

NEW HAMPSHIRE BAR ASSOCIATION

Rule 1.6 Disclosure of a Client's Identity

Ethics Committee Opinion #2019-20/01

ABSTRACT:

Unless one of the exceptions in Rule 1.6 applies, Rule 1.6 prohibits the disclosure of the identity of a client.

ANNOTATIONS:

Rule 1.6's phrase "information related to the representation of a client" includes the identity of a client.

Rule 1.6 does not distinguish between confidential information and non-confidential information.

An attorney may disclose the identity of a client after obtaining the client's voluntary informed consent.

An attorney may disclose the identity of a client if the disclosure is "impliedly authorized in order to carry out the representation" of the client.

Rule 1.6 contains other limited exceptions to the general prohibition against revealing the identity of a client.

Subject to the exceptions contained in Rule 1.6, Rules 1.6 and 1.9 prohibit the disclosure of the identity of a former client.

Subject to the exceptions contained in Rule 1.6, Rules 1.6, 1.9 and 1.18 prohibit the disclosure of the identity of a prospective client from whom the lawyer receives or reviews information but with whom no lawyer-client relationship ensues.

Rule 1.6 and the Disclosure of a Client's Identity

The Ethics Committee was asked whether a lawyer would violate the Rules of Professional Conduct by disclosing the identity of a client. The answer is yes, unless one of the exceptions in Rule 1.6 applies to the particular situation.¹

Rule 1.6 provides that “[a] lawyer shall not reveal information related 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 [under the enumerated exceptions listed in the Rule].”

The answer to the question turns on whether the client's identity is “information related to the representation of a client.” The term “information” is not defined in Rule 1.0, and Rule 1.6 does not expressly state that the identity of a client is among the information it protects. Rule 1.6 uses the broad term “information” without categorizing any information as “confidential” or “non-confidential.” *All* information, therefore, is protected so long as it is “related to the representation of a client.” *See* ABA Model Rule 1.6, Cmt. 3 (“The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”). And although the Rule is perhaps most intuitively applied to substantive information that a lawyer has learned from the client, the client's identity is itself “related to the representation” under a plain reading of that language.

¹ We note at the outset that this opinion deals solely with the question of whether a client's identity is protected by the Rules of Professional Conduct. This question should not be confused with the somewhat related question of whether a client's identity is protected by the attorney-client privilege. *See, e.g., In re Advisory Opinion No. 544*, 103 N.J. 399, 407-08 (1986) (“[A] client's identity per se might not be necessarily considered a privileged communication as such . . .”).

This plain reading finds support in the ABA’s comments to Model Rule 1.6. Comment 4, for example, explains that the Rule permits an attorney to “use . . . a hypothetical to discuss issues relating to the representation . . . so long as there is no reasonable likelihood that the listener will be able to ascertain the *identity* of the client or the situation involved” (emphasis added). The language of Rule 1.6(b)(5) also supports this conclusion, limiting the information that may be shared to detect or resolve conflicts of interest. *See* ABA Model Rule 1.6, Cmt. 13 (stating that Rule 1.6(b)(5) encompasses only “limited information” that includes a client’s identity—the implication being that such information ordinarily cannot be disclosed under the Rule).²

When the underlying purpose of Rule 1.6 is taken into account, the matter becomes clearer still. As explained in Comment 2 to ABA Model Rule 1.6, the protection afforded to information relating to the representation “contributes to the trust that is the hallmark of the client-lawyer relationship” and encourages clients “to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.” There are many contexts in which revealing the mere identity of a client could indirectly reveal sensitive information about the client’s personal life that the client would not want others to know, thereby damaging that trust and discouraging full and frank lawyer-client communications. Consider, for example, a client who approaches a lawyer about a potential divorce. Such a client would undoubtedly expect the lawyer not to reveal substantive information that the client shares with the lawyer but would also probably not want it known that the client has met with and retained a divorce lawyer. Similarly, a business would not expect the

² Comment 13 refers to Rule 1.6(b)(7), which is the ABA analog to New Hampshire Rule 1.6(b)(5).

white-collar criminal defense lawyer who it hired to conduct an internal investigation of possible criminal activities to reveal the existence of such a client-lawyer relationship.

Many jurisdictions have addressed this topic, perhaps none more comprehensively than the New Jersey Supreme Court in *In re Advisory Opinion No. 544*, 103 N.J. 399, 408 (1986). The court considered Rule 1.6 and the identity of a client in the context of a legal services organization that provided representation to mentally impaired or disabled and indigent persons. The court explained that disclosure of clients' identities "would be tantamount to the revelation of the mental and financial status of the individuals, as well as the fact that he or she has a legal problem that required the services of an attorney," and that "depending upon the nature of such additional or collateral information that is revealed by the disclosure of a client's identity, the need for confidentiality could appropriately cloak even identity." *In re Advisory Opinion No. 544*, 103 N.J. at 408. Thus, the court concluded that in this context

client information that serves to identify the client would clearly be protected under [Rule 1.6]. As noted, this rule accords confidentiality to any information relating to the representation of a client. Manifestly this would include a client's identity.

Accordingly, we hold that under current standards governing attorney conduct, client-identity may not be disclosed to any private or public funding agency in the absence of appropriate consent or other legal justification. In so ruling, we determine that a client's identity constitutes information relating to the representation of a client under the current Rules of Professional Conduct

Id. at 409; *see also In re Goebel*, 703 N.E.2d 1045, 1047 (Ind. 1998) ("'[I]nformation relating to the representation of a client,' as stated in Prof. Cond. R. 1.6(a), is a broad definition and has been construed to include all information relating to the representation regardless of the source. Thus, 'information' may include the identity or whereabouts of a client.") (alteration in original) (citation omitted).

Many other jurisdictions have similarly concluded that Rule 1.6 protects a client's identity. *See, e.g.*, Wisconsin Professional Ethics Committee Opinion EF-17-02 (Apr. 4, 2017) (client identity is protected by Wisconsin Supreme Court Rule 20:1.6); Ohio Bd. of Professional Conduct Opinion 2016-08 (Oct. 7, 2016) (noting that Rule 1.6 "prohibit[s] the release of . . . the client's identity without the client's consent"); Missouri Informal Advisory Opinion 2015-09 (2015) (opining that attorney could not disclose client names on financial disclosure form because client name is among the confidential information protected under Missouri Rule 4-1.6); Pennsylvania Ethics Opinion 2008-1 (2008) (opining that Rule 1.6 prohibits revealing the identity of clients by publishing their photographs on website); Connecticut Informal Ethics Opinion 99-40 (1999) (opining that client's name, address, and telephone number were information relating to the representation and thus protected under Rule 1.6); Connecticut Informal Ethics Opinion 99-35 (1999) (opining that lawyer could not reveal clients' names to credit counseling service without clients' consent); Rhode Island Ethics Advisory Panel Opinion 95-61 (Jan. 11, 1996) (opining that attorney could not turn over an accounts receivable list including client names to government agency without client consent because "[t]he identity of a client is confidential information and is protected under Rule 1.6"); *but see Hunter v. State Bar ex rel. Third Dist. Comm.*, 744 S.E. 2d 611 (Va. 2013) (concluding that an attorney's disclosure, in a blog, of information not protected by the attorney-client privilege, including clients' identities, was commercial speech protected by the First Amendment and Rule 1.6 could not be interpreted to prohibit an attorney from disclosing such information).

Prohibiting disclosure of a client's identity under Rule 1.6 does not hinder an attorney from representing a client, as Rule 1.6 has several exceptions. The lawyer may obtain informed consent from the client so long as "the client fully understands the scope of the impact of

consent, that consent is totally voluntary, and that client can deny consent without any sense of guilt or embarrassment.” *In re Advisory Opinion No. 544*, 103 N.J. at 408 (citing *ABA Informal Opinion 1287* (1974)); *cf.* Rule 1.0(e) (defining informed consent). Also, Rule 1.6(b) contains several specific contexts in which a lawyer may reveal information relating to a client.

The broadest and most commonly used exception is when “the disclosure is impliedly authorized in order to carry out the representation.” When a lawyer negotiates with adversaries or represents a client in court or before a municipal or administrative agency, the lawyer is impliedly authorized to reveal the identity of the client. However, while the lawyer may have been impliedly authorized to file a pleading identifying the client, subsequent disclosures of the client’s identity are subject to Rule 1.6. Simply because a publicly available pleading is filed in court or a representation is made during a public hearing before a governmental body, the pleading or representation may not become known to a large number of people. The lawyer must consider whether each subsequent disclosure of the client’s identity is “impliedly authorized *in order to carry out the representation*.” Rule 1.6(a) (emphasis added); *see also* Wisconsin Professional Ethics Committee Opinion EF-17-02 (“If the publicly disclosed (or available) information relates to the representation of a client, it is protected by [Rule 1.6].”). The lawyer’s analysis should include whether the client would approve of the disclosure, whether the client could be prejudiced by the disclosure, and whether the disclosure is in furtherance of the representation.

The protection of Rule 1.6 also applies to former clients and to prospective clients even when no lawyer-client relationship ensues. Rule 1.9 identifies a lawyer’s duties to former clients. Under Rule 1.9(c)(2), “[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not

thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.” Thus, the identity of a former client is protected by Rule 1.6 unless one of that Rule’s exceptions apply.

With regard to a prospective client from whom the lawyer receives or reviews information but with whom no lawyer-client relationship ensues, Rule 1.18(b) directs that the lawyer “shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client.” Rule 1.9’s and Rule 1.18’s use of the broad term “information” leaves no doubt that the “information” referred to is all of the information protected by Rule 1.6, including the identity of the former or prospective client.

NH RULES OF PROFESSIONAL CONDUCT:

Rules 1.6, 1.9, 1.18

SUBJECTS:

Confidentiality

Client information

- **By the NHBA Ethics Committee**
This opinion was submitted for publication to the NHBA Board of Governors at its January 6, 2020 meeting.