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ETHICS YEAR IN REVIEW

James T. Erickson*

I. INTRODUCTION

If ignorance of the law is no excuse, it is especially inexcusable for attorneys to be ignorant of the law governing their profession. As suggested by soaring malpractice insurance rates,1 such ignorance can be costly. More fundamentally, however, the "law of lawyering" plays an essential role in maintaining the high ethical standards incumbent upon the sole profession allowed access to the judicial system. While it is obviously important to every attorney to avoid litigation as a defendant in civil suits, of even greater importance is the need to assimilate the relevant law as a guide to proper ethical choices in complex circumstances. No one's intuitive sense of right and wrong is sufficiently comprehensive to provide the correct, spontaneous "reading" of every professional situation. By the same token, though, it is difficult to stay apprized of an area of law subject to such variation not only from state to state,2 but also with respect to general guides such as the Restatement of the Law Governing Lawyers and the American Bar Association Model Rules of Professional Conduct.

This article will review the most significant ethical developments of 2003, primarily but not exclusively in regard to legal ethics in California. Part II of this article describes the background and results of a five-year re-evaluation of the

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2. See, e.g., Thomas E. Spahn, Sarbanes-Oxley and "Whistleblowing" by Corporate Lawyers—The Untold Story, CORP. COUNS. MAG. (Mar. 2003), at http://library.lp.findlaw.com/articles/file/00037/008728 (describing "the dizzying variation among state ethics rules").
rules applicable in California to multijurisdictional practice. Part III provides summaries of the four most recent formal opinions of the California State Bar’s Standing Committee on Professional Responsibility and Conduct. Finally, Part IV describes two somewhat controversial amendments to the ABA’s Model Rules of Professional Conduct, both of which redefine lawyer-client confidentiality in an era marked by corporate scandals.

II. PROPOSED REVISIONS TO THE RULES OF MULTIJURISDICTIONAL PRACTICE

Recently, the topic of multijurisdictional practice has come to the forefront in debates over the future of the legal profession. Attorneys frequently cross state lines to attend to their clients’ concerns, and often do so "virtually" as the result of "the advent of technological change, the Internet, and rapid growth of interstate and multinational commerce" in an "increasingly global economy." The American Bar Association has hosted a forum on multijurisdictional practice and formed a commission to consider it, while various state bars (including California’s) "have established committees, task forces, and advisory groups to study the issue." At least in California, such efforts are likely to produce significant changes in the near future, particularly in regard to revisions of the California Rules of Court.

A. Background: Birbrower, Montalbano, Condon & Frank v. Superior Court

The turning point in the movement toward the proposed revisions came with the California Supreme Court’s decision in Birbrower, Montalbano, Condon & Frank v. Superior Court. One legal publication described Birbrower as an "al-

3. See infra Part II.
4. See infra Part III.
5. See infra Part IV.
8. TASK FORCE, supra note 6, at 5 n.1.
10. Id.; see also Flaherty, supra note 7, at ABA 3.
ready unusual case [that] took an even more unusual turn.”  

California attorney Scott Mosko, who represented Birbrower before the high court, later suggested that “[t]he maxim ‘bad facts make bad law’ probably applies to this case.”  

Birbrower, a New York law firm representing a New York client, negotiated a license with California-based Tandem Computers.  

Birbrower's New York client then created ESQ, a California company, to manage the work generated by the license. When a dispute arose with Tandem, Birbrower sent two attorneys to California to advise ESQ and negotiate with Tandem. Eventually the two sides reached an agreement.

ESQ, however, later sued Birbrower for malpractice. Birbrower then cross-complained for lack of payment. The “even more unusual turn” in this unusual case was ESQ's response to Birbrower's cross-complaint: Because Birbrower's attorneys were not licensed to practice in California, ESQ argued, Birbrower was barred from recovering compensation. The Santa Clara District Court granted summary judgment in favor of ESQ (the case's real party in interest), and the court of appeal affirmed.

In affirming in part the lower courts' decisions, the California Supreme Court agreed that Birbrower had violated section 6125 of the State Bar Act, which prohibits the unauthorized practice of law in California. With certain exceptions, “no one but an active member of the State Bar may practice law for another person in California.”

In defining “the practice of law in California,” the court specified “sufficient contact with the California client to ren-
der the nature of the legal services a clear legal representation. Notably (although not pertinent to the facts in Birbrower), the phrase “in California” does not necessarily imply physical presence in the state: “The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.”

Most crucially, Birbrower had argued that section 6125 should allow for an exception “for work incidental to private arbitration or other alternative dispute resolution proceedings.” Alternatively, Birbrower argued for an ad hoc exception based on the fact that “[m]ultistate relationships are a common part of today's society and are to be dealt with in common sense fashion. In many situations, strict adherence to rules prohibiting the unauthorized practice of law by out-of-state attorneys would be ‘grossly impractical and inefficient.’”

The court's response foreshadowed the subsequent proposal of new rules of multijurisdictional practice: “[A] decision to except out-of-state attorneys . . . from section 6125 is more appropriately left to the California legislature,” the body that “has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law.”


In the wake of Birbrower, the legislature requested the California Supreme Court to assemble a task force to “[s]tudy and make recommendations regarding whether and under what circumstances, attorneys who are licensed to practice law in other states and who have not passed the California State Bar examination may be permitted to practice law in California.” As assembled, the Task Force on Multijurisdictional Practice (“Task Force”) comprised “civil and criminal litigators, private and public attorneys, lawyers and layper-

23. Id. (emphasis added).
24. Id. at 8.
25. Id. at 10 (quoting In re Estate of Waring, 221 A.2d 193, 197 (N.J. 1966)).
26. See id. at 8-9.
sons, and transactional and trial counsel." After meeting "as a whole on six occasions," and soliciting and considering public commentary on its Preliminary Report and Recommendations, the Task Force released its Final Report and Recommendations on January 7, 2002—four years to the week after the *Birbrower* decision, which the Report pointedly cites several times.

1. Recommendations in Favor of Revision

The Task Force recommended liberalizing the rules of multijurisdictional practice in regard to four categories of practice:

(a) in-house counsel residing in California;

(b) public-interest attorneys relocating to California;

(c) nonlitigating lawyers temporarily in California to provide legal services; and

(d) lawyers temporarily in California as part of litigation.

Attorneys in the first two categories would be allowed to practice through a system of registration, a "process similar to admission to the [Bar], but without requiring an attorney to pass the California bar examination." Registration requirements would include, for example, agreeing to "abide by the rules that govern members of the State Bar, and submit to discipline by the State Bar," as well as to "participate in mandatory continuing legal education."

Attorneys in the latter two categories would qualify via a change in the definition of "the unauthorized practice of law"—a "safe harbor" approach by which the attorneys would be allowed to "undertake specified tasks." While also being obliged to submit to discipline by the State Bar, however, they would not be required to participate in mandatory con-
2. Recommendations Against Revision

The Task Force recommended against changing the rules in regard to two categories: (a) experienced attorneys moving to California from other states; and (b) government lawyers located in California. Perhaps as important, the Task Force considered at length but rejected adopting a system of reciprocity. Reciprocity would permit "lawyers licensed to practice law in other states... to practice law in California, provided those states confer a similar right on California lawyers." The Task Force pointed out that California permits graduates of unaccredited law schools to join the bar; if such attorneys were not permitted to practice in reciprocal states, not only would a two-tier "class" system be imposed on California attorneys, but the distinction would "have an adverse effect on law schools that the ABA has not approved." With less discussion of the issue, the Task Force also rejected adopting a system of comity, which would allow attorneys licensed in any other state to practice in California. In effect, comity would lower the standards of admission to California legal practice to the lowest level acceptable in any other state, a result the Task Force found inconsistent with the goal of protecting consumers of legal services.

39. See id. at 24, 32.
40. Id. at 39.
41. TASK FORCE, supra note 6, 11.
42. See id.
43. Id.
44. See id. The report does not explicitly use a phrase such as "two-tier," but the implication is clear. See Mike McKee, California Rules May Ease for Out-of-State Lawyers, RECORDER (N. Cal.), May 14, 2003, at http://www.acca.com/practice/mjp/ca_rules.php (quoting law professor Gerald Uelman in regard to the danger of "creat[ing] two classes of California lawyers").
45. TASK FORCE, supra note 6, at 19.
46. See id. at 23.
47. See id. The Report also states the concern that "lawyers would lose substantial connection to the geographic community in which they practice," id. at 5, which "could make it difficult to protect consumers of legal services and could degrade professionalism." Id. at 6.
C. The Work of the Multijurisdictional Practice Implementation Committee: Proposed Rules of Court 964, 965, 966, and 967

In response to the Task Force's recommendation that a new committee be formed to "address issues related to the implementation of any of the task force's proposals,"48 the California Supreme Court appointed the Multijurisdictional Practice Implementation Committee ("MPIC").49 On May 12, 2003, the MPIC released "Multijurisdictional Practice of Law by Lawyers Not Admitted to the State Bar of California," a preliminary report intended to stimulate public comment.50 The Supreme Court invited "state, local, and specialty bar associations, judges, consumer groups, legislators, and other interested groups and individuals" to submit responses to the report by July 7, 2003.51

In essence, the MPIC codified as formal rules the Task Force's plain-language recommendations.52 However, the MPIC "[went] further than the task force with its recommendation to allow attorneys to practice temporarily on specific matters."53

1. Proposed Rule of Court 964: Registered Public Interest Attorneys

Proposed Rule 964 would allow registered out-of-state attorneys to practice law for up to three years at "public interest organizations" if supervised by a member of the State Bar.54 As summarized by the MPIC's report, the rule defines such organizations as "nonprofit entities whose primary pur-

48. See id. at 41.
51. Id.
52. See McKee, supra note 44.
53. Id.
54. See PRELIMINARY REPORT, supra note 49, at Proposed Rule 964 (to be codified at CAL. R. CT. 964) (addressing work in California by registered public interest attorneys).
pose is to provide legal services without charge to indigent persons."

2. Proposed Rule of Court 965: Registered In-House Counsel

Although not permitted to appear in court, registered in-house counsel licensed in other states would be allowed by Rule 965 to provide legal services to their employers. The permission would extend only to California residents whose employer either (a) employs in California an active member of the California Bar, or (b) employs ten or more full-time employees in California. The employer must also be a "legal entity" classifiable within a broad range of "qualified institutions."

3. Proposed Rule of Court 966: Lawyers Practicing Law Temporarily in California as Part of Litigation

Under four circumstances, Rule 966 would allow an unregistered out-of-state attorney to practice law in California on a temporary and occasional basis. The attorney must either (1) be authorized to appear in a legal proceeding occurring in another jurisdiction; (2) expect to be so authorized if the proceeding is merely anticipated; (3) expect to be so authorized in an anticipated legal proceeding in California; or (4) be supervised by an attorney who falls into one of the other three categories.

4. Proposed Rule of Court 967: Non-Litigating Lawyers Temporarily in California to Provide Legal Services

Under three circumstances, Rule 967 would allow an unregistered out-of-state attorney to provide legal assistance in

55. See id at 2.
56. See id. at Proposed Rule 965 (to be codified at CAL. R. CT. 965) (addressing work in California by registered in-house counsel).
57. See id.
58. See id. "Qualifying institution' means a corporation, a partnership, an association, or other legal entity, including its subsidiaries and organizational affiliates." Id.
59. See id. at Proposed Rule 966 (to be codified at CAL. R. CT. 966) (addressing work by lawyers practicing law temporarily in California as part of litigation).
60. See PRELIMINARY REPORT, supra note 49, at Proposed Rule 966.
California on a temporary and occasional basis. The legal assistance must involve either (1) a transaction or other nonlitigation matter substantially taking place wherever the attorney is licensed; (2) an issue of federal law or the law of another jurisdiction being handled by California attorneys; or (3) the needs of an employer-client or its subsidiaries or organizational affiliates.

III. FORMAL OPINIONS OF THE STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT OF THE STATE BAR OF CALIFORNIA

From time to time, the Standing Committee on Professional Responsibility and Conduct of the State Bar of California ("Committee") issues advisory opinions in response to queries from members of the State Bar or on its own initiative. Limited to questions of professional responsibility and ethics, these opinions are non-binding. In 2003, the Committee issued four opinions.

A. The Duty of Confidentiality in the Context of Informal Requests for Legal Advice: Formal Opinion 2003-161

Most attorneys have received casual requests for legal advice from strangers, acquaintances, and family members. Often such requests come too quickly or unexpectedly for an attorney to discourage the speaker from revealing confidential information. In considering whether and when the duty of confidentiality arises in such situations, the Committee discussed three hypothetical scenarios.
1. Hypothetical Facts

Situation 1: Jones spots Lawyer in the courthouse and asks whether she is an attorney. Lawyer responds, “Yes.” Jones, a complete stranger, immediately confesses that he alone committed a burglary for which he and Doe have been charged. Jones asks Lawyer for advice. Lawyer suggests contacting the public defender’s office. Later, Doe seeks to hire Lawyer to defend him against the burglary charges.

Situation 2: At a party, Smith learns vaguely that Lawyer is an attorney, with no reference to her area of practice. During a casual conversation, Smith briefly describes problems he is having with his insurer, who refuses to pay for replacement of his office’s badly leaking roof. Without identifying the insurer, he asks for advice. Lawyer politely refrains from interrupting Smith’s brief statement, but then immediately says she is not in a position to advise Smith about the situation. Later, Smith’s insurer—one of Lawyer’s clients—assigns Lawyer the defense of Smith’s claim.

Situation 3: Aware that Lawyer handles wills and estates, Lawyer’s Cousin calls Lawyer at home. Cousin explains that he borrowed their late grandmother’s uninsured car and “wrecked” it. He asks whether this will cause problems when her estate is resolved, and whether he should do anything. Lawyer refrains from interrupting Cousin, but then suggests he call a lawyer referral service. Later, Lawyer’s family hires her to probate her grandmother’s estate and obtain compensation for the damaged car.

2. Discussion

A two-part analysis is required to determine whether any of the three situations creates a duty of confidentiality. First, the duty arises upon the formation of an express or implied-in-fact attorney-client relationship. Second, absent such a relationship, the duty arises if Lawyer has “manifested a willingness to engage in preliminary consultation” in order to provide legal advice or services. In the latter case, how-

68. See id.
69. See id.
70. See id.
ever, the duty arises only if the communication is, in fact, confidential; for example (with some exceptions), no duty exists if the information is publicly known, or if the speaker transmits it to third parties.\textsuperscript{72}

\textsuperscript{72} See Formal Op. 2003-161, supra note 66 (citing CAL. BUS. \& PROF. CODE § 6068(e) (West 2003); CAL. EVID. CODE § 951, 952, 954 (West 2003); CAL. RULES OF PROF'L CONDUCT R. 3-310(E) (2000)).

The relevant part of California Business and Professions Code section 6068(e) states that "it is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client." CAL. BUS. \& PROF. CODE § 6068(e).

California Evidence Code section 951 states: "As used in this article, 'client' means 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 ...." CAL. EVID. CODE § 951.

California Evidence Code section 952 states: As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. CAL. EVID. CODE § 952.

The relevant part of California Evidence Code section 954 states: [T]he client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:
(a) The holder of the privilege;
(b) A person who is authorized to claim the privilege by the holder of the privilege; or
(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

CAL. R. EVID. 954.

Rule 3-310 of the California Rules of Professional Conduct is mentioned at several points in this article. For the sake of reference, the complete text states:
(A) For purposes of this rule:
(1) "Disclosure" means informing the client or former client of the relevant circumstances of the actual and reasonably foreseeable adverse consequences to the client or former client;
(2) "Informed written consent" means the client's or former client's written agreement to representation following written disclosure;
(3) "Written" means any writing as defined in Evidence Code section 250.
(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:
a. Whether an Attorney-Client Relationship Exists

In none of the situations did Lawyer expressly assent to represent the speaker. However, an implied-in-fact agreement between the parties may exist depending on the parties'

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
(2) The member knows or reasonably should know that:
   (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
   (b) the previous relationship would substantially affect the member's representation; or
(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter or
(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.
(C) A member shall not, without the informed written consent of each client:
   (1) Accept representation of more than one client in a matter in which the interest of the clients potentially conflict; or
   (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
   (3) Represent a client in a matter and at the same time in a separate matter accept as client a person or entity whose interest in the first matter is adverse to the client in the first matter.
(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.
(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.
(F) A member shall not accept compensation for representing a client from one other than the client unless:
   (1) There is no interference with the member's independence of professional judgment or the client-lawyer relationship; and
   (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
   (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
      (a) such nondisclosure is otherwise authorized by law, or
      (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

conduct in light of the totality of the circumstances.\textsuperscript{74} To determine if an implied agreement exists, the courts look to a number of factors, none of which is necessarily dispositive.\textsuperscript{75}

In regard to Lawyer’s conduct, the relevant factors include whether Lawyer (1) volunteered services to a prospective client; (2) agreed to investigate a case and give legal advice about its merits; (3) previously represented the client, particularly over a lengthy period of time or in several matters, or without an express agreement, or in circumstances similar to those at hand; and (4) provided advice about the matter in question, and the individual sought advice.\textsuperscript{76}

In regard to each of the three speakers, the relevant factors include whether he (1) paid fees to Lawyer or gave other consideration in regard to the matter in question; (2) consulted Lawyer in confidence; and (3) reasonably believed he was consulting Lawyer in a professional capacity.\textsuperscript{77}

The last factor is among the most important: the consulting individual’s expectation, based on how the situation would appear to a reasonable person in the same position, is highly relevant to finding an implied-in-fact attorney-client relationship.\textsuperscript{78} However, this expectation must be reasonably induced by the attorney’s representations or conduct.\textsuperscript{79}

In the three hypothetical situations, none of the above factors is present.\textsuperscript{80} Thus, none of the speakers “could have held a reasonable belief that Lawyer would either protect his or her interests or provide legal services.”\textsuperscript{81} No implied-in-fact attorney-client relationship was formed.\textsuperscript{82}

\textbf{b. Whether Lawyer Manifested a Willingness to Engage In Preliminary Consultation and the Communication Was Confidential}

Although the lack of an attorney-client relationship ex-

\textsuperscript{74} See id.
\textsuperscript{75} See id. For further discussion of this subject, see infra Part III.D.2.
\textsuperscript{77} See id.
\textsuperscript{78} See id.
\textsuperscript{79} See id.
\textsuperscript{80} See id.
\textsuperscript{81} See id. at 4; see also Part III.A.2.b. infra (discussing, in the last paragraph, the possibility that Cousin considered the phone call confidential, which is the second factor applicable to the speakers).
tinguishes many potential duties, the duty of confidentiality may still apply. The question then is whether an attorney has manifested a willingness to engage in a confidential communication. This question leads in turn to two further questions, to be addressed with regard to the totality of the circumstances: (1) whether an individual is a “client” within the meaning of Evidence Code section 951, and (2) whether the communication was confidential.

1. The Individual Must Be a “Client”

In a previous opinion, the Committee explained that the same basic policy underlies both the evidentiary attorney-client privilege and the duty of confidentiality: “[T]o encourage clients to disclose all possibly pertinent information to their attorneys so that the attorneys may effectively represent the clients’ interests.” For the purposes of the evidentiary privilege, and thus of the duty of confidentiality, a person is a “client” if a lawyer’s conduct “manifests a willingness, express or implied, to consult with the person in the lawyer’s professional capacity.”

The critical factor, therefore, is the attorney’s conduct. Unless the attorney’s prior conduct or words have created a reasonable expectation that she has agreed to a consultation, she will owe no duty of confidentiality provided that she unequivocally informs the speaker that she will not represent him. She must do so, however, as soon as reasonably possible after it becomes reasonably apparent that the speaker wishes to consult with her.

Absent this unequivocal refusal, the individual may have a reasonable belief that he is consulting the attorney in a professional capacity. Factors to consider in evaluating the rea-

83. See id. at 5
84. See id.
85. See id.
86. See id.; see also supra note 72 and accompanying text.
88. Id.
89. Id.; see also discussion supra note 72 and accompanying text.
91. See id.
92. See id.
93. See id.
sonableness of this belief include whether the attorney has a reasonable opportunity to “interpose a disclaimer before the person begins to speak” or to “comprehend that a person is trying to engage in a consultation”; or whether the speaker’s manner “prevents the lawyer reasonably from interposing any disclaimer or ending the conversation.”

Thus, in “Situation 1” above, if Jones blurted out his confession before Lawyer could speak, there would be no basis for finding Lawyer’s willingness to consult. By contrast, if Jones spoke in a low voice and began drawing Lawyer into a private area of the courthouse, Lawyer might manifest willingness by accompanying Jones without objection. If Lawyer moreover began discussing Jones’ situation, there would be a strong suggestion of consent to consult.

In “Situation 2,” the relevant factors are Lawyer’s lack of opportunity to comprehend that Smith intended to consult with her, her immediate disclaimer, and the conversation’s context within the non-professional social setting of a party. However, had Lawyer been introduced as a specialist in insurance law who “should be able to help you with your problem,” and had Lawyer then listened politely to Smith’s recitation of facts, Smith might have had a reasonable basis to believe he was consulting Lawyer in her professional capacity. Given the nature of the introduction, Lawyer’s failure to interpose an immediate disclaimer could render the incongruous context (the non-professional social situation) less significant.

In “Situation 3,” Lawyer’s familial relationship with Cousin would weigh against Lawyer’s ability to recognize a home phone call as a potential consultation. However, if Cousin’s rapidity of speech did not prevent it, Lawyer should have said something to avoid creating the inference that she did not object to the consultation.

94. Id.
95. See id.
97. See id. at 7.
98. See id.
99. Id.
100. See id.
101. See id.
2. The Communication Must Be Confidential

In pertinent part, California Evidence Code section 952 defines “confidential communication” as “information transmitted . . . in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation . . . .”

Various circumstances can affect a communication’s potential confidentiality. As the Evidence Code indicates, if other individuals are present and able to overhear the communication, there can be no reasonable expectation of privacy unless the other individuals are there to further the speaker’s interests. Also, confidentiality may depend on both the extent to which the information is known publicly, as well as its “inherent sensitivity” to the speaker. A well-known but highly embarrassing fact is unlikely to be communicated with the expectation of privacy; by contrast, a little-known matter of public record, such as a long-past felony conviction, might be considered confidential.

On the other hand, given the opportunity, a burden is placed on an unwillingly consulted attorney to avoid creating an expectation of privacy. Thus an additional factor in analyzing the attorney’s obligation of confidentiality is the attorney’s effort to communicate that the conversation is not appropriate or confidential. The speaker’s motivation for communicating is another factor, in that a communication intended to lead to legal representation or advice might be considered to have been confidential.

Thus, in “Situation 1” above, if Jones blurted out his confession in a populated area, he would have no reasonable basis to believe the communication was confidential. If instead he drew Lawyer into a relatively isolated area and spoke in a low voice, Lawyer may have seemed to acquiesce to

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103. CAL. EVID. CODE § 952 (West 2003); see discussion supra note 72.
105. See id.
106. See id.
107. See id.
108. See id.
109. See id.
110. See Formal Op. 2003-161, supra note 66, at 8
111. See id.
a confidential communication.\textsuperscript{112}

In “Situation 2,” even had Smith spoken quietly in an unpopulated area of the party, the information conveyed (i.e., an office’s roof was badly leaking) was likely to have been widely known; moreover, it was not of a sensitive nature.\textsuperscript{113} No duty would arise.\textsuperscript{114} But had the information, imparted privately, been known only to Smith, and been relevant to an insurer’s defense against the claim, the communication might be found to be confidential.\textsuperscript{115}

“Situation 3,” involving a private telephone conversation, presents a closer question.\textsuperscript{116} Even so, the fact that Cousin had damaged the car may have already been publicly known.\textsuperscript{117} In quickly suggesting that Cousin seek other representation, Lawyer would then owe no duty of confidentiality.\textsuperscript{118}

3. Conclusion of Formal Opinion 2003-161

Hypothetical

In the context of an informal request for legal information, if the querent could have held a reasonable belief that the attorney would protect his interests or provide legal services, an implied-in-fact attorney-client relationship may arise. But even absent such a relationship, if an attorney is asked whether she is an attorney, or if the speaker speaks quietly, draws the attorney aside, or otherwise indicates that the conversation is private, the “focus shifts to the attorney to see whether the attorney affirmatively encouraged or permitted the speaker to continue talking. If so the communication will likely be found confidential.”\textsuperscript{119}

\textsuperscript{112.} See id.
\textsuperscript{113.} See id. at 9.
\textsuperscript{114.} See id.
\textsuperscript{115.} See id.
\textsuperscript{117.} See id.
\textsuperscript{118.} See id.
\textsuperscript{119.} See id.
B. Professional Responsibility and the Politically Active Attorney: Formal Opinion 2003-162

Attorneys sometimes engage in political and social activism. In some circumstances an attorney's activism or adherence to a particular philosophy may raise professional responsibility issues related to her duties to clients. These issues may arise, for example, in regard to giving advice, disclosing conflicts of interest, and providing competent representation.\textsuperscript{121}

In Formal Opinion 2003-162, the Committee considered the situation of practicing attorneys who publicly advocate civil disobedience.\textsuperscript{122} The Committee concluded that attorneys must be aware of the possibility that their beliefs or exercise of First Amendment rights may adversely affect the performance of their duties to clients.\textsuperscript{123} To minimize this risk, attorneys should exercise care in their selection of clients, practice areas, and types of cases.\textsuperscript{124}

1. Hypothetical Facts\textsuperscript{125}

Attorney is a member of an Association opposed to taxation of individuals and family businesses. In speeches delivered at Association conferences, Attorney has advocated that individuals and small businesses should neither pay taxes nor make reports to federal agencies that might lead to the imposition of taxation.

Attorney's practice directly and indirectly emphasizes tax consultation. Her activities with Association have resulted in a substantial number of client referrals. Regardless, she advises her clients to behave lawfully.

2. Discussion

Attorney's activism in this hypothetical is legal.\textsuperscript{126} No law may forbid or proscribe the advocacy of illegal behavior except

\begin{footnotes}
\item[121] See discussion infra Part III.B.2.
\item[122] Formal Op. 2003-162, supra note 120.
\item[123] See id. at 1.
\item[124] See id.
\item[125] See id.
\item[126] See id.
\end{footnotes}
where "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."\textsuperscript{127} Attorney's First Amendment rights in this regard are not limited by virtue of her profession.\textsuperscript{128} However, if Attorney actually engages in illegal conduct, she is subject to discipline even if "the conduct occurs outside the practice of law and does not involve moral turpitude."\textsuperscript{129}

Of course, activism and advising are different behaviors: one involves the exercise of First Amendment rights; the other implicates a duty to clients.\textsuperscript{130} Attorney's duty to her clients mandates that she not advise them to violate the law, absent (1) a reasonable, good-faith belief that a given law is invalid, and (2) a good-faith argument for that law's modification or reversal.\textsuperscript{131}

Other issues may arise regardless of the advice given by Attorney. To avoid potential or actual conflicts of interest, Attorney may have a duty to provide her clients with a written disclosure of her membership in Association.\textsuperscript{132} Rule 3-310 of the California Rules of Professional Conduct imposes this duty when a lawyer has or had a legal, business, financial, professional, or personal interest in—or similar relationship with a party or witness in—the subject matter of her representation of a client.\textsuperscript{133} Here, however, neither situation pertains to Attorney: Association is neither a party nor witness to, nor the subject matter of, Attorney's representation of her tax clients.\textsuperscript{134}

However, Rule 3-310 also applies when an attorney knows (or reasonably should know) that another person or entity would be substantially affected by resolution of the client's matter, and the attorney has or had a legal, business, financial, professional, or personal relationship with the person or entity.\textsuperscript{135} Conceivably, the scope and object of the client's engagement of Attorney, or other circumstances, might

\textsuperscript{127} See id. (quoting Brandenburg v. Ohio, 395 U.S. 444 (1969)).
\textsuperscript{129} See id.
\textsuperscript{130} See id.
\textsuperscript{131} See id. at 2 n.1 (citing CAL. RULES OF PROF'L CONDUCT R. 3-210, 3-200; CAL. BUS. & PROF. CODE § 6068(a),(c)) (West 2004).
\textsuperscript{132} See id.; supra note 72.
\textsuperscript{133} See Formal Op. 2003-162, supra note 120, at 2; discussion supra note 72.
\textsuperscript{134} See Formal Op. 2003-162, supra note 120, at 3.
\textsuperscript{135} See id.; discussion supra note 72.
lead to a resolution that would substantially affect Association. If so, this potential conflict of interest may generate the duty to disclose.

Finally, Attorney's advocacy of illegal behavior may affect her competency to represent clients in business and taxation matters. Rule 3-110 prohibits intentional, reckless, or repeated incompetence. Although the Rule's definition of "competence" includes the components of diligence, learning, and skill—all likely to be enhanced by Attorney's strong interest in tax matters—the definition also extends to the "mental, emotional and physical ability reasonably necessary for the performance of such services." In its effect on her ability to objectively evaluate legal positions, provide unbiased advice, and adhere to her clients' directions, Attorney's mental or emotional state in regard to the subject of taxation may lead to violation of the duty of competence.

3. Conclusion of Formal Opinion 2003-162 Hypothetical

In itself, an attorney's political or social activism might create no ethical difficulties. However, an attorney is subject to discipline for engaging in illegal behavior or (except in limited circumstances) advising her clients to behave illegally. Her association with an advocacy group may create a conflict of interest—and thus a duty to disclose her association—if the group might be substantially affected by the resolution of her client's legal matters. Finally, if her activism affects her mental and emotional state in regard to certain issues raised by clients, she risks violating her duty of compe-

137. See id.
138. See id.
139. In pertinent part, Rule 3-110 states:
   (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
   (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
141. CAL. RULES OF PROF'L CONDUCT R. 3-110, quoted supra note 139.
143. See id.
144. See id.; supra note 131 and accompanying text.

Outside corporate counsel sometimes have attorney-client relationships with corporate constituents. The Committee considered both the possibility of conflicts of interest in such situations, as well as the appropriate response to these conflicts under two representative fact patterns.146

1. Hypothetical Facts

Lawyer has separate, on-going professional relationships with both Corp, a closely-held corporation, and Corp’s Chief Financial Officer (CFO). Lawyer’s work for CFO involves only personal matters unrelated to Corp; she has never represented CFO and Corp as joint clients. However, neither has Lawyer excluded from either relationship any matters relating to CFO’s employment, nor does she have any written engagement agreement with either party.

It develops that CFO might have sexually harassed Corp employees. For the purposes of this dual hypothetical, Lawyer learns of this possibility in one of two ways: (1) CFO admits to sexual harassment after Lawyer agrees to speak with him in private about a “personal matter”; or (2) Corp’s President tells Lawyer of both particular and rumored incidents of sexual harassment by CFO, and requests advice regarding Corp’s response.

2. Discussion

a. Lawyer’s Duty Where CFO Provides Information

If CFO had the objectively reasonable belief that he was speaking to Lawyer as CFO’s personal lawyer, the information is confidential.149 Whether or not CFO was attempting to

146. See id.
148. See id. at 1
149. See id.
150. See id. at 2 (citing CAL. BUS. & PROF. CODE § 6068(e) (West 2003)); discussion supra note 72.
obtain legal advice, he communicated a client secret. Client secrets include information whose disclosure would be embarrassing or likely detrimental to the client.

Even if Lawyer had not intended to provide legal advice, her relationship with CFO might have given CFO a reasonable basis for believing that he was speaking to Lawyer in her professional capacity and in confidence. Conversely, if the course of dealing between the two would preclude CFO from believing reasonably that his conversation with Lawyer was an attorney-client consultation, no duty of confidentiality would arise.

Given that a duty of confidentiality has arisen, however, Lawyer may not reveal any information about CFO's harassment learned as the result of her representation of CFO. In turn, this prohibition could impede her ability to discharge her duties to Corp: CFO's alleged harassment could result in liability to Corp, and ordinarily Lawyer's duty of competent representation would include alerting Corp to, and advising Corp about, potential liabilities. Unless CFO were to consent to disclosure of the confidential information, Lawyer's duty to CFO would conflict with her duty to Corp, at least with regard to matters "encompassing CFO's harassment."

Lawyer has a duty to inform Corp of significant developments related to her representation of Corp. Moreover, Lawyer must withdraw from representing Corp to the extent that CFO's confidential information is pertinent to such representation.

Lawyer may be able to limit her withdrawal if a limited withdrawal will not "imperil" CFO's confidentiality. However,

152. See id.
153. See id.
154. See id.
155. See id.
156. See id. (citing CAL. RULES OF PROF'L CONDUCT R. 3-110(A), (B) (2003)); discussion supra note 139.
158. See id. (citing CAL. RULES OF PROF'L CONDUCT R. 3-500; CAL. BUS. & PROF. CODE § 6068(m) (West 2003)).
159. See id. (citing CAL. RULES OF PROF'L CONDUCT R. 3-700(B)(2)).
160. See id.
ever, the terms of such a withdrawal might implicitly disclose confidential information about CFO.\textsuperscript{161} If so, lawyer should withdraw completely.\textsuperscript{162} In either case, Lawyer should take “reasonable steps to avoid reasonably foreseeable prejudice” to Corp’s legal rights.\textsuperscript{163}

\textit{b. Lawyer’s Duty Where the Hypothetical Corporation’s President Provides Information}

In this circumstance, the information about CFO’s sexual harassment does not constitute CFO’s client secret: the information was learned “as a result of Lawyer’s representation of Corp, not CFO.”\textsuperscript{164} Nevertheless, Lawyer may owe a duty of loyalty to CFO.\textsuperscript{165} An attorney’s duty of loyalty “to protect his client in every possible way” forbids him from “assum[ing] a position adverse or antagonistic to his client without the latter’s free and intelligent consent. . . .”\textsuperscript{166} Any advice to Corp regarding Corp’s reaction to the harassment allegations would be adverse to CFO, who might face negative consequences both professionally and legally.\textsuperscript{167}

Lawyer may not simply drop CFO as a client; however, she may be able to ask CFO to waive the duty of loyalty.\textsuperscript{168} If a duty of confidentiality to Corp applies, though, the request for waiver might necessitate Corp’s consent to reveal to CFO the fact that Lawyer has been informed of the allegations.\textsuperscript{169}

If Lawyer cannot obtain CFO’s waiver of the duty of loyalty, Lawyer faces a conflict between this duty and her duty to represent Corp competently.\textsuperscript{170} She must withdraw from representing Corp to the extent necessary to resolve the conflict.\textsuperscript{171} This would include withdrawing from representation whose responsibilities include “identifying and assessing po-

\begin{itemize}
  \item \textsuperscript{161} See id.
  \item \textsuperscript{162} See id.
  \item \textsuperscript{163} See Formal Op. 2003-163, supra note 147, at 3 (citing CAL. RULES OF PROF’L CONDUCT R. 3-700(A)(2)).
  \item \textsuperscript{164} Id.
  \item \textsuperscript{165} See id.
  \item \textsuperscript{166} Id. (quoting Santa Clara County Counsel Attys. Ass’n v. Woodside, 869 P.2d 1142, 1155 (Cal. 1994)).
  \item \textsuperscript{167} See id.
  \item \textsuperscript{168} See id. (citing Flatt v. Superior Court, 885 P.2d 950 (Cal. 1994); Truck Ins. Exch. v. Fireman’s Fund Ins. Co., 8 Cal. Rptr. 2d 228, 231 (1992))
  \item \textsuperscript{169} See Formal Op. 2003-163, supra note 147, at 3.
  \item \textsuperscript{170} See id.
  \item \textsuperscript{171} See id.
\end{itemize}
potential claims against Corp arising from CFO's conduct.\textsuperscript{172}

If, conversely, Lawyer does obtain CFO's waiver, several other issues arise.\textsuperscript{173} Lawyer's advice to Corp must be given without regard to her relationship with CFO; that is, she should not attempt to counsel Corp about CFO unless she can base her advice on independent and objective professional judgment.\textsuperscript{174} Lawyer is also likely to be obliged to disclose to Corp, in writing, the fact of her professional relationship with CFO.\textsuperscript{175} Rule 3-310 requires such disclosure (in this case) for two reasons, either of which would be sufficient for the requirement to apply: first, CFO is a party to the matter in which Lawyer will advise Corp; and second, CFO is likely to be substantially affected by the outcome of the matter.\textsuperscript{176}

3. Conclusion of Formal Opinion 2003-163 Hypothetical

Usually, outside corporate counsel can provide personal legal services to corporate constituents without conflict or violation of the Rules of Professional Conduct.\textsuperscript{177} Attorneys who engage in such practices should be alert to the possibility of potential conflicts of interest as they arise.\textsuperscript{178} Even absent a duty of confidentiality to the corporation or the corporate constituent, the duty of loyalty to one party may occasionally prevent an attorney from competently representing the other party.\textsuperscript{179} Carefully crafted withdrawal from part of the representation, or complete withdrawal from all representation, may be necessary to the extent that the interests of the two types of clients are in direct conflict.\textsuperscript{180}

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172. Id.
173. See id.
174. See id.
178. See id.
179. See id.
180. See id. at 3-4.
D. Professional Duties of Attorneys Who Provide Information to the Public at Large: Formal Opinion 2003-164

Partly as the result of the lack of general access to affordable legal services, various media formats facilitate interaction between attorneys and the public at large. For example, radio call-in programs, newspaper and magazine columns, and interactive Internet sites may provide fora for members of the public to request specific information from attorneys about legal rights and responsibilities. In such circumstances, it may be unclear whether an attorney-client relationship arises, or whether other professional duties may be implicated.

1. Hypothetical Facts

As an uncompensated public service, Attorney participates in a radio call-in show. Listeners and callers are repeatedly advised that the on-air conversations are not confidential, and that the radio show is not intended to be a substitute for personal consultation with an attorney. Meanwhile, callers often give personal information to the radio station's non-attorney "screeners" before being put on the air, regardless of having been asked not to do so.

During the show, one caller asks about a landlord-tenant matter. Attorney gives a generalized answer, avoiding the specifics of the caller's questions. Attorney then explains that the question is outside her area of expertise, and advises the caller to consult an attorney whose practice deals with landlord-tenant issues.

Another caller asks about a probate matter. Except in regard to the legal specifics of her answer, Attorney responds just as she had to the landlord-tenant question. However, the generalized answer she gives is incorrect and misstates the law.

182. See id. at 2.
183. See infra Part III.D.2.
2. Discussion

Attorney has not agreed explicitly to form an attorney-client relationship with the callers. However, an attorney-client relationship may also be formed by implied agreement (thus entailing responsibilities to the client such as confidentiality, loyalty, and competency). To determine if an implied-in-fact agreement exists, the courts consider the totality of the circumstances by looking to a number of factors. No one factor is necessarily dispositive.

In regard to the attorney's behavior, the relevant factors include whether the attorney (1) volunteered services to a prospective client; (2) agreed to investigate a case and give legal advice about its merits; (3) previously represented the client, particularly over a lengthy period of time or in several matters, or without an express agreement, or in circumstances similar to those at hand; and (4) provided advice about the matter in question, and the individual sought advice.

In regard to the potential client, the relevant factors include whether the individual (1) paid the attorney fees or gave other consideration in regard to the matter in question; (2) consulted the attorney in confidence; and (3) reasonably believed he or she was consulting the attorney in a professional capacity.

Here, Attorney invited the callers to ask questions calling for legal knowledge, and voluntarily agreed to provide answers. The questions involved the callers' personal legal problems, and the callers gave personal information to the screeners despite being asked not to do so. These factors might suggest the existence of an implied-in-fact agreement

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185. See id.
186. See id. at 2 (citing CAL. BUS. & PROF. CODE § 6068(e) (West 2003) and CAL. RULES OF PROF'L CONDUCT R. 3-110, 3-300, 3-310 (2003)); see also discussion supra notes 72, 139. For further discussion of this subject, see supra Part III.A.2.a.
188. See id.
189. See id.
190. See id.
191. See id. at 4.
192. See id.
to form an attorney-client relationship.  

However, it was not reasonable for the callers to have believed that calling a radio show (as opposed, for example, to calling or visiting an attorney’s office) is an acceptable manner of seeking legal advice. Further, the public nature of the broadcasts, as well as the frequent warnings that the consultations were not confidential, made it impossible for the callers to reasonably expect confidentiality, which is ordinarily an essential aspect of an attorney-client relationship. The callers were also reminded that the show’s format was not meant to be a substitute for personally hiring an attorney, and were advised to seek out an attorney more knowledgeable in the matters of concern. Finally, the answers provided were meant to be generally applicable to the public, rather than specifically tailored to each caller, and neither the callers nor anyone else paid Attorney for her advice.

In the totality of the circumstances, therefore, “there is no reasonable basis for callers to believe Attorney is undertaking to represent the caller’s specific interests.”

Nevertheless, in such circumstances attorneys should avoid answering questions about areas of law with which they are unfamiliar, or giving information about which they lack confidence. The goal of increasing public access to legal information is not furthered by the dissemination of incorrect information.

3. Conclusion of Formal Opinion 2003-164 Hypothetical

Particularly given the public, non-confidential nature of formats such as those described above, no implied attorney-client relationship is likely to arise as the result of providing general legal information to the public at large. However, attorneys should be mindful of the limitations of such formats, particularly when addressing complex topics or matters

194. See id.
195. See id. at 5 (citing CAL. EVID. Code §§ 951, 952 (West 2003)); discussion supra note 72.
197. See id.
198. Id.
199. See id. at 5.
200. See id.
201. See generally id.
outside their area of expertise.202

IV. AMENDMENTS TO THE AMERICAN BAR ASSOCIATION
MODEL RULES OF PROFESSIONAL CONDUCT: REVISED RULES
1.6 AND 1.13

A. Background: Enron, Sarbanes-Oxley, and the SEC

Public outrage following the collapse of scandal-ridden
Enron Corporation led Congress to pass the Sarbanes-Oxley
Act of 2002.203 Among other things, the Act created “a number
of new requirements for public companies, their boards of di-
rectors, and their auditors.”204

In particular, section 307 of the Act (a directive to the Se-
curities and Exchange Commission) prompted the SEC to
adopt 17 C.F.R. § 205, which alters the responsibilities of at-
torneys who appear and practice before the SEC in the repre-
sentation of “issuers” (i.e., public companies).205 Under the
new SEC regulation, if such an attorney finds evidence of cer-
tain violations committed by agents of a public company, she
must report her findings “up-the-ladder” to one of the com-
pany’s highest officers.206 Absent an appropriate response, the
attorney must then report the evidence to the board of direc-
tors or an independent committee within it, or to an audit
committee.207

Under many circumstances, however, such reports might
arguably constitute a breach of the duty of confidentiality to
one or more clients.208 In response to the potential conflict be-
tween the new SEC regulation and various states’ confidenti-
ality rules, in August 2003 the ABA approved two amend-
ments to its Model Rules of Professional Conduct.209

203. See, e.g., Troy A. Paredes, After the Sarbanes-Oxley Act: The Future of
204. See, e.g., Thomas E. Spahn, Sarbanes-Oxley, The ABA Model Rules and
State “Whistleblowing” Duties: The Untold Story (Sept. 2, 2003), at
(2003).
206. See 17 C.F.R. § 205.
207. See id.
208. See supra Part III.C (discussing conflicts of interest arising for corporate
counsel who also may have duties to corporate constituents).
209. See A.B.A. Press Release, ABA Adopts New Lawyer Ethics Rules, Urges
Fairness in Military Commission Trials (Aug. 12, 2003), at
B. Revised Rule 1.6: Confidentiality of Information Relating to Client Crime or Fraud

ABA Rule of Professional Conduct 1.6 is titled "Confidentiality of Information." The rule "governs the disclosure by a lawyer of information relating to representation of a client during the lawyer's representation of the client." Revised Rule 1.6 permits an attorney "to reveal information relating to the representation of a client" if (a) the attorney believes disclosure is necessary to "prevent, mitigate, or rectify" substantial economic harm to another; (b) the harm results or will result from the client's crime or fraud; and (c) the crime or fraud was committed through the use of the attorney's services.

C. Revised Rule 1.13: Internal Reports and "Whistleblowing"

ABA Rule of Professional Conduct 1.13 is titled "Organization as Client." In essence, the rule highlights the distinction between an organization (as a client) and the constituents of the organization (as agents of the client). Prior to the latest amendments, the rule mandated—as it does now—that an attorney respond to discovery of wrongdoing; however, it provided only an unexclusive and discretionary list of appropriate responses, weakening its proscriptive force on attorneys.

Revised Rule 1.13 no longer allows for discretion. Instead, it requires an attorney to report "to higher authority in the organization" any evidence of wrongdoing by an employee likely to result in substantial harm to the client (i.e., the organization). If this internal reporting fails to produce results necessary to prevent harm to the client, the attorney is

211. See id.
212. See id.
214. See generally Spahn, supra note 2.
218. See id.
permitted to reveal the information to outside persons. In other words, the amended rule permits “whistleblowing” in the absence of meaningful action by internal authorities.

D. Response of the California Legislature: A Much Narrower Revision of the Duty of Confidentiality

As mandated by section 6068(e)(1) of the California State Bar Act, an attorney has the duty to “maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client.” In October 2003, two months after the ABA amended its confidentiality rules, the California legislature added section 6068(e)(2) to the State Bar Act:

Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily injury to, an individual.

Obviously, this is much narrower than the ABA's revisions, pertaining to the prevention of death or bodily injury rather than economic harm.

V. CONCLUSION

In an era marked by increased specialization among attorneys, the one area of law no practitioner can afford to ignore is “the law governing lawyers.” Although the changes occurring in 2003 were less sweeping than in the immediately preceding years, they are crucial to an attorney who might cross state lines to assist a client, or practice in a state requiring corporate counsel to prevent or mitigate economic harms irrespective of the duty of confidentiality. Meanwhile, the

219. See id.
220. See generally Spahn, supra note 2.
221. See CAL. BUS. & PROF. CODE § 6068(e)(1) (West 2003).
223. See CAL. BUS. & PROF. CODE § 6068(e)(2).
four new advisory opinions issued by the Standing Committee on Professional Responsibility and Conduct shed additional light not only on the complexities of confidentiality requirements in the corporate environment, but also on issues as universal as responding to informal requests for legal advice, and as specific as the duties of attorneys who provide information to the public at large or engage in political activism. No citizen, much less an attorney, can fall back on the non-excuse of ignorance of the law. Both practically and ethically, the solution for attorneys is never to ignore the newest "laws of lawyering" in the first place.