NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 718 – 7/28/99

Topic: Confidential communications; disclosure of information relating to clients to bar association for compilation of statistical summary.

Digest: A legal aid office representing clients in juvenile delinquency proceedings may provide information extracted from mental health evaluations to a bar association committee to enable it to prepare a statistical analysis, taking steps to ensure that a recipient of the information would not be able to identify particular clients or their families.

Code: DR 4-101; EC 1-8, 4-2.

FACTS

A legal aid office represents clients in juvenile delinquency proceedings. In the course of these proceedings, after a juvenile has been found guilty, the Family Court judge often orders the county Family Court's in-house Mental Health Clinic to conduct a mental health evaluation to assist the judge in determining an appropriate disposition. The clinic prepares a report containing information gathered by the mental health examiner during interviews with the juvenile and his or her family as well as information provided by the probation officer who investigated the juvenile's social and educational background.

The legal aid office proposes to provide information from a representative sample of mental health examinations to a bar association committee for its use in preparing a report evaluating the practices of the Family Court's Mental Health Service ("MHS"). The office would provide the information in the following manner. The office would identify MHS reports prepared during a particular time period. Based on each MHS report, an employee of the legal aid office would

prepare a "report data form." This form would not identify the particular juvenile client by name, but would extract the following information from the MHS report: the county in which the report was prepared; the client's gender, age, and race or ethnicity; the court's finding ("top charge"); the client's parole or remand status; the length of the Mental Health Service's interview of the client; whether the service interviewed a parent or guardian and, if so, the length of the interview; documents or collateral sources reviewed; and the service's diagnoses and recommendation. After receiving the report data forms, the bar association committee would collate the information contained in them and then return these forms to the legal aid office. The committee would prepare its analysis based on the statistical summary. The analysis and statistical summary would then be published.

The legal aid office has concluded that, although the MHS reports do not contain attorney-client privileged information, their disclosure could nevertheless be embarrassing or detrimental to the juvenile clients if the reports themselves were disclosed in their entirety or if the information they contain were linked to particular clients. However, the legal services office is confident that the information that would be disclosed to the bar association committee "is completely neutral and could not under any circumstances be used to identify a client" of the office. Therefore, it believes that disclosure of the information extracted from a collection of MHS reports would not be embarrassing or detrimental to its clients. Because the process of obtaining consent from its clients would be cumbersome, the legal aid office proposes to compile and provide the above-described information without obtaining its clients' consent.

QUESTION

May a legal aid office extract information from mental health evaluations and provide the information to a bar association committee for preparation and analysis of a statistical summary?

OPINION

The inquiry raises a question of law as well as questions of ethics. The question of law is whether, under relevant statutory provisions governing the confidentiality of mental health reports,[1] the legal aid office may disclose information extracted from those reports without judicial authorization. Our committee does not address this question, because our mandate is limited to interpreting the Code of Professional Responsibility.

1. *Disclosure of information outside the legal aid office*

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[1] *See* Family Court Act Section 351.1(5)(a) and (6).

Assuming that there is no legal restriction against disclosing information extracted from mental health reports, the first ethics question is whether the legal aid office may do so consistently with Disciplinary Rule ("DR") 4-101, which establishes the lawyer's duty of confidentiality. This provision generally requires client consent to the disclosure of information that is protected by the attorney-client privilege as well as to any other information "gained in the professional relationship" if "the client has requested [it] be held inviolate" or "disclosure...would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A); *see* N.Y. State 716 (1999).

Although the information contained in the MHS reports would not ordinarily be protected by the attorney-client privilege, these reports do contain information gained by the legal aid office "in the professional relationship" with its juvenile clients. Therefore, information contained in the reports may not be disclosed if "disclosure...would be embarrassing or would be likely to be detrimental to the client." As the inquirer recognizes, information contained in an MHS report could not properly be disclosed if the information was identified or could be identified with a particular juvenile client, unless the client's consent were first obtained, because such disclosure could be embarrassing or detrimental to the clients identified in them. This is true notwithstanding the worthiness of the bar association committee's proposed study. *See* N.Y. State 485 (1978) (legal aid lawyers may not divulge client confidences to a not-for-profit research organization); *see also* N.Y. State 490 (1978) (staff attorneys of legal services office may not report on specific cases to the office's board of directors without client consent to the disclosure of confidences and secrets).

DR 4-101 would not bar disclosure, however, to the extent that information relating to particular clients can be disclosed in such a form that a recipient of the information could not identify it with a particular individual and, thus, its disclosure could not be embarrassing or detrimental to a client. *See* ABA Formal Op. 95-393 (1995) (a lawyer employed in a government elder care office may provide information to a nonlawyer supervisor by "glean[ing] the relevant data from [the lawyer's] files and disclos[ing] it to the nonlawyer supervisor in a way that does not in any way compromise the confidentiality of any particular client's data or permit the client to be identified or the data to be traced to that client"); *cf.* Restatement (Third) of the Law Governing Lawyers, Section 112, cmt. h (Proposed Final Draft No. 1, Mar. 29, 1996) ("A lawyer may cooperate with reasonable efforts to obtain information about clients and law practice for public purposes, such as historical research, when no material risk to a client is entailed, such as financial or reputational harm. A lawyer thereby cooperates in furthering public understanding of the law and law practice"). The question, then, is whether particular information extracted from the reports, but not specifically identified with a particular client, can be provided with assurance that the information would never and could never be linked to the respective client, thereby embarrassing or harming the client.

The legal aid office must ultimately resolve for itself the question whether a recipient of the "report data forms" can conceivably link the information they contain to a particular client, with the result that the client may be embarrassed or harmed.[2] If there is any possibility that a client can be identified to his or her detriment, the legal aid office must obtain client consent before disclosing the information to a bar association committee or to others outside the legal aid office. *See* D.C. Op. 223 (1991) ("Redaction of client names is insufficient to preserve confidentiality when unredacted information could link the confidence or secret revealed to the client."); *see also* ABA Formal Op. 98-411 (1998) (without client consent, a lawyer seeking advice from another lawyer outside the lawyer's office may not provide anonymous or hypothetical facts to the other lawyer if the lawyer "can foresee at the time he seeks a consultation that even the hypothetical discussion is likely to reveal information that would prejudice the client or that the client would not want disclosed" or "[i]f the hypothetical facts discussed allow the consulted lawyer subsequently to match those facts to a specific individual or entity . . . and disclosure may prejudice or embarrass the client").

2. *Disclosure of information within the legal aid office*

The second ethics question is whether employees of the legal aid office may review MHS forms relating to the office's juvenile clients for the purpose of preparing "report data forms" that can be provided to the bar association committee. This, too, may raise a question of client confidentiality under DR 4-101. No serious question arises under DR 4-101 if the "report data forms" are prepared by lawyers or non-lawyer employees who, independently of preparing these forms, would have occasion to review the MHS forms in connection with their work. The question is whether the MHS forms, containing client secrets, may be provided to personnel who would not otherwise have access to them, so that these personnel may prepare "report data forms."

Ordinarily, unless the client directs otherwise, a lawyer may disclose client confidences and secrets to other lawyers as well as non-lawyer employees within the lawyer's office so that these others can assist the lawyer in rendering legal assistance. Disclosures may be made for other legitimate, foreseeable purposes, such as to enable the office to prepare bills or necessary internal records. The legal work product prepared on behalf of a client may also be shared with others in the office for training purposes or to assist them in preparing similar work on behalf of other clients. Clients implicitly authorize disclosures such as these to be made within the lawyer's office. *See* EC 4-2 ("It

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[2] The answer will presumably depend, in part, on such factors as the size of the office and the number of juvenile clients it represents, the extent of the time period covered by the "report data forms" and the number of such forms that are disclosed, and whether any information disclosed in a particular case (e.g., the court's finding or the juvenile client's parole or remand status) is sufficiently unique or unusual that it might be linked to one or a small number of clients.

is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved").[3] It may be impermissible, however, for a lawyer to disclose client confidences to a non-lawyer in the office for reasons that are unrelated to the representation or to the other legitimate, foreseeable aspects of the office's operation, because doing so may needlessly embarrass the client or expand the risk that confidences will be divulged outside the office . *See* ABA Formal Op. 393 (1995) (without client consent, a lawyer in a government elder care office may not disclose client confidences to a nonlawyer supervisor for purposes other than to assist the lawyer in assisting the client).

We need not resolve the general question of whether and to what extent a lawyer may share client confidences and secrets with other individuals within the lawyer's office for purposes unrelated to the representation of the particular client or to the ordinary functioning of the office. In the situation presented by the inquirer, the legal aid office can reasonably conclude that the proposed intra-office disclosures relate to legitimate, foreseeable activities of a legal aid office. It is a legitimate function of a legal aid office to seek to improve the legal system for the benefit of the office's clientele and other members of the public by drawing on the knowledge it has developed over time in the course of representing many similarly situated clients. *Cf.* Canon 8 ("A Lawyer Should Assist in Improving the Legal System"); Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons, 67 Fordham L. Rev. 1751, 1751-52 (1999) ("[L]egislators...depend on input from a range of persons with special knowledge about the impact on society, or on different groups, of existing or proposed laws. ... Legislative access to legal expertise from lawyers representing the poor is particularly important because impoverished segments of society have particularly limited abilities to wield influence in the legislative arena. ... [L]egal services attorneys…are uniquely able to identify and explain to lawmakers problems with existing and proposed laws affecting poor people..."). Therefore, as long as adequate steps are taken to ensure that the sanctity of client secrets is preserved by the legal aid office's personnel, *see* ECs 1-8 & 4-2, the office's personnel may review client files in order to compile information for subsequent use by a bar association committee in analyzing and reporting on the functioning of a court office.

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[3] Lawyers are also implicitly authorized to make limited disclosures to agents of the lawyer who are outside the lawyer's office where necessary to the operation of the lawyer's office or for other legitimate purposes. *See* EC 4-3 ("Unless the client otherwise directs, it is not improper for a lawyer to give limited information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.").

CONCLUSION

Subject to the limitations discussed above, the question is answered in the affirmative.

(19-99)