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Quandaries & Quagmires: The hypothetical exception to client confidentiality

How to discuss your case without violating Rule 1.6

By: Chuck Lundberg October 25, 2022

I recently presented on this topic at the annual meeting of the Association of Professional Responsibility Lawyers, a national group of about 500 legal ethics nerds, practitioners, and professors in the law of lawyering (including 14 Minnesota members). (APRL.net)
For this national audience, the focus was solely on the language of ABA Model Rule 1.6, adopted by the vast majority of states.

***Spoiler alert**: Minnesota is one of a small handful of states that have adopted a more liberal rule that can lead to radically different results in this context. This column will begin with the national rule, and then note how the analysis differs in Minnesota. It turns out that in Minnesota, there are **three** different safe harbors for disclosing confidential information.*
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The ABA Rules: ABA Model Rule 1.6 broadly defines — and prohibits disclosure of — confidential client information: "a lawyer shall not knowingly reveal *information relating to the representation of a client*."

Comment 4 to Rule 1.6 (in both the ABA and Minnesota versions) expressly excepts from confidentiality a properly constructed hypothetical:

A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

This hypothetical exception provides a broad prerogative to the lawyer: Simply by properly disguising the confidential case facts — one ethics opinion refers to "constructing a hypothetical" — the lawyer may ethically disclose otherwise confidential client information (about either current or former clients, doesn't matter). *It's as close to a safe harbor as one normally gets in the legal ethics world.*

Consider the many contexts in which this hypothetical exception can arise:

First, the hypothetical exception is frequently used when a lawyer discusses a client's legal matter with other lawyers, brainstorming some new legal theory or argument, analyzing what a court might do, spinning creative legal strategies, etc.

We all consult with professional colleagues about our cases from time to time; it's an essential and ancient part of the practice of law. So long as the Cmt. 4 standard is followed ("no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved"), there's nothing wrong with that.

Second — a fast-growing area — lawyers frequently raise real-life legal questions and issues about their cases on legal list servs. (E.g., "Has anyone seen this issue before? I have a client who . . .", [then revealing details of the facts and issues in that specific client's representation]). Note that it doesn't matter that the listener here knows immediately that this isn't hypothetical at all; the only issue is whether the listener can ascertain *the identity* of the client or the situation.

Third, think of writing for legal publication, from a law review article to a legal blog — or a column like this one. For a vivid illustration, see this article in the October 2011 Minnesota Legal Ethics blog, *When Does a Mistake Violate Rule 1.1 (Competence) or Similar Rules?* Minn. Legal Ethics (Oct. 3, 2011)(using confidential client information to discuss and explain important developments from two private Minnesota Lawyers Board proceedings, all disclosed with the clients' informed consent):

https://my.mnbar.org/blogs/william-wernz/2011/10/03/when-does-a-mistake-violate-rule-11-competence-or-similar-rules

Fourth, similar issues arise when teaching the law — giving a CLE presentation to other lawyers in your specialty area, say, or leading a law school class. Effective teaching in either area often requires the use of hypotheticals, including situations based on real-life client matters.

Finally, think of a group of attorney colleagues, gathering for dinner or refreshing adult beverages after work. In that relaxed context, war stories are likely to arise, and, if the attorneys are careful, each of their stories will be constructed as a hypothetical, the facts suitably disguised or scrubbed to comply with Cmt. 4.

War stories by definition begin with the words, "I had a case once . . . ." Again, even though this phrase immediately signals that the matter isn't the least bit hypothetical, that is irrelevant for Cmt. 4 purposes: the only issue is whether the listener can ascertain *the identity* of the client or the situation.

The hypothetical exception can be a *safe harbor* for disclosing confidential client information in all these situations.

A second safe harbor, of course, is client consent. Confidential information can always be disclosed with the client's express *informed consent*. Rule 1.6 (b)(1). But it can be tricky, because *informed consent* is a defined term under Rule 1.0(f): it means the client has consented "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Especially where the information is to be broadly disseminated or published, as in an article or blog, not only must the facts be carefully disguised but obtaining client consent may be essential.

The Minnesota "No Privilege, No Harm, No Foul" exception

Finally, a third safe harbor is available in Minnesota (and a few other states) which adopted a substantially different version of Rule 1.6, by retaining the old DR 4-101 exception from the pre-1985 Code of Professional Responsibility. See MRPC 1.6 (b)(2) (client information is not confidential if (1) it is not protected by the attorney-client privilege under applicable law, (2) the client has not requested that the information be held inviolate, and (3) the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client.

As explained in Wernz, *Minnesota Legal Ethics* (12th ed. 2022), MRPC 1.6(b)(2) materially alters the analysis that is made under the Model Rules: "The practical consequence of the Minnesota position was that lawyers were permitted to reveal non-privileged client information, unless "the client has requested [the information] be held inviolate or the disclosure … would be embarrassing or would be likely to be detrimental to the client." *Id.* at 351.

This has the substantial benefit of avoiding some truly ridiculous results arising from the ABA's radical interpretation of Rule 1.6 in ABA Formal Opinion 480 (2018). As the Wernz treatise points out cogently and at length (at pp. 346 – 48), Op. 480 takes the position that court records that relate to a client representation may not be revealed without informed client consent. Op. 480 states, "Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is not exempt from the

lawyer's duty of confidentiality under Model Rule 1.6." This raises the specter that a lawyer could not even discuss a victory in a published Supreme Court decision without first seeking and obtaining informed client consent.

That is simply not the case in Minnesota, where a safe harbor protects the lawyer who discloses non-privileged information that the client has not requested be held inviolate and the lawyer reasonably believes the disclosure of which would not be embarrassing or likely detrimental to the client.

On the other hand, sometimes the "embarrass/detriment" issue under (b)(2) may be genuinely problematic. Attorneys may think that when the client has prevailed, embarrassment will not be an issue. But consider an example of client embarrassment based on its law firm's disclosure of victories on the firm website: "Total victory for client XYZ Inc. in defending seven employment claims." Client XYZ's reaction: "this implies we're a bad employer — why did you say that?"

Many such problems can be avoided simply by not identifying the client, say by changing the marketing blurb to "Prevailed in defending ten employment claims against multiple employer clients."

And where the client's matter was not so successful, possible embarrassment / detriment might be a real issue, and thus (b)(2) may not apply. Worse, the application of the embarrassment test may not be completely clear in a particular case.

In each of these situations, however, the hypothetical exception would still be available. Indeed, possible embarrassment seems completely irrelevant under Cmt. 4 because by definition the client is not identifiable, and thus no embarrassment could reasonably result. In other words, the Cmt. 4 safe harbor may completely avoid some problems raised by (b)(2).

And the audience is often a factor relevant to the confidentiality analysis. Disclosing facts about a client matter to a small group of close friends over dinner is obviously different from publishing a blog post about the case. Similarly, lawyers who practice in small towns may run a greater risk of the client being identifiable in a hypo.

There are other possible problems. The Model Rule is apt to apply to a Minnesota lawyer who is temporarily representing a client in another state. If, say, the lawyer represents a client in Iowa, and practices near the Iowa border, advertises on his website that he's licensed in Iowa, and discloses client info that's not privileged or embarrassing, he may face discipline in Iowa.

Is improper disclosure of client information a serious issue for Minnesota lawyers? Experienced ethics attorneys point out that, at least in Minnesota, it is not clear that there has ever been any discipline for a 1.6 violation in contexts like this. But one can't be too sure. There may well have been private disciplines issued that have not been publicized. Indeed, in the nature of things any discipline for violating Rule 1.6 in this context would likely be private.

In the final analysis, lawyers should think carefully before talking about their client matters. Take pains to disguise the client's identity. It's not that difficult to seek client consent before

referring to a client by name on a website. And sometimes it might be more prudent not to share the war story at all.

Chuck Lundberg is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with Bassford Remele. He now teaches at the University of Minnesota Law School and consults with and advises attorneys and law firms on the law of lawyering through Lundberg Legal Ethics (www.lundberglegalethics.com).