

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1995-96/7
Attorney-Client Privilege
December 13, 1995

RULE REFERENCES:

CODE REFERENCES:

SUBJECTS:

ANNOTATION:

FACTS:

The inquiring attorney represents a client charged with numerous felonies. In response to a discovery request, the trial court ordered the state to turn over an investigative file involving a police officer who is expected to be a witness at trial against the client. The court's order prohibits the inquiring attorney and his client from disclosing the contents of the file.

Following production of the file, the local newspaper published an article indicating that it had obtained a copy of the file. Thereafter, the county attorney represented to the court that the only people who had access to the file, other than the inquiring attorney and his client, had not given it to the newspaper. Contrary to the county attorney's suggestion, however, there is no public information that the inquiring attorney gave the file to his client. The court then asked the inquiring attorney whether he had given the file to the newspaper. The inquiring attorney, in response, declined to answer and expressed concern about answering because of the attorney-client privilege. For example, if he were to tell the court that he had not given the file to the newspaper, could his answer be used to implicate his client?

At the inquiring attorney's request, the court permitted him to solicit an opinion from the ethics committee.

QUESTIONS PRESENTED:

1. Does the attorney-client privilege preclude the inquiring attorney from answering any questions related to whether he disseminated the file to the newspaper?
2. Does the attorney-client privilege preclude the inquiring attorney from answering questions regarding whether he provided his client with a copy of the file?

RESPONSE:

"A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation." N.H. R. Prof. Con. 1.6 ABA Model Code Comments. This principle finds expression in rule 1.6(a):

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

The inquiring attorney obtained the investigative file in the course of representing his client. Information about that file, including whether the inquiring attorney or his client has given it to anyone, is "information relating to representation of a client." Rule 1.6(a) applies. See Annotated Model Rules of Professional Conduct 91 (2d ed. 1992) ("The obligation extends to all information about a client acquired in the course of the representation, whether or not disclosure would be embarrassing or detrimental"). Because the facts presented do not implicate either exception in rule 1.6(b), the inquiring attorney may not voluntarily answer either question presented unless his client consents after consultation. (As to the consultation required, see New Hampshire Comment 1 to the "Terminology" section of the New Hampshire Rules of Professional Conduct). Assuming the client does not consent after consultation, whether the court might order the inquiring attorney to answer the questions presented is beyond the scope of this opinion. See N.H. R. Prof. Con. 1.6 ABA Model Code Comments ("...Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client"); but see N.H. R. Prof. Con. 1.6 New Hampshire Comments ("The disclosure of client confidences is an extreme and irrevocable act").