

ORANGE COUNTY BAR ASSOCIATION

Formal Opinion 2022-01 (Attorney Bios)

Issue: Without obtaining a client’s consent, may an attorney include on her bio or resume or in other marketing materials information about the representation of that client or even the name of the client in a listing of representative clients?

Digest: Absent informed client consent, the duty of confidentiality precludes an attorney from including on her bio or resume or in other marketing materials the names or other information about her representation of a current or former client if the listing would be embarrassing or detrimental to that client or the client requested it to be kept confidential. An attorney also may not suggest that she regularly represents a client absent that client’s informed consent. In addition, even if listing a representation would not be embarrassing or detrimental to the client, and thereby not a breach of the duty of confidentiality, an attorney still would be precluded from listing the client representation if the listing is in any way misleading.

STATEMENT OF FACTS

Attorney is preparing her bio to be included on her law firm’s website. Under the section of the resume entitled “Representative Matters,” Attorney lists the following:

1. Defended Johnny Client against pre-litigation allegations of sexual harassment in the workplace.
2. Successful appeal overturning adverse trial verdict against Client Corporation for wrongful termination and racial discrimination. *See Miller v. Longstar Corp.*, 34 Cal. App. 4th 254 (2011).
3. Closed \$2 million bond funding transaction for Acme Company.

Below the “Representative Matters” section of the bio, Attorney has a section entitled, “Representative Clients,” which shows the logos of clients she represents and/or has represented.

Attorney has neither sought nor obtained consent from any of the clients described, or from any of the “Representative Clients.”

DISCUSSION

The Duty of Confidentiality

The ethical duty of confidentiality is set forth in the State Bar Act – specifically, Business and Professions Code section 6068(e)(1), which states that it is the duty of an attorney

“[t]o maintain inviolate the confidence, and at every peril to himself or herself preserve the secrets, of his or her client.” Cal. Bus. & Prof. Code § 6068(e)(1). Rule 1.6 of the Rules of Professional Conduct states, “A lawyer shall not reveal information protected by Business & Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent,*”¹ “Informed consent” means the client or former client’s “agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably* foreseeable adverse consequences of the proposed course of conduct.” Rule 1.0.1(e).

The duty of confidentiality is broader than the attorney-client privilege, which is an evidentiary rule. *See Dietz v. Meisenheimer & Herron*, 177 Cal. App. 4th 771, 786 (2009). Whereas the attorney-client privilege covers confidential communications between a lawyer and her client, the duty of confidentiality includes “not only confidential attorney-client communications, but also information about the client that may not have been obtained through a confidential communication.” Cal. Formal Opn. No. 2016-195 (2016).

Client “secrets,” as used in Section 6068(e)(1), thus applies to information that, in any other context, may not seem secret at all. For example, a client secret may include publicly available information. *See In the Matter of Johnson*, 4 Cal. State Bar Ct. Rptr. 179, 189 (Rev. Dept. 2000) (conviction record of client was found to be confidential client secret, even though it was in the public record, albeit not easily discoverable); Cal. Formal Opn. No. 2016-195 (defining “publicly available” client information as information that is “available to those outside the attorney-client relationship, although it must be searched for (*e.g.*, in an internet search, a search of a public court file, or something similar)” or it may be “‘generally known’ such that most people already know the information without having to look for it”); Cal Formal Opn. No. 2004-165 (2004) (“The duty [of confidentiality] has been applied even when the facts are already part of the public record or where there are other sources of information”). Thus, it is not the secretiveness of the information that makes it a “client secret”; rather, as the California State Bar has explained, “Client secrets means any information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client.” Cal. Formal Opn. No. 1993-133 (1993); *see also Matter of Johnson*, 4 Cal. State Bar Ct. Rptr. at 189 (duty of confidentiality “prohibits an attorney from disclosing

¹ The one exception provided in both Section 6068(e) and in Rule 1.6 relates to disclosure necessary to prevent a criminal act the lawyer reasonably believes is likely to result in death or substantial bodily harm. That exception is not applicable here.

facts and even allegations that might cause a client or a former client public embarrassment”).²

Advertising

Rule 7.1 states, “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.” Comment [4] to Rule 7.1 provides that even a truthful client testimonial or endorsement may be misleading if it creates an unjustified expectation in a potential client.

Rule 7.2 states that a lawyer may advertise services through any written, recorded, or electronic means, including by public media. This would include a website or other online presence. Comment [1] to Rule 7.2 provides that the rule “permits public dissemination of accurate information concerning a lawyer and the lawyer’s services, including, for example, . . . with their consent, names of clients regularly represented.”

Scenario 1

The first scenario above describes the pre-litigation representation of an individual accused of sexual harassment. From the description, it appears that the allegations likely are not even in the public record, as no public lawsuit has been filed. This information is subject to Attorney’s duty of confidentiality.

Even leaving aside the non-public nature of the allegations and representation, Attorney’s representation of this client still would be considered a client secret because publication of that information likely would be detrimental or embarrassing to him. The client was accused of sexual harassment in the workplace. However the matter was resolved, the client likely would not want others knowing about it. For that reason, even the fact of the representation is a client secret, and Attorney would breach her duty of confidentiality by listing it on her online bio without the client’s informed consent.

Notably, Attorney could have imparted effectively the same information to would-be clients by instead stating on her bio something like, “Defended manager against pre-litigation allegations of sexual harassment in the workplace.” As long as the identity of “manager” is not easily deduced, that would be an appropriate listing on an online bio. *See* ABA Formal Opn. 480 (2018) (“A violation of Rule 1.6(a) is not avoided by

² Institutional and corporate clients increasingly utilize outside counsel guidelines requiring the client’s written consent before the attorney may refer to the client or legal matters handled for the client in the attorney’s bio or marketing materials. These contractual prohibitions often go beyond the Rules of Professional Conduct or applicable duties and may extend to references that are not client secrets, embarrassing, or detrimental to the client. If such guidelines apply to your representation, they should be evaluated to determine whether the client has prohibited reference to its identity or legal matters.

describing public commentary as ‘hypothetical’ if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical.”).

This conclusion is not changed by the fact that the client is now a former client, rather than a current client. The duty of confidentiality applies to former clients. Rule 1.9(c); *see also Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 822-23 (2011) (“It is well established that the duties of loyalty and confidentiality bar an attorney . . . from using a former client’s confidential information. . . .”); *Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 573-74 (1932) (“[A]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship”); Cal Bar Formal Opn. 2016-195 (“Although most of an attorney’s duties to his client terminate at the conclusion of the representation, the duty of confidentiality does not.”). Thus, even after a representation has concluded, an attorney may not disclose information about the representation that, if disclosed, would be detrimental or embarrassing to the former client or that the former client requested remain confidential.

Scenario 2

Whereas Scenario 1 described a representation that would not be known to or even discoverable by a third party (that is, the information is not publicly available), Scenario 2 describes a representation that is captured in a published appellate decision, and thus constitutes publicly available information. In these facts, however, the corporate client not only was accused of racial discrimination and wrongful termination by a former employee, but also was found liable after a jury trial. Even though the verdict and subsequent judgment were overturned on appeal, it is unlikely that the client would want to publicize the result more than is necessary. Publication of the accusation and/or the verdict likely would be considered detrimental or embarrassing to the client. Accordingly, it is a client secret that, absent informed client consent, cannot be listed on Attorney’s bio.³

To the extent the client’s loss at trial garnered unwelcome publicity (through no fault of Attorney), it is conceivable that the client would want to publicize the reversal on appeal. But

³ Attorney here lists not only the reported decision, but a description of the issues addressed in that decision. Even without this description, however, the mere reporting of the case name and cite would constitute disclosure of confidential client information for the same reasons discussed above. To the extent, however, that the appellate opinion concerned matters that were not potentially sensitive (in contrast to the issues in the hypothetical opinion that is the subject of Scenario 2), Attorney would not need to seek Client’s consent when referencing the published appellate opinion, as the opinion would not be embarrassing or detrimental to the Client.

given the reasonable concern that the client may not appreciate the extra publicity, Attorney must seek the client's informed consent before listing the representation on her bio or otherwise publicizing it.

Scenario 3

Scenario 3 describes a bond funding on which Attorney represented its client, Acme Company. Unlike the representations in Scenarios 1 and 2, there would not appear to be anything detrimental or embarrassing about this representation, or the fact of the bond funding.⁴ In fact, the client may have publicized the funding itself. Accordingly, under the standard described above, the name of the client likely would not constitute client confidential information.

Not all jurisdictions have come to the same conclusion regarding the identity of a former client in similar circumstances. For example, citing to ABA Formal Opinion 09-455, the Illinois State Bar Association concluded that the identity of a represented party constitutes confidential information under Illinois Rule 1.6. ISBA Advisory Opinion 12-03 (2012) (noting ABA's conclusion that "*the person* and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent"). Similarly, the Wisconsin Bar Association noted that it "has long recognized . . . that client identity and information concerning fees are protected. . . ." Wisconsin Formal Ethics Opinion EF-17-02 (2017). The Nevada Bar Association did not go so far as to conclude that client identity always constitutes information protected by Rule 1.6, but did describe the listing of clients in a law firm brochure as "food for thought" in considering whether Rule 1.6 would be violated. Nevada Formal Opinion No. 41 (2009).

In contrast to these opinions, the New York State Bar Association concluded that, "[i]f the client has not requested that the lawyer keep the client's name confidential, then the lawyer must determine . . . whether disclosing the identity of the client and the fact of the representation is likely to be embarrassing or detrimental to the client." NYSBA Ethics Opinion 1088 (2016). We believe New York's approach to this question is more appropriate under California's framework, which also depends on whether information about a former client would be detrimental or embarrassing. Indeed, the California State Bar stated in Formal Ethics Opinion 2011-182 that "in most situations, the identity of a client is not considered confidential." *See*

⁴ If publicity about the bond funding in any way would injure the client or its reputation (for example, if it indicated the client was in financial distress), then Attorney may not list the representation on her bio without informed client consent. But absent some reasonable basis to conclude that is the case (and nothing in the facts presented in this opinion would lead to that conclusion), Attorney's duty of confidentiality would not appear to preclude listing the representation, even without client consent. That said, if there is any doubt at all, the wiser course would be to seek informed client consent.

also Los Angeles County Bar Association Formal Opn. Nos. 456 (concluding that information about client identity contained in an attorney's invoice generally is not confidential). Outside of the "embarrassing or detrimental" scenario, it is only in narrow circumstances where a client's identity would become a client secret that needs to be maintained in confidence. *See, e.g., Baird v. Koerner*, 279 F.2d 623, 632 (9th Cir. 1990) (client's identity is confidential if revealing it would constitute the "last link" in chain of evidence likely to lead to the client's conviction); *cf. Rosso, Johnson, Rosso & Ebersold v. Superior Court*, 191 Cal.App.3d 1514, 1518-1519 (1987) (client's name is privileged if disclosure would betray confidential communication).⁵

Accordingly, under the facts of Scenario 3, the duty of confidentiality would not preclude Attorney from listing the client's name on her online bio.

Notwithstanding that Attorney's representation of this client may not be confidential, it still must be considered whether the advertising rules prevent the listing of the client on Attorney's online bio. As discussed above, Attorney may not list the client on her bio if the manner in which she does so is misleading. Rule 7.1(a). As long as Attorney merely lists the client by name as a former client, with a brief and accurate description of the bond offering representation, there would be nothing misleading. If, however, Attorney in any way suggests that the client was a repeat client – one that came back to Attorney because it was satisfied with the result of the representation – then arguably listing the client's successful bond issuance could be considered a testimonial or endorsement. Such a testimonial or endorsement could be misleading absent a disclaimer or other qualifying language. Rule 7.1, Cmt. [4].

Rule 7.2 addresses a lawyer's advertising through written or electronic means, which would include the online bio here. Comment [1] states that a lawyer may disseminate accurate information about a number of subjects (*e.g.*, firm name, fees, references). With respect to the identity of clients, however, Comment [1] states that a lawyer may list, "with their consent, names of clients **regularly represented**." (emphasis added).⁶

⁵ Although the attorney-client privilege is treated differently than the duty of confidentiality, it is worth noting that California case law holds that the identity of a client generally is not considered to be privileged. *See Hays v. Wood*, 25 Cal. 3d 772, 785 (1979) (noting that client identity generally is not privileged, but finding exceptions where disclosure would reveal the nature of legal problems or personal confidential information).

⁶ There is authority finding that discipline may not be imposed based solely on a comment to a rule: "Although we may look to the Discussion accompanying the rule as an interpretive aid, it cannot add an independent basis for imposing discipline." *In re Dale*, 4 Cal. State Bar Ct. Rptr. 798, 805 (2005) (declining to impose discipline based on violation of former rule 2-100 (current Rule 4.2) where rule referred to a represented "party", but comment suggested it applied to any represented "person"). We do not take a position on whether discipline may be imposed solely on a violation of a comment to a rule, but do rely on Comment [1] to Rule 7.2 as providing guidance on the application of Rule 7.2.

Because Rule 7.2 is relatively new (adopted in November 2018), there are not yet any California cases interpreting the relevant language in it. Although the language of Comment [1] suggests that a lawyer may not advertise the names of clients without first getting the clients' consent, the language is expressly limited to "the names of clients ***regularly represented***" (emphasis added). This suggests that the limitation does not apply to ***all*** clients, and likely does not apply to ***former*** clients. NYSBA Ethics Opinion 1088 found that this same language in its own version of Rule 7.2 does not preclude a lawyer from listing the name of a client in its advertising as long as there are no additional facts that would make that listing harmful to the client. We agree with that approach.

Accordingly, we conclude that Attorney may list its client (here, Acme Corporation) in her online bio, even without the client's consent, as long as she does not imply or provide any additional information indicating or suggesting that she regularly represents the client or otherwise implying that the client endorses Attorney's services.⁷ Key to our opinion is the conclusion, discussed above, that Attorney's former representation of this client does not constitute confidential client information because disclosure of the fact of the representation would not be detrimental or embarrassing to the client and the client did not request the information remain inviolate.

Scenario 4

In the final scenario, Attorney lists a number of "representative clients" through the use of the clients' logos. Unless disclosing the identity of Attorney's clients could be embarrassing or detrimental to those clients or they requested their identities remain confidential, listing the logos as "representative clients" without their informed consent generally would not violate Attorney's duty of confidentiality. However, although the commonly used phrase "representative clients" leaves room for ambiguity, in our opinion, listing a client as being a "representative client" arguably suggests that a lawyer regularly represents that client, thereby bringing the situation directly under Rule 7.2, cmt. [1] (lawyer may list "with their consent, names of clients regularly represented"). Accordingly, Attorney's failure to obtain consent from these clients before listing them on her website as "representative clients" constitutes a violation of Rule 7.2.

Even if some of the clients listed have only been represented by Attorney in a single, one-off matter, the implication is that they are regularly represented clients. Thus, even if, in that case, there is no violation of Rule 7.2 because the client is not in fact a regularly

⁷ Even with the client's informed consent, it is possible that a statement about a prior representation still could be misleading, thereby running afoul of Rule 7.1, if it suggested that the client was endorsing the lawyer or providing a testimonial and created unjustified expectations that could be avoided with an appropriate disclaimer or qualifying language. Rule 7.1, cmt. [4]. We do not believe the specific language in Scenario 3 runs afoul of Rule 7.1.

represented client, there still may be a violation of Rule 7.1 because the communication could be considered misleading.

Conclusion

Absent informed client consent, a lawyer's duty of confidentiality precludes her from disclosing information about a former representation where the disclosure would be detrimental or embarrassing to the former client or the client requested it remain inviolate. This would include listing those representations in an online bio or resume, or in other marketing materials, unless the identity of the client were sufficiently protected. Even where the non-consensual disclosure of a representation may not be detrimental or embarrassing to the client, and thus not a client secret, a lawyer may not state or imply that she regularly represents a particular client absent that client's informed consent nor may any of the information provided mislead or create unjustified expectations. Finally, even if listing a client would not violate Rule 1.6 or the advertising rules (Rules 7.1 and 7.2), lawyers should be aware that some clients do not want any publicity, and those clients' wishes should be respected, even if not mandated by the State Bar Act or the Rules of Professional Conduct.

Opinions by the Professionalism and Ethics Committee are given as an uncompensated service of the Orange County Bar Association ("OCBA"). Opinions are advisory only, and no liability whatsoever is assumed by the Committee members or the OCBA in rendering such Opinions. Opinions are relied upon at the risk of the user. Opinions of the Committee are not binding in any manner upon any courts, the State Bar of California, any of the disciplinary committees, the OCBA, or the individual members of the Committee. In utilizing these Opinions, one should be aware that subsequent judicial opinions and revised rules of professional conduct may have addressed the areas covered by these Opinions.