

Your Court Street Lawyer's Quick Reference Guide

I got “Bloomed”!

(Don't let your client say this about you)

Keeping Client Confidences and Loyalties after
the attorney-client relationship has terminated

By Richard A. Klass, Esq.



Richard A. Klass, Esq. maintains a law firm engaged in civil litigation in Brooklyn, New York. He may be reached by e-mail at richklass@courtstreetlaw.com or by phone at (718) COURT●ST with any questions. Prior results do not guarantee a similar outcome.

This book is designed for general information only. The information presented here should neither be construed to be formal legal advice nor the formation of a lawyer/client relationship.

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BIO

Richard A. Klass is the quintessential "Court Street lawyer," as defined by *The New York Times*, a "street-smart sharpie with verve, hustle and a striver's charisma." Practicing law much like a critical care doctor functions, Klass is the lawyer clients appreciate when the issue is so vital. Practicing primarily in the areas of commercial litigation, debt collection and enforcement of judgments, legal malpractice, and real estate litigation, his firm also represents clients in bankruptcy, civil appeals, and federal court litigation. Mr. Klass lectures and writes extensively for lawyers and industry professionals.

Mr. Klass serves as an Officer of the Brooklyn Bar Association, Member of the Grievance Committee for the Appellate Division, Second Department, Former Chair of the General Practice Section of the New York State Bar Association, Co-Editor of the New York State Bar Association's General Practice Section *One on One* Publication, and an Arbitrator, Small Claims Part of the Civil Court of the City of New York, County of Kings. He also served as a representative to the Statewide Special Counsel for the Supreme Court's Commercial Division. Mr. Klass also serves as a Fee Arbitrator in the Part 137 Attorney-Client Fee Dispute Program. He has been selected for the New York Super Lawyers List.

In 1989, Mr. Klass received his Bachelor of Arts at Hofstra University and his Juris Doctorate at New York Law School in 1992. He was the Recipient of the American Jurisprudence Award in Conflict of Laws. Mr. Klass is admitted to the following jurisdictions: State of New York (1992); State of New Jersey (1993); U.S. District Court for the Eastern District of New York (1992); U.S. District

Court for the Southern District of New York (1992); U.S. District Court for the District of New Jersey (1993); U.S. Court of Appeals for the Second Circuit (1999); and the U.S. Supreme Court (1997).

Richard Klass has been a formative voice within New York law circles both for the high standards of his work as well as his extensive writings, lectures, and appearances in the media. He reaches an audience of lawyers and non-lawyers equally through publications which include his quarterly newsletter, *Law Currents* and his blogs *Law Currents* and *The Legal Malpractice Blog, New York*. His books include *I Got Bloomed: Keeping Client Confidences and Loyalties* (2018), *Killing the "Zombies": Recent Changes to New York State's Foreclosure Laws* (published 2017), *Attorney's Liens and Legal Fee Enforcement* (2015), *Retention and Withdrawal of Counsel: a guide for attorneys* (2015), and *Successfully Defending Your Credit Card Lawsuit* (2013). The newsletter and blog, *Law Currents*, with tens of thousands of readers combined, is particularly popular. Written in a style that appeals to nearly anyone who likes a good story, this two-page illustrated quarterly features entertaining and informative case studies written in plain English.

Richard A. Klass, Esq.

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Keeping Client Confidences and Loyalties after the attorney-client relationship has terminated

There is nothing more sacrosanct in the relationship between a client and his attorney than that of the joint duties owed by the attorney to his client to keep his confidences and remain loyal. By virtue of these duties owed by the attorney, the client is able to completely and candidly communicate with his attorney without the threat of having his confidential information revealed to anyone else (with few exceptions). When the attorney has completed the legal matter at hand for the client, it is also important to recognize that these duties to keep client confidences and be loyal continue through the termination of representation. Thus, the duty to protect confidential information of an attorney's client is owed from the initial consultation with the client to the conclusion of the legal matter and, further, to the rest of the attorney's life.

They Got "Bloomed"

The year 2017 will be remembered as the year that Hollywood was forced to deal with its reputation for being sleazy; hopefully, the days of the typical Hollywood casting couch abuses will end. The allegations of sexual assault by many women against film producer Harvey Weinstein has now brought about the "Weinstein effect," where many people now feel empowered to reveal abuse and harassment committed by celebrities and politicians.

Lisa Bloom and Harvey Weinstein:

One of the attorneys advising Harvey Weinstein concerning the sexual assault allegations of several women was Lisa Bloom, daughter of famed women's legal advocate Gloria Allred. In a statement to BuzzFeed News when she ceased advising him, Bloom allegedly said:

"All I can say is, from my perspective, I thought 'here is my chance to get to the root of the problem from the inside ... and to get a guy to handle this thing in a different way.'"

"I can see that my just being associated with this was a mistake."

In the article in BuzzFeed News on October 14, 2017, Claudia Rosenbaum wrote: "In fact, it got worse, particularly from an attorney-client perspective. The next day, during an appearance on Good Morning America, she appeared to

acknowledge that Weinstein had engaged in illegal behavior."

"It's gross, yeah," Bloom told GMA. "I'm working with a guy who has behaved badly over the years, who is genuinely remorseful, who says, you know, 'I have caused a lot of pain.'"

In November 2017, Bloom appeared on "The View" and admitted that her judgment about advising Harvey Weinstein was clouded because of a miniseries she was developing with his company. She stated: "When I was approached ... I was thrilled. It's not a conflict legally for an attorney to have a business deal with a client. Ethically, it's not an issue."

Lisa Bloom and Kathy Griffin:

At the same time that Bloom was dealing with fall-out from her representation of Harvey Weinstein, she was also dealing with another public relations crisis – Kathy Griffin.

According to the *NY Post*, *Page Six*, the situation was allegedly as follows:

Comedian Kathy Griffin displayed awful humor by being photographed with a fake bloody head of President Donald Trump. She retained Bloom to represent her at a press conference about the controversy. Apparently, there was a breakdown of their attorney-client relationship resulting in a tweet from Griffin to Bloom, telling her to "pls stop calling me."

In her own Twitter response, Bloom revealed that she worked on statements to be made at the press conference but "Kathy then during the press conference spontaneously chose to put aside the notes we had worked so hard on together. . . She's the only client I've ever had who chose to extemporize at a press conference rather than to read from notes we prepared in advance."

Bloom also denied Griffin's claim that she repeatedly calling Griffin: "Really? Bombarding? Please show me the call logs then. I sent one text to Kathy in the last three months and placed one call to Randy [Griffin's boyfriend] recently."

Griffin then had her own response when asked about her experience with Bloom:

"If you want my Lisa Bloom statement, anybody, OK, here it is. Yes, I got Bloomed! Yes, I did not have a good experiences with her. . . I'm not gonna sue Lisa Bloom. I don't think Lisa Bloom should be shot, like some people want to shoot me. So, there's my f—cking statement."¹

¹"Lisa Bloom says advising Weinstein 'was a mistake'"; *Page Six*; by Christine Burroni; October 14, 2017; <https://pagesix.com/2017/10/14/lisa-bloom-says-advising-weinstein-was-a-mistake/>

"Kathy Griffin severs ties with Lisa Bloom"; *Page Six*; by Yaron Steinbuch; October 23, 2017; <https://pagesix.com/2017/10/23/kathy-griffin-severs-ties-with-lisa-bloom/>

"Kathy Griffin slams Lisa Bloom and 'Spineless Heiress' Anderson Cooper"; *Page Six*; by Francesca Bacardi; October 24, 2017; <https://pagesix.com/2017/10/24/kathy-griffin-slams-lisa-bloom-and-spineless-heiress-anderson-cooper/>

Duty to Preserve Confidential Information of a Client:

The duty of the attorney to preserve the confidential communications of his or her client continues after the relationship with a client is terminated, and the attorney therefore must not use, or make available for use, any information obtained through that relationship against such a former client. *1B Carmody-Wait 2d § 3:385*

In *Swidler & Berlin v United States*, 524 US 399, 403, 118 S Ct 2081, 2084, 141 L Ed 2d 379 [1998], Chief Justice Rehnquist held that the attorney-client privilege applied to confidential information even after the client passed away.

The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888). The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn, supra*, at 389, 101 S.Ct. at 682.

Rule of Professional Conduct 1.6 provides that:

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

"Lisa Bloom: Weinstein-produced miniseries 'clouded' my judgment"; *Page Six*; by Francesca Bacardi; November 10, 2017; <https://pagesix.com/2017/11/10/lisa-bloom-weinstein-produced-miniseries-clouded-my-judgment/>

(1) the client gives informed consent, as defined in Rule 1.0(j)²;

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another

² “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.”

lawyer associated with the lawyer's firm or the law firm;

(5)(i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

Rule of Professional Conduct 1.9 provides, in relevant part, that:

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

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Civil Practice Law and Rules (CPLR) 4503(a) provides:

1. Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action,

disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

In *New York State Bar Association Committee on Professional Ethics Opinion 1057* (6/5/15), the issue was whether a client's confidential information could be revealed when the attorney is withdrawing from representation in court proceedings:

The nature and extent of information about a client that a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6. The lawyer should also consider (1) whether withdrawal is mandatory or permissive; (2) whether withdrawal may be accomplished without significant disclosure to the court; (3) whether disclosure is ordered by the court; (4) the circumstances under which the information is to be disclosed (e.g., in open court or in camera); and (5) whether the client consents to the disclosure. The lawyer may test on appeal the validity of a court's order to disclose. Client documents filed with another court in other proceedings will be deemed confidential unless their existence is generally known in the community or in the legal profession.

Duty to Be Loyal to the Client:

An attorney owes fidelity to his client, he owes his profession the duty not to dishonor it and he owes the administration of justice the duty not to bring it into disrepute. See, *Packer v Rapoport*, 88 NYS2d 118, 120 [Sup Ct 1949], *rev'd*, 275 AD 820 [1st Dept 1949], and *aff'd sub nom. In re Pabst's Will*,

277 AD 1116 [1st Dept 1950], and *aff'd sub nom. In re Pabst's Will*, 278 AD 649 [1st Dept 1951]

The duty of loyalty to a former client is broader than the attorney-client privilege and an attorney is not free to attack a former client with respect to the subject matter of the earlier representation even if the information used in the attack comes from sources other than the former client. (*People v Liuzzo*, 167 AD2d 963 [4 Dept. 1990]; see *Wise v Consolidated Edison Co. of N.Y.*, 282 AD2d 335 [1st Dept 2001] ["The ethical obligation to maintain the confidences and secrets of clients and former clients is broader than the attorney-client privilege, and exists without regard to the nature or source of information or the fact that others share the knowledge" (internal quotation marks omitted)], *lv denied* 96 NY2d 717 [2001].)

Avoiding Conflicts of Interest:

According to the General Principles underlying the Rules of Professional Responsibility, "loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client."

"The lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. "

Rule of Professional Conduct 1.7 provides that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

- (1) the representation will involve the lawyer in representing differing interests; or
- (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.³

The Court of Appeals stated, in *Greene v Greene*, 47 NY2d 447, 451 [1979], "It is a long-standing precept of the legal profession that an attorney is

³ (e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

duty bound to pursue his client's interests diligently and vigorously within the limits of the law. For this reason, a lawyer may not undertake representation where his independent professional judgment is likely to be impaired by extraneous considerations. Thus, attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests (see, e. g., *Cardinale v. Golinello*, 43 N.Y.2d 288, 296, 401 N.Y.S.2d 191, 195, 372 N.E.2d 26, 30; *Eisemann v. Hazard*, 218 N.Y. 155, 159, 112 N.E. 722, 723; Code of Professional Responsibility, DR 5-105). This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large."

An attorney has to be extremely careful to avoid any conflict of interest when advising a client and having a business relationship with the client at the same time.

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer's investment on behalf of a client. For these reasons, business transactions between a lawyer and client are not advisable. If a lawyer nevertheless elects to enter into a business transaction with a current client, the requirements of N.Y. Rules of Prof. Conduct, Rule 1.8(a), 22 NYCRR § 1200.0 must be met if the client and lawyer have differing interests in the transaction and the client expects the lawyer to exercise professional judgment therein for the benefit of the client. 7 N.Y. Jur. 2d Attorneys at Law § 461

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Please feel free to contact me with any questions.

— Richard A. Klass 