New Hampshire Bar Association

The Lawyer's Authority to Disclose Confidential Client information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm

Ethics Committee Advisory Opinion #2014-15/05

ABSTRACT:

Rules 1.6(b) (1) and 1.14(b-c) may authorize an attorney to take protective action on behalf of a client, including disclosing confidential client information if necessary, when sufficient evidence of actual or threatened harm to the client exists, and when the client either cannot, or refuses to, provide informed consent for disclosure.

ANNOTATIONS:

A lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client when the client's capacity to make adequately considered decisions in connection with a representation is diminished.

A lawyer may take reasonably necessary protective action when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest.

Information relating to the representation of a client with diminished capacity is protected by Rule 1.6.

A lawyer is impliedly authorized to reveal confidential client information when taking protective action, but only to the extent reasonably necessary to protect the client's interests.

OPINION

Issue Presented:

Can an Attorney Disclose Confidential Client Information, Over a Client's Objection, to Protect the Client from Elder Abuse or Other Threats of Substantial Bodily Injury?[1]

Factual Background:

Lawyers representing the elderly frequently encounter problems that require more than purely legal solutions, and that are better handled with the assistance of specialists from other fields. While this can happen with clients of all ages, the elderly client will frequently suffer from mental impairments such as depression, dementia and Alzheimer's disease. The medical problems and loss of mental acuity that can accompany old age also can undermine the client's ability to work with his or her attorney to assess situations and make decisions that are in the client's own best interests.

In addition to the natural processes of deterioration that will occur at some point in the aging process, elder abuse is an increasingly well-documented phenomenon in the lives of older people

from all demographic and economic backgrounds[2]. The National Center on Elder Abuse ("National Center")[3] defines several categories of elder abuse: physical abuse, sexual abuse, psychological abuse, financial exploitation, caretaker neglect, self-neglect and abandonment.[4] Abused elders experience poorer health and shorter life expectancies than those who are not victimized. In extreme cases of neglect, self-neglect and abandonment, fatal illnesses can result.

The National Center also reports that "in almost 90 percent of the elder abuse and neglect incidents with a known perpetrator, the perpetrator is a family member, and two-thirds of the perpetrators are adult children or spouses".[5] When family members are involved, victims are frequently reluctant to disclose the problem or seek help from third parties outside of the attorney-client relationship. They are not prepared to subject themselves or their families to the humiliation and loss of privacy that outside attention might bring. They are also afraid to face the unknown consequences that can stem from disclosure to third parties, which could include placement in nursing homes, separation of couples and general loss of control over the final years of their lives.

Medical and mental health professionals, social workers and geriatric care managers are better qualified than most lawyers to recognize and assess the significance of adverse physical and mental conditions–including injurious home environments–that old age can bring. They will also typically be better informed of the range of resources and treatment options that are available. Elder law attorneys recognize their limitations, and will look for opportunities, with the informed consent of their clients, to access multidisciplinary services for elderly clients.6 In cases of family-based elder abuse, however, the client will frequently object to the disclosure of information necessary to secure assistance from parties outside of the attorney-client relationship.

This leads to the ethical question underlying this opinion: whether an attorney can disclose confidential client information, over the client's objection, to secure assistance for a client who is threatened by ongoing elder abuse or other forms of substantial bodily injury.

Analysis Under Rule of Professional Conduct 1.14 (Client with Diminished Capacity)
In some cases–although certainly not always–a client who refuses to authorize the disclosure of confidential information even when disclosure is necessary to protect the client from abuse by a third party may be manifesting a "diminished capacity" to appreciate the full significance of the threats he or she faces; or to render well-considered decisions regarding the best course to follow.

If the client is acting with diminished capacity, Rule 1.14 modifies some of the ethical rules applicable to the attorney-client relationship so as to give the attorney greater latitude than might otherwise be the case to protect the interests of the client. These modifications include, under certain circumstances, relaxation of the rigorous duty of confidentiality an attorney traditionally owes to his or her client.

New Hampshire's Diminished Capacity rule is set forth below:

- **Rule 1.14: Client with Diminished Capacity**

a. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, *mental impairment* or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

b. When the lawyer reasonably believes that the client has diminished capacity, *is at risk of substantial physical, financial or other harm unless action is taken* and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

c. Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(Emphasis added).

New Hampshire's rules do not define "diminished capacity"; nor do the ABA Model Rules of Professional Conduct. However, "(w)hen a diminished capacity results from mental impairment, the lawyer must make an assessment of the client's mental capacity", Rotunda and Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, Section 1.14-1 at pp. 657-658; and Comment 6 to ABA Model Rule 1.14 identifies factors that will be important in an assessment of diminished capacity:

- In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

If, through consideration of these or other factors, the lawyer concludes that his or her client has diminished capacity, it is clear that Rule 1.14 relaxes an attorney's ethical duty to protect client confidentiality. More specifically, Rule 1.14(c) confirms the continuing application of the basic confidentiality rule, Rule 1.6, to information relating to the representation. However, this subsection goes on to say that when dealing with a client with diminished capacity, an attorney will be "impliedly authorized", under Rule 1.6(a), to disclose confidential client information "to the extent reasonably necessary to protect the client's interests." Rule 1.14 (c). As noted above, elderly clients may be incapacitated by conditions such as severe anxiety, depression, dementia, or Alzheimer's disease–any of which may erode the client's ability to make independent decisions regarding how best to protect their own welfare in the face of elder abuse. If the mental impairment resulting from such conditions rises to the level of "diminished capacity", and the client is at "risk of substantial physical, financial or other harm unless action is taken…", Rule

1.14(b), the lawyer may make careful and limited disclosures of confidential client information in order to protect the client.

This conclusion is supported, we believe, by ethics opinions is several other jurisdictions that have applied Rule 1.14 in analyzing a lawyer's confidentiality obligation in connection with a client's threat to commit suicide. See *Alaska Bar Assoc. Ethics Op. No. 2005-1* ("(U)nder ARCP 1.14, the attorney may disclose the client's stated intent to commit suicide to the proper authorities [e.g., the court, appropriate mental health professionals, or appropriate detention facility personnel] irrespective of the client's custodial status, but is not required to do so."); *Massachusetts Ethics Op 01-2 (2001)*("A lawyer may notify family members, adult protective agencies, the police, or the client's doctors to prevent the threatened suicide of a client if the lawyer reasonably believes that the suicide threat is real and that the client is suffering from some mental disorder or disability that prevents him from making a rational decision about whether to continue living."); *CT Ethics Op. 00-5, 2000* (Under Rule 1.14, "a lawyer, without the client's consent, may disclose the client's intent to commit suicide in order to prevent it."); *SC Ethics Opinion 99-12* (similar result).

The confidentiality obligation of Rule 1.6 is not, however, the only concern faced by an attorney considering disclosure of confidential client information to protect a client. For example, while the final sentence of ABA Comment 6 to Model Rule 1.14 (set forth above) would appear to allow consultation with outside specialists without first securing the informed consent of the client, the comment does not address the potential waiver of confidentiality protections–including most importantly the attorney-client privilege–that could result from the participation of an outside health care provider.

More important, if the client or lawyer discusses ongoing elder abuse during consultations with an outside specialist, the information may trigger a reporting obligation that does not apply to the attorney.[7] A report to law enforcement, of course, may be a consequence that the client vehemently opposes. It may also result in an involuntary change in living arrangements, guardianship and even the arrest and prosecution of a close family member. These steps may protect the client, but there may also be less draconian measures that provide similar protection with less disruption. Before bringing third parties into the situation, therefore, the attorney should attempt to determine whether reporting obligations will be triggered, or whether the attorney-client privilege will be waived.[8]

In sum, when "diminished capacity" exists, Rules 1.14(b) and (c) allow a lawyer to use or disclose confidential client information, without a client's consent, "to the extent reasonably necessary" to protect the client from elder abuse or other threatened substantial injury bodily. Diminished capacity will not, however, exist in all or even most cases. For example, a client's bad decisions do not amount to "diminished capacity" that allows a lawyer to intervene. "A client's poor judgment does not suffice to warrant "protective action" under Rule 1.14(b)." ABA Formal Opinion 96-404 (1996). Well recognized ethics authorities have expressed this caution as follows: "(Rule 1.14) does not give the lawyer carte blanche to impose on the client the lawyer's personal view of what is in the client's best interest. Rather, Rule 1.14 authorizes the lawyer to engage in a *limited intervention* when the client's mental incapacity is such that he or she cannot

adequately protect his or her own interests." Rotunda & Dzienkowski, *supra* at pp. 658-659. (Emphasis added.)

Because all consequences of unauthorized disclosure of confidential client information cannot be foreseen or controlled by the lawyer, a determination of "diminished capacity" must be made with great care.

Analysis under Rule of Professional Conduct 1.6 (Confidentiality of Information)
This leaves for discussion the lawyer's authority to use or disclose confidential client information, over the client's objection, to protect the client from threatened and substantial bodily harm when diminished capacity does not exist. Rule 1.6 provides the analytical framework for this issue. Relevant parts of the rule are set forth below:

- **Rule 1.6: Confidentiality of Information**

    a. A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

    b. A lawyer may reveal such information to the extent reasonably necessary:

        1. to prevent reasonably certain death or substantial bodily harm….

****

Rule 1.6(a), which encompasses not just attorney-client communications but all "information relating to the representation", mandates sweeping protection for confidential client information.[9] Citing commentary to both the ABA Model Rules of Professional Conduct and the New Hampshire Rules of Professional Conduct, the New Hampshire's Supreme Court, in *Lane's Case*, 153 N.H. 10 (2005), noted that the confidentiality interests protected by Rule 1.6 "serve[] as the foundation of the attorney-client relationship"; and that such protection encourages clients to communicate fully and frankly with the attorney even as to embarrassing or legally damaging subject matter". *Lane's Case, supra*, at 21 "Thus, 'the disclosure of client confidences is an extreme and irrevocable act.'" *Id., citing NHRPC 1.6, N.H. cmt. (2005)*.

There are exceptions to this broad mandate of client confidentiality. Two of these exceptions, found in Rule 1.6(a), are disclosure with a client's "informed consent" (not relevant to the present opinion), and disclosure "impliedly authorized in order to carry out the representation" (relevant to the present opinion only in circumstances involving a client's diminished capacity, see Rule 1.14[c]). Three additional exceptions found in NHRPC 1.6(b)(2-4) are for disclosures "to secure legal advice"[10]; disclosures to establish a claim or defense in attorney/client controversies or to defend against claims or allegations made in criminal or civil litigation or "any proceeding concerning the lawyer's representation of the client"; and disclosures "to comply with other law or court order".[11] These also do not provide authorization to disclose elder abuse over the client's objection.

This leaves the confidentiality exception set forth at Rule 1.6(b)(1):

a. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary

    1. to prevent reasonably certain death or substantial bodily harm[12] or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another.

As explained in comments to the ABA model rule, the 1.6(b) (1) exception "recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." *ABA Model Rule 1.6, cmt.6*.

The *Restatement of the Law Governing Lawyers* elaborates on the overriding importance placed on life and "physical integrity" that supports the exception for disclosures necessary to prevent reasonably certain death or substantial bodily harm:

- Threats to life or body encompassed within (Section 66 of the Restatement) may be the product of an act of the client or a non-client and may be created by wrongful acts, by accident, or by circumstances. (citation omitted). In all such events, the ultimate threat is the same, and its existence suffices to warrant a lawyer's taking corrective steps to prevent the threatened death or serious bodily harm. *Restatement at Section 66, Comment b, p.496*.

****

- So long as the predicate threat to life or body exists, discretion (to use or disclose confidential information) exists notwithstanding that …the lawyer's information comes from otherwise privileged conversations. *Restatement at Section 66, Comment c, p. 498*.

Mere suspicion that elder abuse or other forms of harm might be occurring is not adequate to trigger this exception. A lawyer can act under this exception only based on "reasonable belief", defined in the Terminology Section of New Hampshire's rules as existing when "…the lawyer believes the matter in question and the circumstances are such that the belief is reasonable", NHRPC 1.0(i). The definition, which requires both subjective and objective inquiries, was discussed by the dissent in *Lane's Case, supra* at 25: "The lawyer must 'actually suppose [the matter in question] to be true' *and* the circumstances must be such that the belief is reasonable." (Citations omitted.) There must be sufficient evidence (bruises, personality change, manifestations of fear or trepidation, eye witness statements or statements by the client) to lead to an actual supposition that the client is being abused physically or psychologically or threatened with such abuse.

Further, the attorney should seek consent from the client directly, and if possible in person, before acting on the attorney's belief that elder abuse and substantial physical harm is occurring or threatened. Not only is it possible that this discussion will provide more evidence regarding whether risks to the client are real. The discussion will also provide an opportunity to underscore

the support the client will receive from the attorney, other professionals and reliable family members if consent is given to disclosure.

The Committee has noted that the threatened harm at issue in situations of elder client abuse is different than the harm typically encountered under NHRPC 1.6(b)(1), in which the disclosures are typically undertaken when the attorney's client, not a third party, threatens death, substantial bodily harm or substantial financial or property damage to another. This distinction does not affect the analysis. Client consent for the disclosure must still be sought. And even if the client continues to object to disclosure of the elder abuse–in family-based situations for example–the attorney will almost always gain information from the discussion that informs his or her judgment regarding whether to proceed with disclosure over the client's objection.

In sum, Rule 1.6(b) (1)–even in the absence of diminished capacity–may also authorize an attorney to use or disclose confidential client information, over the client's objections, in order to prevent substantial harm to the client from occurring or continuing.

CONCLUSION:

An attorney must always proceed with thoughtful, cautious analysis in deciding to reveal a client's confidences. However, when sufficient evidence of actual or threatened harm to the client exists, and when the client either cannot, or refuses to, provide informed consent for disclosure, Rules 1.6(b) (1) and 1.14(b-c) may authorize the attorney, after considering other less irrevocable options, to take protective action on behalf of the client even when the disclosure of confidential client information is necessary during the process.

ENDNOTES:

[1] This Opinion arises from an inquiry to the Ethics Committee that focused on elder abuse; the Opinion therefore uses elder abuse as one of the factual underpinnings for the analysis. However, the same analytical framework would apply whenever a client faces the risk of substantial harm and refuses to authorize his or her lawyer to disclose confidential information as necessary to protect the client.

[2] *See generally, Fisher, Elder Abuse: A Private Problem That Requires Private Solutions*, 8 J. Health & Biomedical L. 81 (Suffolk Law School 2012).

[3] he website for the National Center is ncea.acl.gov.

[4] *See Major Types of Elder Abuse*, www.ncea.aoa.gov in the FAQ section.

[5] *The National Elder Abuse Incidence Study: Final Report* at 1 (1998), cited at Fischer, s*upra*, at p.103, n. 155.

[6] *See generally Wydra, Keeping Secrets within the Team: Maintaining Client Confidentiality while Offering Interdisciplinary Services to the Elderly Client*, 62 Fordham Law Review 1517 (1994)(arguing that the need for interdisciplinary services for elderly clients should be facilitated by enacting modifications to ethical [primarily confidentiality] rules that hinder interdisciplinary consultations.

[7] *See* discussion of New Hampshire's elder abuse reporting statute, RSA 161-F:46, in n. 11 herein.

[8] Comment 3 to ABA model rule 1.14 raises some of the same concerns. It encourages the involvement of "family members or other persons" to assist in discussions between the attorney and client if the client requests their involvement; and concludes without supporting authority that "the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege". This Committee has previously raised a red flag in connection with the reliability of the ABA's assurance regarding the attorney-client privilege. Rather, the Committee has admonished New Hampshire lawyers to make their own determination regarding whether the privilege would be waived as a result of the involvement of family members or others. *See* Comment No. 1, Ethics Committee Comments to Rule 1.14.

[9] The Committee assumes, for purposes of this analysis, that the information regarding elder abuse or other form of threatened and substantial bodily harm is "confidential information relating to the representation" that is protected by Rule 1.6(a).

[10] Rule 1.6(b)(2) authorizes an attorney to discuss the elder abuse with lawyer's outside of their firm to secure legal advice regarding actions the lawyer may take within the constraints of the rules of professional conduct. The exception provides no support, however, for disclosures to programs that may provide specialized assistance, such as the NH Bureau of Elderly and Adult Services, the NH Adult Protection Program, or the NH Long Term Care Ombudsman's office; or to family members or others who might assist in investigating or responding to suspected elder abuse.

[11] New Hampshire has enacted legislation mandating reports of "adult abuse" by "any person, including, but not limited to, physicians, other health care professionals, social workers, clergy, and law enforcement officials". RSA 161-F:46. However, this mandatory reporting provision is limited by RSA 161-F:48, which reads:

- **Abrogation of Privileged Communication**. The privileged quality of communication between husband and wife and any professional person and his patient or client, *except that between attorney and client*, shall not apply to any proceedings instituted pursuant to this subdivision *and shall not constitute grounds for failure to report as required by this subdivision*. (Emphasis added.)

Stated alternatively, the confidentiality obligation imposed on lawyers by the attorney-client privilege trumps the RSA 161-F:46 reporting obligation. As discussed previously, the confidentiality obligation mandated by Rule 1.6, which applies to all "information relating to the representation", provides greater protection than the common law attorney-client privilege. This would allow an argument that the statutory reporting obligation would require an attorney to disclose confidential information about the representation that falls beyond the scope of the attorney-client privilege. The legislation is, however, not clear on this point and the Supreme Court has provided no guidance on the issue. Further, a lawyer seeking to justify the disclosure of confidential client information over the client's objection will have the burden of proving the application of any exception to the general confidentiality rule. See Lane's Case, 153 N.H.10 at

21 (2005). Under these circumstances, we conclude that the exception found in RSA 161-F:48 is intended to protect the full scope of confidential information relating to a client's representation.

[12] "Substantial bodily harm" is not defined further in the ABA model Rules or New Hampshire's rules. Comment (c) to Section 66 of the Restatement of the Law Governing Lawyers, (which uses the phrase "serious bodily harm" rather than "substantial bodily harm"), contains the following definition:

- Serious bodily harm within the meaning of this Section includes life threatening illness and injuries, and the consequences of events such as imprisonment for a substantial period and child sexual abuse. It also includes a client's threat of suicide.

[13] "A threat within (Section 66[1] of the *Restatement*) need not be the product of a client act; an act of a non-client threatening life or personal safety is also included."

NH RULES OF PROFESSIONAL CONDUCT:

Rule 1.14
Rule 1.6

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

SUBJECTS:

Client with Diminished Capacity
Confidentiality

- **By the NHBA Ethics Committee**
  This opinion was submitted for publication to the NHBA Board of Governors meeting and was published in Bar News on January 21, 2015.