

**LOS ANGELES COUNTY BAR ASSOCIATION  
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

OPINION NO. 529  
August 23, 2017

ETHICAL RISKS IN USING SOCIAL MEDIA

SUMMARY

Every lawyer must act competently to protect confidential client information against inadvertent or other unauthorized disclosure. While lawyers always should be cautious about disclosing any information related to a client, on-line communications present particular risks. One example of such a risk arises when someone attempts to elicit information from a lawyer via social media pretexting. A lawyer's unguarded disclosure of client information might result in violations of the duties of competence and confidentiality and might cause the loss of the lawyer-client privilege and work product protection.

AUTHORITIES CITED

**Cases**

*In re Jordan* (1972) 7 Cal.3d 930  
*McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal. App. 5th 1083  
*Lenz v. Universal Music Corp.* (N.D. Cal. Oct. 22, 2010) 2010 U.S. Dist. LEXIS 119271  
*Kintera, Inc. v. Convio, Inc.* (S.D. Cal. 2003) 219 F.R.D. 503

**Statutes**

Bus. & Prof. C. § 6068(e)(1)  
Code Civ. Proc. §§ 2018.010, *et seq.*  
Evid. C. §§ 912(a) and 950, *et seq.*

**Rules of Professional Conduct**

California Rules of Professional Conduct, Rules 3-100 and 3-110

## **Ethics Opinions**

Cal. State Bar Formal Opns. 2016-195, 2010-179, 2004-165, 2003-161, 1999-154, 1993-133, 1981-58, and 1980-52  
L.A. County Bar Assoc. Opns. 524, 456, 436, and 386

## **Other Authorities**

Fed. R. Evid., Rule 502

## **Statement of Facts**

Attorney is active on an Internet website that permits interactive communications with other visitors to the website. Attorney begins corresponding through the website with an Individual unknown to Attorney. Neither Attorney nor Individual uses his actual name. Attorney reveals that Attorney is a litigator. Individual states that Individual works in a non-legal capacity in a non-legal industry. Attorney is not aware that Individual is actually associated with the opposing side of a pending case in which Attorney represents Client and is “catfishing,” i.e., assuming a false on-line identity to obtain information by pretext.<sup>1</sup>

During their correspondence, Attorney tells Individual about Attorney’s upcoming interviews with Lay Witness and Expert Witness, both of whom are potential witnesses in Client’s matter. Attorney communicates to Individual the general geographic location of Lay Witness and the general subject matter of Expert Witness’s expected testimony. Attorney does not reveal the name of Client or of either witness.

Attorney also maintains a blog associated with his law firm website and comments on both the blog and a legal industry on-line discussion board that in a matter Attorney is handling there is a lay witness whose “memory is weak” and who is “an older gentleman.” Attorney also notes on the blog and discussion board that in the same matter he has retained an expert witness whose opinion is “very supportive” of the client’s position and Attorney now estimates damages in the matter “greater than” what Attorney originally calculated.

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<sup>1</sup> Merriam-Webster Dictionary defines “catfish” as “[A] person who sets up a false personal profile on a social networking site for fraudulent or deceptive purposes” (available at: <https://www.merriam-webster.com/dictionary/catfish>).

This Opinion does not address the ethical implications for the lawyer or law office associated with the individual perpetrating the catfishing referenced in this Opinion.

Attorney believes the revealed information is innocuous, in part because Attorney has not identified by name Client, Lay Witness, or Expert Witness. However, Attorney has revealed sufficient information so that a person familiar with aspects of Client's litigation would be able to identify the witnesses and the significance of Attorney's disclosures.

### **Issue**

What are the ethical implications of an Attorney's disclosure of client-related information through social media to the public and to a person whose identity is unknown to Attorney where the cumulative effect of Attorney's use of social media can allow readers to aggregate and study information so that a Client's confidential information may be deduced or discovered from it, and the information includes Attorney's personal impressions, opinions or assessments related to the representation?

### **Discussion**

Business and Professions Code § 6068(e)(1) obligates each attorney to preserve the "secrets" of the client. Client "secrets", often referred to as confidential client information, includes all information obtained by a lawyer as a result of a lawyer-client relationship, the disclosure of which likely would be harmful or embarrassing to the client or that the client has directed the lawyer not to disclose. See, e.g., California Rules of Professional Conduct, Rule 3-100, Discussion ¶ [1];<sup>2</sup> *In re Jordan* (1972) 7 Cal.3d 930, 940-41; Cal. State Bar Formal Opns. 2016-195, 2004-165, 2003-161, 1999-154, 1993-133, 1981-58, and 1980-52; and L.A. County Bar Assoc. Formal Opns. 456, 436, and 386.

Confidential client information is a broad category that encompasses information protected by the lawyer-client privilege and the work product doctrine. In addition to not intentionally disclosing confidential client information, a lawyer's duty of competence under California Rule 3-110 requires that the lawyer take reasonable precautions to safeguard against its unintended disclosure. See Cal. State Bar Assoc. Formal Opn. 2010-179 ("An attorney's duties of confidentiality and competence require the attorney to take appropriate steps to ensure that his or her use of technology in conjunction with a client's representation does not subject confidential client information to an undue risk of unauthorized

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<sup>2</sup> Unless otherwise indicated, all references to rules are to the California Rules of Professional Conduct.

disclosure.”).<sup>3</sup> A lawyer’s failure to take reasonable precautions to protect the information could have serious adverse repercussions for the client’s interests. Although this opinion focuses on potential adverse repercussions that can result from an incautious use of social media, the principles discussed apply with equal force to all interactions in which a lawyer might engage in the lawyer’s professional or personal life.

*Lawyer-Client Privileged Information.* As noted, within the broad range of information protected by Business and Professions Code § 6068(e)(1) is the narrower category of lawyer-client communications that are protected by the evidentiary lawyer-client privilege under Evidence Code §§ 950, *et seq.* Although inadvertent disclosure might not waive the lawyer-client privilege,<sup>4</sup> a lawyer’s disclosure of confidential client information, including that which is privileged, nevertheless makes that information available for use by others and could cause the client harm. For example, assume that during a conference with the lawyer, the client had revealed facts that were detrimental to the client or the client’s matter. Further assume that the lawyer then disclosed those same facts on-line when discussing a “client” whose name the lawyer did not reveal. Although the lawyer might believe that those facts could not be associated with the particular client, it is possible that an opposing party or third person might be able to infer the client’s identity from the context of the disclosure. Although the disclosure by the lawyer would likely not constitute a waiver of the privilege, the opposing party would be able to use the underlying facts disclosed during the lawyer-client communication to the client’s detriment or embarrassment.

*Work Product.* It also is possible that a lawyer’s disclosure would waive work product protection otherwise available under Code of Civil Procedure §§ 2018.010, *et seq.* For example, in *Lenz v. Universal Music Corp.* (N.D. Cal. Oct. 22, 2010) 2010 U.S. Dist. LEXIS 119271, the “YouTube ‘dancing baby’ case”, the court determined that work product protection had been waived by the client’s blog posts, gmail chat posts, and e-mails discussing the lawyer’s strategy. In addition, in *Kintera, Inc. v. Convio, Inc.* (S.D. Cal. 2003) 219 F.R.D. 503, the court ordered

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<sup>3</sup> Formal Opn. 2010-179 addressed the duty to guard against the kind of eavesdropping and interception that might be possible when a lawyer communicates electronically, such as when using a public wireless connection. The current opinion discusses the situation in which a lawyer discloses information intentionally but with the belief that confidential client information is not being revealed.

<sup>4</sup> Under Evid. C. § 912(a), only the holder of a privilege can waive its protections, either by disclosing a significant part of the protected communication or by consenting to its disclosure by another person. See also *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal. App. 5th 1083, 1101.

production over the plaintiff's work product objection after plaintiff had posted to its website allegations of misappropriation of trade secrets and said it possessed employee affidavits signed under penalty of perjury.<sup>5</sup> Although *Lenz* and *Kintera* both involved the clients' disclosures of the lawyer's work product, the same result would follow a lawyer's disclosure on social media of the lawyer's own work product. Under the facts presented, Attorney has disclosed to Individual, a person working with the opposing party in Client's case, general information about Client and both witnesses in Client's matter. Attorney has also disclosed on both his blog and the on-line discussion board Attorney's potentially damaging impression of Lay Witness's memory that the other side might be able to use to impeach the witness's testimony. Further, Attorney's disclosed opinion on those same social media sites regarding Expert Witness's anticipated damages testimony will alert the other side to countermeasures they will need to take in the damages phase of the case. The general information Attorney relayed to Individual in their one-on-one communication, in concert with Attorney's disclosures about the two witnesses on the blog and discussion board, can provide the opposing side with information to develop strategies that are detrimental to Client's interests.<sup>6</sup>

Lawyers should always protect client information carefully; discretion is essential to client protection and a hallmark of professionalism. Further, communication through social media carries enhanced risks, not only because, as in this situation, the recipient of an electronic communication might not be the person whom she or he purports to be, but also because the recipient has the ability to share the information with others easily. In addition, information distributed electronically has a continuing life, and it might be possible for recipients to aggregate, mine, and analyze electronic communications made to different people at different times and through different social media. These dangers are enhanced by the casual, informal, and spontaneous nature of some Internet communications: a lawyer who is part of an on-line community must comply with all of the duties with regard to confidential client information that lawyers have in every other circumstance.

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<sup>5</sup> Federal Rules of Evidence, Rule 502 controls waiver of the lawyer-client privilege and work product protection in the federal courts.

<sup>6</sup> It is possible that Attorney's disclosures about the two witnesses on the blog and discussion board may alone, without the one-on-one communication with Individual, provide sufficient information so as to be detrimental to Client's interests (e.g., if Attorney's case load is relatively small such that the disclosures likely relate to Client's matter). In any event, the cumulative effect of the disclosures and the communication make such detrimental effect much more likely.

## **Conclusions**

Lawyers are required to be sensitive to the interplay of advancing technology and the lawyer's professional responsibilities. A lawyer who communicates on-line regarding professional activities must guard against doing so in a way that discloses confidential client information. A lawyer's failure to recognize the risks inherent in the use of on-line social media could result in client injury and the possibility of professional discipline under Business and Professions Code § 6068(e)(1) and Rules of Professional Conduct 3-100 and 3-110.

This Opinion is advisory only.