Confidentiality and ineffective assistance of counsel claims

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Maintaining client confidences is a core professional responsibility obligation and a pivotal part of gaining and maintaining client trust. The Office of Lawyers Professional Responsibility's ethics hotline fields numerous questions from lawyers navigating their confidentiality obligation, including queries from criminal defense lawyers wondering how to respond to a former client's claim of ineffective assistance of counsel. Those questions prompted this column, in which I am joined by Ben Butler, board chair of the Lawyers Professional Responsibility Board and managing attorney with the Office of the Minnesota Appellate Public Defender, as a contributing author.[1]

The starting point

Lawyers sometimes assume that because a client is complaining about them, the rules on confidentiality are waived. In believing as much, lawyers might be confusing confidentiality with attorney-client privilege and waiver of that privilege. These are two different concepts. Attorney-client privilege is an evidentiary privilege against compelled testimony that can be waived by the client. But such communications are a subset of the broader ethical obligation to keep *everything* related to the representation confidential—whatever its source, and irrespective of whether it is privileged. A client cannot "waive" a lawyer's confidentiality obligation.

Rule 1.6(a), Minnesota Rules of Professional Conduct (MRPC), directs that "a lawyer shall not knowingly reveal information relating to the representation of a client," except "when permitted under subparagraph (b)." Again, the obligation is broad; confidentiality covers everything related to the representation. Importantly, there is no exception for publicly available information. Just because information may be in a court file, for example, does not mean that it isn't subject to the confidentiality rule.[2] While there are several exceptions in Minnesota (even more than in the American Bar Association's model rules) permitting lawyers to disclose information relating to the representation, one cannot disclose information relating to the representation except under a specific exception.

Most permissible disclosures occur under the first three exceptions to Rule 1.6(b). Rule 1.6(b)(1) permits disclosure if "the client gives informed consent;" Rule 1.6(b)(2) permits disclosure when "the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client." Rule 1.6(b)(3) permits disclosure when "the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation." These rules are unlikely to come up much in ineffective-assistance cases unless the lawyer is assisting the client to show the lawyer's performance was deficient.

Ineffective assistance of counsel allegations

Criminal defendants have the constitutional right to the effective assistance of counsel. When a criminal defense lawyer's performance is objectively unreasonable, the client's constitutional rights may have been violated. In Minnesota, most ineffective-assistance claims are brought through a petition for postconviction relief under Minn. Stat. chapter 590. It is at this stage—after the former client has filed a petition—that most lawyers become concerned with their confidentiality obligations.

It is undisputed that the assertion of ineffective assistance of counsel claims waives the attorney-client privilege, meaning a client may not invoke the privilege to prevent a lawyer from testifying about communications relevant to the claim.[3] But this is different from permitting or authorizing a lawyer to voluntarily disclose information outside of that narrow context.

Rule 1.6(b)(8), sometimes referred to as the "self-defense exception," permits disclosure if:

> "the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client."

However, the existence of these seemingly broad exceptions may not allow as much disclosure as you think. ABA Formal Opinion 10-456 cautions that clauses one and two of Minnesota's rule (which is identical to Rule 1.6(b)(5) of the model rules) are not applicable to

ineffective-assistance claims.[4] The first clause is not applicable because the legal controversy is not between the client and the lawyer, although it may feel that way. The second clause is not applicable because postconviction petitions, appellate motions, or *habeas* cases in which the ineffective assistance claim is asserted are not proceedings against the lawyer.

The third clause may be relevant because ineffective-assistance claims concern the lawyer's representation of the client and are usually part of an official proceeding. But caution is still warranted. The exception permits disclosure "only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish" the purpose of the disclosure.[5] Thus, to fit within the exception, your response must be necessary (viewed objectively), narrowly tailored to the issue, and made in the context of a proceeding.

Of note, the ABA takes a very restrictive approach to how a disclosure can fit within the exception, essentially prohibiting non-court-supervised disclosures ("it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.")

Practical considerations

With that background, what a criminal defense lawyer may disclose, as well as when they can do so and under what circumstances, needs to be examined on a case-by-case basis. Here are some tips to help you through the process.

First, is your response *necessary*? For example, responding to a subpoena and testifying is necessary, and allows the judge to determine that the evidentiary privilege has been waived regarding the specific disclosures. But other types of disclosures, such as communicating with the prosecutor opposing the petition, are probably not necessary. You may want to defend yourself, but it is highly likely that such a defense is not necessary, because you are not a party to the proceeding. You are, at most, a potential witness to the former client's claim. And you almost certainly will have the opportunity to disclose what might be needed by testifying at an evidentiary hearing on the petition.[6] At that hearing, the court will learn "all of the facts concerning why defense counsel did or did not do certain things."[7]

Second, is whatever you are proposing to disclose narrowly tailored to respond to the specific alleged deficiency raised by the former client? Will there be a way for the client (or successor counsel) to raise objections to what you disclose before you disclose it? As comment [14] to Rule 1.6 states, "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose" of the exception. Even a necessary disclosure must be narrowly tailored to respond to the specific alleged deficiency at issue.

You will want to defend yourself against client allegations of ineffectiveness. In most cases, that opportunity will come at an evidentiary hearing. Taking care in how you do this is important, because your ability to defend yourself may not be as broad as you would like it to be.

Conclusion

This article is focused on the self-defense exception relevant to ineffective-assistance claims. Other client criticisms or claims of malpractice in different contexts may trigger different confidentiality exceptions. The main thing to remember is that your confidentiality obligation is broad, even when a former client criticizes your work, and defending yourself in a manner that's consistent with your ethical obligations requires analysis. If you need assistance in understanding your ethical obligations, please do not hesitate to call the Office at 651-296-3952. Every day a senior lawyer is available free of charge to answer your ethics questions. ▲

NOTES

[1] Susan Humiston wishes to thank Mr. Butler for his editorial contributions, and notes any opinions expressed are his personal opinions and not necessarily those of the Lawyers Board or Minnesota Board of Public Defense.

[2] American Bar Association Formal Opinion 479, "The 'Generally Known' Excep tion to Former-Client Confidentiality," 12/15/2017 (discussing when information is "generally known" under Rule 1.9(c), relating to a former client and may be permissively used, including that information is not generally known "simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.").

[3] *State v. Walen*, 563 N.W.2d 742, 753 (Minn. 1997) (holding that "a defendant who claims ineffective assistance of counsel necessarily waives the attorney-client privilege as to all communications relevant to that issue.")

[4] ABA Formal Opinion 10-456, "Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim (7/14/2010) ("When a former client calls the lawyer's representation into question by making an ineffective assistance of counsel claim, the first two clauses of Rule 1.6(b)(5) do not apply."

[5] Rule 1.6(b), MRPC, comment [14].

[6] *See* Minn. Stat. §590.04, subd. 1 (2024).

[7] *State v. Roby, 531 N.W.2d 482, 484 n.1 (Minn. 1985).*