

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 13-0005**

ISSUE: What duties does a lawyer owe to current and former clients to refrain from disclosing potentially embarrassing or detrimental information about the client, including publicly available information the lawyer learned during the course of his representation?

DIGEST: A lawyer may not disclose his client's secrets, which include not only confidential information communicated between the client and the lawyer, but also publicly available information that the lawyer obtained during the professional relationship which the client has requested to be kept secret or the disclosure of which might be embarrassing or detrimental to the client. Even after termination of the attorney-client relationship, the lawyer may not disclose potentially embarrassing or detrimental information about the former client if that information was acquired by virtue of the lawyer's prior representation.

**AUTHORITIES
INTERPRETED:**

Business and Professions Code section 6068(e)(1).

Evidence Code sections 952 and 954.

Rule 3-100 of the Rules of Professional Conduct of the State Bar of California.^{1/}

STATEMENT OF FACTS

Lawyer is hired by Hedge Fund Manager to defend him against a fraud claim brought by several of his investors. The investors alleged that Hedge Fund Manager was operating a Ponzi scheme or similar financial fraud. During the representation, Hedge Fund Manager acknowledged in confidence to Lawyer that earlier in his career he had taken certain liberties with his investors' money, but assured Lawyer he had been completely above board in his dealings with the investors who now were suing him.

While the lawsuit was pending, Lawyer interviewed several former investors in Hedge Fund Manager's fund, including Former Investor. Former Investor told Lawyer that, several years earlier, she had accused Hedge Fund Manager of fraud in connection with the fund, and that Hedge Fund Manager paid her \$100,000 to resolve their dispute before she filed a lawsuit. After they spoke, Former Investor forwarded Lawyer a link to a blog post she had written about her accusations against Hedge Fund Manager. Lawyer forwarded the link to several friends, saying only "interesting reading."

After exchanging a limited amount of discovery, Hedge Fund Manager settled the lawsuit by paying each of the 16 investor plaintiffs \$250,000. The parties documented the settlement in a non-confidential settlement agreement, which was submitted to the court in connection with a motion for determination of good faith settlement. After the court granted the motion, the lawsuit was dismissed, and Lawyer's representation of Hedge Fund Manager concluded. The settlement was reported in a small article in a local newspaper, but not picked up by the national press.

Several months after the settlement and the conclusion of Lawyer's representation, Lawyer read an interview with Former Investor in the Wall Street Journal in which Former Investor recited the details of her prior dispute with Hedge Fund Manager. In response, Lawyer wrote a letter to the editor of the Journal, noting he represented Hedge

^{1/} Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

Fund Manager in connection with Former Investor’s accusations as well as the more recent investor lawsuit, and stating, “I did a great job of getting Hedge Fund Manager out of the lawsuit for only a seven-figure settlement.”

Several years after the second lawsuit settled, Hedge Fund Manager was arrested for driving under the influence of alcohol. Lawyer commented on the arrest on his Facebook page, stating, “Drinking and driving is irresponsible.”

DISCUSSION

The Duty of Confidentiality and the Attorney-Client Privilege

One of the most important duties of an attorney is to preserve the secrets of his client. “No rule in the ethics of the legal profession is better established nor more rigorously enforced than this one.” (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 572 [15 P.2d 505] (“*Wutchumna*”).) “A member’s duty to preserve the confidentiality of client information involves public policies of paramount importance.” (*In re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship.” (Rule 3-100, Discussion paragraph [1].)

Business and Professions Code section 6068, subdivision (e)(1) states that it is the duty of an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” (Bus. & Prof. Code § 6068(e)(1).)^{2/} As this Committee has explained, “[c]lient 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. State Bar Formal Opn. No. 1993-133.)

As noted above, the duty of confidentiality – that is, the duty to maintain client secrets – is set forth in the State Bar Act and included as an express ethical obligation. By contrast, the attorney-client privilege is a statutorily created evidentiary rule that protects from disclosure “confidential communication” between a lawyer and his or her client. (Cal. Evid. Code § 954; see also *Solin v. O’Melveny & Myers* (2001) 89 Cal.App.4th 451, 456-57 [107 Cal.Rptr.2d 456].) For purposes of the attorney-client privilege, “confidential communication” is defined in the Evidence Code to be “information transmitted between a client and his or her lawyer in the course of that relationship and in confidence” (Cal. Evid. Code § 952; see also *In re Jordan* (1972) 7 Cal.3d 930, 939-40 [103 Cal.Rptr. 849].) The attorney-client privilege has been described as necessary to “safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters.” (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599 [208 Cal.Rptr. 886].) While the ethical duty of confidentiality applies to *information* about the client, whatever its source, the attorney-client privilege is expressly limited to confidential *communications* between a lawyer and his or her client.

Thus, “client secrets” covers a broader category of information than do confidential attorney-client communications; confidential communications are merely a subset of what are considered client secrets. Indeed, “client secrets” include not only confidential attorney-client communications, but also information about the client that may not

^{2/} This Opinion focuses on the “secrets” aspect of Business and Professions Code section 6068(e)(1). Much has been written about the word “confidence” as used in Section 6068(e)(1), and this Committee previously has noted that “confidence” in the context of this statute means “trust,” as separate and distinct from “secrets” or even “confidences” (plural). (See, e.g., Cal. State Bar Formal Opn. No. 1996-146 [“[T]he preservation of the client’s ‘confidence’ means that a lawyer must maintain the trust reposed in the lawyer by the client.”]; Cal. State Bar Formal Opn. No. 1987-93 [“The concept of confidence as trust is firmly embedded in the decisional law of California.”]; see also *In the Matter of Soale* (1916) 31 Cal.App. 144, 153 [159 P. 1065] [“The phrase, ‘maintain inviolate the confidence,’ as contained in section 282 of the Code of Civil Procedure [the predecessor to Section 6068(e)(1)], is not confined merely to noncommunication of facts learned in the course of professional employment; for the section separately imposes the duty to ‘preserve the secrets of his client.’”]; but see *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 [43 Cal.Rptr.3d 771] [discussing “confidences” (plural) as shorthand for “secrets” and implicating the duty of confidentiality, while also noting the separate duty of loyalty].)

have been obtained through a confidential communication. Yet rule 3-100(A) – which provides, “A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client . . .” – recognizes no such distinction and applies to both the broad category of client secrets and the subset of confidential attorney-client communications. As stated in rule 3-100, Discussion paragraph [2]:

The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under the ethical standards of confidentiality, all as established in law, rule and policy.

(Rule 3-100, Discussion paragraph [2]; see also *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189 (“*Johnson*”) [The ethical duty of confidentiality “prohibits an attorney from disclosing facts and even allegations that might cause a client or a former client public embarrassment”]; *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 786 [99 Cal.Rptr.3d 464] [“The duty of confidentiality is broader than the attorney-client privilege.”], citing *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].)^{3/} Thus, information protected by the ethical duty of confidentiality is broader than what is protected as attorney-client privileged under the Evidence Code. (See *In the Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 189.)

In *In the Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. 179, an attorney had told one of his clients, in the presence of others, about another client’s previous felony conviction. That conviction was a matter of public record, but, as indicated by the state bar court, it was not easily discovered. The court found that the disclosure of the client’s publicly available conviction constituted a violation of the lawyer’s duty of confidentiality.⁴ “The ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the evidentiary attorney-client privilege.” (*Id.* at p. 189; see also Cal. State Bar Formal Opn. No. 2004-165 [“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.”]; Los Angeles County Bar Association Formal Opn. No. 386 [finding duty of confidentiality applies “even where the facts are already part of the public record or where there are other sources of information”]; see also Cal. State Bar Formal Opn. Nos. 2004-165; 2003-161; 1993-133; 1976-37.)

^{3/} The ABA Model Rules provide a similar rule: “[T]he confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” (Comment [3] to ABA Model Rule 1.6.) Courts in other states also have ruled similarly. (See, e.g., *In re Gonzalez* (D.C. 2001) 773 A.2d 1026, 1031 [the duty of confidentiality, “unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge”]; *Lawyer Disciplinary Board v. McGraw* (1995) 194 W.Va. 788, 798 [461 S.E.2d 850] [relying on Model Rule 1.6, the court stated that confidentiality of client information “is not nullified by the fact that the circumstances to be disclosed are part of the public record, or that there are other available sources of such information, or by the fact that the lawyer received the same information from other sources”].)

⁴ Client information may be “publicly available” in that the information 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 can be “generally known” such that most people already know the information without having to look for it. ABA Model Rule 1.9(c)(1) provides that information that is so generally known or widely disseminated (as opposed to publicly available) ceases to be a client secret. (See ABA Model Rule 1.9(c)(1) [“A lawyer who has formerly represented a client in a matter . . . shall not thereafter (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known. . . .”], emphasis added; Restatement of the Law Governing Lawyers §59 & Comment d (discussing ABA Model Rule 1.9).) California does not have an analogous rule addressing “generally known” information, although *Johnson*’s reliance on the fact the confidential information at issue was not “easily discovered” may support those who argue that generally known information – that is, information which either is easily discovered or does not even need to be discovered to become known – should not be considered a client secret. This Committee takes no position on this issue, and this opinion goes only as far as finding that client information does not lose its confidential nature merely because it is publicly available.

Disclosures During Representation

During Lawyer's representation of Hedge Fund Manager, Hedge Fund Manager told Lawyer in confidence that he had taken certain liberties with previous investors' money. Such information is protected both by Lawyer's ethical duty to maintain client secrets and by the attorney-client privilege because it was confidentially communicated by Hedge Fund Manager to Lawyer during the course of the representation. There is no indication Hedge Fund Manager waived the privilege by disclosing this information to a third party.

Lawyer also learned information about Hedge Fund Manager from Former Investor. That information was not learned through a confidential communication with Hedge Fund Manager, so the information is not protected by the attorney-client privilege. (See Cal. Evid. Code § 954; see also Cal. Evid. Code § 952 [defining "confidential communication" as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence . . ."]; *Solin v. O'Melveny & Myers*, *supra*, 89 Cal.App.4th at pp. 456-57.) It was obtained, however, in the course of Lawyer's representation of Hedge Fund Manager, and disclosure likely would be embarrassing or detrimental to Hedge Fund Manager. Thus, this information constitutes a client "secret" that must be protected by Lawyer under his duty of confidentiality.^{5/} Even though Former Investor made her information publicly available by writing a blog post about it, Lawyer had a duty to protect that information as a client secret, and not disseminate the information by further publicizing Former Investor's negative comments, including not forwarding the blog post to friends. Just as the State Bar Court concluded in *Johnson*, Lawyer's disseminating or commenting on information he learned from Former Investor during his representation of Hedge Fund Manager – including forwarding the blog post to several friends – violates his ethical duty of confidentiality.⁶

Post-Termination Disclosures about Alleged Fraudulent Scheme

In the hypothetical, after the termination of his representation, Lawyer wrote a letter to the Wall Street Journal commenting on the interview with Former Investor and discussing the lawsuit he handled for Hedge Fund Manager concerning similar allegations, including the settlement of that matter. Even though Hedge Fund Manager was a *former* client at the time Lawyer made those comments, for the reasons discussed below, we conclude that Lawyer violated the duty of confidentiality.

^{5/} See also Cal. State Bar Opn. No. 1996-146 ["Under section 6068(e), the fact that the lawyer received the information from a non-client . . . makes no difference."].

⁶ Lawyer's act of spreading negative information about Hedge Fund Manager – even publicly available negative information – also likely would be a breach of Lawyer's duty of loyalty to his current client. (See *Flatt v. Super. Ct.* (1994) 9 Cal.4th 275, 284 [finding duty of loyalty to be the primary duty at issue in connection with a current representation].)

Although most of an attorney's duties to his client terminate at the conclusion of the representation, the duty of confidentiality does not.^{7/} As the California Supreme Court stated, "an 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." (*Wutchumna, supra*, 216 Cal. at pp. 573-74; see also *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822-23 [124 Cal.Rptr.3d 256] ["It is well established that the duties of loyalty and confidentiality bar an attorney . . . from using a former client's confidential information . . ."]); *City Nat'l Bank v. Adams* (2002) 96 Cal.App.4th 315, 324 [117 Cal.Rptr.2d 125] [attorney may not use information to former client's detriment]; Cal. State Bar Formal Opn. 1993-133 ["The obligation to protect client confidences continues notwithstanding the termination of the attorney-client relationship."].⁸ The Los Angeles County Bar Association stated in its Formal Opinion No. 409 that the duty to a former client forbids "use against the former client of any information acquired during such relationship." (quoting *Yorn v. Superior Court* (1979) 90 Cal.App.3d 669, 675 [90 Cal.App.3d 669]). That opinion concluded that a public defender representing an entertainment industry client charged with a felony in a high-profile trial could not disclose to the media confidential information he had learned about his client, even *after* termination of the attorney-client relationship.

Here, Lawyer's letter to the newspaper, which included discussion about the settlement Lawyer obtained for Hedge Fund Manager, constituted a disclosure of a client secret because it caused Hedge Fund Manager harm or embarrassment. Although Hedge Fund Manager's settlement agreement resides in the court file (as it was an exhibit to the motion for determination of good faith settlement) and, thus, is publicly available, Lawyer's statements nonetheless could be considered a disclosure of a client "secret," as was the disclosure in *Johnson*, where the lawyer disclosed publicly available information about the client's prior conviction. Moreover, not only did Lawyer disclose facts about the settlement (and, by necessity, the existence of the lawsuit), but he also suggested he was privy to bad facts about Hedge Fund Manager's defense such that a "seven-figure settlement" was a good one. Under these facts, we conclude that Lawyer's disclosures would cause Hedge Fund Manager harm or embarrassment and, thus, Lawyer breached his duty of confidentiality.

The fact that Lawyer made the comments after termination of the attorney-client relationship does not change the result because Lawyer learned about the lawsuit and settlement through his representation of Hedge Fund Manager; thus, the information was "acquired by virtue of the previous relationship." (*Wutchumna, supra*, 216 Cal. at pp. 573-74.) In *Wutchumna*, discussed above, the Supreme Court found a lawyer owed a duty to his former client to preserve secrets he had "acquired in the course of the earlier employment" and to refrain from doing anything "which will injuriously affect his former client in any matter in which he formerly represented him." (*Id.* at pp. 571-72.) Here, Lawyer knew the details, including the amount, of Hedge Fund Manager's settlement by virtue of his representation of Hedge Fund Manager. Comments on that settlement are likely to cause Hedge Fund Manager embarrassment or harm and, consequently, are considered a client secret. Thus, Lawyer should not have made the comments in his letter.

Disclosures about Arrest for Driving under the Influence

In addition to writing a letter to the editor commenting on Hedge Fund Manager's alleged fraud against Former Investor, several years later Lawyer posted a comment about Hedge Fund Manager's drunk driving arrest. Unlike the letter to the editor about Hedge Fund Manager's alleged financial fraud, a comment about Hedge Fund Manager's drunk driving arrest bears no relationship to Lawyer's prior representation of Hedge Fund Manager.

^{7/} There is some disagreement over the scope of a lawyer's duty of loyalty to a former client. (See, e.g., Mark L. Tuft, "Do Lawyers in California owe Former Clients a Duty of Loyalty?" (www.cwclaw.com/publications/articleDetail.aspx?id=616#.) The Supreme Court in *Oasis West Realty* stated, "Among those fiduciary obligations were the duties of loyalty and confidentiality, which continued in force even after the representation had ended." (*Oasis West Realty, supra*, 51 Cal.4th at p. 821.) Our conclusions in this opinion are not dependent on resolution of this question.

⁸ California's approach is consistent with the approach of the ABA Model Rule on this point. See ABA Model Rule 1.6, Cmt. 20 ["The duty of confidentiality continues after the client-lawyer relationship has terminated."].)

Because drunk driving is unrelated to the prior representation, and Lawyer learned nothing about the issue in the course of his representation of Hedge Fund Manager, Lawyer owes no duty to Hedge Fund Manager to maintain in confidence anything he thereafter learns about that issue. Neither the duty of confidentiality nor any other duty that may survive termination of the attorney-client relationship would preclude posting of or commenting on such a story.⁹

CONCLUSION

A lawyer's duty of confidentiality is broader than the attorney-client privilege, and embarrassing or detrimental information learned by a lawyer during the course of his representation of a client must be protected as a client secret even if the information is publicly available. A lawyer's duty to preserve his client's secrets survives the termination of the representation. If, however, otherwise embarrassing or detrimental information was not learned by the lawyer by virtue of his representation of the client, it is not a client secret, and the lawyer is not bound to preserve it in confidence.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[Publisher's Note: Internet resources cited in this opinion were last accessed by staff on May 18, 2015. Copies of these resources are on file with the State Bar's Office of Professional Competence.]

⁹ By contrast, had Lawyer learned this information during his representation of Hedge Fund Manager, rather than after termination of the representation, Lawyer's duty of loyalty likely would have precluded Lawyer from publicly discussing even the drunk driving arrest. (See *Flatt*, 9 Cal.4th at p. 284.)