

Standard 4.3 on Protecting Client Confidences

STANDARD 4.3 ON PROTECTING CLIENT CONFIDENCES

STANDARD

Consistent with its ethical and legal responsibilities, a provider must protect information relating to representation of a client from unauthorized disclosure.

COMMENTARY

General considerations

The attorney-client relationship depends upon the free and candid flow of information between client and practitioner. This will occur only if clients are certain that the information they provide will be protected from unauthorized disclosure. The provider must make certain that all personnel understand and abide by their ethical obligation to protect client confidences.¹

Specific considerations

Intake. The responsibility to assure confidentiality begins at intake. Persons who are seeking representation are entitled to the same level of protection as clients regarding confidentiality of communications.² The provider's responsibility to protect information from disclosure does not diminish because an applicant is not accepted as a client.

Applicants for service must be guaranteed a private interview, whether it is conducted in person or by phone. Interviews need to be conducted in a setting where confidential information provided by the applicant cannot be overheard by persons who are not employed by the provider and where notes from the interview as well as confidential documents provided by the applicant are not visible to anyone other than appropriate provider personnel. The identity of each applicant and confidential information supplied in support of the application should be protected from improper disclosure to third parties, including other applicants for service or other clients of the provider.

Authorized disclosure. The provider and its practitioners should be familiar with the ethical rules in its jurisdiction regarding the authorized disclosure of confidential information and what information is deemed to be protected. Generally, information relating to the representation cannot be disclosed unless the client gives informed consent, the disclosure is implicitly

¹ See Model Rules of Professional Conduct R. 1.6 (2003) regarding Confidentiality of Information. American Law Institute's *Restatement Third, The Law Governing Lawyers*, Section 59, states that "Confidential client information consists of information relating to representation of a client, other than information that is generally known."

² See Model Rules of Professional Conduct R. 1.18 (2003) regarding Duties to a Prospective Client, which reads:
“(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.”

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authorized in order to carry out the representation or the disclosure is permitted in special circumstances set out in the ethical rule.³

Disclosure of confidential information is often essential as part of representation of a client. Client approval of a particular course of action implicitly may authorize disclosure of information to courts or other tribunals, opposing counsel or other third parties in order to carry out the representation. When particularly sensitive information is involved, the provider should explicitly discuss the disclosure with the client, and consent should be obtained before the information is disclosed.

Risks of unauthorized disclosure. The provider needs to be particularly sensitive to several risks of unauthorized disclosure. The first risk involves inadvertent disclosure of confidential information. Such disclosure can occur when practitioners or other staff engage in casual conversations inside and outside the provider's office. Information about applicants and clients should never be discussed among the provider's staff when there may be other applicants for service, clients of the provider or non-provider personnel present. Hard-copy documents containing confidential information should not be left where they can be seen by anyone other than the appropriate staff, and confidential client information should not be displayed on computer screens that are visible to persons who should not have access to the information.

Confidential client information can also be inadvertently disclosed when intake records or materials from case files, including attorney work product such as drafts of confidential memorandum and other documents, are disposed of improperly. The provider should shred paper records that contain confidential information when disposing of them. Providers should make certain that electronic records that contain confidential information are removed from computer hard drives, storage disks, servers and other devices when the provider disposes of such devices.

A second risk to client confidences arises when judges or opposing counsel, seek information about the legal services which are provided to a particular client, or about the basis on which a client was found to be eligible. The provider should take appropriate steps to protect confidential client information from such disclosure, including challenging the request in court and, if necessary, on appeal.⁴

Requests for confidential information by funding sources. There can be a tension between the legitimate interest of funding sources to account for the proper expenditure of funds, and the need for providers to protect the confidences and secrets of their clients. Providers should be

³ See Model Rules of Prof'l Conduct R. 1.6(b) (2003).

⁴ See Comment to Model Rules of Prof'l Conduct R. 1.6(b)(4) (2003), Par . 11 which states "A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order."

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careful not to reveal confidential information to a funding source, unless the provider is required by law to disclose the specific information requested to the funding source.

In an early opinion the American Bar Association specifically ruled that a legal aid provider could not ethically give a funding source access to confidential information in the absence of willing and informed consent by the client.⁵ However, in February 2002, the American Bar Association adopted revisions to Model Rule on Professional Conduct 1.6(b) to state that a "...lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary...to comply with other law or a court order."⁶

Approximately half of the states have adopted some variation of Model Rule 1.6 and other states are considering the revision. Some states ethics opinions interpret their rules of professional responsibility to incorporate the "other law" exception.

While the rule may not require client consent to such disclosures, where providers are operating under state ethics rules that are based on Model Rule 1.6(b)(4) or where ethical opinions permit disclosure based on other law, they should inform clients at the outset of the representation that confidential information may be disclosed to a funder, if the law requires it. The provider should be careful not to disclose more information than is specifically required by law and should resist disclosing information that could potentially compromise the client's representation without the client's consent.⁷

Ultimately, the scope of the protection for information relating to representation of a client is a matter of federal and state law⁸ as well as state ethical rules ethics. Providers and their practitioners should be familiar with the relevant state and federal law and ethics requirements, as well as any other law that is applicable, and they should examine them carefully to determine

⁵ ABA Comm. On Ethics and Prof'l Responsibility, Informal Op. 1394 (1977).

⁶ The Comment to Model Rules of Prof'l Conduct R. 1.6(b)(4) (2003) states in Paragraph 10 that "Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law."

An example of "other law" is Section 509(h) of the Appropriations Act which provides funds for the Legal Services Corporation (LSC). The provision states that, notwithstanding state ethical considerations, LSC recipients are required to make available to LSC and certain auditors "...retainer agreements, client trust fund and eligibility records, and client names..." unless they are covered by the attorney-client privilege. Courts have interpreted this provision to require disclosure of these items even when the recipient argues that the information sought by LSC is protected by state ethical rule. *See, e.g., United States v. Legal Services for New York City*, 249 F. 3d 1077 (DC Cir. 2001).

⁷ The Comment to Model Rules of Prof'l Conduct R. 1.6(b)(4) (2003), Par. 11 states in part "...Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law."

⁸ While statutes that require disclosure are clearly "other law," it is arguable that regulations adopted by agencies to implement such statutes also constitute "law." It is far less clear that other documents stating agency policy or practice would constitute law for purposes of Model Rules of Prof'l Conduct R. 1.6 or the comparable state ethical provision.

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what, if any, information may be disclosed to a funding source without client consent. There may be instances where federal or state laws mandating disclosure of client information conflict with ethical rules or other law.⁹ In those instances providers should make every effort to negotiate with funding sources over disclosures that may violate ethical rules or other laws, to protect both the clients involved and the provider's resources. In some instances, the provider may have to seek opinions from state ethics bodies or courts in order to resolve the issue.

Use of interpreters. Special confidentiality concerns arise when dealing with applicants and clients who are hearing impaired or have limited proficiency in English and who require the services of interpreters who are not provider employees.¹⁰ The provider should be aware of the potential impact on confidentiality when a third party acts as an interpreter in a communication between an applicant or client and the provider. The provider should, whenever possible, use the services of a professional or qualified volunteer interpreter, who is responsible to the provider so that the confidential and privileged nature of the communication is preserved. The provider should assure that all such interpreters are aware of the responsibility to protect from disclosure any information communicated between the applicant or client and the provider.

The provider should discourage use of third party interpreters who are friends or family members or non-professional volunteers from client communities. Not only does such a situation potentially jeopardize the confidentiality of the communication between the applicant and the provider, it also potentially compromises the accuracy and quality of the interpretation. However, there may be circumstances where the client or applicant insists that such a person be used, or there is an emergency and no professional interpreter is immediately available. In such a situation, the provider should impress upon the interpreter the need to keep the communication confidential.¹¹

⁹ For example, state law may prohibit the disclosure of the identity of clients who are suffering from AIDS or who are victims of domestic violence, while federal statutes may require disclosure of the names of all clients who receive legal services from a recipient of federal funds.

¹⁰ See ABA Standards for the Provision of Civil Legal Aid (2006), Standard 4.6 (on Communication in the Primary Languages of Persons Served).

¹¹ The ABA Section on Litigation has published *The Attorney-Client Privilege and the Work-Product Doctrine* by Edna Selan Epstein (Fourth Edition 2001) which provides at page 160: "The client may use an agent for communicating with the attorney. As long as the client reasonably expects the agent to keep the communication confidential from third parties and does not, by entrusting the communication to the agent, indicate a lack of concern for keeping the communication secret, the privilege should apply. Thus, when...a Spanish-speaking client asks a translator to come along when consulting an English-speaking lawyer, the privilege should not be lost."