

Practice Pointer: An Attorney's Duty to Maintain Confidentiality of Information Relating to Representation of a Client

by Kate A. Toomey

Attorneys often call the Office of Professional Conduct's Ethics Hotline with questions about when they may and when they must reveal information related to their representation of a client. In the course of answering these calls, I've discovered that many attorneys do not understand what the Rules of Professional Conduct require and permit, and that attorneys commonly confuse the ethical duty to refrain from revealing information relating to the representation with the evidentiary attorney-client privilege¹ and the statute governing privileged communications.²

The Confidentiality Rule

The Utah Rules of Professional Conduct³ state that "A lawyer shall not reveal information relating to representation of a client . . . unless the client consents after consultation." Rule 1.6(a), Rules of Professional Conduct. The rule identifies exceptions, which are discussed below. But consider what is meant by "information relating to representation of a client."

For one thing, it encompasses more than communications from a client. As the Comment following the rule makes plain, the rule "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Rule 1.6(a), Comment, Rules of Professional Conduct. This means that communications from sources other than clients are covered by the rule. Note, too, that the client need not tell the attorney that the information is confidential to make it so.

Strictly interpreted, the rule could encompass all sorts of things that attorneys don't ordinarily think of as confidential, such as the client's identity. *See e.g. Dietz v. Doe*, 935 P.2d 611 (Wash. 1997) (lawyer for client sought in hit-and-run accident may withhold client's identity when disclosure would implicate client in criminal activity for which legal advice was sought).

The rule isn't limited to information acquired during the representation; it can apply before the formal relationship existed, and it can include information acquired later. When a prospective client consults an attorney to consider obtaining legal representation,

the duty may arise even if the relationship is never formalized. *See* ABA Formal Op. 90-358 (1990). At the other end, the obligation of confidentiality persists even after the formal relationship terminates. *See* Rule 1.6(a), Comment, Rules of Professional Conduct.

A Client's Consent Avoids a Rule Violation, But Waiver Doesn't Apply

Even if the attorney's motives are benign, disclosure isn't allowed unless one of the exceptions identified in the rule applies. For example, although attorneys in the same law firm may discuss cases, an attorney consulting an outside attorney on a client's case can't transfer the file for review without the client's permission. The potential rule violation is readily avoided if the client consents after consultation.

The concept of waiver, seen in the context of the evidentiary privilege, has no place in the context of considering an attorney's ethical duty to maintain confidentiality of information. For example, the attorney's awareness that others know what the attorney knows doesn't release the attorney from maintaining confidentiality of the information. Technically, a lawyer can't even reveal those things that are commonly known or are a matter of public record.

The Rule Permits, But Doesn't Require, Disclosure in Some Circumstances

Nothing in the rule *requires* disclosure. *See* Rule 1.6, Rules of Professional Conduct; *see also* Utah Ethics Adv. Op. 97-12 (1998) (lawyer who suspects client of child abuse not required by rules to report suspected behavior). The scenarios the Office of Professional Conduct's attorneys are often asked about involve whether the rules allow an attorney to reveal information to prevent harm. Understand, however, that a decision to remain silent is not a violation of Rule 1.6, and this is the course that least exposes the attorney.⁴ But silence itself sometimes comes at its own cost,

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and many of the attorneys who call the Hotline are struggling to balance their professional duties toward their clients with their moral obligations to other human beings.

The rule is explicit about permitting attorneys to prevent harm: “A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) [t]o prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or substantial injury to the financial interest or property of another.” Rule 1.6(b)(1), Rules of Professional Conduct.

One Utah Ethics Advisory Opinion addressed this exception in the context of a client’s announced intent to commit suicide, and this is one of the opinions I most frequently send to Ethics Hotline callers. See Utah Ethics Advisory Op. 95 (1989). The exception also applies when a client threatens another person with “death or substantial bodily harm.” Hotline examples I’ve heard include client threats to kill the attorney, and client threats to kill family members. Reported cases from other jurisdictions include an attorney’s disclosure of a client’s intent to burn down a building from which the client had been evicted. See *Purcell v. District Attorney for Suffolk County*, 676 N.E.2d 436 (Mass. 1997).

The more troubling portion of the rule is the section permitting attorneys to reveal information to prevent a client from committing a criminal or fraudulent act that is likely to result in “substantial injury to the financial interest or property of another.”⁵ How to evaluate the likelihood and sufficiency of injury to someone else’s financial interest or property isn’t something I’ve been asked to consider on the Ethics Hotline, and in my recollection, no attorney has been disciplined for violating this portion of the rule in the seven years I’ve worked in the OPC. My speculation is that when financial and property interests are the only thing at stake, attorneys are less inclined to volunteer information that might prevent the harm.

Returning to the issue of matters that fall within the exception for “death or imminent bodily harm,” I always encourage attorneys to consider the portion of the rule requiring a belief that the act will “likely” result in the harm. This is a matter left to the attorney’s discretion, but it’s well to consider that people who need lawyers are often in the throes of great emotional turmoil, and they sometimes say things they don’t mean. On the other hand, if your client is someone with a violent criminal history, or is someone you know to have severe psychiatric problems associated with violent behavior, you may want to consider intervention.

Remember, though, that an attorney should only reveal the infor-

mation “to the extent the lawyer reasonably believes necessary.” This means considering who to notify – if you know of someone who can effectively intervene, confine your disclosures to that person – and revealing only what is necessary to prevent the harm.

A second exception is “To rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.” Rule 1.6(b)(2), Rules of Professional Conduct. If you were innocently the instrument of a client’s crime or fraud, you have “a legitimate interest in being able to rectify the consequences of such conduct,” with a “professional right, although not a professional duty, to rectify the situation.” Rule 1.6, Comment, Rules of Professional Conduct. I’ve seen this come up after civil court proceedings are entirely closed, and the attorney discovers the client’s perjury. Again, you may, but you need not, disclose the information.

Another exception is that you may reveal information to protect yourself. You may “reveal such information to the extent the lawyer reasonably believes necessary: . . . [t]o establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.” Rule 1.6(b)(3), Rules of Professional Conduct. Respondents in disciplinary cases often ask if they can reveal information necessary to defend themselves, and the short answer is yes. But remember that you should limit what you disclose to that which is necessary to your defense. The same thing goes for establishing your claims against a client – such as collecting your fee. In other words, avoid unnecessary disclosure, and take precautions if you can.

The rule also permits you to reveal information “[t]o comply with the Rules of Professional Conduct or other law.” Rule 1.6(b)(4), Rules of Professional Conduct. Among other things, we tell Ethics Hotline callers that if a court orders the attorney to reveal information, the attorney may do so. We caution, however, that the lawyer should attempt to limit the breadth of such an order. We also routinely tell callers that they may have an obligation to attempt to quash a subpoena if the client doesn’t consent to disclose the information the lawyer is being asked to reveal. Indeed, some Bar ethics advisory opinions provide that an attorney must attempt to exhaust all such protections before revealing the information. See D.C. Bar Legal Ethics Comm., Op. 288 (1999).

The portion of Rule 1.6 that refers to complying with the Rules of Professional Conduct relates directly to the rule requiring candor to the tribunal. The duties set forth in that rule “continue to the conclusion of the proceeding, and apply even if compliance

requires disclosure of information otherwise protected by Rule 1.6.” Rule 3.3(b), Rules of Professional Conduct. This is a subject for another Practice Pointer, but in the meantime, it’s a good idea to review the rule.

Conclusion

The safest course for avoiding a Rule 1.6 violation is to remain silent unless you are compelled to do otherwise by a court or by your obligation of candor to the tribunal. Bear in mind that the confidentiality rule is much broader in scope than the statutory and evidentiary privileges, and continues indefinitely. Depending upon the nature of your practice, you may someday find yourself confronting the awful dilemma of whether to make a disclosure against your client’s immediate interests and wishes, or to take the safer road of keeping the information to yourself with the hope that no one suffers serious consequences. As always, if you think that it would be helpful to discuss a particular situation with an OPC attorney, call the Ethics Hotline.

¹ The evidentiary privilege applies to the use of information in court proceedings. *See* Rule 504, Utah R. Evid.; Rule 507, Utah R. Evid. Disclosures elsewhere aren’t covered, and the privilege doesn’t apply to information received from someone other than the client.

² The statute provides that “[a]n attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given regarding the communication in the course of his professional employment.” Utah Code § 78-24-8. As the cases identified in the annotations following this section of the code demonstrate, the privilege belongs to the client, and may be waived through a variety of actions. It may not be waived or invoked by anyone else.

³ Attorneys who are licensed in states in addition to Utah would do well to review Utah’s confidentiality provision inasmuch as it differs in significant respects from the Model Rules of Professional Conduct and may substantially differ from the rule employed in other jurisdictions.

⁴ The conspicuous exception to this arises from the attorney’s duty of candor toward the tribunal. *See* Rule 3.3, Rules of Professional Conduct. Attorneys also must withdraw if continued representation will result in violation of the rules or other law. *See* Rule 1.16(a), Rules of Professional Conduct. Sometimes obtaining court permission to withdraw requires limited in camera disclosures.

⁵ This is one of the substantial divergences between Utah’s rules and the Model Rules of Professional Conduct. The Model Rules contain no exception for this type of harm.