NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1266 (06/14/2024)

Topic: Disclosing confidential information to government agency that is funding a client's representation.

Digest: An attorney may not report a client's confidential information to a government agency that funds the representation of the client without the client's informed consent.

Rule: 1.0(j), 1.4, 1.6(a)-(b), 1.8(f), 1.9(c), 1.18(b)

FACTS:

1. The inquirer receives funding from a government agency to support the representation of clients in immigration matters. The agency requires information from funding recipients regarding individual representations, including the identity of individual clients, personal information regarding the clients, and the outcome of the representations.

QUESTION

2. When a lawyer receives funding from a government agency to represent clients, under what circumstances may the lawyer provide information to the funder regarding the clients and their matters?

OPINION

3. Rule 1.6(a) provides in pertinent part that "[a] lawyer shall not knowingly reveal confidential information . . . unless . . . the client gives informed consent [or] . . . 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 an exception in Rule 1.6(b) applies. The rule 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." A lawyer is subject to a similar duty of confidentiality with respect to a prospective client, and the duty of confidentiality continues even after the lawyer's relationship with the client or prospective client ends. *See* Rules 1.18(b) & 1.9(c).

4. Although client identities and other information sought by the funding agency are unlikely to be protected by the attorney-client privilege, any or all of the information may be confidential information subject to Rule 1.6(a), either because the client seeks to keep it confidential or because its disclosure would be embarrassing or detrimental to the client. *Cf.* N.Y State 1088 (2016) (clients' identities may be, but are not necessarily, confidential information). That is for the lawyer to determine in consultation with the client or prospective client. Addressing a similar question in

N.Y. State 1059 (2015), we observed that it was uncertain whether information sought by a third-party – in that instance, the Vera Institute of Justice, which was conducting research regarding immigration proceedings – would be "confidential information" of minor clients in immigration proceedings. But we stated that the lawyer for the minor clients could not disclose information relating to any such representation without determining in the individual case that the information was not confidential under Rule 1.6(a). We observed:

> Here, with the exception of the last item of data sought (the results of interviews designed to capture the client's understanding of immigration proceedings), the data being sought disclose procedural steps in the course of administrative or court proceedings, and such information is clearly not protected by the attorney-client privilege. Whether disclosure of the information to Vera would be embarrassing or detrimental to the clients depends on the context and the precise nature of the information involved. It is not, however, readily apparent that disclosure to a research organization of the fact that a child is involved in removal proceedings or that a court or administrative body has taken certain procedural steps would be embarrassing or detrimental to the child in the typical case. Those facts will already be known to the parts of U.S. Citizenship and Immigration Services most concerned with the clients' cases, so the disclosure here will merely bring it to the attention of Vera, which is required by contract to redact and/or anonymize the data before disclosing it to the granting agencies. Nevertheless, not every case is typical, *so the inquirers must weigh in each case whether disclosure would be embarrassing or detrimental to the child.*

Id. at para. 9 (emphasis added).

5. In some contexts, lawyers have been able to share information with funders in anonymized or aggregated form without thereby disclosing confidential information. *See* N.Y State 1059 (2015). In the inquirer's situation, if it were possible to provide information in this manner so that "there [were] no reasonable likelihood that the [agency] will be able to ascertain the identity of the client," Rule 1.6, Cmt. [4], then disclosure would be permissible. However, we understand that, in this case, the agency requires that individual clients be identified. Therefore, if the information in question, such as the client's identity and the outcome of the representation, will be "confidential information" (for example, if the disclosure would be embarrassing or detrimental to the client), then the lawyer may not share that information with the funding agency unless (i) the client gives informed consent, or (ii) the disclosure is impliedly authorized, or (iii) a confidentiality exception applies pursuant to Rule 1.6(b).

6. We do not believe the lawyer is impliedly authorized to disclose information to the funding agency. Comment [5] to Rule 1.6 addresses the concept of implied authorization, in part, as follows:

> Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer may make disclosures of confidential information that are impliedly authorized by a client if the disclosures (i) advance the best interests of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

See generally N.Y. State 1084 (2016) (lawyer may have implied authority to disclose deceased client's confidential information to exonerate a co-defendant, if doing so is consistent with the deceased client's previous wishes). In retaining a lawyer in an immigration matter, a client does not impliedly authorize the lawyer to disclose confidential information to a funder, because doing so does not advance the client's interests in the immigration matter in which the lawyer represents the client. Therefore, the client would not expect the information to be disclosed. *Cf.* N.Y. State 991 (2013) ("The 'impliedly authorized' exception is intended mainly for situations in which time is of the essence and it is impractical for the lawyer to wait for the client's informed consent (such as during settlement negotiations or trial), or for situations in which revealing information about a client with diminished capacity is 'necessary to take protective action to safeguard the client's interests.'").

7. Nor do we believe any exception in Rule 1.6(b) to the confidentiality duty applies. The only plausible candidate is Rule 1.6(b)(6), which allows a lawyer to disclose confidential information "to the extent that the lawyer reasonably believes necessary . . . when permitted or required . . . to comply with other law . . .." It may be that when lawyers accept government funding to represent clients in immigration matters, lawyers undertake a statutory or regulatory obligation – and not just a contractual obligation – to report back specified information relating to the representations. Whether that is true, and whether such a requirement would pass constitutional muster, are questions of law that we cannot answer. But even assuming that there is such a legal obligation, it does not follow that the lawyer must undertake a representation that would be subject to such a disclosure obligation. And if the lawyer does accept a representation eligible for government funding, the lawyer is not also required to accept that government funding in connection with the representation of any given client. In any event, any such federal law requiring individualized disclosures about clients in exchange for government funding does not relieve a lawyer of the obligation, before undertaking the representation, to obtain the client's informed consent to make the requisite disclosures. *See also* Rule 1.4. Clients are entitled to know that if they accept a lawyer's free services, the lawyer will be required to disclose their confidential information to a government agency, and they are entitled to make an informed decision whether to retain the lawyer subject to that condition.

8. 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.

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.

9. Accordingly, if the client gives informed consent before the representation commences or at the outset of the representation, the lawyer may undertake the representation and, relying on the client's consent, make the requisite disclosures to the government agency. N.Y. State 1059 (2015), para. 12.

10. Some prospective clients may be incapable of understanding the risks of disclosure of their information to the government agency and/or incapable of making a reasoned judgment whether to retain the lawyer subject to the disclosure obligation. In that event, or if the prospective client declines to give informed consent, the lawyer may not undertake the representation subject to an obligation to disclose confidential information to the funding agency. The lawyer may decline the representation, represent the client without funding conditioned on disclosure of confidential information, or seek an agreement by the government agency to forgo receiving confidential information.

11. All of what we have said above is consistent with Rule 1.8(f), which provides that a lawyer shall not accept "compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client" (which would include the government) unless three conditions are satisfied, including: "(1) the client gives informed consent" and "(3) the client's confidential information is protected as required by Rule 1.6." In our view, the government funding in this situation is either "compensation for representing a client" or it is something "of value related to the lawyer's representation of the client …." Accordingly, each client's confidential information must be "protected as required by Rule 1.6," which means that the lawyer cannot disclose the information at issue without obtaining the client's informed consent.

CONCLUSION

12. A lawyer may disclose information relating to a representation to a government agency that funds the representation if the information is not confidential under Rule 1.6(a). However, the lawyer may not disclose the client's confidential information to the agency unless the client gives informed consent.

(17-23)