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To blog or not to blog: that is the ethical question

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First there was the Gutenberg Press, which ushered in the Printing Revolution that allowed for the printing and widespread dissemination of information.


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Now there is the internet, which allows the individual desktop publisher to engage in the printing and widespread dissemination of information from her own office, creating opportunities for individuals to conduct direct marketing and engagement with existing and potential clients.

It should come as no surprise that lawyers, like those in any other business, have jumped into the world of blogging, Facebook, Twitter and other social media. The pitfalls, however, are very real for attorneys who are unaware of their special ethical obligations when publishing discussions about their clients and cases. This article identifies and discusses the most dangerous pitfall: the unethical disclosure of client information.

A well-known example of an unethical blog was a publication by an Illinois public defender. She maintained a blog about her work, and in her blog entry on March 14, 2008, she wrote about her representation of a college student accused of possessing a controlled substance. She wrote in part:

"[the client's jail identification number] This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because 'he's no snitch.'" *Matter of Peshek*, No. M.R. 23794 (Ill. 2010).

The blogger was suspended from the practice of law for 60 days for the disclosure of client information because readers could determine the identity of her client. She also lost her job.

ABA MODEL RULE 1.6

ABA Model Rule 1.6 is the main concern of attorneys discussing their matters, as it forbids the disclosure of client information. It states:

"Rule 1.6 *Confidentiality of Client Information*.

(a) 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).

(b) ... *(exceptions that are likely inapplicable)*

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

The highlighted language is a very broad definition of client information, as it does not contain a carve-out for otherwise publicly available client information — in other words, the literal interpretation of Rule 1.6 leads to the conclusion that it is about keeping the confidentiality of *all* client information, and not necessarily just confidential client information.

Comments 3 and 4 to ABA Model Rule 1.6 further explain:

"[3] ... The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a

> hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."

In sum, comment 3 expands Rule 1.6 to include information from sources other than client communications. Information from court orders, the docket, or other documents can be sources of client information that must be kept confidential.

Comment 4 provides that hypotheticals and attempts to anonymize disclosures may not be enough if there is a "reasonable likelihood" that the reader can ascertain the identity of the client. For example, there would be a "reasonable likelihood" that a reader of a blog about an unnamed client who is a "former Black president of the United States" could ascertain the identity of the client.

ABA Model Rule 1.8(b) supplements the restriction of Rule 1.6 by prohibiting the use of client information to the disadvantage of the client. It provides that:

> "(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."

Notwithstanding this provision, it appears that Rule 1.6 is the primary driver of disciplinary actions arising from social media posts impermissibly disclosing client information.

FORMAL OPINION 480

On March 6, 2018, the American Bar Association published its Formal Opinion 480, which discussed the ABA's interpretation of the application of Rule 1.6 to attorney blogging and social media publications. While ABA formal opinions are not ethical rules, they often have substantial persuasive affect.

Opinion 480 is very expansive in its interpretation of what constitutes protected client information and interprets Rule 1.6 very broadly. According to Opinion 480, Rule 1.6 would not permit attorneys to disclose client information even if it was already contained in a public document such as a court decision, or even if the information is known to others, or others have access to it.

It is a very literal interpretation of the language of Rule 1.6. As a result, "[a] lawyer may not voluntarily disclose such information, unless the lawyer obtains the client's informed consent, the disclosure is impliedly authorized to carry out the representation, or another exception to the Model Rule applies." Opinion 480 at 5.

It would appear that Opinion 480 was a response to the Virginia Supreme Court decision *Hunter v. Virginia State Bar*, 285 Va. 485 (2013). In Hunter, an attorney was accused of violating his duty of confidentiality when he blogged about his cases on his firm's website without clients' prior consent.

The lawyer was reprimanded by the bar association, even though the information in the blog posts was publicly available, often in published court opinions. The Virginia Supreme Court sided with the lawyer.

Subsequently, the ABA issued Opinion 480, which references the *Hunter* opinion in its footnote 20.

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There is variation from state to state in the exact language of Rule 1.6. In Massachusetts, Rule 1.6 states that:

"A lawyer shall not reveal confidential 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). 'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege, (ii) likely to be embarrassing or detrimental to the client if disclosed, or (iii) information that the lawyer has agreed to keep confidential. 'Confidential information' does not ordinarily include (A) a lawyer's legal knowledge or legal research or (B) information that is generally known in the legal community or in the trade, field, or profession to which the information relates." Mass. R. Prof. C. 1.6.

The Massachusetts rule diverges from the ABA model rule in two key points. First, it protects only "confidential information" as opposed to all "information" found in the model rule.

It does not, however, give attorneys a free pass to publish discussions about all publicly available facts of their clients' cases.

The rule also defines "confidential information," to include information that is "likely to be embarrassing or detrimental to the client if disclosed."

Massachusetts has adopted comments to Rule 1.6 that are not found in the ABA model rules. Comment 3A explains:

> "[3A] … Information that is 'generally known in the local community or in the trade, field or profession to which the information relates' includes information that is widely known. Information about a client contained in a public record that has received widespread publicity would fall within this category. On the other hand, a client's disclosure of conviction of a

> crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not 'generally known in the local community.' As another example, a client's disclosure of the fact of infidelity to a spouse is protected information, although it normally would not be after the client publicly discloses such information on television and in newspaper interviews … ."

In other words, not all information from a public record can be discussed. If the information is not generally known in the local community, and its disclosure would embarrass or harm the client, then the attorney cannot discuss it in any publication. Moreover, comment 3B explains:

> "[3B] All these examples explain the addition of the word 'confidential' before the word 'information' in Rule 1.6(a) as compared to the comparable ABA Model Rule. It also explains the elimination of the words 'or is generally known' in Rule 1.9(c)(1) as compared to the comparable ABA Model Rule. The elimination of such information from the concept of protected information in Rule 1.9(c)(1) has been achieved more generally throughout the Rules by the addition of the word 'confidential' in this Rule."

A published Massachusetts discipline on the subject is *In Frank Arthur Smith III* (Public Reprimand No. 2019-16), in which the Board of Bar Overseers took "the opportunity to reiterate the BBO's view on the law on confidentiality and its application to social media." *In re Smith* at 1.

In this case, attorney Smith received a public reprimand for posting the details of a guardianship case on Facebook:

> "I am back in the Boston office after appearing in Berkshire Juvenile Court in Pittsfield on behalf of a grandmother who was seeking guardianship of her six year old grandson and was opposed by DCF [i.e., Department of Children and Families] yesterday. Next date — 10/23."

He also posted:

> "[t]he grandson is in his fourth placement in foster care since his removal from GM's residence in late July. I will discover what DCF is doing or not doing as to why DCF opposes the GM as guardian. More to come."

The client learned about the lawyer's posts and complained to the Office of Bar Counsel. The BBO issued a public reprimand, concluding that the disclosures of confidential client information, though such disclosures did not explicitly name the parties, constituted a violation of Rule 1.6(a).

The focus was not on whether the information was confidential, but whether the client information was "likely to be embarrassing or detrimental to the client if disclosed," the additional language found in Massachusetts' Rule 1.6.

Although the attorney did not identify the client by name, there was enough information in the postings so that it was "reasonably likely that a third party could do so" — even if there was no evidence that anyone did so. *In re Smith* at 8.

The basic facts about the grandson having been previously removed and DCF's concerns that the client could not control her daughter were "pejorative." The BBO also noted that care and protection matters are confidential by statute.

CONCLUSION

The absence of an explicit safe harbor for writing about publicly known or available facts from a client's case makes it perilous for an attorney to discuss her client matters in social media absent the client's permission.

It gives rise to the circumstance in which an attorney has substantially more freedom to discuss another attorney's case than their own cases. In other words, two identical articles discussing publicly available facts can lead to the discipline of the attorney involved with the case and none for the outside attorney.

Accordingly, an attorney thinking about blogging or discussing a client's matter should obtain that client's permission to publish.

In Massachusetts, Rule 1.6 applies only to prohibit the disclosure of facts and information that is likely to be embarrassing or detrimental to the client. Whether certain information is embarrassing or detrimental has an arguably subjective component, so the wise attorney would be sensitive to her client's potential objection to the disclosure of the facts of a case, even in the context of a "win."

Last, while a lawyer can discuss a client's case through the use of hypotheticals, the caveat is that the facts have to be sufficiently scrubbed such that "there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or situation involved." Mass. R. Prof. C. 1.6, Comment [4].

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