

# Fighting Abuse of Confidentiality Orders

BY ROY SIMON

If you litigate in areas like product liability, employment discrimination, or breach of employment contracts, odds are that at least some of your cases are covered by confidentiality orders. Those orders typically provide that documents and information obtained in a case may be used only for purposes of the case, in which they were produced, and not in any other case or for any other purpose. Confidentiality orders ordinarily serve legitimate purposes. For example, confidentiality orders prevent competitors and the public from seeing or using information about proprietary product designs and production methods or about sexual harassment embarrassing to both the victim and the harasser, or about salaries, bonuses, executive perks, and other employment benefits whose disclosure might create jealousy and infighting within a defendant corporation.

However, confidentiality orders sometimes facilitate discovery abuse. If you litigate multiple cases against the same defendant, the defendant may occasionally tell you in one case that crucial documents don't exist but then produce the very same "nonexistent" documents (usually through other counsel) in another case. For example, suppose you have two clients, Client A and Client B, who have each sued the same defendant in federal court for employment discrimination. (I'll call Client A's case "Case A" and Client B's case "Case B".) In both cases, confidentiality orders prohibit you from using any documents outside the case. Suppose further that in Case A, you requested some key documents but the defendant's lawyer said the documents were irretrievably lost (or never existed). Now, the defendant in Case A has moved for summary judgment, and you don't have the documents that may help you fight the motion. But while the summary judgment motion is pending in Case A, the defendant's lawyer in Case B produces the very documents you are seeking in Case A (or information proving that they exist). How can you fight the defendant's abuse of the confidentiality order without violating the confidentiality order? May you ethically attempt to obtain the "missing" documents for the benefit of your client in Case A? If not, do you have a conflict of interest that requires you to withdraw from representing Client A? This article discusses these dilemmas.

## Is the Information a Confidence or Secret?

The starting place for analyzing this situation is to ask whether the information you have acquired in Case B about the existence of the documents in question is either a "confidence" or a "secret." This is a crucial inquiry because, except for restrictions imposed by court orders or by law (such as the law of fiduciary obligations or the law of agency), the only restrictions on a lawyer's use of information are found in DR 4101. That rule begins by defining the terms "confidence" and "secret" as follows:

- A. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client

has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Subparagraph (B) of DR 4101 then restricts a lawyer's ability to use confidences or secrets as follows:

- B. Except when permitted under DR 4101(C), a lawyer shall not knowingly:
  - 1. Reveal a confidence or secret of a client.
  - 2. Use a confidence or secret of a client to the disadvantage of the client.
  - 3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

The information you have learned about the nonexistent documents is apparently not a "confidence" (*i.e.*, it is not protected by the attorney client privilege) because you did not learn it directly from your clients (or their agents). But it may be a "secret" of Client B, because the information was "gained in the professional relationship" with Client B. (In my view, the phrase "gained in the professional relationship" means both "during" and "because of" the relationship.)

Here, you learned the information about the missing documents during and because of your attorney client relationship with Client B, so the information will be a "secret" of Client B if it meets the remaining criteria of DR 4101(A). (The information is not a secret of Client A. You gained the information "during" your relationship with Client A but not "because of" your attorney client relationship with Client A.)

Because the information was gained in the professional relationship with Client B, it will be a "secret" if Client B has asked you (or you have promised) to keep the information "inviolate," or if using or disclosing the information would be "embarrassing" or would be likely to be "detrimental" to Client B.

In some circumstances, the disclosure of the information in question might be "embarrassing" or "detrimental" to Client B. For example: in an employment discrimination case, suppose Client B is a female employee who slept with the boss to keep her job. You may need those records to bolster Client A's case, but surely the disclosure of that information would be "embarrassing" to Client B. As for the "detrimental" branch of DR 4101(A), disclosure would be likely to be detrimental to Client B if, for example, the defendant corporation has a fixed, limited budget for settling all of the cases against it, or if the defendant has limited resources, or if the claims exceed the amount of the defendant's insurance.

In any of those situations, a larger settlement for Client A might mean a smaller settlement for Client B; or the defendant's management might blame Client B for helping Client A obtain access to the documents in question, and might therefore be less cooperative in Client B's case, or less generous to Client B in settlement. If these or other "detrimental" consequences would be likely to result from the disclosure of information, then DR 4101 (B) (1) says that you must not knowingly "reveal" the information absent an exception in DR 4101(C) (3); and DR 4101 (B) (3) says that you must not knowingly use the secret "for the advantage of... a third person" (Client A) unless Client B "consents after full disclosure." In this context, "full disclosure" would include advice to Client B about the realistically possible adverse ramifications of

using the information for the benefit of Client A. Likewise, you could “reveal” the information to the court or to opposing counsel in Client A’s case if Client B consents after “full disclosure,” as permitted by DR 4101(C) (1). I think the identical disclosures would satisfy the “full disclosure” mandate of both DR 4101 (B) (3) and DR 4101(C)(1).

In sum, if you conclude that the information in question here is not “secret,” then you may freely use it for the benefit of Client A, but if you conclude that the information is a “secret,” then you may not use or reveal it unless you obtain the consent of Client B after “full disclosure.” If the information is a “secret” and Client B will not consent to let you use or reveal it to help Client A, then you may not use it or reveal it unless some other provision of the Code of Professional Responsibility trumps DR 4101.

The confidentiality obligations of DR 4101 are reinforced by DR 7101(A)(3), which provides that a lawyer “shall not intentionally ... [p]rejudice or damage the client during the course of the professional relationship, except as required under DR 7102(B) or as authorized by DR 2110.” Therefore, even if the information about the documents is a secret, we must analyze the situation under DR 7102 (B).

### **May You Reveal a Fraud on the Tribunal?**

Recall that in Case A, the defendant has filed a motion for summary judgment. The papers that defendant has submitted in support of summary judgment obviously do not mention the documents that you requested in Case A but that defendant claims do not exist. However, you now know from your work in Case B that the documents do exist. Thus, the defendant’s failure to produce the documents in Case A may amount to a “fraud on the tribunal.” A lawyer’s obligations upon learning about a fraud on a tribunal are governed by DR 7102 (B), which provides as follows:

- B. A lawyer who receives information clearly establishing that:
  - 1. The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal... shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.
  - 2. A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.

Here, the fraud (if any) was not committed by either of your clients, but rather by the defendant in Case A. The fraud was to withhold documents called for by your discovery request, and to deny that these documents exist, when in fact they do exist. If you have “information clearly establishing” that the defendant in Case A has perpetrated a fraud on the tribunal presiding over Case A by failing to mention the documents in the summary judgment papers, then DR 7102(B)(2) provides that you “shall” reveal the fraud to the tribunal. This obligation applies even if the information is protected as a secret under DR 4101.

Unfortunately, there is one gap in this analysis. The “confidentiality order” in our hypothetical Case B was issued by a federal court. Does a provision of the New York Code of Professional Responsibility override the terms of a federal court order? Since the federal courts also follow the Code, I think the answer is probably “yes.” But even if DR 7102 (B) (2) does not automatically trump the court’s

confidentiality order in Case B, DR 7106 (A) suggests that you may ethically ask the court in Case B to relieve you from the restrictions of the confidentiality orders. DR 7106 (A) provides that a lawyer “shall not disregard or advise the client to disregard... a ruling of a tribunal made in the course of a proceeding,” but a lawyer “may take appropriate steps in good faith to test the validity of such... ruling.” I think you would be acting in “good faith” within the meaning of DR 7106 (A) if you advised the court in Case B that you believe the defendant has used the cloak of the confidentiality order to help it commit a fraud in Case A, and you would like the court to permit you to “reveal the fraud to the tribunal” in Case A in order to comply with your obligations under DR 7102(B)(2). (If the “confidentiality order” were merely by agreement or stipulation between you and counsel for the defendant, then DR 7102(B)(2) would clearly take precedence and you would not need the permission of Court B to reveal the fraud to the tribunal in Case A.)

If DR 7102(B)(2) does not automatically trump the confidentiality order, and if the court presiding over Case B will not permit you to reveal the fraud to the tribunal in Case A in order to comply with your obligations under DR 7102(B)(2), then you may have a serious conflict of interest. I will now analyze the conflict question.

### **Do You Have a Conflict of Interest?**

If you are prohibited from revealing to the court in Case A that the defendant has deliberately withheld and concealed relevant, unprivileged documents in Case A, then you have a conflict of interest within the meaning of DR 5105(B) of the New York Code of Professional Responsibility. The conflict exists because your exercise of independent professional judgment on behalf of your client in Case A will be or is likely to be adversely affected by your representation of Client B. The root source of the conflict is your fear of violating the confidentiality order in Case B. An attorney unfettered by the confidentiality order might use the information you have acquired to redraft the document request in Case A in another effort to obtain the documents, or might be more aggressive in seeking the documents that the defendant says do not exist, or might do other things that you are not permitted to do to obtain those documents. Because you cannot do that until the confidentiality order is modified, you have a conflict.

However, courts always retain power to modify their confidentiality orders, and I have already suggested that DR 7106 (A) would permit you to ask the court in Case B to modify its confidentiality order to permit you to use the documents in Case A (or at least to reveal the existence of the documents to the court in Case A). I think you could seek this permission from the court even if Client B objects, because seeking the court’s modification would be a reasonable, good faith step on the path to revealing the fraud to Court B in compliance with your obligations under DR 7102 (B)(2), and each step on that path should fall within the mandate of DR 7102(B)(2). Likewise, even if Client B objects, I believe you could ask the defendant’s counsel in Case B to stipulate to a modification of the confidentiality order to permit you to use the Case B documents for the benefit of your client in Case A. Counsel might stipulate to the modification to avoid the embarrassment of explaining to the court that the defendant’s counsel in a similar case has denied that the documents exist. If counsel agrees to the stipulation, the court in Case B will almost certainly grant your request for modification. A sufficient modification of the confidentiality order in Case B would apparently resolve your dilemma and cure the conflict that you face in Case A.

## **Asking The Court To Order The Production of Documents**

Even if the court or counsel in Case B will not agree to modify the confidentiality order to permit you to use the documents in Case A, you may still escape the conflict if you already have the right under the confidentiality order – or if the court in Case B grants you the right – to advise the court in Case A that you believe the defendant has not fully complied with your discovery requests. If the court in Case B, or the confidentiality order by its own terms, would allow you to advise the court in Case A of the defendant’s fraudulent noncompliance with your discovery requests, then the court in Case A might order the defendant to produce the documents in question. That would alleviate your conflict. Furthermore, because DR 7102 (B) (2) requires you to reveal a fraud on the tribunal whether or not the information establishing the fraud is protected as a confidence or secret, I do not believe that you need Client B’s informed consent to reveal the fraud to the tribunal – and (as discussed above) you also do not need Client B’s consent if the information about the documents is not a “secret” within the meaning of DR 4101.

If the information about the documents is a “secret” and you do not succeed in obtaining a modification of the confidentiality order, then you may have an irresolvable conflict. At a minimum, you could not continue to represent both Client A and Client B simultaneously without complying with DR 5105(C). That rule has two prongs. The first prong of DR 5105(C) is the “disinterested lawyer” test. If you know of documents that are important to Client A’s case but you are prohibited from using those documents on behalf of Client A or revealing their existence to the court in Case A, then I doubt that a disinterested lawyer would believe you can continue to competently represent Client A.

In that case, you would fail the “disinterested lawyer” test. As the second paragraph of EC 516 says, “If a disinterested lawyer would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client’s consent.”

## **Applying The Full Disclosure Prong Of DR 5105(C)**

Even if a disinterested lawyer would approve of the simultaneous representation, you would still need to satisfy the second prong of DR 5105(C), which requires you to obtain Client A’s consent to the conflict after full disclosure. This will very likely be impossible because you cannot fully disclose the nature of your conflict. What would you say to comply with the “full disclosure” provision of DR 5105(C)? You could not say to Client A, “The defendant in your case did not produce some crucial documents in discovery and has denied that they exist, but in another case against the same defendant I have learned that they do exist. Unfortunately, I am prohibited from using either the documents or my knowledge of those documents to advance your interests.” A disclosure like that would reveal the very information that the confidentiality order prohibits you from revealing. Thus, you will be in the situation described in EC 516:

[T]here may be some circumstances in which is it impossible to make the disclosure necessary to obtain consent, such as when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision....

Here, the confidentiality order may prohibit you from obtaining Client A’s informed consent to your conflicted representation. If you have a conflict but cannot obtain informed consent from each client, then

your continued representation of both clients would violate DR 5105(B) and you would be required to withdraw from representing Client A in order to avoid that violation – see DR 2110(B)(2) (withdrawal is “mandatory” where “continued employment will result in violation of a Disciplinary Rule”).

In sum, you may not continue to represent both Client A and Client B simultaneously in these matters unless you succeed in gaining the right to use the missing documents on Client A’s behalf.

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