



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1061 (6/15/15)

Topic: Duty of Confidentiality; Informed Consent; Client Payment History; Law Firm Reporting Client’s payment history to database with Client’s Informed Consent

Digest: Subject to certain conditions, a lawyer may report a client’s payment history on a database system that allows lawyers to report on the timeliness of payment of legal bills and gives access to such information to subscribing law firms and their staff members. Such reporting does not violate the Rules of Professional Conduct provided that (i) the lawyer has obtained the client’s informed consent, and (ii) the client’s consent is not coerced. To obtain the client’s uncoerced informed consent, the lawyer should fully explain the material risks of consenting, including the uses to which the information may be put, and the lawyer should take into consideration the sophistication of the client. The lawyer should also inform the client of his/her right to have independent counsel advise on whether the client should consent. A client who has given informed consent to disclose confidential information may later revoke the consent at any time.

Rules: 1.0(j), 1.6(a) & (b), 1.7(b), 1.9(c), 1.16(b) & (c)

FACTS

1. The inquirer proposes a subscription-based database system or information clearinghouse (the “System”), akin to a credit reporting system, in which lawyers would report information about the payment status of legal bills of a commercial (i.e. non-consumer, non-household use) client.¹ The System would be accessible through a secure website solely to subscribing law firms (“Subscribers”) and their constituent lawyers and staff members. Subscribers would be allowed to file reports on the payment histories of their consenting clients and to review reports filed by other lawyers. The purposes of the System are to allow Subscribers to predict a potential client’s timeliness of payment of fees (i.e., assess the credit-worthiness of a prospective client) and to incentivize clients to pay legal bills as agreed. The System would identify not only potential problematic credit risks but also good credit risks. Under the System’s business model, the Subscriber would have the client sign a consent, allowing the law firm to report the client’s timeliness in payment.

2. The System, as proposed, would enable law firms to report a client’s payment history using such categories as non-payments, late payments, disputed payments and prompt payments, but it would not report the amount owed by the client. The reporting Subscriber would be required to notify the client when the Subscriber files an adverse report about an unpaid invoice with the System, and the client would be entitled to notify the System if the client disputes the amount or validity of the unpaid invoice.

3. Subscribers would be obligated to treat the payment histories in the System's database as confidential, but would be authorized to use the information in the System in determining whether to accept an engagement or in establishing the financial terms of the engagement, including whether to request or require an advance retainer and in what amount.

4. Subscribers would be required to notify the System if a client disputes an invoice, or if a dispute with a client has been settled. The inquirer has indicated that a negative payment history will not be reported until after an attorney-client relationship has ended.²

5. The inquirer has advised that the System's rules mandate that, before accepting an engagement, the System's subscriber must obtain the client's informed, written consent and a limited waiver of confidentiality. The form of consent to be provided to the client upon engagement informs the client that by executing the consent, the client authorizes the lawyer to file a report with the System that contains (a) the client's name, address, state of incorporation, names of principals, officers and directors; (b) dates services were rendered and dates payment were due; and (c) the length of time the invoice was outstanding (with notations such as: "paid as agreed" or "invoice was 60, 90, 120 or 120+ days past due"). In addition, the form of consent informs the client to "feel free" to consult with other counsel regarding the implications of the consent.

QUESTION

6. May a lawyer participate in a system that reports the payment histories of the law firm's clients to other system subscribers, if the client gives informed consent for the lawyer to make such reports to the system?

OPINION

7. Rule 1.6 of the New York Rules of Professional Conduct (the "Rules") describes a lawyer's duty of confidentiality to a current client. Rule 1.6 provides as follows:

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (a) likely to

be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (1) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

8. Comment [2] to Rule 1.6, headed “Scope of the Professional Duty of Confidentiality,” underscores the importance of a lawyer’s duty of confidentiality. It states, in pertinent part:

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. . . . The lawyer’s duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. . . .

9. Rule 1.9 addresses a lawyer’s duties to former clients, including the duty of confidentiality. Paragraph (c) of this rule states in pertinent part:

(c) A lawyer who has formerly represented a client in a matter . . . shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

The confidentiality obligation to a former client is thus the same as that to a current client, and the same exceptions apply.

Payment History as Confidential Information

10. We have previously addressed whether a client’s payment status constitutes confidential information. In N.Y. State 684 (1996), interpreting DR 4-101(B), the predecessor to Rule 1.6(a), the Committee concluded that a client’s unpaid account status will almost always constitute a “secret”³ within the meaning of DR 4-101(B) because it is information “gained in the professional relationship” and because its “is likely to be embarrassing or detrimental to the client if disclosed.” We therefore found that reporting the client’s payment status to a credit bureau would plainly violate the prohibition on using a client secret “to the disadvantage of the client” and for the “advantage of the lawyer.”

11. Our conclusion under Rule 1.6 on the facts before us is the same. We see no practical difference between a credit bureau and the System proposed here.

12. The analysis, however, does not end there, since the Rules contain certain exceptions to confidentiality. Rule 1.6, and therefore Rule 1.9, contains two potentially applicable exceptions to the proscription against disclosure or use of confidential information – information necessary to collect a fee, and information a client has given informed consent to disclose. We will address each exception.

Information Necessary to Collect a Fee

13. Under Rule 1.6(b)(5)(ii), the lawyer may disclose confidential information to the extent the disclosure is “reasonably necessary” to “establish or collect a fee.” In N.Y. State 684 (1996), we concluded that reporting the client’s delinquent status to a credit bureau did not qualify as the type of disclosure that was “reasonably necessary” to “establish or collect the lawyer’s fee” within the meaning of the similar exception under the Code, because the fee can be collected without making such a report. We said:

[T]o the extent it aids the collection process at all, it would appear to do so only by virtue of its *in terrorem* effect on the client, arising from the likely adverse impact on the client’s credit rating. Such use of a client’s secret by a lawyer would plainly violate DR 4-101(B)’s prohibitions on the use of a client’s secret “to the disadvantage of the client” and “for the advantage of the lawyer.”

14. See also Rule 1.6, Cmt. [14] (disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose); N.Y. State 980 (2013) (Rule 1.6(b)(5) is no license for counsel to reveal any confidential information beyond what is “reasonably believe[d] necessary” to collect the fee.)

15. The inquirer argues that the System is consistent with the principle described in Comment [11] to Rule 1.6, which explains the exception for disclosures necessary to collect a fee, and states: “A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.” For example, we have long recognized that lawyers are not compelled to provide free legal services to all clients. See N.Y. State 598 (1989) (client’s knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify lawyer’s withdrawal from employment in accordance with DR 2-110(C)(1)(f) – the predecessor to Rule 1.16(c)(5) – which allows a lawyer to withdraw from representation where the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees). However, our interpretations of the withdrawal rule make it clear that mere nonpayment or late payment is not enough. The client’s failure must be conscious rather than inadvertent, and must not be *de minimis* in either amount or duration. Conversely, a lawyer may withdraw from representing a client who deliberately disregards an obligation to pay a lawyer more than a *de minimis* amount for more than a *de minimis* length of time.

Client Consent to Disclosure or Use

16. The duty of confidentiality owed to a client or former client may be waived if a client or former client gives informed consent to disclose the confidential information, confirmed in writing. See Rule 1.6(a)(i) (disclosure permitted if client gives informed consent); Rule 1.9(c)(1)&(2) (disclosure prohibited except as these Rules would permit with respect to a current client); Rule 1.9, Cmt. [9] (“The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent ...”).

17. The definition of “informed consent” is pertinent to the inquiry, because Rules 1.6 and 1.9 both refer to it. Rule 1.0(j) defines “informed consent” as:

the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks and reasonably available alternatives to the proposed course of conduct.

18. Comment [6] to Rule 1.0 provides the following guidance regarding 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. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. . . . 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 decision of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

See also Rule 1.7, Cmt. [18] (informed consent requires that the client be aware of the material and foreseeable ways that the conflict could adversely affect the interests of the client).

19. This Committee declines to opine whether any particular form of disclosure is adequate to obtain informed consent from any particular population of clients. At a minimum, however, informed consent in the circumstances before us would require disclosing that (i) the client’s payment history would be available to Subscribers, and that (ii) Subscribers might use the client’s payment history to determine whether to accept an engagement or to establish the financial terms of the engagement, including whether to request an advance retainer. Full disclosure may also require informing the client that the waiver would authorize the lawyer to report the client’s non-payment pending a dispute over the legal bill (although we are told that the report to the system would note that the bill was disputed).⁴ In the event of a later challenge, the burden is on the lawyer to demonstrate that consent was informed.

20. In prior opinions involving collection of fees, this Committee has commented on informed consent to the use of a collection agency, and cautioned that the “lawyer must take care to ensure that the client’s consent is uncoerced as well as informed.” We have some concern that, as in N.Y. State 684, the lawyer’s ability to disclose the client’s payment history to the System will have an *in terrorem* effect on the client, arising from the likely adverse impact of a history of slow or contested payments on the client’s ability to hire other counsel on favorable credit terms. But we think that this *in terrorem* effect simply makes it less likely that the client will consent, rather than indicating that the client’s consent is coerced. Coercion may be present, however, if the lawyer refused an engagement unless the client consented to use of the System.

Advance Consent

21. The consent being proposed here is an advance consent. That is, the client is not being asked to consent to a known current disclosure or known use of confidences, but rather is being asked to consent to the lawyer’s possible future disclosure or use of those confidences. In N.Y. City 1997-2, the City Bar ethics committee held that “consent to disclosure under particular circumstances for particular purposes may generally be obtained in advance of obtaining client confidences.” In determining the effectiveness of the consent, the City Bar said that the client’s consent must be given after “full disclosure” and must be “voluntary.” N.Y. City 1997-2. Those two factors are also helpful here.

22. Advance consent to disclosure of confidential information is analogous to advance consent to waive a conflict. Comment [22] to Rule 1.7 provides guidance about what information a lawyer must provide to a client to obtain valid consent to a future conflict:

The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent “informed” and the waiver effective. . . . The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client.
[Emphasis added.]

See generally Restatement Third, The Law Governing Lawyers (“Restatement of the Law Governing Lawyers”) §62 Cmt. c (“When the question concerns the lawyer’s duty to the client, the client’s consent is effective only if it is given on the basis of information and consultation reasonably appropriate under the circumstances.”) A lawyer cannot assume that all “commercial” clients are sophisticated. Many small business clients may not be sophisticated consumers of legal services and may not have experience in negotiating retainer agreements or negotiating waivers of rights bestowed upon them by the Rules.

23. Applying those concepts here, once the client consents in advance to the lawyer's providing otherwise confidential payment information to the System, the question arises whether the client may, at some point thereafter, revoke the consent. Comment [21] to Rule 1.7 states that "a client who has given consent to a conflict may revoke the consent at any time." Similarly, the Restatement of the Law Governing Lawyers takes the view that consent to a conflict can be revoked at any time. Restatement, §122, Cmt f. ("A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent."). See N.Y. State 903 (2012) (client who has given consent to a conflict may revoke the consent). In the case of conflicts, the client's revocation of consent enables the client to terminate the lawyer's representation of the client from that point forward.⁵

24. We believe the same restriction applies to a client's advance consent to a lawyer's disclosure of confidential information. If the client revokes consent, the revocation will prohibit the lawyer from making future reports of the client's payment status to the System, but will not require the lawyer to remove any past reports to the System. See N.Y. City 1997-2 ("If the minor client consents in advance to the lawyer's reporting of confidences or secrets concerning abuse or mistreatment, the client may later change his mind and revoke consent, in which event the lawyer must maintain confidentiality."). The City Bar further opined that whether the lawyer may withdraw from representing the revoking client or a conflicting client upon the client's revocation of consent is governed by the rule on withdrawal from representation (now Rule 1.16). Similarly, whether the inquiring lawyer here would have grounds to withdraw from representing a client who revoked consent to allow the lawyer to report the client's late payments would depend on Rule 1.16(b)-(c).

25. Aside from complying with the requirements of the aforementioned Rules, the lawyer must also comply with applicable law, including laws such as the Fair Credit Reporting Act. (We offer no opinion on whether the FCRA or any other law is applicable in these circumstances.)

CONCLUSION

26. A lawyer may report a client's payment history to a database system that allows lawyers to report on the timeliness of payment of legal bills and gives access to such information to subscribing law firms and their staff members, provided that lawyer has obtained the client's informed consent, and provided that the client's consent is not coerced. In order to obtain the client's informed consent, the lawyer should fully explain the material risks of consenting, including the uses to which the information may be put. In formulating that explanation the lawyer should take into consideration the sophistication of the client, and should inform the client of his/her right to have independent counsel review the consent. In addition, the client who has given informed consent to disclose confidential information may revoke the consent at any time.

(54-14)

¹ The inquirer may have chosen the term "commercial" to avoid the application of consumer protection laws such as the Fair Credit Reporting Act. The distinction made by ethics rules,

particularly those involving informed consent, is not the same as that made by consumer protection laws. Rather, as noted below, it is based on the sophistication and experience of the client, and all “commercial” clients will not have the same degree of sophistication in, and experience with, legal matters.

² The inquirer apparently changed the method of operation of the System after another state’s ethics committee opined that, under the ethical rules in its state, a lawyer could not make reports on current clients. Because the inquirer has told us that lawyers would make reports only with respect to former clients, we have not examined whether our Rules would permit such reports with respect to current clients.

³ The Code defined “secret” as information gained in the professional relationship that is not protected by the attorney-client privilege, but 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. Although the Rules do not use the term “secret,” the term “confidential information” includes information gained during or relating to the representation that is likely to be embarrassing or detrimental to the client and information that the client has requested to be kept confidential. Thus, the term “confidential information” is similar to and slightly broader than the terms “confidences” and “secrets” under the Code.

⁴ Under New York’s Attorney-Client Dispute Resolution Program, 22 N.Y.C.R.R. Part 137, the lawyer could not sue the client for the unpaid fee without giving the client 30 days’ notice of the right to demand fee arbitration. Thus New York disfavors unilateral actions by lawyers to collect legal fees.

⁵ In the context of conflicts, whether the client’s revocation and firing of the lawyer results in the lawyer’s disqualification from representing the other client depends on the circumstances, including whether the parties have agreed to permit continued representation adverse to the withdrawing client after a conflict has arisen. See N.Y. 903 (2012) (“When a lawyer jointly represents two co-defendants pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the joint clients, and one of the clients later revokes consent, whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent.”); D.C. Bar Opinion 317 (2002).