NEW YORK STATE BAR ASSOCIATION
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**New York State Bar Association**
**Committee on Professional Ethics**

**Opinion 1268 (07/03/2024)**

**Topic**: Confidential information; publication of article about issues arising in a case handled by the lawyer

**Digest**: After the termination of the representation, a lawyer may publish an article that discusses legal issues in the representation, as long as the article does not reveal confidential information without the consent of the client. Confidential information does not include a lawyer's "legal knowledge or legal research" or information that is "generally known" in the local community or in the trade, field or profession to which the information relates. But information is not generally known merely because it is available in court files.

**Rules:** 1.1(c), 1.6(a), 1.7(a), 1.7(b), 1.8(b), 1.9(c), 7.1(r).

**FACTS:**

1. The inquirer represents one of two partners ("Client A") in a contentious dissolution of a business. The case has raised several interesting legal issues. The inquirer also writes on legal issues and would like to write an article about the case. Client A is very wary of publicity and believes that publicity about the case could be damaging to his reputation.

**QUESTION:**

2. May the inquirer publish an article on legal issues arising in a case in which he represented one of the parties, if the article isn't published until after the conclusion of the proceeding and discusses the issues only from a strictly intellectual perspective?

**OPINION:**

3. Rule 7.1(r) of the New York Rules of Professional Conduct (the "Rules") encourages lawyers to speak publicly and write for publication on legal topics to help lay persons identify legal problems. Similar policy considerations apply to lawyers who speak or write for the legal community on legal issues that may arise. *See also* Rule 7.1, Cmt. [9] ("[L]awyers should encourage and participate in educational . . . programs concerning the legal system, with particular reference to legal problems that frequently arise"); N.Y. State 1251 ¶ 3 (2023) ("It is not unethical for a lawyer to write articles, give lectures, or write a blog about topics of general or specific interest, including the law. In fact, such activities are encouraged and protected, reflecting well on the legal profession and its members as examples of lawyers … seeking to contribute to the general well-being of the public").

4. The inquirer's concern is that Client A is wary of publicity and believes that publicity about the case could be damaging to his reputation. That raises the question whether the proposed article

would violate any other provisions of the Rules.

The Duty of Loyalty and the Duty Not to Harm the Client

5. One of the hallmarks of the legal profession is the duty of loyalty to the client. *See* Rule 1.7, Cmt. [1] ("Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client"); Preamble to the Rules, ¶ 2 ("The touchstone of the client-lawyer relationship is the lawyer's obligation to act with loyalty during the period of the representation.").

6. Rule 1.1(c)(2) reflects the lawyer's duty of loyalty to the client by prohibiting the lawyer from acting against the interests of the client. It says: "A lawyer shall not intentionally prejudice or damage the client during the course of the representation except as permitted or required by these Rules." The exception refers to Rules that authorize a lawyer to take actions that might prejudice or damage the client in limited circumstances, such as disclosures permitted under Rule 1.6(b), withdrawal permitted by Rule 1.16, and disclosure to a court under Rules 3.3(a) and (b). None of those Rules apply here.

7. By its terms, Rule 1.1(c) applies *during the course of the representation*. Thus, Rule 1.1(c) does not apply to former clients. *See* Roy Simon, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED ("Simon's") at § 1.1:44 ("the word 'during' makes clear that the duty not to prejudice or damage the client applies only to *current* clients, not to *former* clients.") (emphasis in original).

8. Similarly, Rule 1.8(b) -- one of the rules concerning "specific" conflicts of interest with current clients -- provides that a lawyer may not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent or the disclosure is permitted or required by the Rules. But this Rule, too, applies only to current clients. Indeed, the title of Rule 1.8 is "*Current* Clients: Specific Conflicts of Interest" (emphasis added).

When Does a Current Client Become a Former Client?

9. Different confidentiality rules apply once a client becomes a former client. The lawyer's confidentiality duties to a former client are set forth in Rule 1.9(c), which prohibits a lawyer from using or revealing the former client's confidential information unless there is an exception in Rule 1.6 (the confidentiality rule). Specifically, Rule 1.9(c) reads, in relevant part, as follows:

> (c) A lawyer who 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.

10. The inquirer will therefore have to determine whether Client A remains a current client in the matter of the representation. In N.Y. State 1008 (2014), we addressed this issue, noting that whether a person is a current client or a former client is a mixed issue of fact and law that the Committee cannot resolve. *See* Rules, Scope ¶ 9 ("principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. . . . Whether a client-lawyer

relationship exists for any specific purpose can depend on the circumstances and may be a question of fact."). We stated in Opinion 1008, however, that termination of the attorney-client relationship does not depend on whether the lawyer has sent a termination letter. Rather, a representation often ends when the lawyer has accomplished the purpose of the representation. As we explained in Opn 1008 ¶ 10:

> … [A]n attorney-client relationship may also terminate without a termination letter. *See, e.g., Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 389-91 (S.D.N.Y. 2010) ("'In what is perhaps the most typical situation, an attorney-client relationship … is terminated, simply enough, by the accomplishment of the purpose for which it was formed in the first place,'" ; *Miller v. Miller*, 203 A.D.2d 338, 339, 610 N.Y.S.2d 88, 89 (2d Dep't 1994) ("When the Family Court matter concluded, so did the attorney-client relationship"); Restatement (Third) of the Law Governing Lawyers § 31(2)(e) (2000) ("a lawyer's actual authority to represent a client ends when … the lawyer has completed the contemplated services").

Sometimes, on the other hand, even accomplishing the purpose of the representation does not end the representation of the client. As we said in N.Y. State 1008 ¶ 11:

> … Other circumstances, such as a longstanding pattern of representation over the years or the client's reasonable belief that a lawyer needs to perform additional legal work to fulfill the purpose of the representation, could also preserve an attorney-client relationship, even if the Law Firm has no specific pending assignment . . . at a given moment.

The remainder of our opinion here assumes that the attorney-client relationship in the particular matter before us has indeed ended, and that Client A is now a former client.

Would the Article Use Confidential Information in Violation of Rule 1.6?

11. As noted above, a lawyer's duty of confidentiality to a former client is set forth in Rule 1.9(c), which depends on whether information is "protected by Rule 1.6." Rule 1.6(a) prohibits a lawyer from knowingly revealing "confidential information" (as defined in Rule 1.6), or using it to the disadvantage of the client or for the advantage of the lawyer, unless the client gives informed consent. Rule 1.6 defines the term "confidential information" – and thus defines the information "protected by Rule 1.6" -- as follows:

> "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.

In addition, the client and lawyer may agree that other information will be held confidential. *See* Rule 1.6, Cmt. [4A] ("[W]here the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research.").

12. The inquirer states that Client A is worried about information the inquirer gained during or relating to the representation that is "likely to be embarrassing or detrimental to the client if disclosed." Whether any particular information meets this requirement is a question of fact that

we cannot resolve. However, if the article would discuss the legal issues arising in the matter from a strictly intellectual perspective without discussing particular facts of the matter that are not generally known, and if the lawyer has not agreed with the client to refrain from publishing material related to the matter, we do not believe the article would run afoul of Rule 1.9(c).

13. The definition of confidential information in the black letter text of Rule 1.6 (quoted earlier) excludes the lawyer's "legal knowledge or legal research." Comment [4A] elaborates by saying: "The accumulation of legal knowledge or legal research that the lawyer acquires through practice ordinarily is not client information protected by this Rule." Consequently, an article restricted to discussing legal issues and either omitting or masking the facts that come from Client A's matter should not run afoul of Rule 1.6 unless the inquirer has agreed with the client to keep "a particular product of the lawyer's research" confidential. But if the article uses facts from the client's matter, the inquirer should ensure that readers cannot use those facts to ascertain the identity of the client. *See* Rule 1.6, Cmt. [4] ("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."); N.Y. State 1026 ¶ 15 (2014) (in the context of a lawyer writing a novel based on her career as a lawyer-mediator, the Committee stated that "if confidential information is sufficiently altered, disguised, rearranged, and infused with the inquirer's own imagination so that no one can trace particular information to a particular client, then the book will not reveal 'confidential information' within the meaning of Rule 1.6.").

14. Another important exception in the definition of "confidential information" excludes information that is "generally known" in the local community or in the trade, field or profession to which the information relates. We explained the meaning of the phrase "generally known" in N.Y. State 991 ¶¶ 20 (2013): "In our view, information is generally known only if it is known to a sizeable percentage of people in 'the local community or in the trade, field or profession to which the information relates.'" . . . As explained by Rule 1.6, Cmt. [4A], "Information is not 'generally known' simply because it is in the public domain or available in a public file."

15. In N.Y. State 1057 (2015), the inquirer's client wanted him to use allegations the client had made in pleadings in other cases about lawyers and judges involved in those cases. The inquirer asked us if he could provide copies of these pleadings to the judge in support of his withdrawal motion, even if using those documents might prejudice the judge against the client. After quoting Comment [4A] to Rule 1.6, we said in Opinion 1057:

> Here, we believe that, unless the allegations in the client's other lawsuits were reported in the public media, or unless the client himself has widely publicized the allegations, the documents in the client's other cases do not fall within the [generally known] exception and therefore constitute confidential information of the client.

*See generally* ABA 479 (2017) (discussing the "generally known" exception).

16. We continue to believe that pleadings and other documents filed in a court case are not "generally known" within the meaning of Rule 1.6. Consequently, facts set forth in a court decision should be deemed to be confidential unless those facts are "known to a sizeable percentage of people" in the community, trade, field or profession.

Undermining or Negating the Lawyer's Work for the Client

17. As noted above, after termination of the relationship with Client A, Rule 1.9 would prohibit the inquirer from thereafter representing another client whose interests are materially adverse in a

"substantially related" matter. A subset of this prohibition involves representations that would involve the inquirer in attacking or undermining work done for Client A. *See* Rule 1.9, Cmt. [1] ("a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of a former client"). We believe the same principle would apply to an article written by the inquirer – a lawyer may not write an article about a former client that attacks or undermines the legal work the lawyer did for that client. However, it is our understanding that the proposed article would not undermine any positions taken by the inquirer in the representation.

**CONCLUSION:**

18. After the termination of the representation, a lawyer may publish an article that discusses legal issues in the representation, as long as the article does not reveal confidential information without the consent of the client. Confidential information does not include a lawyer's "legal knowledge or legal research" or information that is "generally known" in the local community or in the trade, field or profession to which the information relates. But information is not generally known merely because it is available in court files.

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