

Uber Policy Calls For Refresher On ABA Confidentiality Rules

By **Paul Boehm**

For most lawyers, getting work done while traveling is a necessary part of the job. Protecting confidential information while simultaneously navigating the highways, skyways and byways — elbow to elbow with, and often within earshot of, fellow voyagers — requires the highest standard of care.

A new reason to be careful has emerged. Uber Technologies Inc. recently announced that, for safety reasons, its drivers may audio-record passenger rides as part of the app's standard terms of service.



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Uber's announcement calls for renewed attention to the American Bar Association's Model Rule 1.6 — which requires that lawyers vigorously protect confidential information of clients — and specifically for caution in settings that some might previously have considered private.

The ABA Rules

The ABA rules are clear when it comes to client confidentiality. ABA Model Rule 1.6(a) instructs that 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)."

The rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."^[1] Confidential information includes information protected by Rule 1.6(a) with respect to current clients; information protected by Rule 1.9(c) with respect to former clients; and information protected by Rule 1.18(b) with respect to prospective clients.

Unless one of the exceptions to Rule 1.6(a) applies, a lawyer cannot comment publicly about any information related to a representation. He or she cannot reveal the client's identity.^[2]

Accordingly, the scope of protection afforded by the rule is broader than the attorney-client privilege. As the ABA has observed: "The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge."^[3]

According to the West Virginia Supreme Court of Appeals' opinion in *Lawyer Disciplinary Board v. McGraw*:

Unlike the evidentiary attorney-client privilege ... a lawyer's ethical duty of confidentiality under Rule 1.6 of the Rules of Professional Conduct, applies to all information relating to representation of a client, protecting more than just "confidences" or "secrets" of a client. 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.^[4]

The risk to client confidentiality is heightened in a world where recording technologies are ubiquitous. A lawyer's recorded conversation about confidential information might not only

implicate confidentiality, but also a lawyer's duties under other ABA Rules.

Rule 3.6, for instance, bars lawyers from making "an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The ABA recently reminded lawyers that confidentiality obligations also apply to online blogging, a practice some attorneys use for business development.[5]

ABA rules together with ABA ethics opinions also address cell phone use, portable devices, blogs, Listservs, social media, webinars, email, cloud storage and similar traps for the unwary, inadvertent or careless lawyer. Many state bar association opinions also have addressed these issues. Remember that even though a court filing may disclose confidential information, that information remains confidential and is not generally known,[6] and that the use of your client's name alone can lead to bad results for your client and for you.

What to Do

ABA Rule 1.6 (c) requires that a lawyer act competently to safeguard confidential information. The rule requires that a lawyer make reasonable efforts to prevent the inadvertent disclosure or use of confidential information; the unauthorized disclosure or use of confidential information; or the unauthorized access to confidential information.

The rule extends not only to lawyers, but also to "other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." [7] Violations of the ethical rules can result in sanctions, including suspension from the practice of law and legal malpractice litigation.

Uber's decision to permit drivers to create app-based audio recordings during passenger rides as part of the app's standard terms of service is another reminder for lawyers to observe the highest standard of care in protecting client confidentiality wherever they are — in restaurants,[8] at sporting events, in elevators, on public transportation, walking down the street, while sharing office space, or when traveling in a taxi or Uber.[9] The same rules apply even in your own law firm's cafeteria if individuals from outside the firm dine there as well.

The best strategy for lawyers getting work done while on the road is the most obvious one: Be aware of your surroundings and know your ethical obligations; reserve your sensitive conversations, even those spoken in code, for another time. When possible, use private meeting spaces to discuss confidential client issues that require urgent communication. If you feel the inescapable itch to pull out your phone while traveling, use it to set up calls for later in the day, send emails or take notes on matters that must be communicated to the client or the legal team at a later time, but not to discuss sensitive information.

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[1] Model Rules of Professional Conduct R. 1.6 cmt. [3] (2019).

[2] See Wis. Op. EF-17-02 (2017) (“a client’s identify, as well as a former client’s identity, is information protected by [the Rule].”)

[3] ABA Formal Op. 480 (Confidentiality Obligations for Lawyer Blogging and Other Public Commentary”). See also ABA Formal Op. 479 (2017).

[4] Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850 (W.Va. 1995).

[5] See ABA Formal Opinion 480 (Mar. 6, 2018).

[6] See ABA Formal Op. 480.

[7] See ABA Model Rules of Professional Conduct 1.6(c), 5.1 & 5.3.

[8] At least one case suggests that, if confidential information is disclosed within earshot of third parties in a restaurant, the attorney-client privilege may be waived. In *MacFarlane v. Fivespice LLC*, No. 3:16-CV-01721-HZ, 2017 WL 1758053 (D. Or. May 4, 2017), the court recognized that a lawyer-client conversation in a restaurant could have waived the privilege with respect to certain communications, but concluded that there was no waiver since the area around the booth where the conversation took place was empty at the time.

[9] See New York State Bar Ass’n Ethics Op. 1102 (2016) (in-house attorneys who share space with non-legal staff must make certain their conversations regarding clients are not overheard).