

ADVISORY ETHICS OPINION 91-06

SYNOPSIS:

Information constituting secrets or confidences contained in the client files maintained by a *special project* of the Vermont Legal Aid Project may not be disclosed to federal monitors examining the files of the project.

The names and other personally identifiable information are secrets within the meaning of DR 4-101(A), since their revelation might embarrass the client of a special project of Vermont Legal Aid. Federal monitors may, however, review information contained in the file relevant to establishing the financial eligibility of the client of the special project, provided the names and other personally identifiable information contained in the information presented to the monitors are blocked out.

FACTS:

The Committee has received a request from a special project of Vermont Legal Aid for an Opinion as to whether a monitoring team assigned by a branch of the federal agency which funds this special project may look at individual client files maintained by the special project as permitted by an applicable federal regulation. The special project believes that its ethical responsibilities to its clients, in terms of the preservation of confidentiality, is no different from those of other client-attorney relationships. Additionally, the special project indicates that its files frequently contain information that is protected by confidentiality and privacy requirements of other professions, e.g., educational records and medical/psychological records and evaluations.

QUESTION PRESENTED:

May the special project attorneys allow the federal monitors to review the files of the project's clients: (1) with names and other personally identifiable information visible; (2) with names and other personally identifiable information blocked out.

DISCUSSION:

The names, addresses and other personally identifiable information which may lead to the identification of a particular client of the special project appearing in client files of such project are secrets within the meaning of DR 4-101(A) since it might be an embarrassment to the client for any number of reasons to have it revealed that he was a client of the special project. Other information in the client's file may also constitute confidences or secrets under DR 4-101(A)

Accordingly, it would be in violation of DR 4-101(8) for the special project attorneys to allow federal auditors or any other person not engaged in rendering services to the client on behalf of the special project access to records containing information which contains client's confidential communications or secrets of the client.

The Committee acknowledges that the pertinent federal statute reads as follows:

SEC.104.[42 U.S.C. 6003]

- (a) Each recipient of assistance under this title shall keep such records as the Secretary shall prescribe, including: (1) records which fully disclose (A) the amount and disposition by such recipient of the proceeds of such assistance, (B) the total cost of the project or undertaking in connection with which such assistance is given or used, and (C) the amount of that portion of the cost of the project or undertaking supplied by other sources, and (2) such other records as will facilitate an effective audit.
- (b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients of assistance under this title that are pertinent to such assistance.

The Committee also recognizes that failure to cooperate with the federal agency funding the project may put the continuation of the project at risk. Nevertheless, it is the Committee's Opinion that the special project's attorneys are bound by the rules of the Code of Professional Responsibility in carrying out his/her professional obligations, and that a request from the funding agency is not grounds to disclose confidences or secrets of the project's clients.

DR 4-101 reads in part as follows:

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
 - (1) Reveal a confidence or secret of this client.
 - (2) Use a confidence or secret of his client to a disadvantage of the client.
 - (3) Use a confidence or secret of his client for the advantages of himself or of a third person, unless the client consents after full disclosure.

A "confidence" within the protection of the Rule is that information which is already protected by the attorney-client evidentiary privilege. Second, the Rule also protects "secrets" - that is - anything else about oneself communicated by the client to the attorney which the client requested to be held secret or which could be considered embarrassing or detrimental to the client.

Arguably, information relating to one's financial eligibility for free legal services presents problems because of the competing interests. The federal legislation specifically mandates monitoring of program activities, presumably with the goal of assuring that the program funds are spent to meet the needs of eligible persons, thus competing against a client's highly valued expectation of privacy concerning his/her financial and personal affairs.

The critical issue raised by the competing interests is not whether the financial information can be disclosed, but *to whom* and in *what manner*.

The ABA Standing Committee has issued several Opinions relevant to this issue. Together, the several Opinions conclude: (1) that client information, including eligibility information in the legal services context, is protected under the Disciplinary Rules, either as a confidence or a secret; (2) that there are legitimate needs for auditing programs to determine types of cases handled, results obtained, and whether eligibility requirements are being met; and (3) in deference to accommodating (1) and (2) above, information can be supplied in a manner aimed at preserving confidentiality.

Therefore, as long as certain safeguards are provided in the monitoring procedures, such activity would not necessarily entail a violation of the professional responsibilities to clients.¹

Such safeguards include: (1) maintaining the anonymity of the clients whose financial information is being compiled and reported; (2) ensuring that the monitoring will be carried out by qualified, independent personnel chosen with particular care. (Note: On this point, Ethics Consideration 4-3 provides:

Unless the client otherwise directs, it is not improper for a lawyer to give limited information . . . to an outside agency necessary for statistical . . . or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.);

(3) strict control over the ultimate recipients of the information. (Note: The exception to the rule against disclosure is limited to the legitimate need of *appropriate governmental personnel* to review program activities; (4) limitation of the kind of information reported to that necessary for *legitimate audit purposes* (See ABA Formal Opinion 334, August 1974, which concludes:

It should be noted that the information sought must be reasonably required by the immediate governing board for a legitimate purpose and not used to restrict the office's activities.)

Unrestricted access to clients' files does not meet any of the safeguards identified.

The Committee has, therefore, determined that it will not be a breach of confidentiality nor a violation of the professional conduct rules to allow the federal monitors to review information and documents extracted from the special project's files and other records of the special project relevant to establishing the financial eligibility of the special project's clients under federal guidelines, provided that information which might tend to identify the client or which contains other confidences or secrets of the client is removed. Information related to determining other eligibility requirements may be subject to further restrictions on disclosure.

To the extent the proposed audit is for a purpose other than determining compliance with financial eligibility requirements, a "quality control audit" for instance, more restrictions will be necessary. There may also be other methodologies to conduct a quality control audit which do not require the examination of individual files. The agency monitors might examine public

¹ ABA Informal Opinion 1443, December 1979.

records or interview judges, opposing counsel, or state agency personnel regarding the conduct of cases. In the alternative, the special project attorneys may answer questions posed by the monitors without showing them the files, as long as the attorneys do not disclose the identity of the client or any secret or confidence. If information other than that related to the financial eligibility of the special project's clients is required, the special project could request that the auditors specify the purpose and methodology of the audit. The special project's attorney would then review the files to determine what information is relevant to the inquiry, whether such information constitutes confidences or secrets of the client, and whether the requested information with all items of personally identifiable information excised would constitute secrets or confidences. If the redacted files would not constitute secrets or confidences of the client, the redacted files may be disclosed. Otherwise, the requested information should not be disclosed.

The special project may disclose any information to the federal monitors from a client's file if the client gives his/her express consent of the full disclosure of the client's rights to restrict disclosure. Full disclosure must include a clear, precise and understandable explanation that the client is not obligated to consent to the disclosure, and that continued assistance from the program does not depend on consenting to the disclosure. Possible options include a selection at random of a list of files. The project attorneys may then notify the clients involved of the potential review, affording them the opportunity to give or withhold consent to disclosure. In the event a client withholds his or her consent, no information regarding the identity of the client or any secret or confidence of the client may be revealed.