

# **ALASKA BAR ASSOCIATION**

## **ETHICS OPINION NO. 2019-1**

### **OBTAINING CONFIDENTIAL INFORMATION**

The Committee has been asked to provide an opinion about a lawyer’s professional responsibility when offered evidence from a third party where such evidence is subject to confidentiality obligations, and where the third party requests payment for delivery of that evidence.

#### **SUMMARY OF OPINION**

A lawyer may not solicit or accept evidence from a person if he or she knows or reasonably should know that doing so violates the legal rights of a third person, which may include obtaining evidence in violation of confidentiality obligations. If obtaining the evidence violates the legal rights of a third person, it follows that the lawyer also may not pay for obtaining such evidence.

#### **DISCUSSION**

##### **I. Facts**

In the hypothetical facts presented to the Committee, a consultant approached a lawyer and offered to provide certain confidential information that would be helpful to the lawyer’s client. The consultant had obtained this information in connection with a prior engagement in which the lawyer represented a party opposing the consultant’s client. The consultant was subject to a duty to maintain the confidence of the information pursuant to a written confidentiality agreement. The consultant requested a sizable monetary payment for delivery of this information to the lawyer. The lawyer knew the information was subject to the confidentiality agreement, and proceeded to pay the consultant for the information.

##### **II. Analysis**

The conduct at issue implicates Rule 4.4(a) (“Respect for the Rights of Third Persons”), Rule 3.4 (“Fairness to Opposing Party and Counsel”), and Rule 8.4 (“Misconduct”).

Rule 4.4(a) provides that, “[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third person].” The

Commentary goes on to note that, while a lawyer is expected and encouraged to be a zealous advocate for her or his client, the lawyer may not disregard the rights of third parties and must adhere to legal restrictions on methods of obtaining evidence. For example, a lawyer may not receive and use statutorily confidential documents that the lawyer is not authorized to have.<sup>1</sup> In the hypothetical facts provided here, irrespective of any payment requested or made, disclosure of the requested documents may well violate the terms of the confidentiality agreement and therefore violate the rights of the counterparty to that agreement.<sup>2</sup> The lawyer may not use methods of obtaining evidence that violate the legal rights of the counterparty to that agreement. “Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by . . . [an] agent of the opposing person, the receiving lawyer must not accept the information.”<sup>3</sup>

In Opinion 06-440, the ABA’s Standing Committee on Ethics and Professional Responsibility opined that a lawyer receiving confidential materials that were sent intentionally but without authorization was not required to notify the other party or that party’s lawyer in order to comply with Rule 4.4(b), and that determining whether any action was required by the lawyer would be dictated by substantive legal considerations.<sup>4</sup> Rule 4.4(b) relates to the receipt of information that was “inadvertently sent” and therefore does not appear to apply to the hypothetical facts present to the Committee, in which the information was intentionally delivered. Further, the remedy contemplated by Rule 4.4(b) is prompt notification to the sender, but no automatic restriction on the use of the information. By contrast, Rule 4.4(a) prohibits the lawyer from using certain methods to

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<sup>1</sup> See Pa. Ethics Op. 93-135 (1993) (applying Rule 4.4 and concluding that an attorney may not have an expert witness review confidential psychiatric records which happened to be housed at the institution where the expert worked).

<sup>2</sup> Whether or not any particular conduct constitutes a violation of the rights of the counterparty – for example, intentional interference with contractual relations – is an issue of substantive law that is beyond the scope of this opinion. The Committee notes that this may be a highly fact-dependent inquiry. See generally Maura I. Strassberg, *An Ethical Rabbit Hole: Model Rule 4.4, Intentional Interference with Former Employee Non-Disclosure Agreements and the Threat of Disqualification, Part II*, 90 Neb. L. Rev. 141 (2011).

<sup>3</sup> Restatement (Third) of the Law Governing Lawyers § 60 cmt.m.

<sup>4</sup> ABA Ethics Op. 06-440 (2006) at 2-3.

obtain the evidence at all.<sup>5</sup> The stakes are considerable. If the attorney obtains information through a means deemed to violate the rights of a third party, the attorney may be subject to disciplinary sanctions. To the extent that there is some question about whether the methods of obtaining the evidence are appropriate, the attorney would be well-advised to seek guidance from Bar Counsel.

Rule 3.4(b) provides that “[a] lawyer shall not . . . offer an inducement to a witness that is prohibited by law.” The Commentary to the rule goes on to state that, while it is not improper to pay a witness’s expenses or to compensate an expert witness, “[t]he common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying . . . .” While the hypothetical facts at issue here relate to the consultant’s delivery of physical evidence, it is conceivable (and perhaps inevitable) that the consultant would also be asked to testify in this matter – particularly if and when the consultant’s disclosure of the confidential documents becomes known. Rule 3.4(b) is concerned, in significant part, with the risk that payments to a fact witness may quickly lead to improper inducements to encourage favorable testimony in return for that payment.<sup>6</sup> The consultant’s demand for a sizable payment, particularly to the extent it exceeds the reasonable cost of gathering the information, runs the risk of blurring the line between the collection of evidence and buying favorable testimony.

The hazards associated with this type of evidence-gathering were explored in *In re Sablowsky*.<sup>7</sup> In that case, Mr. Sablowsky had obtained the identity of a favorable witness for a medical malpractice case being brought by other attorneys. Mr. Sablowsky was a

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<sup>5</sup> The Committee takes no view on whether or not the lawyer’s purchase of these documents under the hypothetical facts presented would be wrongful, but simply notes that the legal rights of the third party could be deemed to have been violated and that significant consequences may follow. *See id.* n.8 (“If the sender of privileged or confidential material has engaged in tortious or criminal conduct, a lawyer who receives and uses the materials may be subject to sanction by a court.”).

<sup>6</sup> *See, e.g., Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass’n*, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994) (finding that Florida’s analog to Rule 3.4(b) “clearly prohibit[s] a lawyer from paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the integrity of the justice system and undermines the proper administration of justice. Quite simply, a witness has the solemn and fundamental duty to tell the truth. He or she should not be paid a fee for doing so.”).

<sup>7</sup> 529 A.2d 289 (D.C. App. 1987).

lawyer and offered to be a medical malpractice consultant in the case and informed the other attorneys that he had information about a helpful eyewitness, but indicated that he would only provide the name of the witness if the attorneys paid him \$25,000.<sup>8</sup> While the case involved a lawyer's efforts to *sell* evidence, the court explained that both sides of the transaction were deeply problematic:

To permit one attorney to sell information is to permit another to buy it; thus, were the profession to countenance the selling of evidence (other than expert opinion evidence for a fee), it would also endorse an attorney's decision, indeed obligation, to further a client's interests by purchasing harmful factual evidence, in order to assure the seller's silence. The buying and selling of factual evidence would thus needlessly cause a cloud on evidence ultimately presented in court, would threaten rational and fair settlements, and would bring the judicial process and its practitioners into even greater disrepute than they already suffer. Because a market in factual evidence would hinder the discovery of truth within the justice system and often taint the outcome of disputes, whether litigated or not, the division unanimously concludes that attorneys, as officers of the courts, may not participate in such a market either as buyers or as sellers.<sup>9</sup>

The Committee is aware that the New York State Bar Association issued an opinion stating that, generally speaking, a lawyer may pay for physical evidence, subject to certain limitations.<sup>10</sup> One of the limitations highlighted in that opinion is the "foreseeable" risk that the person providing the physical evidence may be called as a witness, and that the payment at issue may be deemed to be an improper effort to circumvent the restrictions of Rule 3.4(b).<sup>11</sup> In the hypothetical facts presented to the Committee, the risk that the seller would be called as a witness appears to be more than simply foreseeable, and the size of the payment requested suggest that the lawyer would be purchasing more than just the information held by the consultant.

Ultimately, whether or not the conduct described above would violate Rules 4.4(a) and 3.4(b) (and thereby Rule 8.4(a) as well) is dependent on facts not known to the Committee and not included in the hypothetical provided. Certainly, however, this type of

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<sup>8</sup> *See id.* at 292.

<sup>9</sup> *Id.* at 293 (internal citation omitted).

<sup>10</sup> New York State Bar Ass'n Ethics Op. 997 (2014).

<sup>11</sup> *See id.* The facts presented in that opinion involved a storeowner offering to sell a surveillance tape that recorded an automobile accident. This type of objective physical evidence may entail a lower risk that the seller would be called as a witness.

conduct carries significant risks of violating third parties' rights and crossing the line from evidence-gathering to "buying" favorable testimony.<sup>12</sup>

### **III. Conclusion**

In all situations involving confidential information of a third party, a lawyer must remember that ethical issues should be "resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."<sup>13</sup> To the extent that the information held by the consultant is protected by a confidentiality agreement, obtaining that information in violation of that contractual agreement may well violate the legal rights of a third person. Purchasing that same information raises the additional specter that the lawyer is improperly influencing anticipated testimony from the seller.

Approved by Alaska Bar Association Ethics Committee on January 23, 2019.

Adopted by the Board of Governors on January 31, 2019.

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<sup>12</sup> Additional concerns exist if the consultant was a retained expert of the opposing party, either for testimonial purposes or as a consulting expert. The Committee has previously opined that *ex parte* contacts should not be made with expert witnesses retained by an opposing counsel or party. See Ethics Opinion No. 85-2 (Ex Parte Communication with Experts Retained by Opposing Counsel). In the facts presented, it appears the consultant was not retained as an expert by an opposing party. If the consultant had been a retained expert, the concerns in Ethics Op. No. 85-2 would apply as well. If the consultant was a retained testifying expert, the information purchased may have been subject to the attorney work-product doctrine. See Fed. R. Civ. P. 26(b)(4)(C). In either scenario, the lawyer may be deemed to have improperly gained confidential information in violation of the rights of the opposing party.

<sup>13</sup> ARPC Preamble.