

STATE BAR OF NEVADA

STANDING COMMITTEE ON ETHICS AND
PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 41¹
Issued on June 24, 2009

QUESTION

Confidentiality – What types of information about a client does Rule 1.6 restrict the lawyer from revealing?

ANSWER

ALL information relating to the representation of the client.

DISCUSSION

It is well known by both lawyers and clients that the rules of ethics governing lawyers prohibits a lawyer from revealing confidential client information without the consent of the client. This “confidentiality rule” is at the heart of the lawyer-client relationship² and has been embodied in the written rules of ethics since 1908.³ The current Nevada rule is Rule 1.6 of the Nevada Rules of Professional Conduct. The general rule of confidentiality is contained in Rule 1.6(a):

Rule 1.6. Confidentiality of Information.

(a) 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 paragraphs (b) and (c).

¹This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

²GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW GOVERNING LAWYERS*, §9.2 (3d ed. 2005).

³1908 ABA Canons of Ethics, Canon 6; 1969 ABA Model Code, DR 4-101; and 1983 ABA Model Rules of Professional Conduct, Rule 1.6.

Rule 1.6(a) imposes a duty on all lawyers not to reveal information relating to the representation of their clients to anyone unless there is an applicable exception.⁴

The information protected by the lawyer's ethical confidentiality duty under Rule 1.6 is much broader than privileged information protected by the attorney-client privilege under NRS 49.185.⁵ Comment [3] to ABA Model Rule 1.6 provides:

*The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.*⁶

Rule 1.6 prohibits a lawyer from volunteering any information relating to representation of a client; the attorney-client privilege prohibits a lawyer from being compelled to reveal confidential communications between a lawyer and a client.⁷

In contrast to predecessor Rule DR 4-101⁸, the language of Rule 1.6(a) has three remarkable omissions from the historical rule of confidentiality.

The first is the omission of the qualifier “confidential” between “reveal” and

⁴*McKay v. Bd. of Co. Comm'rs*, 103 Nev. 490, 746 P.2d 124 (1987); *Todd v. State*, 113 Nev. 18, 931 P.2d 721 (1977).

⁵*Eighth Judicial Dist. Court v. County of Clark*, 116 Nev. 1200, 14 P.3d 1266 (2000)(Agosti, Shearing, Leavitt dissent).

⁶Cited approvingly by *McKay v. Bd. of Co. Comm'rs*, 103 Nev. 490, 746 P.2d 124 (1987).

⁷GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW GOVERNING LAWYERS*, §9.2 (3d ed. 2005).

⁸This Rule was in effect in Nevada until 1986.

“information”.⁹ As a result, all information relating to the representation of the client is thereby made confidential.¹⁰ Rule DR 4-101 protected the client from the lawyer’s disclosure of “secrets”, defined as: (1) information that the client “has requested to be held inviolate”; and (2) information that would be “embarrassing” or “likely to be detrimental” if revealed.¹¹

The second remarkable aspect of Rule 1.6(a) is that the confidential information need not be information that is “adverse” to the client. Rule DR 4-101(B)(3) did not prohibit the disclosure of nonadverse client information.¹²

The final remarkable omission from Rule 1.6 is an exception for information already generally known or public. This element is contained in the Restatement’s definition of “confidential client information”, but omitted from Rule 1.6.¹³

Thus, the language of Rule 1.6(a) is so broad that it is – at least on its face – without limitation. Rule 1.6(a) requires that ALL information relating to the representation of a client is confidential and protected from disclosure. Even the mere identity of a client is protected by Rule 1.6.¹⁴ The Rule applies:

1. Even if the client has not requested that the information be held in confidence or does not consider it confidential. Thus, it operates automatically;¹⁵
2. Even though the information is not protected by the attorney-client

⁹*Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995).

¹⁰GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW GOVERNING LAWYERS*, §9.15 (3d ed. 2005).

¹¹GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW GOVERNING LAWYERS*, §9.15 (3d ed. 2005). In fact, the Washington State Bar revised Model Rule 1.6 so that its Rule 1.6 reads: “A lawyer shall not reveal confidences or secrets relating to representation of a client...” *In re Disciplinary Proceedings Against Schafer*, 66 P.3d 1036 (2003).

¹²CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* §6.7.6, n. 92 (1986).

¹³RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2001).

¹⁴*In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

¹⁵GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW GOVERNING LAWYERS*, §9.15 (3d ed. 2005); *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

privilege;¹⁶

3. Regardless of when the lawyer learned of the information – even before or after the representation;¹⁷
4. Even if the information is not embarrassing or detrimental to client;¹⁸
5. Whatever the source of the information; *i.e.*, whether the lawyer acquired the information in a confidential communication from the client or from a third person or accidentally;¹⁹and
6. (In contrast to the attorney-client privilege) even if the information is already generally known – or even public information.²⁰

By a literal reading of Rule 1.6, even a laudatory comment about a client or the client's achievement may violate the letter of the Rule. However, the Committee believes that the absolute wording of Rule 1.6 is not literally meant to make every disclosure of the most innocuous bit of client information an ethical violation; but rather it is intended to strongly caution the lawyer to give consideration to the rule of client confidentiality – and whether the informed consent of the client should be obtained – whenever the lawyer makes any verbal, written or electronic communication relating to the client.²¹ For example, a lawyer advising his or her spouse that the lawyer will be traveling overnight to a distant city to defend the deposition of Client A in case A vs. B, is technically the revelation of “information relating to representation of a client” without client consent.²² The Committee suggests that common sense should be a part of Rule 1.6 and the lawyer

¹⁶See *Eighth Judicial Dist. Court v. County of Clark*, 116 Nev. 1200, 14 P.3d 1266 (2000)(Agosti, Shearing, Leavitt dissent)

¹⁷CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.2, at 298 (1986).

¹⁸CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.2, at 298 and §6.7.3, at 305 (1986); *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

¹⁹Comment [3] to ABA Model 1.6; Restatement 3rd, The Law Governing Lawyers, §59 Cmt b; *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

²⁰GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005); *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995); Ariz. Ethics Op. 2000-11 (2000).

²¹See GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005).

²²CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.3, at 301 (1986).

should not be disciplined for a harmless disclosure.

The following are examples of common situations which raise issues under Rule 1.6(a) in the absence of client consent. They are offered – not as examples of Rule 1.6 violations *per se* – but as “food for thought” for all lawyers before communicating any information related to the representation of a client:

1. Phoning a client when the client is not at home and leaving a message about the representation on client’s answering machine or discussing the matter with the roommate, or spouse of the client;²³
2. Submitting a copy of the lawyer’s client billing statements in support of an application for fees, such as a post-judgment motion or at the end of a probate;²⁴
3. Submitting a client list (revealing the identity of the client) to a bank to support the lawyer’s loan application;²⁵
4. Listing some clients in a law firm brochure (revealing the identity of the clients);²⁶
5. Processing a credit card payment (revealing the identity of the client) to the credit card company;²⁷
6. Telling a story to friends about a recent trial without revealing the identity of the client or any other fact not contained in the public record of the case;²⁸

²³*People v. Hohertz*, 102 P.3d 1019 (Colo. 2004).

²⁴There are generally two types of lawyer billing statements: (1) general “for services rendered” invoices that do not reveal the detail of the work performed; and (2) itemized statements that give a detailed description of all work performed by the lawyer on a date-by-date basis. For purposes of Rule 1.6, the difference does not matter. Even a general balance due invoice contains “information relating to representation of a client”, including the fact that the client *is* a client, the client’s address, the previous balance due to the lawyer, the amount of payments made by the client to the lawyer and the total billed to the client for the billing period.

²⁵Ill. Ethics Op. 97-1 (1997).

²⁶Iowa Ethics Op. 97-4 (1997).

²⁷Utah Ethics Op. 97-06 (1997).

²⁸GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW GOVERNING LAWYERS*, §9.15 (3d ed. 2005).

7. A lawyer taking a client file or batch of discovery documents to the local photocopy shop for copying;²⁹
8. A law firm employing an outside computer tech support person to trouble shoot the firm's computer system;³⁰
9. The auditing of insurance defense attorney billing statements by an insurance company auditor;³¹
10. A request for attorney billing statements by a homeowner to the lawyer for the homeowner's association;
11. A request for attorney billing statements by a disgruntled shareholder of a corporation represented by the lawyer in litigation;

12. A request for attorney billing statements under the Open Records Act³² to a public entity represented by outside counsel;³³ and
13. The law firm's listing of its "best" clients in Martindale-Hubbell.

²⁹ABA Formal Opinion 08-451 (2008).

³⁰ABA Formal Opinion 08-451 (2008).

³¹D.C. Bar Ethics Op. 290 (1999); Amy S. Moats, *A Bermuda Triangle in Tripartite Relationship: Ethical Dilemmas Raised by Insurers' Billing and Litigation Management Guidelines*, 105 W. Va. L. Rev. 525 n.58 (Winter 2003).

³²Chapter 239 of NRS.

³³Nevada's Open Records Act allows any person to inspect all public records which are not declared by law to be confidential. NRS 239.010. Where a request is made to a public body under the Nevada Open Records Act for inspection or copies of the billing statements of the public body's outside counsel, there is no question that mere invoices by the lawyer to the public body – without detailed descriptions of the work performed – contain "information relating to representation of a client". On the one hand, the lawyer may not allow an Open Records act inspection of the lawyer's billing statements. On the other hand, the public body is not governed by the Nevada Rules of Professional Responsibility. The public body must allow inspection of the lawyer's billing statements except to the extent that they are privileged under Nevada's attorney-client privilege statutes. NRS 49.035 – 49.115.

CONCLUSION

In view of the unrestricted language of Rule 1.6, all lawyers should pause and think before revealing any information relating to the representation of a client unless the client has given informed consent.

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