

## **ALASKA BAR ETHICS OPINION 2020-02**

### **WHAT ARE COUNSEL’S ETHICAL DUTIES REGARDING PUBLICIZING CLIENT RECOVERIES?**

#### **QUESTION**

The Committee has been asked whether a personal injury lawyer may conduct an advertising campaign featuring client testimonials about the amounts the lawyer has recovered on the clients’ behalf.

#### **SUMMARY**

Testimonials disclosing amounts of recoveries are consistent with the Alaska Rules of Professional Conduct only if the clients provide informed consent.<sup>1</sup>

#### **DISCUSSION**

Rule 1.6(a) of the Alaska Rules of Professional Conduct prohibits a lawyer from revealing a current client’s confidence or secret unless the client gives informed consent. Rule 1.6(a) further states:

For purposes of this rule, “confidence” means information protected by the attorney-client privilege under applicable law, and “secret” means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.

Similarly, under Rule 1.9(c), a former client’s confidences and secrets are protected and cannot be disclosed absent consent: a “lawyer who has formerly represented a client in a matter ... shall not thereafter ... (2) reveal confidences and secrets except as these Rules would permit or require with respect to a client.” It is axiomatic that a lawyer “should not use information acquired in the course of the representation of

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<sup>1</sup> This opinion assumes that the content of the lawyer’s advertising and the client testimonials are not misleading and otherwise fully meet the requirements of Rules 7.1, 7.2 and 7.3.

a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes.”<sup>2</sup> And under Rule 1.8(b), “[u]se of [a client’s] confidences and secrets to benefit either the lawyer or a third person” is prohibited absent client consent.<sup>3</sup>

Disclosure of confidential settlement amounts could have adverse effects to the client. Even where the amount recovered is a matter of public record, e.g., when a final judgment is entered after trial, it is reasonably foreseeable that dissemination of the recovery could be detrimental to the client. The definition of a “secret” includes “information that becomes known by others, so long as the information does not become generally known.”<sup>4</sup> The Comment to Rule 1.6 adds, “This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.” A final judgment may be public information, but the judgment amount may not be widely disseminated, and use of the client’s name together with the recovery amount could expose the client to attempts at fraud, thievery or unwelcome requests for loans or gifts. The greater the amount, the greater is the potential risk of client harm.

Rule 9.1(g), Alaska Rules of Professional Conduct, defines “informed consent” as the agreement by a person to a proposed course of conduct after the lawyer has adequately explained the material risks of, and the reasonably available alternatives to, the proposed course of conduct. The Rule 9.1 Commentary further clarifies the necessary steps associated with obtaining a client’s “informed consent”:

The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the

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<sup>2</sup> Former ABA Model Code of Professional Responsibility, DR 4-101, EC 4-5 (1980) (emphasis added),

[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_migrated/mcpr.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/mcpr.pdf) The Alaska Comment to Rule 1.6 states that “The terms ‘confidence’ and ‘secret’ are defined in the amended rule in substantively the same way as those terms were defined in DR 4-101(A) of the ABA Model Code of Professional Responsibility.”

<sup>3</sup> Rule 1.8, cmt. (“Use of Information Related to Representation”).

<sup>4</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (AM. LAW INST. 2000).

need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. (emphasis added). In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.

While not expressly required by Rule 1.6, before using a client testimonial or disclosing amounts recovered for the client, the most prudent course of conduct is for the lawyer to confirm the client's consent in writing, i.e., a tangible or electronic record of a communication or representation. See Rule 9.1(t), Alaska Rules of Professional Conduct. On this issue, the Commentary to Rule 9.1 states:

If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that

consent so long as it is confirmed in writing within a reasonable time thereafter.

In sum, the Committee concludes that use of client testimonials and amounts recovered for clients in a lawyer's advertising is allowable provided informed consent is first obtained by the lawyer.

Approved by the Alaska Bar Association Ethics Committee on August 18, 2020.

Adopted by the Board of Governors on October 26, 2020.