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Sales Pitch: New OSB Opinion on Using Client Information in Lawyer Marketing

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When we do good work for a client, the natural impulse is to tell someone. In today's hypercompetitive market, good results can also be a key selling point in getting new work. At the same time, legal work is fundamentally different than many other occupations. We are bound by strict duties of confidentiality toward our clients and, even if we did a superb job, a client many not want their sensitive information disclosed to the broader public. Late last year, the Oregon State Bar issued an ethics opinion that helps lawyers navigate the intersection of marketing and client confidentiality. The new opinion—Formal Opinion 2024-204 (2004)—is available on the OSB website. In this column, we'll survey that tricky intersection from the perspective of the new OSB opinion.

Before we do, however, three caveats are in order.

First, in keeping with the new OSB opinion, we'll focus here on the confidentiality aspects of using client information in marketing. Other facets of the professional rules—principally RPC 7.1 on truthfulness in lawyer marketing—also enter the mix when advertising results. Comment 3 to ABA Model Rule 7.1, on which Oregon's rule is patterned, suggests the use of disclaimers when

advertising results to avoid creating unjustified expectations. That's good advice, but beyond the area that we'll discuss today.

Second, other constraints—such as confidentiality agreements or protective orders—may also impact the ability to disclose information or results.

Third, because it is a bar ethics opinion, Formal Opinion 2024-204 appropriately focuses on the RPCs. It is important to remember, however, that the regulatory rule on confidentiality—RPC 1.6—is a reflection of our underlying fiduciary duty of confidentiality. This suggests that in at least some instances, a failure to protect client confidential information that results in client harm might provide grounds for a civil damage claim for breach of the fiduciary duty of confidentiality.

OSB Formal Opinion 2024-204 begins by outlining the broad sweep of the confidentiality rule and then applies that to lawyer marketing. We'll take that same tack.

Confidentiality

Formal Opinion 2024-204 leads off with what is protected by the confidentiality rule: "information relating to the representation of a client." The opinion notes that Oregon's definition of that phrase under RPC 1.0(f) includes both conversations falling within the attorney-client privilege and "other

information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." As the definition implies, the duty of confidentiality extends beyond the end of an attorney-client relationship.

Relying on the comparatively recent decision by the Oregon Supreme Court *In re Conry*, 368 Or. 349, 491 P.3d 42 (2021), Formal Opinion 2024-204 (at 4-5) discusses "embarrassing" information:

> The court stated, "[i]n evaluating whether the information is embarrassing, this court has considered '[t]he nature of the disclosures, the overall tone of the [responses], and the circumstances surrounding [their] preparation.'" The court suggested that, unlike with other categories of confidential information under Rule 1.0(f), a client need not actually suffer a detriment for information to be considered embarrassing. Moreover, the client may not even need to be aware of a disclosure for it to violate Rule 1.6(a), suggesting that some situations are sufficiently embarrassing that they objectively constitute a violation of the rule.

Formal Opinion 2024-204 notes that the simple fact that information is "public" does not excuse a lawyer's obligations under RPC 1.6 and underscores that clients may be embarrassed by information that, while technically public, is not widely known. There is no "marketing exception" in the rule.

Application

Formal Opinion 2024-204 reminds lawyers that while the constraints discussed apply to traditional media advertising, those limitations apply with equal measure to non-media marketing such as public presentations and private "pitches."

Given the broad sweep of RPC 1.6, Formal Opinion 2024-204 recommends (at 8) obtaining client consent to marketing disclosures:

> Undoubtedly, the best practice for a lawyer to comply with Rule 1.6(a) . . . is to obtain the informed consent of the client that is the subject of the disclosure. Under Oregon RPC 1.0(g), "'[i]nformed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Thus, an attorney that wishes to disclose information about a client for the lawyer's benefit should first speak to the client about that purpose, explain the risks and alternatives, answer any questions, and obtain the client's consent.

Formal Opinion 2024-204 does not speak directly to the timing of client consent. Its discussion in this regard, however, assumes that the client can evaluate the specific information the lawyer proposes to disclose. This suggests that a general provision in an engagement agreement would not likely pass muster for the later disclosure of the specific details of the case or its resolution. Although client consent is not required to be confirmed in writing under RPC 1.6,

prudent practice suggests documenting consent in writing (traditional or electronic)—ideally memorializing the specific information approved.

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