Ethics Opinion

050621

FACTS: In order to obtain release on bond in some jurisdictions in Montana, criminal defendants are ordered to regularly, (in some cases, weekly) telephone their defense counsel. This is referred to as a "call in bond condition". The practice as hearing and trial dates approach is that judges or prosecutors inquire if the clients have been in contact. Defendants are not typically compromised if they are in compliance. However, for those defendants less diligent in maintaining contact, an answer that they are not in contact results in issuance of a bench warrant, with the effective result that the attorney becomes a witness and has provided critical evidence against their client.

NOTE: This fact pattern pre-supposes that the Court's "call-in bond condition" has a reciprocal but unwritten component which is intended to require that the attorney report a deficiency as it occurs.

QUESTION PRESENTED: How should defense counsel respond to inquiries by judges and prosecutors to inquiries concerning a defendant's compliance with the "call in bond condition "?

SHORT ANSWER: Unless defense counsel has received prior client consent or is specifically ordered to answer by the judge, defense counsel should respond that the information requested falls within Rule 1.6 of the Montana Rules of Professional Conduct , and is, therefore, confidential attorney-client communication.

DISCUSSION: Often referred to as a "core rule" of professional conduct for lawyers, confidentiality is the very heart of the attorney client relationship. The premise of the rule is that the benefit of frank communication is gained under the protection of confidentiality and that the greater societal good is served when clients consult freely with their lawyers.

While the professional obligation to keep client information secret is a hallmark of professional practice, confidentiality can also be exploited and put the attorney in a position to violate the law. This is the reason there are exceptions within the rule. The exceptions provide lawyers with the tools to guard against abuse of the confidentiality rule's protection. (It is notable that the ABA Model Rule contains more exceptions than Montana's current rule.)

Montana 's confidentiality rule provides:

Rule 1.6 -- Confidentiality of Information

(a) A lawyer shall not reveal information relating to the 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 paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) 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 civil claim against the lawyer based up conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

Under Rule 1.6(a), if defense counsel has not obtained prior consent from the defendant to disclose the defendant's compliance with the condition, that information falls within the protections of the rule. "It is the confidentiality principle that most often creates tension between the law of lawyering and 'other' law, for it exacts significant sacrifice of the truth-finding and justice-seeking aims of the law generally, and often requires that victims of a client's misdeeds be forsaken." Geoffrey C. Hazard, Jr., and W. William Hodes, The Law of Lawyering §9.3 (3rd ed. 2001). Thus, when a judge or prosecutor asks the obvious – "Has your client maintained contact?" - the rule is implicated. The answer will depend on the type of discussion the attorney has had with the client about disclosure in this situation, and the situation under which the question is asked.

It is important to note that the issue before the Committee is not bail jumping. If that were the issue, this Committee would defer to ABA Formal Opinion No. 155, which held that when a client jumps bail and an attorney fails to disclose the whereabouts of that client, the attorney assists a fugitive and in effect is aiding and abetting his client in an attempt to escape trial.

The issue before this Committee is whether the information about defendant's compliance with the "call in bond condition " is a protected communication under the confidentiality rule. A plain reading of the Rule intimates that it may be and in most cases is protected confidential communication.

The disclosure of confidential client information is generally prohibited if there is a reasonable prospect that doing so will adversely affect a material interest of the client. Restatement (Third) of the Law Governing Lawyers §60 (1998). Montana's Rule 1.6(a) provides "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…". When asked by anyone, including judge or prosecutor, if the client is complying with the "call in bond condition ", the answer should be that the information involves attorney client communication and is privileged and confidential. The disclosure clearly is not in a defendant's interest if the defendant is not in contact. Disclosure is also not in a defendant's interest if defense counsel develops a pattern of answering in the affirmative when client is in compliance, but asserts confidentiality when

the client is not.

Do any exceptions apply? Potentially. Rule 1.6(b)(4) provides that defense counsel *may* reveal information to comply with a court order. So, if defense counsel is specifically *ordered* to tell a judge if the defendant is complying with the "call in bond condition ", then counsel should raise the defense of attorney-client privilege and confidentiality. With that defense, the debate shifts to evidence law—not the focus of this opinion.

Confusion o ften arises because of the distinction between the duty of confidentiality and the attorney-client privilege. These concepts are often confused. Attorney-client privilege is invoked as a matter of evidence law (pursuant to Sec. 26-1-803, M.C.A.) when a lawyer is called to testify; it only applies to in-court or deposition testimony or document production regarding confidential communications between lawyer and client. ABA/BNA Lawyers' Manual on Professional Conduct, 55:303. Where a lawyer is being officially *compelled* to provide information, as in response to a subpoena or court order, resort must first be made to the attorney-client privilege. Geoffrey C. Hazard, Jr., and W. William Hodes, The Law of Lawyering §9.2 (3rd ed. 2001). The Rule of Professional Conduct on confidentiality is much broader. It covers all information relating to the client's representation, whether or not it came from the client and whether or not it was imparted in confidence. It even extends to information that may be known to others. ABA/BNA id. "Rule 1.6 applies most insistently to prevent lawyers from *volunteering* information about a client" to anyone. Geoffrey C. Hazard, Jr., and W. William Hodes, The Law of Lawyering §9.2 (3rd ed. 2001).

Also, prior to entering an evidentiary debate or raising a confidentiality defense, defense counsel should assess the overlapping responsibilities of Rule 3.3, titled "Candor to the Tribunal". The pertinent portions of this Rule provide:

(a) A lawyer shall not knowingly:

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> ***
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
>
> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
>
> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

As noted in (c), Rule 3.3 "trumps" Rule 1.6 on confidentiality. But confidentiality is trumped only with false representations to the tribunal. Thus, an att orney must be extremely careful when responding to questions from the tribunal in this context. The instant issue before the Ethics Committee does not, as presented, include false representations to the tribunal. The issue has not gotten that far yet. However, this is an important consideration for defense counsel as they proceed with the defense.

The Ethics Committee struggled with this opinion. Clearly the Committee is not in a position to tell Courts whether "call in bond conditions " are ethical. The Committee is also respectful of overburdened Court calendars and issues of judicial efficiency. For these reasons, the Committee encourages defense attorneys to consider that it is necessary to have a candid discussion with the client in the face of a " call-in bond condition". Also, the discussion should include the attorney's obligation in the face of a break-down in the attorney-client relationship and whether the attorney is prepared to proceed to trial when pressed for an answer by the Court. The d efense bar may find it necessary to seek a declaratory judgment or other ruling in order to fully clarify this ethical, evidentiary and constitutional issue, as the Ethics Committee can only speak to the fact pattern raised in this instance, and cannot beg in to address the myriad of factual scenarios which might occur.

CONCLUSION: Prosecution or judicial inquiries to defense counsel as to a defendant's compliance with "call in bond conditions " should be answered by relying on Rule 1.6 and maintaining that the information requested is protected confidential information unless defense counsel has received prior client consent to disclose or defense counsel is specifically ordered to answer by a judge. [It should be noted that prosecutors should be wary of inviting this type of disclosure.] If so ordered, defense counsel should raise the evidentiary defense that the information is protected from disclosure under the attorney-client privilege in order to preserve the attorney's ethical obligation. Defense counsel is well-advised to consider the type of candid conversation this issue raises.

Because of the complex relationship between the ethical, evidentiary and potential constitutional issues, pursuit of a declaratory judgment action may be appropriate to complete resolution of this issue.

THIS OPINION IS ADVISORY ONLY