

Ethics Advisory Opinion Committee

Opinion No. 21-01

Originally Issued April 13, 2021

Amended November 28, 2023

ISSUES

- ¶ 1 May a lawyer ethically disclose the name of her client?
- ¶ 2 When is a lawyer prohibited from revealing the source of her fee and/or the terms of her fee agreement when representing a client?

OPINION

¶ 3 Under Rule 1.6(a) of the Utah Rules of Professional Conduct, “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” Thus, the default answer is that a lawyer may not reveal the identity of her client except to the extent allowed by Rule 1.6(a) or Rule 1.6(b).

¶ 4 Likewise, the identity of the person or entity paying attorney’s fees is subject to the same confidentiality requirements of Rule 1.6. Further, unless the provisions of Rule 1.6 are met, the terms of the fee agreement are confidential.

¶ 5 A further exception to confidentiality required under Rule 1.6 is the prohibition on a client using the lawyer’s services to commit a crime or a fraud. Utah R. Prof’l Conduct 1.6(b)(2).

BACKGROUND

¶ 6 This request was posed to the Ethics Advisory Opinion Committee (“EAOC”) without any background. The EAOC is charged with responding to non-hypothetical questions. The EAOC chose to answer these questions because it perceived that such questions may reoccur in both civil and criminal settings.¹

DISCUSSION

¶ 7 The default rule under Rule 1.6(a) of the Utah Rules of Professional Conduct is that all information relating to the representation of a client is confidential.² This conclusion is based upon the language of Rule 1.6(a) which provides that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” Utah R. Prof’l Conduct 1.6(a).

¶ 8 Wrongful disclosure of Confidential Information by an attorney is serious. “Shall” is an imperative. It defines “proper conduct for purposes of professional discipline.” *Id.* Preamble: A Lawyer’s Responsibilities, ¶ 14.

¶ 9 There are three exceptions to the rule forbidding a lawyer’s disclosure of Confidential Information. First, a lawyer may disclose Confidential Information if the client gives informed consent. *Id.* 1.6(a). Second, the lawyer may disclose Confidential Information if

¹ The EOAC’s undertaking this Opinion should not be construed as a license to request ethics advisory opinions without adequate factual background. Here, the EAOC is convinced that the answers to the questions would be helpful to the general bar, as the EAOC perceives that there is a substantive question posed in the short request.

² The term “Confidential Information” as used in this Opinion means information related to the representation of a client that is protected under Rule 1.6(a) of the Utah Rules of Professional Conduct.

that information is impliedly authorized to carry out the representation. *Id.* Otherwise, the lawyer may not disclose Confidential Information unless the disclosure is permitted under Rule 1.6(b).³

¶ 10 With respect to the informed consent of the client, the lawyer must evaluate the risks and benefits of disclosure. This information must be communicated to the client. The client must thereafter give informed consent. “Informed consent” is defined as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information

³ Rule 1.6(b) of the Utah Rules of Professional Conduct provides:

(b)A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is suing the lawyer’s services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
- (4) to secure legal advice about the lawyer’s compliance with these Rules;
- (5) 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 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;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” *Id.* 1.0(f). Informed consent should be confirmed in writing at the time the client gives informed consent or within a reasonable time thereafter. *Id.* 1.0 cmt. 1.

¶ 11 The lawyer should never assume that the client has given informed consent. Further, if a lawyer does not personally communicate the risks and benefits of disclosure of Confidential Information, then the lawyer assumes the risks that the client is inadequately informed and that the consent is invalid. *Id.* 1.0 cmt. 6.

¶ 12 The second exception to the prohibition of disclosure of Confidential Information is when the disclosure is impliedly authorized in order to carry out the representation. Common examples include a lawyer who enters an appearance in litigation or who represents someone in settlement negotiations.

¶ 13 The third exception allows disclosure in limited circumstances under Rule 1.6(b) of the Utah Rules of Professional Conduct to the extent the lawyer reasonably believes necessary.⁴ Rule 1.6(b) contemplates circumstances where the lawyer’s duty to protect the public and other interests outweigh the client’s expectation of confidentiality. Those circumstances include the prevention of reasonably certain death or substantial bodily harm. *Id.* 1.6(b)(1). The lawyer may disclose information to prevent the client from “committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.” *Id.* 1.6(b)(2). The lawyer may also disclose Confidential Information “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to

⁴ The EAOC notes that the duty of confidentiality under Rule 1.6 of the Utah Rules of Professional Conduct is broader than the attorney-client privilege found in Rule 504 of the Utah Rules of Evidence.

result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." *Id.* 1.6(b)(3).

¶ 14 In this context "reasonable" "denotes the conduct of a reasonably prudent and competent lawyer." *Id.* 1.0(k). Further, "reasonable belief" means that "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." *Id.* 1.0(l). "Substantial" denotes a "material matter of clear and weighty importance." *Id.* 1.0(p).

¶ 15 Rule 1.6(b), together with the definitions of "reasonable," "reasonable belief," and "substantial," indicate that these exceptions require more than ordinary suspicion that the client will misbehave. Rule 1.6(b) contemplates that such exceptions would be relatively rare and that the lawyer should not disclose Confidential Information unless doing so is "necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services." *Id.* 1.6 cmt. 7.

¶ 16 The lawyer may disclose Confidential Information needed to protect herself. Thus, the lawyer may seek advice as to her compliance with the Utah Rules of Professional Conduct. *Id.* 1.6(b)(4). The lawyer may disclose Confidential Information related to a dispute between the client and herself. The lawyer is also authorized to disclose Confidential Information to defend herself against criminal charges or civil claims against her arising out of the representation, "or to respond to allegations in any proceeding concerning the lawyer's representation of the client." *Id.* 1.6(b)(5). The lawyer may disclose Confidential Information "to comply with other law or a court order." *Id.* 1.6(b)(6). Finally, the lawyer may disclose

Confidential Information to resolve conflicts arising from the lawyer's change of employment.
Id. 1.6(b)(7).

¶ 17 If a lawyer is served with a subpoena seeking to compel disclosure of Confidential Information related to the representation of a client, the lawyer must determine whether the information compelled is protected by any privilege or rule. If it is, the lawyer must inform the client about the subpoena and discuss what privileges or objections could be asserted in response to the subpoena and the consequences of waiving any privileges or objections. The lawyer should also consider whether there are grounds for entry of a protective order limiting the information sought or its use or disclosure. The lawyer must assert nonfrivolous privileges and raise nonfrivolous objections to the subpoena unless the client gives informed consent to waive them. If the court orders the lawyer to comply with the subpoena, then "the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order." *Id.* 1.6 cmt. 15. The lawyer's duty is to maintain client confidentiality unless and until compelled to do so by proper order of a tribunal.

CONCLUSION

¶ 18 Rule 1.6 of the Utah Rules of Professional Conduct establishes the default position that the identity of a client, the source of funding for the attorney's fees, and the fee agreement are confidential, unless an express exception is found in either Rule 1.6(a) or Rule 1.6(b).