



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1084 (1/22/2016)

Topic: Confidential information; defense attorney’s knowledge of co-defendant’s innocence; consent to disclose confidential information of deceased former client; implied authorization to disclose

Digest: Where a defense attorney obtained information from a deceased client that appears to exonerate a co-defendant, that information is protected as confidential, notwithstanding that the client was convicted and there are no pending proceedings against the client or in which the attorney has appeared. Authorization to disclose confidential information may have been expressed by the client, or may be implied when the disclosure is consistent with the client’s best interests and is reasonable under the circumstances.

Rules: 1.6(a) & (b) and 1.9(c)

FACTS

1. While the inquiring attorney was representing a client charged with fraud, the client revealed information to the inquiring attorney that would seem to exonerate a co-defendant. The client was convicted and has since died in prison. There are no pending proceedings in which the attorney has appeared on the client’s behalf. The co-defendant has pled guilty, but is now in the process of seeking to vacate her plea and has asked if the inquirer knows anything that could help her. Prior to his death, the client told the inquiring attorney that if he was convicted, he wanted to exonerate his co-defendant.

QUESTION

2. May an attorney disclose, to a co-defendant of the attorney’s now-deceased client information imparted by the client that might exculpate the co-defendant?

OPINION

3. The nature and extent of information about a non-client that a lawyer may ethically reveal in connection with that non-client’s motion to vacate a plea depends on a number of factors, including: (a) whether the information is protected as “confidential” by Rule 1.6; (b) whether, as a matter of law, there is anyone who can waive the privilege or provide an informed consent to disclose the information; and (c) whether such consent was impliedly authorized by the now deceased client.

Whether the Information Is Protected as “Confidential”

4. Rule 1.6(a) defines and protects certain information as “confidential.” It provides:

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) 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; or

(3) the disclosure is permitted by paragraph (b).

“Confidential information” consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. “Confidential information” does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

5. Rule 1.6(b)(1) authorizes disclosure of a client’s confidential information “to prevent reasonably certain death or substantial bodily harm.” Comment [6B] to Rule 1.6 explains that this paragraph recognizes the overriding value of life and physical integrity. As an example, Comment [6B] says: “Wrongful execution of a person is a life-threatening and imminent harm under paragraph (b)(1) once the person has been convicted and sentenced to death.” Incarceration as a result of a fraud conviction is not covered by this exception.

6. Rule 1.9(c) speaks to the confidential information of a former client and states in relevant part:

(c) A lawyer who has formerly represented a client ... shall not thereafter . . .

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

7. In criminal proceedings, the relative culpability of the defendants is often a matter of great significance when negotiating a plea. Hence, a statement tending to negate the guilt of a co-defendant may well prove disadvantageous to any other defendants who are more culpable. Because the information exonerating the co-defendant was “gained during ... the representation

of a client” and is protected by the attorney-client privilege there can be no doubt that it should be deemed “confidential” within the meaning and protection of Rules 1.6(a) and 1.9(c)(2). *See* N.Y. State 1057 (2015).¹

Whether Disclosure Is Expressly Authorized

8. On the facts presented -- *i.e.*, that the client at one time expressed a desire to exonerate the co-defendant -- it is possible to discern an authorization to disclose on the happening of some future event which would conclude the client’s case, or at least place the client in a situation where disclosure would not redound to the client’s detriment. Whether the client gave such express authorization is a question of fact beyond the jurisdiction of this Committee to resolve. If, in fact, the client instructed the inquiring attorney to reveal information necessary to exonerate the co-defendant, and if the client persisted in this instruction after he had been “informed” of the relevant considerations, the lawyer could disclose the information pursuant to the exception in Rule 1.6(a)(1) for “informed consent.”

9. Even if the client did not personally and explicitly provide informed consent to the disclosure, the inquiring attorney may still disclose the information if informed consent is given by someone who is legally entitled to waive the deceased client’s attorney-client privilege and has legal authority to provide informed consent to waive the attorney’s ethical obligation of confidentiality. *Cf.* N.Y. State 970 (2013) (“If the executrix is legally entitled to the same access that the decedent had when alive, then the former attorney should ordinarily provide the executrix access to all the files”). Whether and under what circumstances this authority can be exercised by the deceased client’s personal representative is uncertain. The issue is, however, ultimately a matter of law beyond the jurisdiction of this Committee.

Whether Disclosure Is Impliedly Authorized

10. Rule 1.6(a)(2) adopts the concept of implied authorization to disclose client confidential information. Comment [5] to Rule 1.6 explains:

Except to the extent that the client’s instructions or special circumstances limit that authority, a lawyer may make disclosures of confidential information that are impliedly authorized by a client if the disclosures (i) advance the best interests of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. In addition, lawyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with

¹ If disclosure would be “detrimental to the client” it would be confidential for that reason (even if not privileged) under Rule 1.6.

diminished capacity when necessary to take protective action to safeguard the client's interests.

11. Where there is reason to believe that the now-deceased client would have wanted the co-defendant to be exonerated under the current circumstances, the concept of implied authorization to disclose in Rule 1.6(a)(2) would permit the lawyer to make such disclosures as may be necessary to accomplish that end.

CONCLUSION

12. Statements made by a deceased client that may exonerate a co-defendant are protected as confidential information. The client may have expressly authorized disclosure of the information by personally giving informed consent to the disclosure, or authorization to disclose it may be implied if the disclosure is consistent with the client's best interests and is reasonable under the circumstances.

(29-15)