

Fatality Review may receive confidential information

This advisory opinion was issued recently by the State Bar Ethics Committee following a request by a Bar member.

ETHICS OPINION No. 070523

FACTS:

Montana has a Fatality Review Commission whose charge, under section 2-15-2017, MCA, is to examine domestic violence related fatalities for trends and patterns, then use that information to recommend policies, practices and services to reduce those fatalities. The Commission is also charged with educating the public, service providers and policymakers about domestic violence fatalities and strategies for intervention and prevention. The Commission's membership includes, among others, state legislators, representatives from law enforcement, the judiciary, the mental health community and private and state government entities. The Commission is directed to review fatalities that are not under investigation and fatalities in cases that have been adjudicated and have received final judgment.

Within the statute is the direction:

(6) Upon written request from the commission, a person who possesses information or records that are necessary and relevant to a domestic violence fatality review shall, as soon as practicable, provide the commission with the information and records. A person who provides information or records upon request of the commission is not criminally or civilly liable for providing information or records in compliance with this section.

The meetings and proceedings of the Commission are confidential, in accord with (7) of the statute. In addition, the statute provides:

(8) The records of the commission are confidential and are exempt from the provisions of Title 2, chapter 6 (on disclosure of public records). The records are not subject to subpoena, discovery, or introduction into evidence in a civil or criminal action unless the records are reviewed by a district court judge and ordered to be provided to the person seeking access. The commission shall disclose conclusions and recommendations upon request but may not disclose information, records, or data that are otherwise confidential. The commission may not use the information, records, or data for purposes other than those designated (within the statute).

An attorney whose client was murdered by the client's part-

ner has been asked to RESPOND TO A REQUEST FOR INFORMATION FROM THE COMMISSION in accord with (6).

QUESTION PRESENTED: May an attorney comply with the statutory directive of the Fatality Review Commission without violating the attorney's duty of confidentiality to his deceased client?

SHORT ANSWER: Yes. Rule 1.6(b)(4) of Montana's Rules of Professional Conduct permits, within constraints, disclosure of confidential information to comply with "other law."

DISCUSSION:

Confidentiality is the very heart of the attorney client relationship, surviving even the death of the client. ABA/BNA Lawyers' Manual on Professional Conduct, 55:107. Rule 1.6 on confidentiality 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 Lawyers' Manual on Professional Conduct, 55:303. "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).

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.

(It is notable that the ABA Model Rule on confidentiality contains more exceptions than Montana's current rule.)

Under the facts presented, the attorney of the murdered client can analyze his obligation following two paths, with the

same result: that limited disclosure of information useful to the Fatality Review Commission is permitted.

The first path is within the language of Rule 1.6(a): “the disclosure is impliedly authorized in order to carry out the representation.” There are a series of other states’ ethics opinions that hold a lawyer may disclose information relating to the representation of a deceased client only if disclosure would further the client’s interests, and only if the lawyer believes that the client would have consented. ABA/BNA Lawyers’ Manual on Professional Conduct, 55:107. Several of those opinions suggest or, in some cases, mandate, the consent of the personal representative of the deceased client. We will not impose that obligation on the attorney in this opinion, leaving it to the attorney’s discretion in light of the facts as he knows them. Neither do we opine as to whether the personal representative has authority to waive the decedent’s attorney-client privilege (an evidentiary decision outside our purview) or release the attorney from the other duties imposed by rule 1.6.

The second path is within the language of Rule 1.6(b)(4): “to comply with other law....” Section 2-15-2017, MCA, falls within the “other law” component of permitted exceptions to the Rule.

There is some debate in the national literature about whether a statute falls within the category of “other law.” The commentary identifies discovery requests or subpoenas as the most typical “other law” triggering the exception. Also cited are the tax code and Patriot Act. In these instances, the literature suggests attorneys are required—“shall make”—all non-frivolous arguments that the information is protected from disclosure by Rule 1.6 and, if applicable, by attorney-client privilege. This mandate ensures that confidentiality protections are weighed by the Court; the Court is the arbiter of compelled disclosure by “other law.” ABA/BNA Lawyers’ Manual on Professional Conduct, 55:1207. The national debate so alarmed the ABA that in 2003 it announced its opposition to any proposals that require disclosure of confidential information to government officials, (acting on the recommendations of its Task Force on Gatekeeper Regulation). See www.abanet.org/crimjst/taskforce.

We believe that the national discussion does not address the point of the process at issue in this opinion and is distinguishable. In those instances, the “other law” is seeking client confidential information with the intent of prosecuting the client for alleged misdeeds. In the case of the Montana statute, the goal is not disclosure of the client’s confidences, but information about the client that could have helped save the client’s life and which may reduce the risk of future homicides.

Also distinguishing the Montana statute is its appreciation of the confidential nature of the information obtained: The meetings and proceedings of the Commission are confidential, the records of the commission are confidential and not subject to subpoena, discovery, or introduction into evidence in a civil or criminal action “unless the records are reviewed by a district court judge and ordered to be provided to the person seeking access.” Further, while the commission shall disclose conclusions and recommendations, it “may not disclose information, records, or data that are otherwise confidential.” Finally,

“The commission may not use the information, records, or data for purposes other than those designated (within the statute).” In short: the Montana statute is written with sensitivity about confidentiality.

Because the Fatality Review Commission’s process is designed to continue to protect a client’s confidences, this Committee believes it is not required that an attorney representing a murdered client fight the Commission’s request to respond; nor is it necessary that the attorney representing a murdered client require a court order prior to disclosing the deceased client’s confidences. To read it with those limitations creates a hurdle in a process which already includes protections for the deceased client’s confidences. However, if the attorney believes a court order is appropriate, the attorney may require one. The attorney is in the best position to appreciate the significance of disclosure.

We emphasize that the duty of the attorney to consider “other law” originates with Rule 1.6 and not 2-15-2017, MCA. The legitimacy of Rule 1.6 is conferred by the power of the judicial branch of government and the legal profession. Absent Rule 1.6(b)(4) an attorney would not be compelled to consider a request for information made under 2-15-2017, MCA.

We do not believe that attorneys are required to respond to a request for information from the Fatality Review Commission’s process. Rule 1.6(b)(4) is permissive: the attorney may reveal the client confidences—and then only to the extent the attorney reasonably believes the information is necessary. Whether certain facts are protected or revealed depends entirely on the circumstance—no one can fully appreciate or anticipate the ripple effect of released confidential information. Again, if the attorney believes a court order is appropriate, the attorney may require one. The attorney may possess confidential information not relevant to the Commission’s work; if that is the case, the attorney need not reveal the information.

We limit our opinion to the question of whether Rule 1.6 confers discretion of an attorney to respond to a request for information from the Commission made pursuant to 2-15-2017, MCA. We do not reach the question of whether an attorney may ethically participate as a member of the Commission to review a fatality if that attorney or that attorney’s firm represented the decedent or the perpetrator.

CONCLUSION: An attorney may disclose confidential information to the Montana Fatality Review Commission without a court order because there are confidentiality protections within the statute; the attorney can use his or her discretion in disclosure (rule 1.6’s disclosure provision is permissive, not mandatory); and the attorney may refuse to participate unless ordered by a court to do so.

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