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The Secrets of Success: Crafting Attorney Bios While Safeguarding Client Confidentiality

You've earned a hard-fought victory for your client. After the celebrations are over, you turn your attention to updating your bio on the firm's website to tout your latest client win. But what can you say? Can you use your client's name? Can you describe all of the amazing work you did on behalf of your client? Can you use your client's logo?

The answer to these questions involves a nuanced analysis of California's Rules of Professional Conduct, as well as statutes governing a lawyer's confidentiality obligations to his or her clients. Thankfully, the OCBA recently issued a formal ethics opinion tackling this important and thorny issue (OCBA Formal Opn. 2022-01) (the "Opinion"). The Opinion examines the following hypothetical additions to the "Representative Matters" section of an attorney's bio, and assumes the attorney has not sought or obtained consent from any of the referenced clients:

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.
4. Listing of client logos under a section entitled "Representative Clients."

At the center of the analysis is the attorney's ethical duty of confidentiality, which the opinion notes is broader than the attorney-client privilege. "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.'" Opinion (quoting Cal. Formal Opn. No. 2016-195 (2016)).

Notably, and surprisingly to many attorneys, an attorney's duty of confidentiality can extend even to information that is publicly available or generally known. Examining an attorney's duty to maintain client "secrets" as set forth in the State Bar Act (Business and Professions Code section 6068), the Opinion states:

> 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) (holding a 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 (as that word may be commonly used) 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 (finding a duty of confidentiality "prohibits an attorney from disclosing facts and even allegations that might cause a client or a former client public embarrassment.").

Against this backdrop, and turning back to the four scenarios listed above, the Opinion provides the following information regarding the hypothetical additions to the attorney's online bio.

Scenario 1

The Opinion finds that the representation of an individual accused of sexual harassment would be considered a client secret because publication of that information likely would be detrimental or embarrassing to the client. Irrespective of how the matter was resolved and whether the allegations were in the public record, the client likely would not want others to know about it. Accordingly, the Opinion concludes that "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." Because the duty of confidentiality survives the termination of the attorney-client relationship, the Opinion reaches the same conclusion whether the client is a current or former client. *See* Opinion, citing Rule of Professional Conduct 1.9(c) and *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 . . . .").

So what may an attorney say about the representation without potentially breaching his or her duty of confidentiality? The Opinion suggests the attorney could take a more generic approach provided the attorney refrains from identifying the client.

> 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 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.").

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Thus, the attorney wanting to tout this representation in his or her bio should either obtain informed consent from the client or make the description sufficiently generic that the client's identity cannot be inferred from the description.

Scenario 2

Scenario 2 is distinguishable from Scenario 1 because the representation involves a published appellate decision and, thus, the information is publicly available. Although the verdict ultimately was overturned on appeal, the client was found liable for racial discrimination and wrongful termination at trial—a fact that the client presumably would not want the lawyer to further disseminate. For that reason, the Opinion concludes that "[p]ublication 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."

Given the nature of the allegations leading to the jury verdict, even the mere reference to the case name and citation, without any further description, likely would constitute a breach of the attorney's duty of confidentiality. In short, where a matter involves potentially detrimental or embarrassing allegations, an attorney should be cautious about disclosing any information about the representation without first obtaining informed client consent.

Scenario 3

Scenario 3 describes an attorney's representation of a client in connection with a bond transaction. The Opinion concludes that, because there does not appear to be anything detrimental or embarrassing about the representation, this description, including the name of the client, likely would not constitute client confidential information. That said, the Opinion is quick to point out that the result may not be the same across all jurisdictions:

> 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).

Yet, in California, the analysis is likely to come down to whether the information would be embarrassing or detrimental to the former client. Drawing on a similar opinion from the New York State Bar Association, the Opinion notes that, "[o]utside 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."

Additionally, even where disclosure of the representation and client name would not run afoul of client confidentiality, an attorney must also comply with the ethical rules regarding advertising. On this point, the Opinion cites Rule of Professional Conduct 7.2, which addresses a lawyer's advertising through written or electronic means. While Comment [1] to Rule 7.2 requires a lawyer to obtain client consent before listing names of clients "regularly represented," the Opinion interprets that provision to apply only to current clients. Thus, it concludes that "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."

Thus, including a client's name in an online bio description is permissible provided that (1) the attorney does not imply that he or she regularly represents the client or that the client endorses the attorney's services; and (2) the information disclosed would not be detrimental or embarrassing to the client (or information that the client asked the attorney to maintain inviolate).

Finally, as with all advertising, the Opinion reminds us that a lawyer's description on his or her bio must not be misleading, or else it would run afoul of Rule 7.1.

Scenario 4

The final scenario involves the use of the clients' logos as "representative clients." With respect to client confidentiality, the Opinion concludes that unless the disclosure of the client identities would be embarrassing or detrimental (or the client asked the lawyer to keep its identity confidential), listing the logos without client consent likely would not violate the duty of confidentiality. However, listing a client's logo as a "representative client" is likely to suggest that the lawyer regularly represents the client, thus implicating Rule 7.2 relating to advertising, as described above. For that reason, the Opinion finds that an attorney's failure to obtain client consent before listing the client's logo as a "representative client" is likely to constitute a violation of Rule 7.2.

Conclusion

Next time you achieve a victory on behalf of your client, before you update your bio, ask yourself the following questions: Would the information be embarrassing or detrimental to my client? Is it information the client has asked me to keep confidential? Would disclosing the information suggest that I regularly represent the client? Unless the answer to each of those questions is a clear "no," you must obtain the client's informed consent before updating your bio. Indeed, even if the answer to all of these questions is "no," it still might be prudent—even if not ethically mandated—to seek the client's permission.

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