

Disclosing Client Names Should Not Be Routine  
by Clare Pastore<sup>1</sup>

It's a fact of life that today's lawyers, and those following us into the profession in years to come, will work in many professional settings over the decades of our working lives. Gone forever for the vast majority of lawyers are the days of entering a firm as a new lawyer and leaving some 50 years later, gold watch in hand. Given that most lawyers today will have many jobs, and therefore many clients, the possibility of conflicts of interest between former and new clients has multiplied, because every move carries the possibility of such conflicts. While sharing client lists with new employers in order to check for conflicts has become an accepted part of transitioning from one work setting to another, the ethical limits on when lawyers may and may not disclose client names are often overlooked.

It's a truism that California's confidentiality rules for attorneys are considered the strictest in the nation. Under California Business and Professions Code section 6068(e)(1), it is the duty of every attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." In contrast to the ABA Model Rules of Professional Conduct ("Model Rules") adopted by most states, which spell out seven exceptions to the duty of confidentiality,<sup>2</sup> our governing statute includes only one, applicable when "the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."<sup>3</sup> Our confidentiality rule, California Rule of Professional Conduct 1.6, likewise underscores that lawyers shall not reveal confidential information unless the client gives informed consent, or the death/bodily harm exception applies.

Notably, in adopting the Model Rules numbering and organizational system in 2018, California did *not* adopt Model Rule 1.6(b)(7), added to the Model Rules in 2012, which provides a specific exception to the duty of confidentiality for disclosures "to detect and resolve conflicts of interest arising from the lawyer's change of employment. . ." So unlike in states which have embraced the Model Rules more fully, there is no explicit authority in California to reveal information in order to facilitate conflicts checks. A recent California State Bar ethics opinion on the duties of lawyers leaving a law firm notes that the conflict checks required at an attorney's new firm implicates the lawyer's duty to protect the confidences of former clients, which can lead to "a tension between the duty of confidentiality and the other ethical duties the Departing Lawyer and Law Firm face as part of the departure process."<sup>4</sup>

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<sup>1</sup>Professor of the Practice of Law, USC Gould School of Law, and Member of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association. The opinions expressed here are the author's alone.

<sup>2</sup>See ABA Model Rules of Professional Conduct 1.6(b)(1) through (b)(7).

<sup>3</sup>Bus. & Prof. Code § 6068(e)(2); California Rules of Professional Conduct 1.6(b).

<sup>4</sup>California State Bar Standing Committee on Professional Responsibility and Conduct, Opinion 2020-21 (2020) at 7.

Even in jurisdictions where the Model Rule confidentiality exception for conflicts-checking applies, the exception itself specifies that it applies “only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.”<sup>5</sup> And the comments to Model Rule 1.6(b)(7) caution that even when disclosures are authorized by the Rule, they should “ordinarily include no more than the identity of the persons and entities involved, . . . a brief summary of the general issues . . . , and information about whether the matter has terminated.”<sup>6</sup> Moreover, disclosure of even this limited information is “prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client.”<sup>7</sup> This is consistent with the ABA’s longstanding position, as set forth in a one-sentence Informal Opinion from 1971: “a lawyer may reveal the name of his client unless the client has requested that the professional relationship be held inviolate or the disclosure would be embarrassing or would be likely to be detrimental to the client.”<sup>8</sup>

The comment to the recently added Model Rules conflicts checking provision gives three examples of situations where disclosing a client’s name could be prejudicial to the client: clients involved in a corporate takeover that is not yet public, consultations about divorce before the person’s spouse is aware, and consultation with a criminal lawyer where charges do not ensue.<sup>9</sup>

Another example came to my attention recently when a former colleague in the nonprofit legal services world called me for advice on behalf of an attorney transitioning to private practice from a legal aid position. The new employer asked for a list of all clients and matters on which the attorney had worked while at the legal aid office. In my opinion, such a disclosure (absent client consent) would violate the attorney’s duties under Business and Professions Code section 6068(e) and California Rule 1.6, since revealing the names of former legal aid clients inevitably reveals their financial circumstances (or at least their past financial circumstances) and perhaps, depending on the scope of the legal aid program, that their legal problem involved housing or government benefits or domestic violence. This information could certainly be sensitive or embarrassing and should not be revealed without client consent.

In addition to conflicts checking, controversy over revelation of client names has come up in at least two other areas: discovery in litigation and demands for disclosure of former clients when an attorney enters public office.

With regard to the former, California courts have recognized that in appropriate cases, where revealing client names would reveal either sensitive or inculpatory information about the

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<sup>5</sup>Model Rule 1.6(b)(7).

<sup>6</sup>Model Rules 1.6, Comment 13.

<sup>7</sup>*Id.*

<sup>8</sup>ABA Informal Opinion 1200 (Sept. 13, 1971).

<sup>9</sup>Model Rule 1.6, Comment 13.

client, the names can be protected by the state constitutional right of privacy or the attorney-client privilege. For example, the Court of Appeal has shielded the names of potential class members who contacted counsel about a wage and hour class action,<sup>10</sup> the names of persons who responded to advertisements regarding a contraceptive device products liability case,<sup>11</sup> and the clients of an attorney who was a judgment debtor,<sup>12</sup> among others. The principle linking these cases and the conflicts-checking concern is the same: where revealing a client or potential client's name could be prejudicial to a client, it cannot be done automatically.

Finally, recall also the acrimonious Los Angeles City Attorney election of 2009, where candidate and City Councilmember Jack Weiss lambasted eventual winner Carmen Trutanich over Trutanich's representation in private practice of the National Rifle Association, Los Angeles billboard operators, and others.<sup>13</sup> Weiss challenged Trutanich over and over again to reveal his prior clients, calling some of them "Trutanich's polluters." Trutanich claimed the ethics rules forbade it, noting that clients don't sign up to be punching bags for the future political opponents of their lawyers. Attorneys and experts lined up on both sides.<sup>14</sup>

None of this is to say that attorneys may never reveal the names of their clients; all of it is to say that we must do so only with care. Routinely handing over to new employers the names of clients, without consideration of whether the fact of representation could invade a client's privacy or reveal sensitive or prejudicial information, is not consistent with our duties of confidentiality.

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<sup>10</sup>*Tien v. Superior Court*, 139 Cal.App.4th 528 (2000) (invoking Cal. Const. Art I, sec. 1).

<sup>11</sup>*Rosso, Johnson, Rosso & Ebersold v. Superior Court*, 191 Cal.App.3d 1514, 1519 (1987). See also *Willis v. Superior Court*, 112 Cal.App.3d 277, 293 (1980) (collecting cases evaluating application of privilege to client names and also discussing constitutional privacy interests of third parties such as clients of doctors or lawyers when their records are sought by litigants).

<sup>12</sup>*Hooser v. Superior Court*, 84 Cal.App.4th 997 (2000) (shielding names of undisclosed clients of lawyer/judgment debtor because their right to privacy outweighed judgment creditor's interest in the information). *Hooser* and similar cases were narrowed recently by *Williams v. Superior Court*, 3 Cal.5th 531, 557 (2017), which rejected the suggestion that "an egregious invasion" of privacy was at stake in every discovery request for private information, but affirmed that the constitution protects against disclosure of client names in cases where harm shown.

<sup>13</sup>See, e.g., Frank Stoltze, "LA City attorney candidates sharpen attacks against each other," Southern Cal. Public Radio (May 7, 2009), available at <https://www.scpr.org/news/2009/05/07/16/la-city-attorney-candidates-sharpen-atta/>.

<sup>14</sup>For example, Dean Erwin Chemerinsky, then of UC Irvine School of Law, opined in the *Los Angeles Times* that "Clients Aren't a Lawyer's Secret" (<https://www.latimes.com/archives/la-xpm-2009-may-01-oe-chemerinsky1-story.html>), while attorney and newspaper publisher Roger M. Grace wrote in *Met News* that "Jack Weiss's Campaign Approach Is Affront to the Legal Profession." <http://www.metnews.com/articles/2009/perspectives051209.htm>