NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

Committee on Professional Ethics

Opinion 866 (5/23/11)

Topic: Disclosure of confidential information to prevent reasonably certain death or substantial bodily harm or to prevent a crime; confidential information acquired after termination of representation

Digest: Under the New York Rules of Professional Conduct, a lawyer is permitted (but not required) to disclose a current or former client's confidential information if the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm or to prevent the client or former client from committing a crime. Information relating to the representation of a client may be confidential information even though it is acquired after the client-attorney relationship has ended.

Rules: 1.6(a)-(b); 1.9(c)

QUESTIONS

1. When a lawyer has acquired confidential information about a client or former client evidencing a risk of death or substantial bodily harm, do the New York Rules of Professional Conduct (i) require the lawyer to disclose such information, (ii) prohibit the lawyer from disclosing such information, or (iii) give the lawyer discretion whether or not to disclose such information?

2. Can information acquired after the termination of a representation constitute confidential information of the former client?

FACTS

3. Inquirer assisted two principals, Doe and Roe, in forming a business (the "company"). Inquirer's professional services consisted principally of preparing the organizing documents and assisting with organizational activities and filings. Inquirer understood that Doe and Roe on their own would carry forward the company's business (*e.g.,* obtaining any necessary registrations and licenses, negotiating any leases or contracts, and the like). Four months after inquirer organized the company, without the direct assistance of inquirer, the company received its operating license as a center for the on-site provision of certain services to the public.[1]

4. Inquirer provided no further assistance after forming the entity, and the clients did not ask him for any further assistance. Accordingly, inquirer believes that his representation of Doe and Roe in connection with the company concluded when he completed the organizing steps. However, inquirer never sent a termination letter to Doe and Roe, and Doe and Roe never expressly terminated inquirer's services. In other words, Doe and Roe have never explicitly acknowledged or confirmed, either in writing or orally, that inquirer's representation has terminated.

5. After notice of formation of the company was published but before the company received an operating license, inquirer provided legal assistance to Doe in his individual capacity. Inquirer's legal services to Doe individually concerned a matter unrelated to the organization or business of the company owned by Doe and Roe together.

6. Also after the company had been organized but before the company received its operating license, inquirer overheard a conversation that is the centerpiece of the inquiry here. Inquirer has not identified the speakers, but during the conversation, one of the speakers said that the principals of the company had failed to secure a license because the water available in the premises where the company proposed to provide on-site services had failed to meet required water quality standards. The speaker also said that the principals intended to submit a water sample from another location for testing in order to meet the required water quality standard. Apart from this conversation, inquirer has no knowledge of the water quality at the proposed premises and no knowledge (as distinguished from belief or suspicion) of what in fact the company or anyone acting on its behalf said or did with respect to water quality to secure an operating license.

7. Inquirer asks whether the New York Rules of Professional Conduct (the "Rules") require him to disclose the information about the water quality, prohibit him from disclosing the information, or give him discretion whether or not to disclose the

[1] Examples of businesses that provide services to the public and require an operating license from the government include private schools, nursing homes, restaurants, hospitals, hospices, day care centers, and rehabilitation facilities. For purposes of our opinion, it would make no difference which type of business inquirer represented.

information. In addition, given his belief that his representation of Doe and Roe with respect to their company ended before he overheard the conversation about water quality, inquirer asks whether the information he acquired after the attorney-client relationship ended is protected by the Rules as "confidential information."

OPINION

8. At the outset, regardless of ethical requirements, inquirer would be well-advised to consider discussing his concerns with the client or former client. Such a discussion would be consistent with Comment [6A] to Rule 1.6, which advises a lawyer to remonstrate with the lawyer's client before making a disclosure of confidential information permitted under Rule 1.6(b)(1), (2) or (3). Even where possible disclosure would not be governed by Rule 1.6 and the advice of Comment [6A] to remonstrate would not apply, such a conversation would afford the Doe and/or Roe an opportunity to remediate the problem, if any, or to allay inquirer's concerns that a problem exists.

Meaning of the term "confidential information"

9. We now turn to the Rules and their application to the facts presented. If the information inquirer heard in the critical conversation is not "confidential information," then the rules protecting confidential information (discussed below) do not apply and inquirer is free to disclose the contents of the conversation if he so desires. We therefore first consider whether the information that inquirer overheard in the critical conversation is "confidential information" protected by the Rules.

10. "Confidential information" is defined in Rule 1.6(a) as "information *gained during* ***or*** *relating to* the representation*, whatever its source*," that meets one of three criteria: (i) it is protected by the attorney-client privilege, or (ii) it is likely to be embarrassing or detrimental to the client if disclosed, or (iii) the client has asked that the information be kept confidential. (Emphasis supplied.) Given the nature of the critical conversation, there can be little doubt of its potential, if revealed, to embarrass or harm not only the company but also its principals. Thus we are brought to the questions of whether the critical conversation is information "gained during or relating to" either the representation of the principals, Doe and Roe, or the separate representation of Doe. If the answer is "yes" to either of those questions, either with respect to the principals in the joint representation or to Doe in the individual representation, then the information gleaned from the conversation is confidential information protected by Rule 1.6. If the information is confidential information, then inquirer must not reveal it or use it to the disadvantage of the client unless an exception to Rule 1.6 applies. We will first address the remaining elements of confidential information, and then address the possible exceptions.

11. The Rules generally protect confidential information with respect to current and former clients to the same extent. Rule 1.9(c) provides, in pertinent part, that a lawyer shall not reveal confidential information of a former client protected by Rule 1.6 except as would be permitted or required with respect to a current client. But whether

information qualifies as "confidential information" in the first place does differ depending on whether a client is a present or former client. Under the definition in Rule 1.6(a), information can be "confidential information" simply if it is acquired "during" the representation, but information acquired after the representation terminates can be "confidential information" only if it "relates" to the representation. Since it is unclear from the facts whether Doe and/or Roe are current clients or former clients, we will address both possibilities.

Protection of information gained during the attorney-client relationship

12. The question is whether inquirer's representation of Doe and Roe was a continuing representation at the time of the critical conversation or, in the alternative, whether it had previously ended. The answer to the question depends on whether the clients reasonably believed that they continued to have a client-attorney relationship with inquirer (*e.g.,* whether the principals reasonably believed that inquirer stood ready to provide legal advice and counsel to them on demand, pursuant to the initial retainer or engagement letter). *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14 (lawyer-client relationship arises when a person manifests intent to a lawyer that the lawyer provide legal services for the person and the lawyer either manifests consent to do so or knows the person reasonably relies on the lawyer to do so). This inquiry is highly fact dependent.

13. The facts presented here are ambiguous. On the one hand, inquirer provided services to the principals only in connection with the organization of the company. He completed that assignment before he overheard the critical conversation and provided no further services to the principals or to the company after the company was organized. On the other hand, inquirer has had no written or oral communication with the company or its principals explicitly marking an end to the representation. Other factors that could bear upon whether the representation continued beyond the critical conversation include: (a) the terms of the original retainer or written letter of engagement, particularly any stated scope and duration of the engagement; (b) the length of time between the completion of the organizing work and the time of the critical conversation; and (c) whether either or both of the principals were continuing to communicate with inquirer about company business at or near the time of the critical conversation.

14. Under the facts presented, we cannot say conclusively whether inquirer's representation of Doe and Roe had ended by the time of the critical conversation. For example, it is unclear what the retainer or engagement letter provided, how much time passed after inquirer finished organizing the company, whether the principals communicated with inquirer about company business after the organizing work was done, who took part in the critical conversation, or the purpose of the conversation.

15. In addition, inquirer represented Doe individually at roughly the same time that he represented Doe and Roe together. Revelation of a conversation suggesting that Doe, his co-member Roe, or the company they owned had falsified test data concerning

drinking water in order to secure a license to operate would be embarrassing or detrimental to Doe, so the critical conversation is protected confidential information as to Doe as well. Therefore, inquirer must apply the same analysis to his representation of Doe as to his representation of Doe and Roe jointly.

16. If either the company or Doe continued to be inquirer's current client, then we must ask whether the information was acquired "during . . . the representation." Literally read, this requirement could be merely temporal, so that any information whatsoever that a lawyer learns from any source after a lawyer begins and before the lawyer finishes representing any client is "confidential information" if disclosure would be detrimental or embarrassing to the client or if the client requested that the lawyer not discuss the information. This reading would extend to information learned from third parties having no connection to the subject matter of the representation or even in the course of another representation. We do not think this purely temporal reading is sound.

17. A more sensible reading is that "during" implies some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information -- for example, if the lawyer learned the information because of the lawyer-client relationship.[2] We do not need to decide here the precise parameters of any such requirements beyond the temporal. Although we do not know the circumstances of the conversation that the lawyer overheard, it is clear that the information can be traced directly or indirectly to the principals, and that should be enough to meet any requirement beyond the temporal that may be implied by the phrase "during … the representation." Thus, if the representation of either Doe and Roe or of Doe alone was continuing at the time inquirer learned the information, then inquirer is bound by Rule 1.6 with respect to the contents of the conversation. In other words, absent an exception to his duty of confidentiality under Rule 1.6, he may not disclose the information to anyone.

Protection of information acquired after the termination of a representation

18. If, on the other hand, inquirer's representations of Doe and Roe had already terminated – and Doe and Roe were former clients rather than current clients – when he overheard the critical conversation, the question arises whether information acquired after the termination of a representation can constitute confidential information of a former client. We conclude that it can.

19. Rule 1.6(a) defines confidential information to include both information acquired "during" the representation and information "relating to" the representation. Either

[2] *Cf.* Nassau County Bar Op. 05-1 (duty not to prejudice a client "during the course of" the representation in DR 7-101(A) (now Rule 1.1(c)(2)) "extends only to the professional services the lawyer is rendering to the client"); Roy Simon, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 34 (2009 ed.) ("Rule 1.1(c)(2) does not prohibit a lawyer from prejudicing or damaging a client *outside* the scope of the representation . . . . as long as [the lawyer's] activities do not undermine or negate the professional work the lawyer is performing for the client.").

element is sufficient. Thus, if the information contained in the conversation related to the representation, then inquirer is bound by Rules 1.6 and 1.9(c) with respect to that information even if inquirer gained the information after the representation ended. Whether information learned after a representation has concluded is information "relating to" that representation depends upon a variety of factors, including but not limited to: (a) whether the information concerned or grew out of specific aspects of the representation and was revealed in the lawyer's presence because of the lawyer's prior representation; (b) whether the information came from the client or the client's close associates (*e.g.,* independent contractors who conducted the water tests), as opposed to coming from third parties; and (c) whether lawyer learned the information as a result of further active inquiry or investigation after the representation ended, as opposed learning the information accidentally.

20. In this case, if licensure was discussed or contemplated by inquirer during his representation of the company, or if inquirer participated in the critical conversation with one or both of the principals or close associates, or if inquirer sought the information in any way, then the overheard conversation would be more likely to be deemed "relating to" inquirer's representation of the company. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59, cmt. c ("post-representation confidential client information might be acquired, for example, in the form of information on subsequent developments").

21. If, however, the issue of licensure was never part of the representation of Doe and Roe and was not discussed with or addressed by inquirer, and if there is no reason to think that the participants in the conversation permitted or intended inquirer to overhear the conversation because of his prior representation, one could reasonably argue that the conversation was unrelated to the representation of the company and therefore not within the scope of Rule 1.6 vis à vis the company.

22. To recapitulate our analysis so far, if inquirer concludes that he had no on-going client-attorney relationship either with the two principals or with Doe individually at the time of the critical conversation, and if he concludes that the information gleaned from the critical conversation does not relate to either representation, then neither Rule 1.6 nor Rule 1.9(c) nor any other provision of the Rules of Professional Conduct bears upon the question of whether inquirer may or may not disclose the information gained from that conversation. If, however, inquirer concludes that either or both representations had not ended, or if he concludes that the information gleaned from the critical conversation relates to either or both of the representations, then inquirer's knowledge of the conversation and its content is information gained "during" or "relating" to the representation, and is thus "confidential information" whose disclosure is governed by Rule 1.9(c) and/or Rule 1.6. Because such information must not be revealed or used to the disadvantage of a client unless an exception applies, we will now address the possible exceptions to the duty of confidentiality.

Do any exceptions to the duty of confidentiality apply?

23. Rule 1.6(a) provides that a lawyer may not disclose confidential information unless at least one of three circumstances obtains: (i) the client gives "informed consent"; (ii) disclosure is "impliedly authorized to advance the best interests of the client" and is either "reasonable under the circumstances" or "customary in the professional community"; or (iii) disclosure is permitted by Rule 1.6(b). Here, the first two exceptions – informed consent or implied authorization – do not appear to apply, but we need to determine whether one or more of the permissive bases for disclosure set forth in paragraph (b) may apply.

24. Two exceptions are potentially relevant here. The first is Rule 1.6(b)(1), which provides that "a lawyer *may* reveal or use confidential information to the extent that the lawyer reasonably believes necessary (1) to prevent reasonably certain death or substantial bodily harm." (Emphasis supplied.) This exception recognizes "the overriding value of life and physical integrity" (Comment [6B]), but is a wholly discretionary exception – it says "may," not "must." *See* Rule 1.6, cmts. [6]-[6D]. The second potentially relevant exception is Rule 1.6(b)(2), which extends a similar exception to disclosure that the lawyer reasonably believes necessary "to prevent the client from committing a crime." The remaining exceptions in paragraph (b) have no apparent application in this case.

25. Whether death or substantial bodily harm to anyone is a "reasonably certain" outcome of exposure to the drinking water in the licensed premises is a question of fact and judgment. See Rule 1.6, cmt. [6A]. For this exception to apply, the lawyer must believe that death or substantial bodily harm is reasonably certain to ensue from exposure to the drinking water at issue here, and that belief must be reasonable, and the lawyer must conclude that disclosure is "reasonably necessary" to prevent such death or bodily harm. "Such harm is reasonably certain to occur if it will be suffered imminently or if there is present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." Rule 1.6(b), cmt. [6B]. Here, where inquirer does not know if the submission of the improper water sample even took place, and does not know what is wrong with the actual water at the licensed premises, it seems unlikely that the lawyer could form a reasonable belief, based on the limited facts that he knows, that death or substantially bodily harm is reasonably certain to occur.

26. Whether the company or anybody on its behalf has committed a crime (such as larceny by false pretenses or operating a business requiring a license without a valid license), and whether that crime is a continuing one, are questions of law beyond the jurisdiction of this Committee. If a lawyer reasonably believes that the client is engaged in a continuing crime or intends to commit a new crime, then to the extent necessary to prevent the continuation of the original crime or the commission of a new crime, the lawyer may (but need not) disclose the contents of the conversation. *See* Rule 1.6(b)(2). *See generally* N.Y. City 2002-1 (2002) (interpreting the phrase "intention of a client to commit a crime" and discussing continuing crimes). However, Rule 1.6(b)(2)

does not permit disclosure of confidential information concerning a completed or past crime; it applies only to confidential information necessary to prevent a continuing or otherwise future crime.

27. In deciding whether to make a disclosure that is permissible under Rule 1.6 (b), a lawyer should consider, *inter alia,* the factors set forth in Comments [6] through [6D] to Rule 1.6. The admonition in Comment [6A] that we pointed out in paragraph 8 above especially bears repeating:

> When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure under paragraphs (b)(1), (b)(2) or (b)(3), the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client.

CONCLUSION

28. Under the New York Rules of Professional Conduct, a lawyer is permitted (but is not required) to disclose confidential information of a current or former client if the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm or to prevent the commission of a crime by the client or former client. Information is confidential if the lawyer acquires the information "during" a representation, provided there is some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information, but information "relating to" the representation of a client may be confidential information even if it is acquired after the client-attorney relationship to which it relates has ended.

(58-09)