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New York State Bar Association
Committee on Professional Ethics

Opinion 1118 (4/4/17)

Topic: Confidential information; disclosure to collect a fee

Digest: A lawyer may disclose confidential information reasonably necessary to collect a fee, but must take all reasonable measures to limit the disclosure to information that is objectively necessary for that purpose.

Rules: 1.6(a) & (b)

FACTS

1. The inquirer represented a client in a court action that ended in a settlement before trial. Shortly before the settlement, the client advised the lawyer of certain facts that, if disclosed, would be detrimental or embarrassing to the client. The settlement was ultimately disbursed to successor counsel, and a litigated fee dispute arose among the client, the inquirer and other lawyers who had been engaged on the matter. In connection with the fee dispute, the inquirer believes that disclosure of some of confidential information may be necessary to show the work he did in order to support a quantum meruit recovery.

QUESTION

2. May a lawyer disclose confidential information reflected in time sheets by providing the time sheets to support a quantum meruit recovery?

OPINION

3. Rule 1.6(a) of the New York Rules of Professional Conduct (the "Rules") imposes a general duty on a lawyer not to knowingly reveal confidential information or use such information to the disadvantage of a client or for the advantage of the lawyer, but Rule 1.6(b) provides several exceptions to that general duty. Rule 1.6(b)(5)(ii) provides: "A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to establish or collect a fee . . . ."

4. Comment [14] to Rule 1.6 emphasizes that "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose." Initially, the lawyer must determine how much disclosure the lawyer believes "necessary" to collect the fee, but the lawyer's determination must be reasonable. Rule 1.0(r) specifies that a lawyer "reasonably believes" something when "the lawyer believes the matter in question and . . . the circumstances are such that the belief is reasonable." While Comment [6A] to Rule 1.6

notes that the lawyer's "exercise of discretion" conferred by other exceptions in Rule 1.6(b)[1] "requires consideration of a wide range of factors and therefore should be given great weight," the Comments contain no such exhortation to defer to the lawyer's judgment in the case of disclosures to collect a fee. Recognizing the lawyer's self-interest in collecting the fee, and the potential of threatened disclosure as a bludgeon to coerce payment, the lawyer should be particularly careful to ensure that disclosure is truly "necessary" – and objectively so – to collecting the fee. See also In re Starbrite Properties Corp., 2012 WL 2050745, at *11 (E.D.N.Y. Bankr. June 5, 2012) (court referred to Disciplinary Committee a lawyer who unnecessarily disclosed client's fraudulent conduct in seeking to enforce a subpoena to support application for fee that client had refused to pay); In re Gonzalez, 773 A.2d 1026 (D.C. 2001) (lawyer admonished for disclosing, in connection with withdrawal motion, not only that fees were owed but also extraneous and embarrassing client information).

5. In N.Y. State 980 (2013), we noted that "[t]he Rules do not define 'necessary,' but WEBSTER'S UNABRIDGED DICTIONARY at 1200 (2nd ed. 1983) says that the word means 'unavoidable, essential, indispensable, needful.'" N.Y. State 980 n.1. In that opinion, which addressed the disclosure of confidential information to collect a fee in a bankruptcy proceeding, we distilled several principles that are helpful in making that determination:

> First, a lawyer should not resort to disclosure to collect a fee except in appropriate circumstances. Second, the lawyer should try to avoid the need for disclosure. Third, disclosure must be truly necessary as part of some appropriate and not abusive process to collect the fee. Fourth, disclosure may not be broader in scope or manner than the need that justifies it, and the lawyer should consider possible means to limit damage to the client.

N.Y. State 980 ¶ 6.[2]

6. Applying these principles here, the inquirer should take all reasonable measures to limit the disclosure of confidential information to information that is objectively needed to prove entitlement to the fee (assuming that the claim to the fee is also objectively reasonable). For example, it may be that the fact that work was done at a particular time could be shown by revealing only redacted time entries or redacted communications with the client. If disclosure to the Court would not itself be harmful to the client, or would be less harmful, the inquirer should consider approaching the Court for guidance.[3] See, e.g., ABA Formal Op. 476 (2016) (noting availability of redaction and in camera submission to preserve confidentiality of information in making motion to withdraw for nonpayment of fees) (citing In re Gonzalez, 773 A.2d at 1032).

CONCLUSION

7. The inquirer may disclose confidential information reasonably necessary to collect a fee, but must take all reasonable measures, such as redaction or seeking Court guidance, to limit the disclosure of confidential information to information that is objectively reasonable to prove his entitlement to his fee.

(8-17)

[1] Comment [6A] refers to the lawyer's exercise of discretion under subparagraphs (1) to (3) of Rule 1.6(b), which deal with disclosures to prevent bodily harm or to prevent the commission of a crime or potential injury to third persons arising out of a lawyer's prior representations.

[2] N.Y. State 980 ¶ 9 also cautioned that the attorney should consider whether the information from the client was not only confidential under the rules of ethics, but also subject to the attorney-client privilege. We do not opine on the rules of privilege, but Opinion 980 noted authority for the proposition that an exception to the privilege may apply to information reasonably necessary to collect a fee. Id. n.8, citing Alexander, CPLR §4503 PRACTICE COMMENTARIES, C4503:5(b) (McKinney) (discussing, as an exception to the privilege, "the rule that permits a lawyer to reveal confidences in order to collect a fee from the client"), and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §83(1) (2000) ("attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding … to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer").

[3] Comment [14] to Rule 1.6 advises:

> If the disclosure will be made in connection with an adjudicative proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the Court should affirmatively order disclosure, the inquirer would be permitted under Rule 1.6(b)(6) to disclose the confidential information to the extent necessary to comply with the Court's order.