

MBA Ethics: Opinion 2024-2

Summary: A published judicial opinion can nevertheless contain confidential information protected by Rule 1.6 of the Massachusetts Rules of Professional Conduct. Accordingly, before including a citation to such an opinion on a firm website, a lawyer must inquire whether the information is “generally known” within the meaning of Rule 1.6(a). If not, and if the information is embarrassing or detrimental to the client, the lawyer must obtain the client’s informed consent before including a citation.

Facts: A lawyer who specializes in litigation wishes to include citations to published opinions in which the lawyer appeared as counsel on the firm website. The lawyer asks whether client permission is required before listing such citations.

Discussion: Mass. R. Prof. C. 1.6(a) provides, in relevant part:

- (a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege, (ii) likely to be embarrassing or detrimental to the client if disclosed, or (iii) information that the lawyer has agreed to keep confidential. "Confidential information" does not ordinarily include . . . information that is generally known in the local community or in the trade, field, or profession to which the information relates.¹

Rule 1.6, comment 3A, provides additional guidance regarding when information is generally known and hence no longer confidential:

“Information that is ‘generally known in the local community or in the trade, field or profession to which the information relates’ includes information that is widely known. Information about a client contained in a public record that has received widespread publicity would fall within this category. On the other hand, a client’s disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not ‘generally known in the local community.’ As another example, a client’s disclosure of the fact of infidelity to a spouse is protected information, although it normally would not be after the client publicly discloses such information on television and in newspaper interviews.”

Applying Rule 1.6, the Committee must first address whether information relating to the representation of a client that has been disclosed to a court in the course of lawsuit can constitute

¹ As originally promulgated, Rule 1.6(a) referred to information generally know in the “legal community” rather than “local community.” The reference to “legal community” was a scrivener’s error that was corrected by order of the Supreme Judicial Court on March 12, 2024, effective April 1, 2024. <https://www.mass.gov/doc/amendments-to-rule-307-of-the-rules-of-the-supreme-judicial-court-effective-april-1-2024>.

“confidential information” under Rule 1.6(a). The fact that a client was a party to a lawsuit is not protected by the attorney-client privilege nor is information disclosed to the court during proceedings, so the protection in Rule 1.6(a)(i) for privileged information does not apply. We assume for purposes of our response that the inquiring lawyer has not agreed to keep the information confidential, so the information is not covered by Rule 1.6(a)(iii). The Committee believes, however, that information about a client disclosed in a judicial opinion can in some circumstances be embarrassing or detrimental to the client. For example, an opinion might disclose personal information about a client that would be embarrassing if generally known, such as the secret marriage or the criminal conviction “a long time ago” mentioned in Comment 3A. Information in an opinion might also be detrimental to a client by, for example, disclosing a claim of unfair trade practices that might be damaging a commercial client’s reputation with customers. In cases such as these, Rule 1.6(a)(ii) applies and client consent must normally be obtained before disclosure.

Rule 1.6(a) makes an exception for information that is generally known and hence no longer confidential. However, the fact that an opinion has been published does not by itself bring it within this exception. Published opinions can range from precedent-setting SJC decisions that are front page news to summary dispositions under Appeals Court Rule 1.28 that will be read only by the parties and their lawyers. To rely on the “generally known” exception, a lawyer must have evidence other than the fact of publication to show that the opinion was widely known in the local community or in the field to which the information relates.

Finally, citing published opinions in which a client was a party does not fall within the exception in Rule 1.6(a) for disclosures which are “impliedly authorized” to carry out a representation. As the ABA Ethics Committee has observed, “Website disclosure of client identifying information is not normally impliedly authorized because the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm.” ABA Ethics Op. 10-547.

Accordingly, the Committee concludes that if a published opinion contains information that may be embarrassing or detrimental to a client and the information is not generally known in the local community or in the field to which the information relates, a lawyer must obtain the client’s informed consent before citing it on the firm website. If the lawyer is in doubt about whether the information is generally known, the lawyer should err on the side of caution and seek consent.

In addition, if a firm website regularly features citations to cases in which firm lawyers were involved, the Committee recommends including a disclaimer so as to not to mislead other clients that the same results could be obtained for them. Mass. R. Prof. C. 7.1, Comment 3.

This advice is from a committee without governmental authority.

This opinion was approved for publication by the Massachusetts Bar Association's House of Delegates on March 21, 2024.