

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1991-92/13
Confidentiality: Responsibility to Client v. Responsibility to Tribunal
June 11, 1992

RULE REFERENCES:

- *Rule 1.6
- *Rule 3.3
- *Rule 3.4
- *Rule 3.5

CODE REFERENCES:

- *DR4-101
- *DR7-108
- *EC7-32

SUBJECTS:

- *Attorney-Client Privilege
- *Attorney-Client Relationship
- *Candor toward tribunal
- *Confidentiality
- *Guardian ad litem
- *Trial Conduct

STATUTORY REFERENCES:

- *RSA 311:6
- *RSA 464-A:41
- *RSA 632-A:6

SUPERIOR COURT RULE REFERENCE:

- *Rule 93-A

ANNOTATIONS:

An attorney has a duty to disclose to the court information regarding potential juror misconduct. (Rules 3.3 - 3.5).

Information acquired by an attorney representing an individual as a guardian ad litem is protected from disclosure under Rule 1.6 if it relates to the representation. (Rule 1.6).

The Rules of Professional Conduct do not resolve the issue of which duty is paramount when there is a conflict between an attorney's duty to the court under the attorney's oath and the attorney's duty to the client of confidentiality under Rule 1.6.

QUESTION:

If an attorney appointed as a guardian ad litem to represent the interests of a victim in a sexual assault case comes into possession of information relative to the impartiality of a juror subsequent to trial, which information may result in a new trial and is thus adverse to the victim's interest, must or may the attorney reveal such information to the court?

FACTS:

An attorney was appointed as a guardian ad litem (GAL) for an adult victim in a sexual assault case. This was tried to a jury and the defendant was convicted. Subsequent to trial, a juror approached the GAL and volunteered that this juror sympathized with the GAL's client and then related that this juror had also been a victim of a sexual assault. This information was not disclosed to the court in response to a specific inquiry in the juror questionnaire.

RESPONSE:

Attorneys have long been regarded as officers of the court with certain obligations to ensure that our system of justice functions properly. Attorneys also owe to their clients a duty of confidentiality regarding

information relating to the representation. These obligations appear to be in conflict in this situation and this inquiry raises the difficult issue of which of these obligations is paramount. For the reasons which follow, the Committee is unable to provide an unequivocal answer to this question. To be sure, the inquiring attorney may consult with the client, if appropriate, and determine whether or not, after full disclosure, the client will consent to the attorney's revealing the information relayed by the juror to the court. However, if the client is unwilling to give such consent, the committee is divided as to whether the inquiring attorney has a duty to disclose the information to the court or a conflicting, controlling duty to keep the information confidential.

Whether or not an attorney has any obligation to reveal to the court potential juror misconduct not involving the actions of the attorney's client or of the attorney exists as a threshold issue. Under the former Code of Professional Responsibility, a lawyer had a duty to ". . . reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge." DR7-108 (G). This obligation was based, in turn, on the duty of an attorney to aid in preserving the integrity of the jury system. EC7-32. The present Rules of Professional Conduct prohibit a lawyer's attempts to influence a juror or prospective juror and bar *ex parte* communications by a lawyer with such persons except as permitted by law. Rule 3.5 (a) and (b). In contrast to the Code of Professional Responsibility, the Rules of Professional Conduct contain no express requirement of disclosure to the court of juror misconduct.

Despite the absence of a provision in the current Rules corresponding directly to the former DR7-108 (G), an attorney ordinarily would have a duty to disclose information regarding juror misconduct to the tribunal, at least in the absence of countervailing obligations. This conclusion stems both from consideration of the general obligations of an attorney pursuant to the attorney's oath and regard for the clear policy of advancing the interests of justice underlying Rules 3.3, 3.4, 3.5, and the Rules of Professional Conduct generally.

All attorneys in this jurisdiction are required to take an oath of office pursuant to RSA 311:6. The attorney's oath includes, among other things, assurances that the attorney will not consent that any falsehood be done in the court and that the attorney will give knowledge of any falsehood to the justices of the court so that it may be reformed. In some circumstances, an attorney's obligation to the court may supersede certain obligations to a client. As observed by the Nebraska Supreme Court a number of years ago:

An attorney owes his first duty to the court. He assumed his obligation toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The (lawyer) cannot serve two masters and the one (he has) undertaken to serve primarily is the court." In re: *Integration of Nebraska State Bar Association*, 133 Neb 283, 289, 275 NW 265, 268 (1937), cited in ABA/BNA Lawyers Manual Of Professional Conduct, 61:302.

Further, the clear import of Rules 3.3-3.5 of the Rules of Professional Conduct is that honesty and fairness in dealings with the judicial system must not take a back seat to the lawyer's obligation to zealously represent a client.

However, the committee believes that the express prohibition against disclosure of confidential information regarding a client contained in Rule 1.6 also is implicated here. To reach this conclusion, an examination of the role of a GAL in a proceeding such as that involving the inquiring attorney is necessary as is consideration of the types and sources of information included within the scope of Rule 1.6.

Pursuant to Superior Court Rule 93-A, the Superior Court is obliged to consider at pre-trial conferences in criminal cases alleging a sex-related offense in which a minor child was a victim the issue of whether or not it is advisable to appoint a guardian ad litem "to represent the interests of the alleged victim." *See also* RSA 464-A:41.

This duty to represent the interests of the alleged victim in such proceedings differs from the GAL's role in child custody cases. In the latter situations, attorneys appointed as guardian ad litem do not act a legal counsel for the child but rather as a party to the proceeding. *Ross v. Gadwah*, 131 NH 391, 394 (1988).¹ Consequently, communications between the guardian ad litem and a minor child in child custody proceedings are not deemed privileged. *id.* Where, as here, an attorney is appointed guardian ad litem to represent the interests of an alleged victim, a true attorney-client relationship exists.

Pursuant to Rule 1.6 of the Rules of Professional Conduct, a lawyer cannot reveal information "relating to representation of a client" unless the client consents after consultation and subject to certain exceptions not here relevant. The phrase "information relating to representation of a client" is very broad in its effect.

Under the former Code of Professional Responsibility, DR4-101, the confidentiality requirement applied only to information governed by the attorney-client privilege and to information "gained in" the professional relationship that the "client has requested to be held inviolate of the disclosure of which would be embarrassing or would be likely to be detrimental to the client". Current Rule 1.6 imposes confidentiality not simply on information "gained in" the attorney-client relationship but on information relating to the representation and regardless of whether the information was acquired from the client or was identified by the client as information which should be treated as confidential. *See* ABA Model Code Comments to Rule 1.6. *See also* ABA/BNA Lawyers Manual On Professional Conduct, 55:303.

When Rule 1.6 is applied to the facts of this inquiry, it appears that the juror's statements to the inquiring attorney constitute "information relating to representation of a client." The information was acquired in the course of representation of the client and is a direct consequence of the representation. Clearly, the juror approached the inquiring attorney because of the inquiring attorney's relationship to the client. The subject matter of the disclosures made by the juror also related directly to the scope of the attorney's representation of the client in the attorney's capacity as GAL. Consequently, the disclosure of the information is proscribed by Rule 1.6 unless the client consents to disclosure after consultations.

As the inquiring attorney clearly recognized, there is a direct conflict in this situation between the attorney's obligation under the attorney's oath to give knowledge to the court of any falsehood so that the same may be reformed and the attorney's obligations in this instance under Rule 1.6 of the Rules of Professional Conduct to keep the juror's revelations confidential, unless disclosure is authorized by the client. Regrettably, no guidance was found either in State statutes or in the Rules of Professional Conduct as to how such a conflict between a lawyer's statutory and traditional obligations to the court and the lawyer's obligations to the client under the Rules of Professional Conduct should be resolved. Lacking such guidance either in the statutes or the rules, the committee would be reduced to speculation if it were to provide a direct answer to this inquiry. Much as the committee would like to provide such an answer for the benefit of the inquiring attorney, the committee is not inclined to base such an answer on speculation.

As we all must do inevitably, the inquiring attorney must decide, based on the inquiring attorney's own reading of the attorney's oath and the applicable rules, what course of action should be followed in this instance. Hopefully, though, the inquiring attorney will derive some comfort from the fact that this body has concluded that no clear answer to this quandary exists.

¹ There have been recent changes to the Statute governing guardians ad litem in marital cases.