substantial conflict of interests. An informed consent may properly be inferred from the circumstances.

Problems such as those presented by this case might have been avoided, however, if at the initial interview with John and Mary the lawyer had probed for possible conflicts. This is especially important in cases in which the likelihood is great that the interests of the husband and wife may be conflicting, such as in a marriage that is in the process of disintegration, in a second marriage in which there are children by the spouses’ prior marriages, or in other cases in which the natural objects of the bounty of the husband and wife are not identical.

Finally, one should recognize that women are taking an increasingly active voice in the conduct of their personal business. A “liberated woman” may feel that sharing a lawyer with her husband enhances neither her personal dignity nor the marital relationship. She may prefer independent representation and be prepared to pay for it.

*Confidentiality with multiple clients.* Disciplinary Rule 4-101 directs that a lawyer shall not knowingly reveal a confidence or secret of a client during or after the termination of the professional relationship. In a multiple representation case the difficulty is determining what constitutes a client’s “confidence.” When John, Mary, and the lawyer meet together face to face, what Mary tells the lawyer is not a confidence, so far as John is concerned. But what if Mary meets privately with the lawyer, or telephones or writes him? There is an implied understanding, when two or more clients retain a lawyer for work on a common project, that the lawyer is free to disclose to all of his clients his communications with each of them.

It was a mistake for the lawyer to ask to meet privately with Mary before she signed her will. By doing so, he invited Mary to speak “confidentially” with him and opened the door to the dilemma that confronted him when Mary told him that she was dissatisfied with her will.

If, after the lawyer met with John and Mary jointly, he had no reason to be concerned as to lack of testamentary capacity on Mary’s part or undue influence or duress by John, the private meeting with Mary was a mistake. If he had these concerns, he should have resolved them by withdrawing from employment.

*The execution of Mary’s will.* The lawyer was correct in refusing to cooperate with Mary in making a secret change in her will. As E.C. 5-14 states, “maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests.”

Though a husband and wife do not agree completely on the provisions of their wills, a lawyer may prepare wills for both, but only if there is an informed consent. That prerequisite is missing here. The consent given by implication at the initial meeting was vitiated when Mary sought to make a change of which John was not informed.

The root of the conflict is Mary’s problem. She doesn’t like the will that was discussed in her husband’s presence, but she doesn’t want to disclose to him her dissatisfaction with it. This dilemma is Mary’s and she should decide what to do about it. The lawyer, by meeting privately with Mary, has permitted her to transfer the problem to him.

I agree that the lawyer should have presented alternatives to Mary and required her to make the choice. I disagree that it would be proper for the lawyer to draw a revised will for Mary on the condition that he be permitted to tell John simply that “Mary changed her will.” This is not the full disclosure that the canons require.

*Validity of Mary’s will.* Mary’s will is valid as signed. She understood the provisions of the will and the significance of signing it. To my knowledge, there is no authority for refusing to probate or for reforming a will on the basis of statements made by the testator at the time of signing that he or she was not entirely satisfied with its provisions.

Most lawyers with extensive experience in writing wills have clients who never sign a will without protesting that it is not final - perhaps they feel that acceptance of the will somehow involves an acceptance of death. The courts properly attach no significance to these statements. There is no evidence that Mary did not understand what she was doing or of lack of capacity, undue influence, or duress. The will should be probated as written.

*The lawyer’s dilemma.* After Mary advised the lawyer that she was dissatisfied with the will and intended to change it, did the lawyer have further responsibilities? In the circumstances it is clear that Mary considered her statements to the lawyer confidential, and the lawyer led her to believe that they would be so treated. If the lawyer discloses to John what Mary has told him about her intentions, he is revealing a client’s confidence.

On the other hand, if by silence the lawyer permits John to leave the office with the false impression that Mary has signed the will she discussed in John’s presence, the lawyer may be seen to have conspired with Mary to defraud John. By doing this, the lawyer has permitted Mary’s desires to dilute his loyalty to John.

There is no easy way out for the lawyer. D.R. 5-105 requires that a lawyer shall not continue employment if it would be likely to involve him in representing differing interests, unless it is obvious that he can adequately represent the interest of each and if each consents, after full disclosure. It is strange that the authorities offer little guidance as to what the lawyer must do when multiple representation is no longer proper. There is some authority for the proposition that the lawyer may continue to represent the client with the most seniority. The better view would seem to be that when the interests of clients diverge and become antagonistic, their lawyer must be absolutely impartial, which, unless they both or all desire him to represent them both or all, usually means that he may represent none.

In most cases the conflict between clients will have become apparent to everyone. Here John does not know that the conflict exists. The lawyer may not disclose Mary’s confidences to John, but he must disclose to both John and Mary that they have differing interests and that he may no longer represent either of them in connection with their estate planning. This will alert John to the fact that something is amiss, without directly breaching Mary’s confidence. This, in my judgment, is the least bad solution.

*Postdeath disclosure.* Mary’s statements to the lawyer about her dissatisfaction with the will were confidences not to be disclosed during her lifetime. It is well established, however, that after the testator's death the attorney is at liberty to disclose all that affects the execution and tenor of a will. If the lawyer were subpoenaed, he would be obliged to testify concerning these matters, but Mary’s statements about her will would not be material in any suit to challenge

it. Thus, even though the privilege expires on her death, the lawyer should not be required to testify.

**Further Reading:**

* [Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963 (1987)](https://scholarship.law.nd.edu/law_faculty_scholarship/533/)
* [Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 Fordham L. Rev. 1453 (1994)](https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3092&context=flr)
* [Alysa Christmas Rollock, *Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary*, 73 Ind. L.J. 567 (1998)](http://ilj.law.indiana.edu/articles/73/73_2_Rollock.pdf)
* [Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses* , 62 Fordham L. Rev. 1253 (1994)](https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3086&context=flr)

1. Liz Phair, *Never Said*, Exile in Guyville (1993). [↑](#footnote-ref-0)
2. Documents filed on the federal court's PACER system are publicly available for a fee to those who have registered for and received a PACER account. However, in his memorandum of law in support of his response to Pepper Hamilton's motion for summary judgment, Appellant asserts that a document on “restricted status” is unavailable to anyone but the court and the parties. [↑](#footnote-ref-1)