Our Client Confidentiality Rules Are Stricter Than You Think

by Keith A. Call and Gregory S. Osbourne

Imagine your next-door neighbor asks you to represent them. Can you disclose to your spouse that you represent your next-door neighbor in a legal matter without disclosing any details? The answer is "no," at least not without first obtaining written consent from your neighbor after full disclosure. That is the conclusion reached by the Utah Ethics Advisory Opinion Committee (EAOC) in an April 2021 Ethics Opinion. *See* Utah State Bar Ethics Adv. Op. Comm., Op. No. 21-01 (Apr. 13, 2021) (Opinion).

When we read the Opinion for the first time, we were struck by its breadth. Sorry to put a damper on everyone's cocktail party, but by our observation there are a lot of rule violations going on out there. Let us try to help.

The Rule and the Opinion

The relevant rule is Utah Rule of Professional Conduct 1.6(a)-(b), which appears in a sidebar to this article.

The EAOC was asked two questions about this rule: (1) "May a lawyer ethically disclose the name of her client?" and (2) "When is the lawyer prohibited from revealing the source of her fee and/or the terms of her fee agreement when representing a client?" Opinion ¶¶ 1–2. The EAOC answered, "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 attorneys' fees, and the fee agreement are *confidential*, unless an express exception is found in either Rule 1.6(a) or 1.6(b). *Id.* ¶ 18 (emphasis added).

If even the *identity* of the client is confidential and may not be disclosed, just how far does this Rule extend? The Opinion answers this question too. "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." *Id.* ¶ 7 (emphasis added).

The EAOC seems to mean it: "Wrongful disclosure of Confidential Information by an attorney is serious. 'Shall' is an imperative. It defines 'proper conduct for purposes of professional discipline.'" *Id.* ¶ 8 (citing Utah R. Pro. Conduct, Preamble: A Lawyer's Responsibilities, ¶ 14).

The Opinion discusses three exceptions: (1) informed consent of the client, confirmed in writing and never assumed; (2) implied authorization to carry out the representation; and (3) the "limited circumstances" described in Rule 1.6(b), which would be "relatively rare." *Id.* ¶¶ 9–16.

The Opinion also discusses a lawyer's duties when responding to a subpoena seeking to compel the disclosure of a client's confidential information. The lawyer must inform the client and discuss what privileges or objections could be asserted in response. The lawyer must raise nonfrivolous objections unless the client gives informed consent to waive them. If the court orders compliance, then the lawyer must consult with the client about an appeal. The lawyer must protect confidentiality unless compelled to make disclosure by a proper order of a tribunal. *Id.* ¶ 17.

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Utah Rule of Professional Conduct 1.6(a)-(b), Confidentiality of Information

(a) 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).

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

(b)(1) to prevent reasonably certain death or substantial bodily harm;

(b)(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 using the lawyer's services;

(b)(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;

(b)(4) to secure legal advice about the lawyer's compliance with these Rules;

(b)(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;

(b)(6) to comply with other law or a court order; or

(b)(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.

[Subsections c and d omitted.]

The American Bar Association has issued a similarly restrictive opinion in the context of lawyer blogging and other public commentary. The ABA opinion emphasizes that the confidentiality rule applies to "all" information related to the representation, whatever its source, even if the information is otherwise widely known. ABA Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018).

Observations

We have a few observations about the Opinion and the lawyer's broad duty of confidentiality.

1. Keith has already written in this column about how "the duty of confidentiality under Rule 1.6 … is broader than the attorney-client privilege." Opinion ¶ 13; *see* Keith A. Call, *What to Do When a Third Party Pays Your Fees*, 30 Utah Bar J. 36 (Mar./Apr. 2017). But the Opinion extends the rule of confidentiality much further than we suspect many lawyers realize. At face value, it applies to "all" information relating to the representation of the client. We think this means there is very little we can discuss about our jobs with anyone, absent consent.

2. It is unclear to us how the Opinion squares with Rule 1.6 Comment 4. According to Comment 4, a lawyer may use a hypothetical to discuss issues relating to the representation so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved. Does this mean that I can discuss hypotheticals about my representation of my next-door neighbor at my family dinner table (or a CLE presentation), so long as my hypothetical does not reveal the identity of my client? How does this square with the default rule that "all" information relating to the representation of the client is confidential?

3. The Opinion places a high burden on any lawyer who receives a subpoena or discovery request that calls for the disclosure of client information. Even though Rule 1.6(b) provides an exception "to comply with other law or court order," the Opinion states that a lawyer "must assert nonfrivolous privileges and raise nonfrivolous objections to the subpoena," and possibly even appeal an adverse ruling, unless the client consents otherwise. Opinion ¶ 17. For a representation that has terminated, this burden may fall solely on the lawyer. It will also raise very tricky issues for lawyers. For example, the Opinion concludes that the identity of a person paying attorney's fees is confidential under Rule 1.6. Contrast that with the Utah Supreme Court's holding that a letter outlining terms for retaining a law firm and describing the agreement

among defendants for allocating costs and burdens of litigation was not protected by the work-product doctrine or the attorney-client privilege. *Gold Standard, Inc. v. Am. Barrick Res. Corp*., 801 P.2d 909 (Utah 1990). Rule 1.6 may not be a proper evidentiary or discovery objection. However, since Rule 1.6 applies to "all" information relating to the representation, lawyers must be extremely wary of disclosing anything about a client in response to a subpoena or discovery request, especially without the informed, written consent from the client.

4. We wonder about the impact of this expansive rule on attorney well-being. Is it healthy for lawyers to be unable to discuss their work with anyone, including their spouses, partners, or others closest to them?

5. "The Rules of Professional Conduct are rules of reason." Utah R. Prof. Cond., Preamble: A Lawyer's Responsibilities, ¶ 14. Is it reasonable to put a blanket on all communication with anyone about our human experiences representing clients? Some have even argued that the confidentiality rule benefits the profession far more than it benefits clients or society. *E.g*., Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1 (Winter 1998). When rules are unreasonable, people do not follow them. When people don't follow the rules, it weakens the entire regulatory framework. We wonder if the Bar could do a better job of articulating a rule that protects the genuine confidentiality interests of a client without putting a complete gag order on all lawyerly communications, as the Opinion seems to do. For example, the rule could change the default so that publicized information, including client identity, is not confidential unless otherwise requested by the client, or if the lawyer knows or should know that further public dissemination may harm the client.

Conclusion

In any event, we bet the Opinion spells out a rule of confidentiality that is far broader than most of you thought. We should all be conscious of this and be more careful about what we share at cocktail parties, with friends, and even over the dinner table.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the authors.