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

Opinion 1088 (3/31/2016)

Topic: Confidentiality; Identifying clients

Digest: A lawyer may include in advertising the names of clients regularly represented by the attorney provided each client has given prior written consent. Absent prior consent after full disclosure to the client, a lawyer may not disclose the identity of a client or the fact of representation, if this information constitutes "confidential information" under Rule 1.6(a). If the client has not requested that the lawyer keep the client's name and the fact of representation confidential, then the lawyer must determine whether such information is publicly known and, if not, whether disclosing the information is likely to be embarrassing or detrimental to the client. This will depend on the client and the specific facts and circumstances of the representation, and, if the lawyer is not reasonably confident of the client's views, it may require the lawyer to consult with the client.

Rules: 1.6(a), 7.1(b)(2),

FACTS

1. The inquirer has been asked by a potential client, a co-op board, to disclose the names of other co-op apartment building boards that the inquirer has represented to assist the potential client in deciding whether to retain the inquirer.

QUESTION

2. May a lawyer disclose to a potential client the names of other current or past clients?

OPINION

3. The New York Rules of Professional Conduct (the "Rules") provide that an attorney may include in advertising the names of clients regularly represented by the attorney provided the client has given prior written consent. Rule 7.1(b)(2). The attorney may have obtained a client's consent to advertise the lawyer's representation of the client as part of the original engagement letter, during the representation, or after the conclusion of the representation. If so, the inquirer may rely on Rule 7.1 to make the requested disclosures. But Rule 7.1(b) is only an illustrative list of examples of permissible advertising content. It does not exhaust the circumstances under which a lawyer may disclose client names.[1]

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[1] See N.Y. City Bar Committees on Professional & Judicial Ethics and Professional Responsibility, Commentary on New York's Ethics Rules Governing Lawyer Advertising and Solicitation (March 2009) at 43 (noting that Rule 7.1(b)(2) is a safe harbor for listing client names in attorney advertising with

4. Absent specific client consent, a lawyer must consider whether a client's name and the fact of representation is confidential information under Rule 1.6(a), which ordinarily prohibits a lawyer from knowingly revealing confidential information, or using confidential information to the disadvantage of the client or the advantage of the lawyer or a third person, unless the client gives informed consent. (Various exceptions to this general rule are not relevant here). "Confidential information" is defined in Rule 1.6(a) as "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." Under the definition, "confidential information" does not include information that is "generally known in the local community or in the trade, field or profession to which the information relates."

5. The identity of a client is information gained during the representation of the client. The client's identity generally is not information protected by the attorney-client privilege. In N.Y. State 720 (1999), we addressed whether the identities of former clients must be disclosed by a moving attorney in the course of performing a conflict check at the new law firm. We stated:

> Although the fact that the client consulted a lawyer and the general nature of the consultation will not usually be privileged, . . . the client's name, the fact that the client consulted a lawyer and the general nature of the consultation may nevertheless constitute 'secrets' of the client which the lawyer may not disclose."[2]
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> Accord N.Y. State 645 (1993) (the identity of the client generally is not deemed attorney-client privileged because disclosure does not reveal the content of any communications and the identity was not provided for the purpose of obtaining legal advice, but the client's identity may constitute a secret because disclosure may be embarrassing or detrimental to the client).

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written permission but does not preclude listing client names without written permission under other circumstances).

[2] As support for the lack of privilege, Opinion 720 cited *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963). Opinion 720 construed Disciplinary Rule 4-101(A) in the New York Code of Professional Responsibility, which is the predecessor to current Rule 1.6(a) in the Rules of Professional Conduct. DR 4-101(A) defined "confidences" to include information protected by the evidentiary privilege, and "secrets" to include information likely to be embarrassing or detrimental to the client if disclosed, or that the client has requested by held inviolate. The definitions of "confidences' and "secrets" under former DR 4-101(A) have been incorporated into the definition of "confidential information" under Rule 1.6(a).

6. If a client has requested that lawyer keep the client's identity confidential, then the lawyer is duty-bound not to disclose the client's name to potential clients.

7. If the client has not requested that the lawyer keep the client's name confidential, then the lawyer must determine whether the fact of representation is generally known and, if not, whether disclosing the identity of the client and the fact of representation is likely to be embarrassing or detrimental to the client. This will depend on the client and the specific facts and circumstances of the representation.

8. In N.Y. State 991 (2013), we stated that information is "generally known" within the meaning of Rule 1.6(a) 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. *See* also *Jamaica Pub. Serv. v. AIU Ins., 92 N.Y. 631* (1998) (information is "generally known" when it is "readily available in such public materials as trade periodicals and filings with State and Federal regulators"). If the lawyer has represented the client in publicly reported litigation or is identified on client websites as representing them, the fact of representation may be readily available in public materials. More broadly, if the fact that the law firm represents its co-op board clients is widely known in the local real estate industry, then the information would be considered to be generally known. If information is generally known, then it is not confidential and the lawyer may freely disclose it. If the information is not generally known, however, then the law firm may disclose it only if it concludes that the information would not be embarrassing or detrimental to the client. This determination is necessarily fact specific.

9. The client is more likely to find that disclosure of the fact of a current or prior representation by a lawyer is embarrassing or detrimental where the representation involves or involved criminal law, bankruptcy, debt collection, or family law. The instant inquiry concerns representations of co-op boards and does not immediately suggest a reason that current or prior clients may deem the representation by the inquirer to be embarrassing or detrimental. However, unless the lawyer is reasonably confident that he or she knows that the co-op board clients would not consider disclosure of their identities and/or the fact of representation to be embarrassing or detrimental, the lawyer must consult with these clients before disclosing their names to the potential client. *See* Nassau County 98-5 (where lawyer receives government subpoena for client names, lawyer should consult with client "unless the lawyer is justifiably confident that he or she already know[s] all of the pertinent facts and already is sensitive to all of the possible nuances of the client's circumstances").

10. A number of factors other than the subject matter of the representation may enable the lawyer to determine that the client would not object to being identified as the lawyer's client. For example, the client may have identified the lawyer to individuals who were not involved in the representation as the lawyer who represented the client in a matter, or the lawyer may hear from individuals not involved in the client representation that the client has given the lawyer's name as the person who had represented him or her in a matter.

CONCLUSION

11. A lawyer may include in advertising the names of clients regularly represented by the attorney provided that each client has given prior written consent. Absent prior consent after full disclosure to the client, a lawyer may not disclose the identity of a client or the fact of representation, if this information constitutes "confidential information" under Rule 1.6(a). If the client has not requested that the lawyer keep the client's name and the fact of representation confidential, then the lawyer must determine whether such information is publicly known and, if not, whether disclosing the information is likely to be embarrassing or detrimental to the client. This will depend on the client and the specific facts and circumstances of the representation, and, if the lawyer is not reasonably confident of the client's views, it may require the lawyer to consult with the client.

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