

DISCLOSING CONFIDENTIAL INFORMATION

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When someone consults Rule 1.6, Minnesota Rules of Professional Conduct (MRPC), concerning the confidentiality of information relating to the representation of a client, at first glance she might think that almost nothing truly is confidential at all. Rule 1.6(b) lists ten situations in which a lawyer may reveal otherwise confidential information, even if the information is adverse to the client. Only the first of these exceptions requires client consent. What too easily can get lost in the exceptions is that the basic tenet of Rule 1.6(a) remains that, “[e]xcept when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.”

Client confidentiality is, without doubt, one of the fundamental principles of lawyering, a concept drummed into the public’s head through numerous law-related television shows and movies, and specifically emphasized to all prospective lawyers in law school and as part of the bar exam. Confidentiality under Rule 1.6 is broader than the attorney-client privilege. And despite the exceptions to the rule that indeed exist, the overwhelming majority of lawyers vigilantly guard their clients’ confidential information, such that complaints and discipline alleging breaches of confidentiality are quite rare. Those few complaints that do result in discipline most often occur “on the periphery” of a law practice.

Exceptions to Client Confidentiality

What are the identified exceptions to client confidentiality? Rule 1.6(b)(1) of course permits disclosure of a client’s confidential information if the client gives informed consent. The rule probably shouldn’t need to include such a provision as it seems intuitively obvious.

So what situations permit a lawyer to disclose his client’s confidential information without the client’s consent and despite the fact that such disclosure may be harmful to the client’s legal matter? Exceptions include disclosure to prevent the

commission of a fraud by the client that will cause substantial financial injury to another or disclosures to rectify the consequences of a fraud that has been committed by the client, but only if the lawyer's services will be or were used as a part of the conduct. Disclosure to prevent reasonably certain death or substantial bodily harm of the client or of a third person is also permitted.

Disclosures necessary to obtain advice about the lawyer's obligations under MRPC (*i.e.*, seeking an advisory opinion from the Director's Office or from private counsel) are allowed, as are those disclosures necessary to establish a claim (including collecting fees) or to defend the lawyer against accusations in civil, criminal or disciplinary matters (based upon conduct in which the client was involved), and disclosures necessary to report another lawyer's misconduct to the proper authorities.Ftn 1 Also permitted are disclosures necessary to comply with a court order. This group of exceptions is a natural outgrowth of the practice of law, allowing disclosure in limited instances where requiring silence could cause harm or be unfair. Notably, even these exceptions are discretionary, not mandatory,Ftn 2 and are always limited to those disclosures "necessary" to accomplish the stated purpose.

The discretionary nature of 1.6(b) disclosures may be seen by an example of an advisory opinion question I fielded a few years ago. The attorney had just obtained information as to the whereabouts of his client, a noncustodial parent who had "kidnapped" his daughter and taken her out-of-state; the mother and authorities did not know her whereabouts. Neither had the attorney known prior to the recent discovery of the location. The caller inquired whether he was required to disclose this information. My first question was, "what do you want to do?" The lawyer did not wish to disclose. While tragic, the answer then was easy, since even if disclosure were permitted, it would not be mandatory.

Somewhat more "elastic" are the exceptions that allow disclosure of otherwise confidential information if the lawyer reasonably believes the disclosure is impliedly authorized,Ftn 3 or disclosure of nonprivileged information that the client has not specifically requested be held inviolate and that the lawyer reasonably believes will not be embarrassing or detrimental to the client.Ftn 4 Caution is in order when considering these sections as a basis to disclose. Most lawyers opt not to make disclosures in almost all instances, so significant abuses of these sections have not been reported.

Finally, one rule in the MRPC mandates disclosure and "trumps" Rule 1.6 confidentiality. Rule 3.3(a) and (b), MRPC, requires remedial measures, including disclosure to a tribunal, if a lawyer learns that she has unintentionally offered false evidence to the court or that her client intends to commit fraud on the tribunal. Such disclosures must be made even if the information is otherwise protected by Rule 1.6.

Some lawyers may believe that withdrawal from representation is sufficient in such situations, but the rule requires disclosure.

Admonitions Issued

As noted, violations of Rule 1.6 have been relatively few. Private admonitions have been issued in some instances. For example, an attorney was admonished for sending a client's file, including personal medical records, to another attorney to ascertain whether that second attorney was interested in assuming the representation. This was done without the knowledge or consent of the client, and the client complained. The attorney was found to have violated Rule 1.6. Another attorney was admonished for disclosing information about a client over his family dinner table in violation of Rule 1.6, information which the lawyer's son then used to taunt the client's son at school. A third was admonished for "cc'ing" an adult client's mother (who also was a client of the lawyer) on the daughter's billing statements in an attempt to pressure the client to pay more regularly, thereby violating Rule 1.6. Finally, an attorney who was representing his own daughter in a dispute with her employer, who formerly was the lawyer's client, was admonished for specifically reminding the employer that his legal position was incorrect by citing to privileged advice that had been given in an earlier similar representation, violating both Rules 1.6 and 1.9(c)(1), MRPC (using client information to the disadvantage of a former client).

Few public disciplinary matters have involved issues implicating Rule 1.6. One that discussed the rule was *In re Fuller*.^{Ftn 5} Fuller disclosed his belief that his client intended to defraud the bankruptcy court, and confidential information upon which his belief was based. Although under the current version of Rule 1.6(b)(4),^{Ftn 6} Fuller's belief, if well-founded, might allow for such disclosure, recall that any disclosure must always be limited to the extent such disclosures are "necessary." In this matter, Fuller sent his allegations not only to the bankruptcy court and trustee, but also to numerous other governmental agencies and he included additional unrelated allegations against the client. The Minnesota Supreme Court noted that, "[w]hile federal and state law may require—and the Rules of Professional Conduct may authorize—an attorney to disclose the ongoing fraud by a client, it is the scope and methods taken by Fuller that have created the disciplinary problem."^{Ftn 7}

Conclusion

Client confidentiality will forever remain fundamental to the attorney-client relationship. Occasionally new exceptions may be added to the rule in order to meet changing societal values; most if not all such exceptions will be discretionary rather

than mandatory. In general, clients may continue to provide information to their attorney with confidence.

Notes

1 See Rule 8.3, MRPC. The rule has a separate provision stating that the rule does not require disclosure.

2 Failure to comply with a court-ordered disclosure may carry its own hazards, however, even if not a violation of Rule 1.6. See, *In re Nathan*, 671 N.W.2d 578 (Minn. 2003).

3 An example is found in Rule 1.14, MRPC, as to disclosures necessary to assist a client with diminished capacity.

4 This provision is not part of the ABA Model Rule 1.6; rather, it is a carry-forward from DR 4-101 of the former Minnesota Code of Professional Responsibility, which was replaced by the MRPC in 1985. Until amendments in 2005, Minnesota's Rule 1.6 remained identical to the former Code provision, and was not based upon the ABA's Model Rule. At that time, this one remnant was added.

5 *In re Fuller*, 621 N.W.2d 460 (Minn. 2001).

6 "A lawyer may reveal information relating to the representation of a client if: the lawyer reasonably believes the disclosure is necessary to prevent the commission of a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."

7 621 N.W.2d 460, 467 (Minn. 2001).