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In this article we review an attorney's obligations to protect a current and former client's confidences while discussing its representation of that client in a public forum.

Ethical and Liability Implications of Promoting Achievements on Client Matters

In the medical malpractice case, *Garcia v. South Coast Global Medical Center*, No. 30-2019-01060953-CU-MM-CJ (Cal. Mar. 29, 2019 filing date), plaintiffs alleged that a feeding tube inserted by defendant, a gastroenterologist, accidently pierced a plaintiff's colon, leading to a fatal infection.

The LA Times **reported** that defense counsel told jurors during closing arguments in April 2022 to disregard the death certificate, which attributed death to an infection from the punctured colon. Instead, defense counsel argued that plaintiff died from nonsurvivable alcohol-related pancreatitis, failures of other hospital staff to relay key information, and pointed to defense's expert opinion finding no negligence occurred and another doctor disputing plaintiff had an infection.

The jury took less than a half-hour to unanimously return a verdict for defendant.

But defense counsel reportedly summarized the case differently during an inter-office celebration in May: "A guy that was probably negligently killed, but we kind of made it look like other people did it," defense counsel is reported as saying to his colleagues. "And we actually had a death certificate that said he died the very way the plaintiff said he died and we had to say, 'No, you really shouldn't believe what that death certificate says, or the coroner from the Orange County coroner's office.'"

The speech was recorded and posted on the firm's social media page. It was then downloaded before being deleted, and is still circulating on **Twitter**.

In a statement to The LA Times, defense counsel said his remarks to his staff were "ineloquent" and "imprecise"; he did not know they would be recorded and posted, and were "intended purely as an internal briefing to our staff, using shorthand phrases which might understandably cause confusion for a lay audience unfamiliar with the case at hand, and the law in general."

Based on these facts (as well as other trial irregularities), Orange County Superior Court Judge James Crandall, who presided over the trial has **reportedly** vacated the verdict, ordering the case back to court: "I think I have to protect the system and say plaintiffs deserve a new trial." "When [defense counsel] says on video a 'guy was probably negligently killed,' probably is more likely than not. Then he goes on to say, 'But we kind of made it look like other people did it' . . . . That seems like an admission of negligence. Seems like an admission the plaintiff should have prevailed."

The judge added that "bragging isn't a great irregularity. . . . He's a lawyer. But here's the problem: bragging that justice wasn't done, that's what bothers the court."

As defendant's new counsel explained, "His former attorney's attempt to make himself appear as a hero by misrepresenting the facts of the case, and the tremendous harm this has caused [defendant], is the story here."

Defense counsel's inadvertent public comments implicate multiple ABA Model Rules ("Rule"), triggering significant confidentiality and advertising issues, exposing counsel to potential liability, and possibly also prejudicing the client's matter.

At the outset, Comment [5] to Rule 1.6 states, in relevant part, "Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm." Therefore, counsel's comments during an inter-office meeting setting were not *per se* improper within the confines of his law firm.

However, the firm, by posting these comments on its social media website disclosed information relating to the representation of the client without the client's consent. The identity of a firm's clients is itself confidential unless already very widely known. See generally ABA Formal Ethics Op. 480 (2018) ("Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules."); Wis. Formal Ethics Op. EF-17-02 (2017); N.Y. State Ethics Op. 1088 (2016); see also In re Peshek, M.R. 23794, 2009 PR 00089 (Ill. 2010) (sixty-day suspension for violating Rule 1.6 by publishing a blog about conversations with clients identified by name and various details of their cases).

In addition, here the content of the statement was against the clien's interests. As the court noted, "'A guy that was probably negligently killed' . . . seems like an admission of negligence" is likely a positional conflict in violation of Rule 1.7. See D.C. Bar Op. 370 (2016) ("Caution should be exercised when stating positions on issues, as those stated positions [on social media] could be adverse to an interest of a client, thus inadvertently creating a conflict.").

Furthermore, such a public comments may be considered to "have a substantial likelihood of materially prejudicing an adjudicative proceeding" within the meaning of Rule 3.6 (Trial Publicity) or be "prejudicial to the administration of justice" within the meaning of Rule 8.4(d). See generally In re: Winston Bradshaw Sitton, BPR#018440 at 22 (Tenn. Jan. 22, 2021) ("We can think of few things more prejudicial to the administration of justice than publicly fostering a view of lawyers as co-conspirators whose role is to manufacture plausible but untrue defenses . . . . It promotes a cynical view of the justice system as something to be manipulated instead of respected."); In re Edson, 530 A.2d 1246 (N.J. 1987) ("Our system is not based on lies and deception but on truth and honor.").

Since the firm's social media post would be considered an "imprecise" advertisement, by the attorney's own admission, then it is also likely in violation of ABA Model Rule 7.1 (duty to not make false or misleading communication about a lawyer's services); see Rule 7.1, cmt. [3] ("A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person

to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.").

Finally, the attorney's purported statement to the LA Times that he, a named partner, did not know his statement would be recorded and posted serves as a reminder that Rules 5.1 and 5.3 obligates attorneys at the firm to assure that lawyers and staff they supervise comply with these confidentiality obligations.

Furthermore, such self-promotion may also lead to malpractice, defamation, or other claims. Examples include Doe v. Burke Wise Morrissey & Kaveny, LLC, 2022 IL App (1st) 211283, 2022 WL 5297636 (law firm defendant's press release of prior medical malpractice trial that described plaintiff's diagnoses and injuries was information covered by Illinoi's Mental Health and Developmental Disabilities Confidentiality Act and such disclosure was limited to trial pursuant to a protective order under HIPAA, making disclosure outside that venue potentially unlawful); Barr v. Liddle & Robinson, LLP, 136 A.D.3d 421 (1st Dep't 2016) (affirming order denying motion to dismiss legal malpractice claim where former client alleged "he would not have lost his contractual right to certain deferred compensation if his attorneys had not acted negligently in speaking to the Wall Street Journal, in violation of the non-disparagement provision of the contract"); Mattel, Inc. v. Luce, No. B143260, 2001 WL 1589175 (Cal. Ct. App. Dec. 13, 2001), as modified (Jan. 8, 2002) (firm newsletter and website describing a lawsuit was not protected by privilege because "the information is clearly slanted in a way to cast a better light on themselves and their client and a worse light on the opposition"); Am. Dental Ass'n v. Khorrami, No. CV 02-3853 DT(RZX), 2004 WL 3486525 (C.D. Cal. Jan. 26, 2004) (biased description of plaintiff on a lawyer's website and press releases was not fair reporting because it was made in an effort to promote litigation business).

In addition to the ethical implications and potential liability for attorneys, even when public disclosure is undertaken by a client, attempting to bolster litigation strategy may also lead to the client being compelled to disclose underlying privileged communications in the new trial. Lenz v. Universal Music Corp., 97 U.S.P.Q.2d 1145, 2010 WL 4789099 (N.D. Cal. 2010) (client's repeated postings on blog and in chat sessions concerning her lawyer's litigation strategy and motivations for bringing suit constituted a waiver of the attorney-client privilege with respect to the topics discussed).

In sum, it is important for firms to make sure there is a procedure in place to screen any social media posts to avoid revealing client confidences – including the client's identity unless consent has been obtained or the representation is widely known (and not merely to be found in a reported decision). And postings also need to be vetted to make sure that if a lawyer of firm is going to boast, or even comment on an outcome or decision, then the posting needs to relate to justice being served—not how the lawyer duped the court. Finally, lawyers and their firms (and their clients) may – or should refrain from – posting in order to avoid prejudicing their matters.

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