NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1059 (6/12/15)

Topic: Disclosure of confidential information, consent by minor clients

Digest: Lawyers for minor clients in immigration proceedings may disclose the names and certain procedural information regarding the clients' cases to granting organizations where (1) the information is not privileged and the disclosure would not be embarrassing or detrimental to the clients or (2) the clients or their legal representatives (*e.g.*, parents or guardians) give voluntary, informed consent to the disclosure.

Rules: 1.0(j), 1.6, 1.14

FACTS

1. The inquirers are legal assistance organizations that receive government grants to represent unaccompanied children in immigration removal proceedings. "Unaccompanied children" for this purpose are persons under sixteen years old who were apprehended by the Department of Homeland Security and were not in the care or custody of a legal guardian or parent at the time of arrest. The governmental granting organizations require that grantees provide data on their clients' cases in an online database created and managed by the Vera Institute of Justice, a private, not-for-profit corporation that carries out research and other projects designed to improve the functioning of the criminal justice system.

2. The data to be entered include the name of the children accepted as clients, the number of hours spent on each client's case, where the attorney represented the child, and various procedural details regarding the conduct of those cases (such as the number of charges that were admitted and that were contested, the relief requested, the types of motions filed, and whether expert testimony was adduced). The term "charges" refers to alleged violations of immigration statutes, such as entering the country without inspection or without possessing a visa at the time of entry. Grantees are also required to input in a narrative field the "results of interviews designed to capture an Unaccompanied Child's understanding of Immigration Proceedings before and after receiving program services."[1]

[1] The precise information requested is as follows:

- number of children accepted as clients, identified by name, gender, date of birth, and alien number;
- number of hours spent on each Unaccompanied Child client's case;

3. Under the terms of the contract between each governmental granting organization and Vera, Vera is responsible for ensuring that the case-specific data is "redacted and/or anonymized" in order not to disclose any information protected by the attorney-client privilege or by the ethical duty of confidentiality.

QUESTIONS

4. May attorneys representing children in removal proceedings disclose to the governmental granting organization specified information about each client and matter without violating the duty of client confidentiality?

5. If disclosure requires client consent, may grantee organizations obtain informed consent to disclosure of this information from an immigrant child who is under sixteen years of age?

OPINION

Disclosing Confidential Information

6. Rule 1.6 of the New York Rules of Professional Conduct (the "Rules") bars a lawyer

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- fora in which the attorney represented each Unaccompanied Child (immigration court, the Board of Immigration Appeals, state court, the U.S. Citizenship and Immigration Services);
- number of cases in which the Unaccompanied Child did not contest the allegations in the Notice to Appear;
- number of charges contested and the outcome;
- whether the Unaccompanied Child requested immigration relief or relief from removal and the disposition of any such applications;
- number of other court/agency orders sought and the disposition of the orders;
- type of motions filed and disposition of those motions;
- disposition of any appeals filed;
- whether any expert testimony was proffered and/or allowed;
- whether the attorney sought or obtained the appointment of a child advocate for an Unaccompanied Child,
- whether special accommodations (such as testimonial aids, closed hearings, or other means to facilitate the adjudication) were sought or utilized;
- results of interviews designed to capture an Unaccompanied Child's understanding of Immigration proceedings before and after receiving program services.

from knowingly revealing "confidential information" or using such information for the advantage of the lawyer or a third person, unless the client gives informed consent. There are exceptions, none of which are applicable here.[2]

7. "Confidential information" is defined as information gained during or relating to the representation of a client (a) that is "protected by the attorney-client privilege," (b) that is "likely to be embarrassing or detrimental to the client if disclosed," or (c) that the client has requested be kept confidential.[3]

8. This Committee and others have concluded that the disclosure of non-anonymized information about client representations for similar purposes is barred, absent client consent, if the information consists of confidential information. For example, in N.Y. State 485 (1978), we opined that the attorneys in the Juvenile Rights Division of the Legal Aid Society, which represented persons in juvenile delinquency and other Family Court proceedings, could not participate in Vera studies that called for in-depth interviews with defense attorneys that would reveal the clients' confidences or secrets, absent client consent, "even for so worthy a purpose as the Vera study." We cited, among other authorities, ABA Inf. 1287 (1974), which held that a Legal Services Office providing legal representation to poor persons could not reveal the names, addresses and phone numbers of its clients so that they could be interviewed for a research study by an outside non-profit group. The ABA committee noted that the names, addresses and telephone numbers of clients were protected from disclosure "since it might be an embarrassment to the client for any number of reasons to have it revealed that he was a client of the Legal Services Office."

9. Here, with the exception of the last item of data sought (the results of interviews designed to capture the client's understanding of immigration proceedings), the data being sought disclose procedural steps in the course of administrative or court proceedings, and such information is clearly not protected by the attorney-client privilege. Whether disclosure of the information to Vera would be embarrassing or detrimental to the clients depends on the context and the precise nature of the information involved. It is not, however, readily apparent that disclosure to a research organization of the fact that a child is involved in removal proceedings or that a court or

[2] One of the exceptions is if "the 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." The disclosures contemplated here, while they are in the interest of the grantee organizations, which wish to receive payment for the services rendered, are not thereby impliedly authorized to advance the best interests of the client for this purpose. That exception implies a closer connection between the interests of the client and the interests advanced by the disclosure. Another exception is disclosure "to establish or collect a fee," but that does not permit a lawyer to enter into a contract with a third party for payment of fees where the contract requires disclosure, and then rely on this exception to justify the disclosure. *See* N.Y. State 716 (1999) ("the fact that the insurance company has agreed to pay the lawyers fee does not in itself authorize the lawyer to disclose information to the [insurance company] auditor that would otherwise be protected by DR 4-101 [the predecessor to Rule 1.6]").

[3] We will assume in the discussion that follows that the clients have not specifically requested that any of the information at issue be kept confidential.

administrative body has taken certain procedural steps would be embarrassing or detrimental to the child in the typical case. Those facts will already be known to the parts of U.S. Citizenship and Immigration Services most concerned with the clients' cases, so the disclosure here will merely bring it to the attention of Vera, which is required by contract to redact and/or anonymize the data before disclosing it to the granting agencies. Nevertheless, not every case is typical, so the inquirers must weigh in each case whether disclosure would be embarrassing or detrimental to the child.

10. The final item is quite different. Depending on the level of detail required for the answers, reports of interviews designed to capture the client's understanding of immigration proceedings may reveal information that is embarrassing or detrimental to the child (*e.g.*, the child's ignorance or lack of sophistication) and possibly information protected by the attorney-client privilege (*e.g.*, the tactical considerations that counsel discussed with the client). That information would be "confidential information" within the meaning of Rule 1.6(a), so disclosure is barred, absent informed consent. We turn to whether and how a grant recipient can obtain that consent.

Client Consent to Disclosure

11. A minor can consent to disclosure of confidential information if the minor is capable of understanding the risks of disclosure and of making a reasoned judgment. *See*, *e.g.*, N.Y. City 1997-2; N.Y. State 485; Connecticut Opinion 03-07 (2003); North Carolina Opinion 18 (1998). *See also* Rule 1.14, Cmt. [1] ("[A] client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.").

12. It is not always appropriate to seek consent for disclosure in order to promote interests other than the interests of the client. In this case, the disclosures would primarily promote the research, and presumably monitoring, interests of the governmental granting organizations. But we and other ethics committees have concluded that it is reasonable to seek consent for disclosure of some information to third parties that is necessary for the lawyer to obtain funding or to further research, depending on the nature of the information and the confidentiality protections in place. As the New York City Bar ethics committee has observed, a lawyer may seek consent for disclosure of confidential information to a social services organization if the lawyer "reasonably believes that such disclosures are either in the client's best interests or likely to be a matter of indifference to the client." N.Y. City 1997-2 (information related to the client's expressed intention to harm herself or possible abuse of the child). Similarly, in N.Y. State 69 (1968) we opined that an attorney could, with consent, disclose to the administrator of the county department of social services that paid for the attorney's services information necessary to obtain payment, including the facts of the case and the services proposed for the client, where the administrator made undertakings of confidentiality. Likewise, in N.Y. State 716 (1999) we concluded that it was permissible to obtain client consent to disclose bills and supporting documentation to insurance company auditors responsible for approving the lawyer's bills. *Cf. Restatement Third, The Law Governing Lawyers* § 60, cmt. h (2000) ("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.").

13. Here, in the typical case, the information sought would appear to be of relatively limited sensitivity and it will be redacted and/or anonymized before transmission to the granting agencies. To the extent the information qualifies as "confidential information" at all, a lawyer could in most cases reasonably conclude that the risks of harm are very small or nonexistent, so the inquirers would be free to seek consent to disclosure.

14. Even if it is permissible to seek consent for disclosure of information that the lawyer concludes is confidential, however, it may not be possible for the child to give consent. First, very young children will be incapable of giving consent. There is no particular age when children can be said to have capacity to give consent. The New York City Bar ethics committee observed in an opinion dealing with "verbal minors ages twelve or older who affirmatively seek a lawyer's assistance" that such clients "generally will be capable of making considered judgments concerning the representation." N.Y. City 1997-2 (citing, *inter alia*, Standard for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings § 2.2 (Am. Academy of Matrimonial Lawyers 1995) for the proposition that there is "a rebuttable presumption that children above the age of twelve are competent"). But the children that are the inquirers' clients may be less capable of making considered judgments than the clients in N.Y. City 1997-2, given that the unaccompanied children who are the inquirers clients are likely to be unfamiliar with American society, or may be more capable of making considered judgments, given their experiences in their home countries and during their unaccompanied trip to the United States. If the children have been released to the custody of a parent or guardian – the inquiry states that "approximately 45% of the children are not released to a parent," leaving approximately 55% who are – the parent or guardian may be able to consent. *See* Rule 1.14, Cmt. [4] (discussing possibility of looking to parents to make decisions for minor clients, and noting that whether the lawyer should do so may depend on the nature of the matter).

15. Second, the consent must not be accepted until the lawyer has made full disclosure of "information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j) (definition of "informed consent"). The extent of the information needed and risks to be addressed will vary both with the nature of the information being disclosed and the sophistication of the child, parent or guardian whose consent is sought. Where the information is relatively innocuous, it may be possible to delegate the task of obtaining consent to nonlegal personnel; but where the information is more sensitive, that may not be possible.

16. Third, the client's consent must be voluntary. As this Committee observed in N.Y. State 490 (1978), lawyers providing services to indigent clients "should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and, such requests should be made only under circumstances where the staff is satisfied that their clients could refuse to consent without any sense of guilt or embarrassment."

CONCLUSION

17. Whether the inquirers can disclose the information sought by the granting organizations depends, first, on whether the information is protected by the attorney-client privilege or

disclosure in a particular case would likely to be embarrassing or detrimental to the clients. If the lawyer concludes that the information is protected but that disclosure would not be adverse to the interests of the child, the lawyer may seek the consent of the child or, in some circumstances, the child's parent or guardian, but the consent must be preceded by full disclosure of any risks and benefits and must be fully voluntary.

(12-15)