



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

Opinion 1198 (06/22/2020)

Topic: Former government lawyer disclosure of confidential government information

Digest: A former government lawyer is permitted to disclose confidential information of a former client if the lawyer reasonably believes it is necessary to comply with a court order. Upon receiving the subpoena or court order, the lawyer must first consult with the former client and, until otherwise instructed by former client, the lawyer should seek to limit the demand or disclosure prior to disclosing any confidential information. If the lawyer discloses the client's confidential information, the lawyer should seek to minimize the disclosure of confidential information consistent with law.

Rules: 1.4, 1.6, 1.9, 1.11, 8.5

FACTS

1. The inquirer, an attorney licensed in New York, previously served as a government prosecutor. While a prosecutor, the inquirer served as an onsite legal advisor to the team conducting a certain criminal investigation. The investigation included search warrants and the inquirer was present at the crime scene for evidence gathering.

2. The inquirer has reason to believe that the victim and the victim's family will commence a civil lawsuit and name the inquirer's former government client as a defendant. The inquirer anticipates being called as a witness in connection with the civil case arising from the investigation. The inquirer seeks guidance on how to respond if served with a subpoena in the civil case.

QUESTION

3. What are a former government attorney's obligations regarding compliance with a subpoena that seeks information or testimony from the attorney about a matter in which the attorney was involved while a government prosecutor?

OPINION

4. As a preliminary matter, we note that the inquirer's former government employer may have its own rules and regulations pertaining to its current or former government employees that may impose obligations on the inquirer apart from and may be superior to those in the N.Y. Rules of Professional Conduct ("Rules"). Our jurisdiction is limited to questions of ethics under the Rules, so nothing in this opinion is intended to express a view on whether other law may require the inquirer to abide by laws specific to the government agency that employed the inquirer notwithstanding anything in the Rules.

5. Rule 1.6 provides that a lawyer shall "not knowingly reveal confidential information...or

use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless (a) the client gives informed consent, as defined in Rule 1.0(j); (b) 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 (c) the disclosure is permitted by paragraph (b)” of Rule 1.6.

6. Although the inquirer is no longer employed as a prosecutor, the duty of confidentiality continues after the representation of the client has ended. Under Rule 1.9(c), a lawyer who has previously represented a client in a matter shall not thereafter: (i) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as the Rules would permit or require with respect to a current client or when the information has become generally known; or (ii) reveal confidential information of the former client protected by Rule 1.6 except as the Rules would permit or require with respect to a current client. Thus, Rule 1.6’s duty of confidentiality endures following the termination of the attorney-client relationship.

7. Rule 1.6(a) defines “confidential information” as “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.” Under the definition, “confidential information” does not include “a lawyer’s legal knowledge or legal research” or information that is “generally known in the local community or in the trade, field or profession to which the information relates.” *Id.* We note, as well, that not all information falling within the definition of “confidential information” under the Rules may be subject to evidentiary privileges, though a lawyer’s ethical obligation of confidentiality is not limited to privileged information.

8. In parallel to Rule 1.6, Rule 1.11, entitled “Special Conflicts of Interest for Former and Current Government Officers and Employees,” defines “confidential government information” to mean “information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.” Although this definition is narrower than that of “confidential information” in Rule 1.6, we consider Rule 1.6 as a touchstone for analysis.

9. Rule 1.6(b) sets forth six permissive exceptions under which a lawyer may reveal confidential information related to a client’s representation. The exception of most apparent relevance here is found in Rule 1.6(b)(6), which says that a lawyer “may reveal confidential information to the extent that the lawyer reasonably believes necessary” when the lawyer is “permitted or required under these Rules or to comply with other law or court order.” Comment [15] to Rule 1.6 explains that “[p]aragraph (b) permits but does not require the disclosure of information relating to a client’s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). A lawyer’s decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may, however, be required by other Rules or by other law.” Rule 1.6, Cmt [15].

10. Comment [12] to Rule 1.6 observes that “[p]aragraph (b) does not mandate any disclosures. However, other law may require that a lawyer disclose confidential information. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.” Rule 1.6, Cmt [12]. Comment [12] instructs further that, when disclosure of confidential information appears to be required by other law, the lawyer must consult with the client to the extent required by Rule 1.4 – the Rule requiring communications with a client – before making the disclosure, unless such

consultation would be prohibited by other law. If the lawyer concludes that other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures “as are necessary to comply with the law.” Rule 1.6, Cmt [12]. *See* N.Y. State 998 ¶ 12 (2014) (Rule 1.6(b)(6) permits disclosure to the extent reasonably believed necessary “when permitted or required under these Rules or to comply with other law or court order”).

11. Comment [13] to Rule 1.6 provides additional guidance. The inquirer is to consult with the client and seek informed consent. The inquirer should seek to prevent disclosure by raising arguments to challenge the order. Comment [13] elaborates: “Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other laws, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law.”

12. In 2016, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 473, which detailed a lawyer’s obligation upon receiving a subpoena relating to the lawyer’s representation of a client. The ABA Committee opined that “a lawyer must obey a court order, subject to any right to move the court to withdraw or modify the order or to appeal the order. But a lawyer facing a court order requiring the disclosure of client confidential information still is faced with complex, critical and fact-intensive questions on how to respond — e.g., what challenges should be considered, what specific information should be disclosed, and what protective measures should be sought. In making these judgments the lawyer must balance obligations inherent in the lawyer’s dual role as an advocate for the client and an officer of the court.” Initially, if the client is available, the lawyer must consult the client. If instructed by the client or if the client is unavailable, the lawyer must assert all reasonable claims against disclosure and seek to limit the subpoena or other demand on any reasonable ground. ABA Formal Opinion 473 (2016). We agree.

13. Hence, the inquirer must initially consult the former client. If the inquirer determines that he or she is required to disclose the client’s confidential information to comply with a court order or subpoena, any adverse disclosure should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. Rule 1.6, Cmt [14].

14. In N.Y. State 1057 (2015), this Committee held that: “[w]here a court orders that confidential information be disclosed, the lawyer should seek to protect the information by asking for an in camera examination by the court. In many cases, this will limit the adverse effects of disclosure on the client.” *Id.* ¶ 18. The Committee in its opinion continued that in the alternative, “the lawyer may ethically decide not to comply immediately with the court’s order. Instead, the lawyer may test the validity of the order by appealing. An appeal is not mandatory, but if the lawyer believes the information to be disclosed is protected by the attorney-client privilege, the lawyer should appeal the court order.” *Id.* ¶ 19; *see* N.Y. State 681 (1996) (lawyer may disclose “secrets” [such as information embarrassing or detrimental to the client] if ordered by a court to do so, but if information is protected by the privilege, lawyer may have an ethical obligation to appeal court’s ruling); N.Y. State 528 (1981) (when lawyer’s claim of privilege is rejected by a court ruling or order, lawyer may postpone disclosure until validity of adverse ruling is determined on appeal).

15. We also note that if the inquirer is licensed to practice in New York and another jurisdiction

Rule 8.5, governing choice of law, would determine which jurisdiction's rules should be applied to the lawyer's conduct. The laws of the disciplinary jurisdiction to apply would be the jurisdiction where the lawyer principally practices. "If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct." Rule 8.5(b)(2)(ii). Accordingly, it is possible that another jurisdiction's rules may apply to the lawyer's conduct as dictated by Rule 8.5.

CONCLUSION

16. A former government lawyer is permitted to disclose confidential information of a former client if the lawyer reasonably believes it is necessary to comply with a court order. Upon receiving the subpoena or court order, the lawyer must first consult with the former client and until otherwise instructed by client, the lawyer should seek to limit the demand or disclosure prior to disclosing any confidential information. If the lawyer discloses the client's confidential information, the lawyer should seek to minimize the disclosure of confidential information to the necessary, consistent with law.

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