

1994

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Recommended Citation

Reports of Working Groups on Client Confidentiality, 62 Fordham L. Rev. 1015 (1994).

Available at: <https://ir.lawnet.fordham.edu/flr/vol62/iss5/4>

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REPORT OF WORKING GROUP ON CLIENT CONFIDENTIALITY*

INTRODUCTION

At the end of the working group's first morning session, members identified four categories under the broader issue of client confidentiality: capacity, joint representation, duty to the court and other tribunals, and knowledge of client wrongdoing.

I. HYPOTHETICALS AND QUESTIONS RAISED

The participants then focused on specific issues which were articulated, in some instances, as direct questions and, in other cases, raised in the form of hypothetical situations. The group identified the hypotheticals and questions raised within the four categories noted above.

A. *Capacity*

A substantial number of the issues raised by the group involved clients who lack capacity to make decisions or whose capacity is questionable, and the effect of that incapacity on the lawyer's duty to safeguard client confidences.

1. Capacity Hypotheticals

The group raised the following hypothetical cases for discussion:

a. *Hypothetical (1)*

A client with a significant psychiatric disability and a less severe physical impairment applies for disability benefits and wants to base her claim on physical impairment without revealing her psychiatric impairment. The client consented to a medical examination which revealed both impairments. The client's decision-making capacity is questionable, particularly with respect to the basis of her disability claim.

Issues: Can the attorney pursue the disability case based on the psychiatric impairment? To what extent can the attorney weigh and judge the client's need for benefits against the client's expressed wish for confidentiality regarding her psychiatric problem?

b. *Hypothetical (2)*

A long-term client's ability to manage at home and elsewhere is diminishing. The client's children are geographically scattered.

Issue: When a lawyer has concerns about the client's capacity and ability to live independently, can he or she make disclosures to the client's children or to care providers?

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c. *Hypothetical (3)*

A lawyer has prepared a will for a client in the past. The client now comes in and wants to change the will. The lawyer suspects undue influence by a potential beneficiary and that the client's capacity appears to be diminishing.

Issues: Does the lawyer have an affirmative duty to tell the client's children or new lawyer of the diminished capacity? May the lawyer tell if asked by the children or new lawyer?

d. *Hypothetical (4)*

An individual consults an attorney about representation and the attorney immediately has questions about the client's capacity.

Issue: When does the attorney-client relationship trigger the obligation of preserving confidences?

e. *Hypothetical (5)*

A woman comes into a legal services office claiming that the bank is stealing her money. The legal services attorney suspects that the woman's friend may be exploiting her by taking her money and that the woman has diminished capacity. The woman's resources make her ineligible for representation by the legal services program.

Issues: Has an attorney-client relationship been sufficiently established to impose an obligation of confidentiality? Does the attorney have an affirmative duty or an option to reveal information to a third party because of the possibility of ongoing fraud?

f. *Hypothetical (6)*

The client has previously shared beliefs with the attorney regarding life-sustaining medical treatment. The client later becomes incapacitated and questions arise regarding the use of life-sustaining technology. The hospital asks the court to address the substituted judgment question.

Issues: Can the attorney testify regarding previously shared confidences? Is there an implied consent to reveal confidences in this situation?

2. Capacity Questions Raised

The working group asked the following questions with respect to capacity:

- a. What should an attorney do who realizes that the client is incapacitated after taking the case, for example if the incapacity is not initially obvious?
- b. Can an attorney seek guardianship for his or her own client?
- c. Can an attorney reveal that a client has stopped taking his or her medication?
- d. Do observations qualify as confidences, for example observing a client's demeanor or other non-verbal behaviors?

B. *Joint Representation*

A second set of issues raised by group members involved situations in

which the lawyer represents related individuals, for example husband and wife, parents and children, and other configurations of relatives or significant others.

1. Joint Representation Hypotheticals

The group addressed the following hypothetical situations:

a. *Hypothetical (1)*

A lawyer represents an older man of diminished capacity for estate planning and also represents his children who are also his heirs. The lawyer believes the man's housekeeper may be taking property.

Issue: Does the lawyer have an affirmative duty or option to disclose information about the housekeeper to the client's children?

b. *Hypothetical (2)*

A lawyer represents a father and his children for estate planning. The father now wants to change his will but the lawyer suspects undue influence of his new companion.

Issue: Can the lawyer disclose information to the children?

c. *Hypothetical (3)*

An older couple comes to see the lawyer. It is the second marriage for each spouse. The wife has a disabled adult child from her previous marriage and the wife has guardianship of that child. The couple seeks preparation of new wills. The lawyer asks if the husband and wife might want separate conferences and each says no, agreeing that all confidences may be shared. Six months later, the husband tells the lawyer he wants to change his earlier estate planning decisions and he does not want the lawyer to tell his wife.

Issues: How should the lawyer proceed? Can he or she share information from the husband with the wife? Can he or she continue to represent both spouses? If the lawyer must withdraw, should the withdrawal be noisy or quiet?

2. Joint Representation Questions Raised

The working group raised the following questions for discussion:

- a. Who is the client?
- b. When is that determination made?
- c. Should the lawyer ask that question at the outset?
- d. Should the attorney lay out the ground rules on confidentiality at the outset?
- e. If several family members, for example parent and children, come together to consult the attorney, how should the attorney make clear to these individuals who the client is and, therefore, who may be protected by confidentiality rules?
 - i. What if more than one family member is eligible, for example a 65-year-old daughter and her 85-year-old mother?

C. *Duty to Court and Other Tribunals*

A third set of issues and hypotheticals related to the attorney's duty of confidentiality when a court or other tribunal is involved.

1. Duty Hypotheticals

Many of these hypotheticals involve attorney withdrawal and information shared with the court at the time of withdrawal.

a. *Hypothetical (1)*

A lawyer represents a daughter who has been appointed conservator for her elderly mother. The attorney obtains information suggesting that the daughter is improperly using her mother's money for her own purposes. The attorney reaches a point at which he or she must withdraw from the representation.

Issue: What may or should the attorney reveal to the court in seeking to withdraw?

b. *Hypothetical (2)*

An attorney represents the wife in a contested divorce involving millions of dollars. The attorney concludes during the course of the representation that the wife is not competent to assist in her own representation.

Issues: Should the attorney withdraw? Should he or she file for guardianship? In any case, what confidential information can the attorney share with the court?

2. Duty Questions Raised

a. How does an attorney balance the duty of confidentiality against the duty of candor to the tribunal?

b. Does the duty of candor to the tribunal extend to administrative agencies such as a state agency determining eligibility for Medicaid?

D. *Knowledge of Client Wrongdoing*

The fourth area of inquiry revolved around situations in which an attorney obtains information showing that a client has previously done or is planning to do something improper, and the attorney must decide whether to communicate this knowledge to a third party. These situations do not necessarily involve a court or other tribunal.

1. Knowledge Hypotheticals

a. *Hypothetical (1)*

A client retains a lawyer to help him receive Medicaid benefits. In the course of assisting with the application process, the client reveals that he had previously transferred assets with an eye toward becoming eligible for benefits.

Issues: Must the lawyer reveal this confidential information to the

state Medicaid agency? Does the lawyer's obligation vary depending on whether he or she prepares the Medicaid application form?

b. *Hypothetical (2)*

A client with diabetes retains a lawyer because the Department of Motor Vehicles ("DMV") has notified him that his license is going to be suspended after he was found in his car at the side of the road suffering from diabetic shock. The client tells the lawyer that his diabetes has not been well-controlled lately and that he has had several other similar incidents of which the DMV is unaware.

Issues: Must the lawyer share this information with the DMV? May the lawyer reveal the information?

2. Knowledge Questions Raised

a. When a client reveals criminal behavior to the lawyer, when must the lawyer disclose this information?

i. To prevent a future crime from occurring?

b. What factors must the lawyer weigh in making the decision?

II. DISCUSSION

The working group decided that, of the four areas identified during the first discussion session, capacity and joint representation were the two most important areas for the group to address. The group devoted the second half-day session to analyzing the capacity area and the third session to discussing joint representation.

A. *Capacity*

The working group discussion on capacity focused on the following broad questions:

1. When a lawyer believes that a client's capacity to make decisions is impaired and that the client is at risk of harm, may the lawyer disclose confidential information without client consent?

2. If so, how does the lawyer determine whether to make such disclosure and to whom should such information be disclosed?

Before attacking those broad questions, group members addressed two threshold questions.

1. When is an attorney-client relationship established such that the client is protected by the confidentiality rule?

All agreed that confidentiality protections do not depend on the signing of a retainer. For example, if an individual consults a legal services attorney but is not eligible for representation under the legal services program's guidelines, the disclosures shared during the initial interview are protected.

2. Is information about a client which is communicated to the attorney by a third party to be considered confidential?

The group used the following example of a woman (B) who goes to lawyer (L) claiming to be the neighbor of another woman (A) who has told B that A needs help with a particular problem. The consensus was that B would be acting as A's agent and that the information would be confidential within the attorney-client relationship between L and A. Thus the lawyer should verify the information directly with A, and should inform B that B is not the client and that the lawyer has no duties towards B.

Proceeding to the main issues, the group members began the discussion using the hypothetical of the woman who comes to the legal services office claiming that the bank is stealing her money.¹ The group asked whether the attorney can disclose information shared by the woman with a third party in order to obtain protective services for her. Participants agreed that, when a client appears to lack capacity and to be at risk of harm, the lawyer may disclose confidential information. Group members did not attempt to define incapacity or to spell out how a determination of incapacity should be made but left the working group on capacity issues to address these questions. All agreed that lawyers should vigorously seek client consent before determining whether an unconsented disclosure is warranted.

Without consent, the lawyer may be justified in breaching confidentiality to protect incapacitated individuals. Some authority for this position may be found in Model Rule 1.14(b). Group members, however, recognized that, in some cases, the notion of acting to protect an individual goes beyond the parameters of Rule 1.14(b). For example, in the hypothetical under discussion, the woman is not even a client since she is ineligible for legal services and, moreover, may lack the capacity to enter into an attorney-client relationship. In other cases, the question may be one of taking protective action on behalf of a former client, where the attorney-client relationship was in the distant past.

Despite the lack of authority in the Model Rules and the lack of client authorization to act, group members felt that a lawyer should be permitted to act where the individual lacks capacity and is at risk of serious harm. Some stated that they would find it difficult to live with themselves if they could not exercise the option of taking action to protect vulnerable older persons. A lawyer may not have an affirmative duty to act, but should have discretion to act where they sense a moral imperative to protect individuals from serious harm. Group members agreed that protective action which results in breaching confidentiality should be action which causes the least possible intrusion into client autonomy. A lawyer should respect and preserve client autonomy to the greatest extent possible. An attorney must assess the risk of harm to the client if the attorney does not disclose information to a third party.

Participants next discussed the types of harm to be weighed. Every

1. See *supra* part I.A.1.e.

member agreed that physical and psychological harm are clearly factors. All agreed that the risk of financial harm may justify disclosure but that it is hard to define the requisite magnitude of financial harm. The potential financial loss triggering disclosure might vary depending on the client's resources—the loss of \$10,000 might be relatively insignificant to a millionaire but could be devastating to an elderly person of limited means.

The group also struggled with another major question regarding to whom the attorney may make a disclosure. All participants generally agreed that the lawyer should make the disclosure to the person who will cause the least intrusion into the individual's autonomy and who, in the lawyer's opinion, will act in a manner consistent with the individual's values. Some members believed that person should always be a family member. Others described clients who had strong desires to avoid dealing with family members. Where family members have been abusive or have long been alienated from the clients, high quality social service agency personnel might provide a preferable alternative.

Some group members advocated the system of priorities found in state guardianship and health care consent statutes. This system sets up a pecking order for appointing guardians or granting authority to consent to medical treatment. Others participants, however, rejected such a presumptive system or believed it should be overridden when the attorney has specific knowledge of the client's relationships.

After tentatively identifying factors to examine in deciding whether to make an unconsented disclosure and to whom such disclosure should be made, group members reviewed the hypothetical cases raised during the opening session to test whether these standards worked. Analyzing those cases yielded some additional factors to be weighed. For example, after discussing the case of the long-time estate planning client,² all agreed that the degree to which the lawyer is familiar with the client's situation is one more consideration in whether to disclose.

A discussion of the client under possible undue influence who wants to change his will³ raised the question of whether harm to third parties, for example beneficiaries of the original will, should be a factor warranting attorney action. Members believed that a lawyer should only consider harm to third parties as an aspect of the client's own interests, for example that the client had a particular donative intent before the client's capacity diminished. Possible harm to third parties, however, will not always justify action. For example, in the hypothetical involving an uncontrolled diabetic with a driver's license,⁴ group members concluded that, if the client's capacity is intact, the lawyer would have no authority to reveal disclosures about the client's medical condition.

2. See *supra* part I.A.1.b.

3. See *supra* part I.A.1.c.

4. See *supra* part I.D.1.b.

After reviewing all of the hypotheticals, the working group agreed that the framework developed seemed to work in all cases. Group members agreed that as a practice tip, an attorney should discuss planning for incapacity with his or her clients and clients should provide advance guidance to the attorney on what to do if their capacity diminishes.

B. *Joint Representation*

The working group identified the key issue in joint representation cases as whether an attorney representing a husband and wife, or other joint clients, may disclose to one spouse or joint client a confidence of the other spouse or joint client who made the disclosure with the understanding that it would be kept confidential from the other spouse or joint client. In discussing joint representation, the working group decided to discuss the kinds of agreements that lawyers and clients can make at the outset of the representation regarding disclosures. The group also decided to discuss what lawyers must do in various circumstances when there has been no explicit agreement on handling disclosures.

1. Advance Agreements

The group first addressed the problem of confidentiality that arises when a lawyer jointly represents a husband and wife. Because intergenerational representation is complicated by the fact that it is often not joint at the outset, the group left discussion of that issue for later. The group addressed the problem in the context of the following hypothetical:

Spouses retain an attorney to draft mirror wills. Thereafter, the wife tells the attorney that she intends to change her will but does not want the attorney to disclose that fact to her husband.

At that point, the group recognized, a dilemma arose with regard to the wife's confidence. The group asked whether the attorney may or must disclose the confidence to the husband against the wife's wishes or whether the attorney must preserve the confidence. If the confidence must be preserved, the group asked whether the attorney must withdraw from the representation.

The group first agreed that, as a matter of sound legal practice, the attorney ought to address the problem of confidentiality at the outset of the attorney-client relationship. The group concluded that the attorney should apprise the prospective joint clients of all the legally and ethically permissible ways in which he or she could handle the confidence. The attorney should then obtain the spouses' mutual, informed consent to have the attorney handle confidences in one of the permissible ways. The group concurred that this would enhance clients' ability to structure the attorney-client relationship in ways that suited their individual needs and interests. At the same time, this policy protects clients from later making disclosures to the attorney based on an erroneous understanding as to

whether the attorney would maintain confidentiality. By obtaining informed consent regarding confidentiality and then acting in accordance with the clients' prior agreement, an attorney would avoid the ethical uncertainty that would otherwise arise when one spouse directed the attorney not to disclose certain information to the other spouse.

The group then sought to identify the possible ways in which a lawyer could handle confidences in the joint representation. Without initially considering whether each approach was ethically permissible, the group identified three broad options available to the attorney and his or her joint clients:

1. The attorney must disclose all information revealed by either spouse to the other, regardless of whether the spouse requested that the information be kept confidential.
2. The attorney may, in his or her discretion, reveal information provided by one spouse in confidence.
3. The attorney may not disclose information provided in confidence by one of the joint clients.

The group identified serious problems with the third option. The members noted that, when one spouse reveals information material to the interests of the other spouse, an attorney who is not permitted to disclose that information would likely have to withdraw from the representation. Thus, in the hypothetical involving the wife who sought to alter her mirror will without her husband's knowledge, the attorney would be precluded from representing the couple because of the ethical rules barring the representation of joint clients with conflicting interests.

The participants noted that the attorney's withdrawal might itself be an implicit disclosure of the wife's confidence because it would apprise the husband of the possibility that a conflict of interest had been created by the wife's stated intention to undertake a different financial plan. Nevertheless, the group preferred the minimal, possible disclosure implicit in the attorney's withdrawal to the harm that continuing the representation may create. Moreover, clients who had agreed to deal with confidences in this manner would have accepted the risk of such disclosure at the outset.

Half the working group believed that this third option was not ethically permissible because it entailed an unacceptable risk of conflict of interest. Moreover, the group expressed concern that, in unequal relationships, one spouse would unduly pressure the other to agree that confidences would not be shared. The others in the group believed that, at times, both spouses could make an informed, unpressured decision in favor of handling confidences in this way. These members felt that an attorney's failure to inform the couple of this option was unduly paternalistic and that both spouses might reasonably prefer the ability to talk to the lawyer in confidence, even if that might mean losing the benefit of the lawyer's services because of the necessity of withdrawal.

Ultimately, the group declined to resolve whether the third option was

an ethically permissible way to structure the attorney-client relationship and decided that the question was best left to the working groups dealing with conflicts of interest. Therefore, the group recommended this question for further study and proceeded on the assumption that this was a permissible option. There was a strong consensus that, if permissible, this option should be discouraged. It was further agreed that no lawyer was compelled to accept the representation on this basis. However, assuming this to be a permissible option, a lawyer should make prospective clients aware of the choice so that, if they favor it, they can find another lawyer who is willing to structure the representation along these lines.

The group raised several concerns with respect to the first option, the requirement that the lawyer disclose all confidences. First, the group expressed the view that one spouse should be permitted to disclose, in confidence, information that is irrelevant to the legal interests of the other spouse. The group suggested the example of a husband telling an attorney that he planned to buy his wife a watch for her birthday and asking the attorney not to tell her. Another example given was where the attorney represents the couple with respect to estate planning and also represents the husband individually with respect to his business. At least where disclosures about the business do not relate to the wife's interests with respect to the estate planning, it would be reasonable for the clients to agree that the attorney would preserve the husband's confidences.

The group deemed the requirement of absolute disclosure impractical because the only way in which to ensure the complete exchange of information between the clients would be to avoid ever meeting or talking with the clients individually. Finally, the group recognized that a full disclosure requirement potentially subjects a lawyer to liability for nondisclosure.

For these reasons, the group expressed its preference for the second option, under which the attorney would have discretion to make disclosure. Under this option, disclosures material to the interests of the other spouse would have to be shared or else the attorney might face an impermissible conflict. However, the lawyer could share immaterial disclosures in his or her discretion. The group agreed that it would be preferable for the attorney to explain to the clients at the outset what principle he or she would adopt to govern the exercise of discretion if the couple chose this option.

All working group members agreed that advance agreements on disclosure, preferably in writing, should be encouraged. These writings enhance client autonomy and clarify the obligations of the attorney. The group expressed concern, however, that the proper communication of the options and their ramifications is time-consuming and complex. The time spent may be burdensome to both clients and lawyers and expensive to clients. Therefore, lawyers and bar associations should develop concise, plain language documents to explain the need for such agreements,

indicating the various options. Clients could then read the summary and discuss the confidentiality agreement more efficiently with their attorney.

After hammering out the parameters of disclosure agreements, working group members queried as to how to handle a situation in which one client tries to change the agreement. For example, the group asked what happens if a husband and wife have agreed that the lawyer must share information provided by either spouse and the husband later shares material information with the lawyer with an instruction not to disclose it to his wife. Participants agreed that, if the original agreement was properly entered into, the lawyer must disclose the information to the wife. Similarly, if the couple agreed to non-disclosure, the lawyer cannot later disclose, even though information shared may force him or her to withdraw due to a conflict.

The working group then asked whether a lawyer could utilize the same type of advance agreement on disclosure in the intergenerational situation, for example the representation of parent and child. The participants discussed numerous hypotheticals which revealed the impracticality, in many situations, of attempting to reach such agreements involving all family members. Often the representation of the parties would not begin simultaneously; for example a lawyer may have handled a father's estate planning for ten years before his adult child sought the same attorney's estate planning services. Group members also wondered how to define whether one family member is still a client when the next one seeks services, for example, whether, if a lawyer prepared a father's will ten years earlier and has not heard from him since, that representation is relevant to the subsequent representation of the son.

Again, the group addressed numerous hypotheticals in which a confidence shared by a child could create a possible conflict between the parties. For instance, a lawyer might draft a will for a father with the son as beneficiary. The son might later ask the lawyer to draft his will making his gay lover his beneficiary. The lawyer might know that the father would want to disinherit the son if he knew he was gay. In such situations could any advance agreements have been made which would then instruct the lawyer on whether he should disclose information? Can the lawyer enter into a disclosure agreement with the son alone, or should the father have been involved at the point when the son first contacted the lawyer?

The members agreed that, when parent and child simultaneously seek representation, an agreement can be made in the same fashion as in the spousal situation. When the lawyer first represents one family member and a second family member later seeks the lawyer's services on a related matter, sound practice dictates obtaining an understanding regarding confidentiality before undertaking to represent the second client.

2. Absence of Advance Agreement

Finally, the working group tackled the question of whether the lawyer should maintain confidences in the spousal or intergenerational situation absent an explicit agreement on disclosure. The group members believed that the lawyer should handle confidences in a manner consistent with client expectations. Where the clients come in together to see the attorney, the expectation appears to be that material confidences should be shared. Thus, the commentary to Model Rule 1.6 should reflect that notion of implied consent to disclosure of material communications. The group members did not reach agreement on handling confidences when the joint clients do not come in together to see the attorney.⁵

5. For the full text of the Recommendations of this working group, see Conference on Ethical Issues in Representing Older Clients, *Recommendations, in Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 989 (1994).