**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 or relating to the representation?

**DIGEST:** A lawyer may not disclose his client's secrets, which include not only confidential information communicated by the client to the lawyer, but also publicly available information that the lawyer obtained during or related to 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 is related to or 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.

Rules 3-100 and 3-310(E) 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. After they spoke, Former Investor forwarded Lawyer a link to a blog she had written about her settlement with 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, and the lawsuit was dismissed. After the settlement was completed, Lawyer's representation of Hedge Fund Manager concluded.

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 and settlement with Hedge Fund Manager. In response, Lawyer wrote a letter to the editor of the Journal, noting he formerly represented Hedge Fund Manager and stating his opinion about Former Investor's interview, including a statement that he would not be surprised if Former Investor's claims in the prior dispute had some merit.

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[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.

Several years after the 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." Business and Professions Code section 6068 subd. (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, 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 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

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[2/] This Opinion focuses on the "secrets" aspect of 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).

category of client secrets and the subset of confidential attorney-client communications.[3] 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]); Cal. State Bar Formal Opn. No. 1986-87; *Dixon v. State Bar* (1982) 32 Cal.3d 728, 735 [187 Cal.Rptr. 30] (lawyer violated Business and Professions Code section 6068(e)(1) by including in a declaration "gratuitous" and "embarrassing" information about his former client and her sister, even though the declaration was filed in response to a lawsuit the former client filed against the lawyer).[4/] 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.

This committee previously discussed the distinction between the attorney-client privilege and the broader duty of confidentiality in California State Bar Formal Opn. No. 1986-87 ("Opinion No. 1986-87"). There, we addressed the hypothetical situation of a criminal defendant disclosing to his lawyer a prior conviction, which was relevant to the sentencing phase of his trial. Because the prior conviction was a matter of public record, it was not protected by the attorney-client privilege, as it was not a "confidential communication" within the meaning of that evidentiary rule. For purposes of the separate duty of confidentiality, as stated in Business and Professions Code section 6068 subdivision (e)(1), however, the prior conviction was considered a "secret." Accordingly, we concluded that the lawyer in the hypothetical could not disclose the prior conviction.

In *In the Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. 179, the State Bar Court addressed a factual scenario similar to that posited in Opinion No. 1986-87. In that case, the attorney 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 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: "The ethical duty of

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[3/] The ABA Model Rules generally speak of protecting confidential "information," which includes not only confidential communications between the lawyer and his client, but also "information relating to the representation, whatever its source." ABA Model Rule 1.6 and Cmt. [3]. Thus, the ABA Model Rules similarly include both client "secrets" (which it refers to in Rule 1.6 as "confidential information"), and confidential client communications.

Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered. Rule 1-100(A).

[4/] 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").

confidentiality is much broader in scope and covers communications that would not be protected under the evidentiary attorney-client privilege." *Id*. at p. 189.

**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 public by writing a blog 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 link to friends. Just as this Committee concluded in Opinion No. 1986-87 and 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 link to several friends – violates his ethical duty of confidentiality.

**Post-Termination Disclosures about Alleged Fraudulent Scheme**

In the hypothetical, after the termination of his representation, Lawyer also remarked on an interview in which Former Investor discussed her allegations against Hedge Fund Manager. Lawyer's remarks implied the veracity of Former Investor's negative comments about Hedge Fund Manager. 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.

Although most of an attorney's duties to his client terminate at the conclusion of the representation, the duty of confidentiality does not.[6/] 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. "'This prohibition is in the disjunctive. An attorney "may not use information *or* 'do anything which will injuriously affect his [or her] former client.'"'" *City Nat'l Bank v. Adams* (2002) 96 Cal.App.4th 315, 324 [117 Cal.Rptr.2d 125] (quoting *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 156 [172 Cal.Rptr. 478]); see also *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822-23 [124 Cal.Rptr.3d 256] ("It is well

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[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/] There is some disagreement over whether some limited form of a lawyer's duty of loyalty to his client also survives the termination of the attorney-client relationship. 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* indicated that both the duty of loyalty and the duty of confidentiality survive termination of the attorney-client relationship, although the facts of that case raised issues that fairly fell within a lawyer's duty of confidentiality. *Oasis West Realty, supra,* 51 Cal.4th at pp. 822-23. Our conclusions in this opinion are not dependent on resolution of that question, as the duty to maintain a former client's secrets continues beyond termination of the attorney-client relationship, whether by virtue of the ongoing duty of confidentiality or some combination of the duty of confidentiality and the duty of loyalty.

established that the duties of loyalty and confidentiality bar an attorney . . . from using a former client's confidential information . . . ."). 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. The opinion relied on both the duty of confidentiality and the duty of loyalty.

Here, Lawyer's written remarks about Former Investor's interview statements regarding Hedge Fund Manager's fraud presumably would cause Hedge Fund Manager harm or embarrassment because Lawyer's former representation of Hedge Fund Manager suggests that his remarks are based on confidential information he learned during the representation. Although Former Investor's interview itself is publicly available – likely both in print and online – Lawyer's remarks on the merit of Former Investor's claims would be considered a disclosure of a client "secret," as was the disclosure in *Johnson*, where the lawyer disclosed public information about the client's prior conviction.

The fact that Lawyer made the comments after termination of the attorney-client relationship does not change the result because Former Investor's allegations relate to Lawyer's representation of Hedge Fund Manager, and Lawyer learned about the allegations through his representation of Hedge Fund Manager; thus, the information was "acquired by virtue of the previous relationship." *Wutchumna*, *supra*, 216 Cal. at p. 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 acquired during his representation information from Former Investor about Hedge Fund Manager's alleged fraudulent scheme. Comments on that information by Hedge Fund Manager's former lawyer, who may be assumed to be relying on confidential information he learned during the representation, are likely to cause Hedge Fund Manager embarrassment or harm and, consequently, are considered a client secret. Thus, Lawyer should not have commented on Former Investor's interview.

The conclusions in *Wutchumna,* Los Angeles County Bar Association Formal Opn. No. 409, and this opinion are consistent with the Rules' approach to duties to former clients in a conflict situation. Rule 3-310(E) limits when a lawyer may act adversely to a former client. Specifically, rule 3-310(E) provides a lawyer "shall not, without the informed written consent of the . . . former client, accept employment adverse to the . . . former client where, by reason of the representation of the . . . former client, the [lawyer] has obtained confidential information material to the employment." A lawyer's ability to take on a representation adverse to a former client will depend on whether the current representation is "substantially related" to the former representation. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283 [36 Cal.Rptr.2d 537] ("[W]here a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a '*substantial relationship*' between the subjects of the antecedent and current representations.") Here, Lawyer would be precluded from representing Former Investor in a lawsuit against Hedge Fund Manager related to Former Investor's investment in the fund because the prior and current representations would be substantially related. For similar reasons, Lawyer is precluded from disclosing information about or commenting on Former Investor's allegations, as a reader or listener reasonably might believe that Lawyer's comments are at least partially based on confidential information Lawyer obtained while he represented Hedge Fund Manager. Accordingly, Lawyer's comments on the Wall Street Journal interview with Former Investor violated his duty of confidentiality.

**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. 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. Lawyer could accept representation adverse to his former

client in a matter concerning driving under the influence without violating rule 3-310(E), which suggests Lawyer is free to report or comment on a story about his former client's drunk driving arrest. 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.

## 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 or related to that representation 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, provided the secret relates to the prior representation or was acquired by virtue of the lawyer's prior representation. If, however, otherwise embarrassing or detrimental information is unrelated to a prior representation and was not learned by the lawyer during the course of his representation of the client, the lawyer is not bound to preserve that information as a client secret.

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.]*