

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Formal Opinion #1988-89/13  
Confidentiality: Provision of Information to Funding Source  
February 9, 1989

RULE REFERENCES:

- \*Rule 1.6
- \*Rule 1.6(a)
- \*Rule 1.6(b)(2)
- \*Terminology-Consult, Consultation

CODE REFERENCES:

- \*Canon 4
- \*DR4-101
- \*DR4-101(A)
- \*EC4-3

SUBJECTS:

- \*Attorney-Client Privilege
- \*Attorney-Client Relationship
- \*Client Communications
- \*Confidentiality
- \*Consultation
- \*Lawyer Referral Services
- \*Referrals

ANNOTATIONS:

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 to carry out the representation. (Rules 1.6(a); 1.6(b))

A client's identity may not be revealed by an attorney unless the client consents after consultation, or has implicitly authorized it in order to carry out the representation. (Rule 1.6(a))

The protection of confidentiality afforded clients under Rule 1.6 is broader than that found under the former Code of Professional Conduct. (Rule 1.6; Canon 4; EC 4-3; DR 4-101; DR 4-101(A))

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It would be ethical for a legal service organization to request clients to waive the protections found in Rule 1.6 in order to provide information for use in review of program integrity. (Rule 1.6)

"Consult" or "Consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question. (Comments on Terminology)

The disclosure of client confidences is an extreme and irrevocable act. (Rule 1.6)

A client's indigence cannot in anyway be allowed to undermine strict compliance with the keeping of client confidences. (Rule 1.6)

All close questions as to whether particular information must be held confidential must be resolved in the client's favor. (Rule 1.6)

BACKGROUND:

New Hampshire Legal Assistance (NHLA) and the New Hampshire Pro Bono Referral System (Pro Bono), under the aegis of the NH Bar Association, receive financial grants from the Legal Services Corporation, a quasi governmental agency. These funds are used to provide free legal services to eligible low income persons in civil matters. NHLA and Pro Bono are subject to periodic on-site monitoring reviews and audits by the Legal Services Corporation to ensure program integrity.

QUESTIONS:

1. Must NHLA and Pro Bono protect the identity of their clients, unless such has already been disclosed in a public forum, such as a court proceeding?

2. If NHLA and Pro Bono must protect the identity of their clients, does this requirement preclude NHLA or Pro Bono from revealing:

- a. client names or address
- b. client eligibility information
- c. client trust fund information
- d. client identifying information that may be contained in grievance files or satisfaction questionnaires
- e. client identifying information that may be contained in other program files?

3. Whether NHLA or Pro Bono may ethically request current or former clients to waive their protections in order to furnish information to the Legal Services Corporation?

RESPONSE:

1. New Hampshire Rule of Professional Conduct 1.6(a) provides in part:

"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...."

The only two exceptions to this rule are when a lawyer reasonably believes he must reveal information to prevent a client from committing a crime or when there is a controversy between the lawyer and client.

Thus, under the Rules of Professional Conduct (Rules), an attorney is ethically bound not to reveal the identity of a client, unless the client consents after consultation or implicitly authorizes it. See Maryland State Bar Association Committee on Ethics, Opinion 88-62 (4/22/88) reported in ABA/BNA Lawyers Manual on Professional Conduct 901:436 (hereinafter cited as "ABA/BNA Manual"), see also North Carolina State Bar Association Ethics Committee Opinion 21 (1/15/87) reported in ABA/BNA Manual 901:6604.

While this is a question of first impression for this Committee, the ABA Committee on Ethics and Professional Ethics has specifically addressed the issue. That Committee has held that the names, addresses and telephone numbers of clients of a Legal Services Office are secret. ABA Informal Opinion 1287 (1974). The duty to preserve client anonymity extends to inspections of legal service agency files by outside agencies or policy making boards. ABA Informal Opinion 1394 (1977), ABA Formal Opinion 334 (1974).

Other State Bars have reached the same conclusion. See Board of Professional Responsibility of the Supreme Court of Tennessee Formal Opinion 82-F-25 (2/22/82) reported in ABA/BNA Manual at 801:8105, Opinion No. 101 of The Mississippi State Bar (1/29/85) reported in ABA/BNA Manual at 801:5108.

While these opinions are based on the Code of Professional Responsibility (CPR), it is beyond peradventure that they remain vital under the Rules of Professional Conduct as adopted in New Hampshire. As noted in the discussion below, the scope of protection afforded client information under the RPC is considerably broader than under the CPR.

While the majority of clients will be considered to have implicitly authorized revelation of their identity, this cannot be assumed. The NHLA and Pro Bono must

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protect the identity of their clients from revelation to Legal Services Corporation monitoring staff unless the client consents after consultation, or has implicitly authorized it in order to carry out the representation.

2.(a) Client Names and Addresses:

For the reasons stated in Response 1, the NHLA and Pro Bono cannot reveal client names or addresses, unless the client consents after consultation, or implicitly authorizes it.

2. (b) Client Eligibility Information: Client eligibility information comes within the proscription of Rule 1.6 to the extent that it is "information relating to representation of a client."

Several ABA Ethics Opinions decided under the Code of Professional Responsibility suggest that client eligibility information could be provided to program auditors provided certain safeguards were taken. Those safeguards included preservation of client anonymity, prevention of access to client files, and strict limitation to information needed for legitimate audit purposes, as well as control over the personnel conducting the reviews and the ultimate recipient of the information. ABA Informal Opinion 1443 (12/79), ABA Formal Opinion 334 (8/74), ABA Informal Opinion 1394 (11/77).

However, it is the Committees' opinion that the protection afforded clients under Rule 1.6 is broader than that found under CPR Canon 4, EC 4-3 and DR 4-101 upon which these ABA opinions were based. The Code defined "confidence" as information protected by the attorney-client evidentiary privilege and "secret" as referring to "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." (DR-4-101 (A)).

The Rules of Professional Conduct make no distinction between "confidence" and "secret", nor place any affirmative burden on the client to designate information as secret or upon the attorney to determine that the information is embarrassing or detrimental. If the information relates to representation of the client it cannot be revealed without the client's consent after consultation or implicit authorization. Client eligibility information is information "relating to representation of a client".

2. (c) Client Trust Fund Information: This information cannot be revealed for the reasons stated in response 2(b).

2. (d). Client Identifying information contained in grievance files or satisfaction questionnaires:

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Information contained in a satisfaction questionnaire which might identify a client cannot be revealed unless the client consents after consultation.

Rule 1.6(b)(2) creates an exception to the strict prohibition against revealing information relating to representation of a client:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

While the rule's use of "any proceeding" may include a client's filing of a grievance with the program itself, the exception does not provide for the use of the information for purpose of a review of program integrity by an outside agency. The exception only allows the lawyer to use the information to respond to the client's allegation. Thus client identifying information in program grievance files cannot be revealed without the client's consent after consultation.

2 (e) Client identifying information that may be contained in other program files:

This information cannot be revealed unless the client has consented after consultation, or unless the disclosure was implicitly authorized by the client in order to carry out the representation. See Philadelphia Bar Association Professional Guidance Committee Opinion 87-12 (5/28/87) reported in ABA/BNA Manual 901:7515. Thus a list of pending litigation containing a client's name as plaintiff or defendant would not be protected, while a computerized client appointment schedule might be. Program files must be carefully reviewed to ensure client anonymity where necessary.

3. Request The Client to Waive Protection in Order to Furnish Information to LSC:

It would be ethical for NHLA or Pro Bono to request clients to waive the protections found in Rule 1.6 in order to provide the information to LSC for use in review of program integrity. See: N.J. Advisory Committee on Professional Ethics Opinion 544 (9/8/84), reported ABA/BNA Manual 801:5815.

It would be irresponsible to ignore the important part such audits and reviews play in guaranteeing that the limited funds available for legal assistance to the indigent are not squandered, wasted or purloined. Information about the quantity and quality of legal services provided, and about the clients themselves is essential to this process. However, extreme care must be employed in soliciting client consent to reveal information to LSC for program monitoring purposes.

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As noted repeatedly throughout this opinion, the client's consent can only be given after consultation. "Consult" or "Consultation" is defined in the ABA Model Code Comments on Terminology as denoting "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

The ABA Committee on Ethics and Professional Responsibility" spoke to the issue of the special care required in obtaining consent of an indigent client:

"In the context of full disclosure to clients in poverty groups who in general would tend to be lacking in education and sophistication and might be more likely to be submissive to such requests, particular care must be taken to assure that they have a full understanding of what they are being asked to consent to and further that whether they consent is a completely voluntary matter with them, a consent which they can deny without sense of guilt or embarrassment. As stated in Formal Opinion 250, "The duty of an attorney to his clients is one of great delicacy and responsibility and sometimes of apparent hardship." That owed to the Legal Services client is no less than that owed to any other client." ABA Informal Opinion 1287 (6/74).

In conclusion, as noted in the New Hampshire Comments to Rule 1.6; "The disclosure of client confidences is an extreme and irrevocable act." The fact that the client is indigent cannot in any way be allowed to undermine strict compliance with this fundamental tenet of the profession. All close questions as to whether particular information comes within the prohibition of Rule 1.6 must be resolved in the client's favor.