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Viewpoint: Guard Your Clients' Public Secrets

By Richard Zitrin

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The last Moral Compass column criticized the Virginia Supreme Court's reasoning in *Hunter v. Virginia State Bar*, which disciplined Richmond, Va., attorney Horace Hunter for advertising violations relating to posts on his blog. In several respects, *Hunter* was a case of first impression about lawyer bloggers. Hunter had blogged mostly about his own criminal cases — all of them successfully resolved in his view — without disclaiming that these results could not be used to predict future success. For this, Hunter received a public reprimand.

The worst part of the *Hunter* court's decision was not the court's analysis of Hunter's blog, but its misinterpretation of its own rule on confidentiality. One of the charges against Hunter was that by using his clients' names, he had violated Virginia Rule of Professional Conduct 1.6(a). This rule reads very much like those of most states. Here's the language:

"A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the 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 unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."

And here's the rub: On his blog, Hunter wrote about his own cases in some detail. He used the real names of clients who were acquitted, and the names of clients for whom he negotiated favorable plea bargains to lesser charges. And he acknowledged that he used the names without his clients' consent.

So what's wrong with that? All of the information that Hunter posted on his blog was about past cases, and could be found in the public record of criminal proceedings. As the Virginia Supreme Court noted, "To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom." Thus, concluded the court, Hunter could not violate Rule 1.6.

In reaching its conclusion, the court cited several landmark U.S. Supreme Court First Amendment cases and quoted from a few. From *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), it took this: "[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice. ... A trial is a public event. What transpires in the court room is public property. ... Those who see and hear what transpired can report it with impunity." From *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), it quoted that "the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved." And from *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), it quoted this passage:

"[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law."

And in all these respects, the Virginia court's citations were inapposite. *Richmond Newspapers* and *Seattle Times* both are hugely important freedom-of-the-press cases, but neither has to do with lawyers, whose free speech may be restricted by their duties to their clients — including, of course, confidentiality. *Gentile* is an extremely important case for lawyers. In a split-majority decision with two majority opinions, Nevada lawyer Dominic Gentile was found not to have violated the disciplinary rule against pretrial publicity when he sought to protect his client against law enforcement's accusations, by claiming — correctly as it turned out — that his client was a "scapegoat" and a dishonest cop had actually committed the crime. The *Hunter* court thought that the timing made Hunter's case easier, because his disclosures were all after the fact.

But Gentile was protecting his client, while Hunter was exposing his. The Virginia Bar's point was this: The ethical rule about confidentiality has two parts. First is the obvious: communications between clients and their lawyers, or those things that are attorney-client privileged. But second are those protections, often called "secrets," that, as the Virginia court noted, includes "that which is public information but is embarrassing or likely to be detrimental to the client."

The rule, of course, does not contain the words "public information," and that is where the court determined that the bar had stretched too far. But had it? I don't think so. Certain things that are technically "public" can still be embarrassing or detrimental to a client.

Imagine this situation: Charlie Client is charged with armed robbery, but his lawyer wins a motion to suppress evidence illegally seized from Client's girlfriend's apartment. As a result of this suppression and given the weakness of the remaining case, the DA offers Client a plea to simple misdemeanor possession of stolen property. Client takes this favorable deal and is placed

on probation. It is an ordinary, run-of-the-mill case that receives no press attention, but all of the events — the charging document, the motion to suppress, the final plea and admonishment to and waiver of the defendant — are part of the court file.

No one is interested in this case. No one cares. Client goes about his business, and perhaps even rehabilitates himself, going to junior college and getting a good job as a computer programmer or restaurant manager.

And then Client's lawyer publishes a blog with the details of the case, how the hard-charging lawyer won the motion to suppress using the important protections of the Fourth Amendment, and how Client thus got to plead guilty to only a misdemeanor.

If you were Charlie Client, how would you feel? Embarrassed? Hugely. That the information disclosed by your lawyer is detrimental to you? You bet.

And that is why the Virginia State Bar was right in disciplining Horace Hunter for violating his duty of confidentiality to his clients, even though he disclosed the information only after the cases were over. As the California statute eloquently puts it, it is the duty of every lawyer to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." [Bus. & Profs. Code §6068(e)(1).] Those "secrets" include anything embarrassing or likely to be detrimental to the client. The fact that the information is available to the public doesn't mean it is known by the public. And it is there that an attorney's duty lies and continues, both before and after the end of the case.

The core of where the Virginia court went wrong was its conclusion that "a lawyer is no more prohibited than any other citizen" from talking about an old case. Not so. A lawyer remains at all times a lawyer.

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