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Informal Opinion 08-04

Revealing Confidential Client Information to a Third Party in Fee Arbitration

You have asked our opinion as to whether and to what extent a lawyer may disclose confidential client information to a third-party payer in the context of a fee arbitration.

You report that your firm represented a client in a matter for which a third party, her relative, agreed to pay the fees for your firm's legal services. The third party has now initiated a fee arbitration proceeding with the Dispute Resolution Department of the Connecticut Bar Association. The client has not joined the fee arbitration, and you have not been able to contact the client. You have asked whether exception (d) to Rule 1.6 of the Connecticut Rules of Professional Conduct will allow your firm to use confidential client information to defend itself in a fee arbitration initiated by a third-party payer where the client has not joined in the dispute.

Rule 1.6 governs disclosure of confidential client information. *See* Comment to Rule 1.6. Subsection (a) provides that "[a] lawyer shall not reveal information relating to 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 subsection (b), (c), or (d)." Rule 1.6(a). As you have indicated that you have been unable to contact the client, the client cannot be deemed to have given informed consent to disclosure as required under the first clause of Rule 1.6(a). The exception set forth in the second clause of Rule 1.6(a) is also inapplicable, since disclosure in a fee arbitration would not be impliedly authorized to carry out your representation of the client. Thus, disclosure of confidential client information would be permitted only if it fell within the parameters of subsections (b), (c), or (d).¹

¹

Your question focused on the applicability of Rule 1.6(d), which provides as follows:

(d) A lawyer may reveal such information 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 a 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.

Rule 1.6(d) permits a lawyer to disclose confidential client information in a fee dispute with a client.² As the Comment to Rule 1.6 states, “[a] lawyer entitled to a fee is permitted by subsection (d) to prove the services rendered in an action to collect it.” The first clause of subsection (d) expressly provides that a lawyer may “reveal such information to establish a claim...on behalf of the lawyer in a controversy between the lawyer and the client...” The Comment explains that “[t]his aspect of the rule expresses the principle that a beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.” Here, however, the beneficiary is not exploiting the fiduciary relationship; it is the person that paid for the legal services, not the client, that is challenging the legal fees incurred in the course of the representation. The exception set forth in first clause of subsection (d) is, therefore, inapplicable.

The second clause of subsection (d), which relates to disclosure “to establish a defense to a criminal charge or a civil claim against the lawyer based upon conduct in which the client was involved,” is also inapplicable in the context of the fee arbitration.

The final clause of Rule 1.6(d), permitting disclosure of confidential client information “to respond to allegations in any proceeding concerning the lawyer's representation of the client,” sets forth the exception applicable to disclosure to third parties. As the Comment to Rule 1.6 states, “the defense may be established by

¹ Rule 1.6(b) is inapplicable because it relates to a lawyer's duty to reveal information to the extent the lawyer reasonably believes is necessary to prevent a client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm. Subsection (c) is also inapplicable because it permits a lawyer to disclose information the lawyer reasonably believes necessary to prevent a client from committing a criminal or fraudulent act; to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act; to secure legal advice about compliance with the rules; or to comply with other law or a court order. Rule 1.6(b) and (c).

² *Cf.* Informal Opinion 87-05 (attorney may have access to information given to successor counsel to establish claim for fees); Informal Opinion 05-04 (attorney may retain copies of client files to use if a fee dispute arises).

responding directly to a third person who has made such an assertion.” *See ABA Annotated Model Rules of Professional Conduct*, 6th Ed., Comment to Rule 1.6 (“Rule 1.6(b)(5) [Connecticut Rule 1.6(d)] permits disclosure to defend claims brought by clients, as well as third parties, against a lawyer.”).³

Under Rule 1.6(d), therefore, your firm may disclose confidential client information in the fee arbitration initiated by the third-party payer of your client’s legal fees. Your firm should limit the disclosure to that reasonably necessary under the circumstances and take precautions to control access to the confidential information as much as possible. *See Comment to Rule 1.6.*

Finally, although not the subject of your inquiry, we note that Rule 1.8(f), and possibly Rule 1.7(b), are applicable to your firm’s representation of a client for whom a third party paid the legal fees. The facts you have presented to us do not indicate whether the requirements of these rules were satisfied. *See Pa. Ethics Op. 93-20 (1993) (ethical issues in foreclosing mortgage on property owned by client’s spouse to collect fees).*

THE COMMITTEE ON PROFESSIONAL ETHICS

By Wick R. Chambers

Wick R. Chambers, Chair

³ *See Or. Ethics Op. 2005-104 (2005) (attorney may reveal confidential client information in defending grievance complaint filed by opposing party); S.C. Ethics Op. 94-24 (1994) (attorney may disclose confidential client information in appealing his termination from employment with legal services agency); S.C. Ethics Op. 94-23 (1994) (lawyer permitted to disclose confidential client information in defending allegations that he engaged in misconduct while representing client before Social Security Administration).*