

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2014-6
(July 2014)

The inquirer's law firm has handled a union legal services plan for many years. The plan and its benefits are covered by a summary plan description (SPD) drawn up by the Union and provided to members. Under the Plan, participants are permitted to secure legal services from the inquirer's firm for free for the covered benefits, or to secure representation from a law firm of their choice for the flat rates outlined in the SPD.

The inquirer has been paid a flat monthly retainer to provide all covered services to the Union members. The inquirer's firm does not secure separate retainer agreements from each individual client.

A Board of Trustees, which consists of the elected Board of the Union, recently terminated the relationship with the inquirer's firm, and has demanded a list of all the clients of the inquirer who are presently being represented under the Plan. While there are reporting requirements to the Plan, these have always been done with the protection of client identity, by using a distinct numerical identifier for each client.

While the inquirer has a retainer agreement with the Plan, there is nothing in that agreement which requires the inquirer to provide the identity of those Union members and their families that are availing themselves of the inquirer's firm's services.

When the decision was made to terminate the arrangement with the inquirer's law firm, a demand was made by the Trustees, confirmed by their Fund Counsel, for a list of all the names of the clients presently being represented by the inquirer's law firm. The disclosure of client names was to notify those with open cases that, effective July 1, 2014, another firm using a different payment model would be providing the services for Union members.

The inquirer has maintained that the identity of the clients presently being represented by the firm is confidential and that the firm is constrained from providing this information. Counsel for the Union obtained an attorney opinion that the information was not "privileged" and that this fact, based in conjunction with an implied waiver allowing for third party payment, was sufficient to allow the inquirer to provide the information.

The Committee concludes that the identity of the clients is confidential and cannot be disclosed without the informed consent of each client; that the issue of payment by a third party in no way changes that opinion; that exceptions to confidentiality that would allow disclosure in this situation do not apply; and that the inquirer is ethically required, absent the informed consent of the client, to not reveal the firm's current clients' identities.

Pennsylvania Rule of Professional Conduct (the "Rules") 1.0(e) **Terminology** provides,

...

(e) “Informed consent” denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.4 **Communication** provides,

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

...

Rule 1.6 **Confidentiality of Information** provides,

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

...

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or

disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;...

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Rule 1.8 **Conflict of Interest: Current Clients: Specific Rules**, provides,

...

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

Confidentiality as defined by Rule 1.6 is a very broad ethical concept that covers any and all information about a client. It is quite different than the evidentiary doctrine of the attorney-client privilege, which limits itself to certain information communicated between a client and his or her lawyer. It is settled that in many circumstances, the identity of a client is not privileged. See, Marc Levy, Petitioner v. Senate of Pennsylvania, Respondent Commonwealth Court of Pennsylvania, 65 A.3d 361 (Pa. 2013), 2014 Pa. Commw. LEXIS 58 (Commw. Ct. Jan. 15, 2014). However, this inquiry is not about the attorney-client privilege, but rather about the ethical doctrine of confidentiality.

In Opinion 2006-4, this Committee held that client identity was in fact confidential information and could not be provided to a third party for purposes not relating to the representation. The reason for this lies in the implied exception contained in Rule 1.6a which outlines the circumstances under which confidential information can be revealed, specifically, what is necessary in order to meet the goals of the representation.

In 2006-4, fundraising was not the purpose of the representation, so that revealing the identity would have been a violation of Rule 1.6.¹ Furthermore, in that opinion, the individuals to whom the client list would be provided would not even know that the list had client names on it. In the present instance, the list clearly would be identified as a client list.

¹ "The professional obligation of confidentiality prohibits the unauthorized disclosure of a client's identity, unless disclosure would be permitted (or, in some jurisdictions, required) by an exception." Bloomberg BNA Lawyers' Manual on Professional Conduct, Practice Guide, Rule 1.6 Client Identity §55:306.

The Committee notes that in the present matter, the representation already is being provided to the client. Notice to current clients by the third party paying the bill is not directly related to the implied exception in Rule 1.6a under the circumstances where representation has already started, and the inquirer can directly (and should see discussion below) address any fee issues with the clients.

While the notice to the current clients may be related to payment for the services provided by the inquirer once the Plan change takes effect, disclosure of this change can be and in fact has been accomplished by the Trustee notifying all the Union members about the change in the Plan structure and provider.

Rule 1.8f clearly states that a condition of payment by a third party of legal fees is the maintaining of information protected by Rule 1.6. The exception to confidentiality (as contained in Rule 1.6c4, which is normally used to allow an attorney to reveal confidential information to resolve a dispute or collect a fee from the client,) does not apply to this situation because the fee is due from the Union and not from the client. Thus, the applicable Rule is 1.8f rather than 1.6c4.

The Union pamphlet outlying the benefits of the Plan also buttresses the conclusion that the clients' identity is confidential. The following is the relevant language from the Plan itself:

The Legal Services provided by the attorneys for the Plan shall be provided in accordance with the professional and ethical standards required of attorneys.

Attorneys providing legal services shall adhere to the rules and regulations of the Plan but shall receive no further information, direction or interference from the Union, its officers and agents or from the Board of Trustees.

Any attorney providing legal services under the Plan will have an attorney-client relationship with the individual Member or his Dependent who is receiving the legal services. The attorney has the same exclusive professional duties and obligations to the Member or his Dependent as would be required by any other client who would normally retain the attorney on a private fee basis.

Any attorney providing legal services under the Plan shall maintain the confidentiality of the attorney-client relationship in accordance with the applicable professional standards. [Emphasis added.]

Thus, it is clear that the Plan itself recognizes the duty of confidentiality, and clarifies the express intent that confidentiality apply to the relationship about which the Union is now trying to obtain confidential information. The fact that the Union is paying for the services only means that Rule 1.8f applies, and that Rule does not provide any implied exception to confidentiality, but rather bolsters it. It also appears that the language from the Plan itself constitutes the information required to be given to a client under Rule 1.8f in order that payment to the inquirer by a third party be made based upon informed consent. The Plan language itself only strengthens the position of the inquirer, and in no way allows disclosure under the circumstances described.

Rule 1.4a requires that the inquirer consult with each current client affected by this change in the Plan, so that the clients are aware of what is happening. At this time all the clients have received is a communication from the Union, but the duty to communicate is one that is the inquirer's, and thus the inquirer must provide information about what is happening, and the impact of this on the current clients.

Finally, The Committee cautions that moving forward, in order to protect both the inquirer and the inquirer's clients, should information about the representation, including the identity of the client, be required by the Plan, the inquirer at the start of the representation should review with the client the Plan's requirements. For example, the inquirer should explain: 1) what information the inquirer is required to disclose (and to whom) in order for services to be paid by the union; 2) what the client's options are, i.e., allow this disclosure, limit it, or prohibit it completely, and 3) that in the last two instances this may in fact result in the Plan not paying for services and the client being responsible for the fee. If for some reason in a specific case the inquirer believes it inadvisable to reveal certain confidential information, this also needs to be explained to the client as to why. Although not required by the Rules, the Committee believes that it is advisable that this informed consent of release of the confidential information be confirmed in writing in order to avoid any confusion between the attorney and the client as the representation moves forward.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.