



## Impliedly Authorized Disclosures

We should all be familiar with the ethical rule that requires us to keep confidential all “information relating to the representation” of a client.<sup>1</sup> However, we are allowed to disclose such information to others if the client gives her “informed consent”<sup>2</sup>—such as when a client’s creditor calls you for information about the progress of a lawsuit it hopes will provide a recovery that will help pay the indebtedness, or when you receive a request for an update from your client’s father, who is paying your fees for representing his daughter in her divorce case. These would be considered requests for information relating to the representation that would otherwise not be allowed to be disclosed.

There is another category of confidences recognized in ER 1.6 that includes information that lawyers are permitted to disclose to others without getting the client’s consent if “the disclosure is impliedly authorized in order to carry out the representation.” An obvious example would be discussing your client’s case with one of your more experienced partners. The thought here is that your client would welcome (and may even expect) additional assistance from members of the same team if it advanced his cause, and wouldn’t expect to have to give you his informed consent before it was sought.<sup>3</sup>

Other situations are not quite as obvious and have generated varying degrees of concern for lawyers:

- **Consulting with other lawyers outside the firm.** The general rule here is that client consent is not needed in situations where the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer’s experience or expertise for the benefit of the client.<sup>4</sup> The implied authorization is limited, however. The consulting lawyer cannot make disclosures that waive the attorney–client privilege and should seek the consulted lawyer’s acknowledgment that what is going to be discussed will be held in confidence. Most problems can be avoided by having the consulting lawyer use a hypothetical situation that doesn’t reveal the identity of the client or others involved in the representation.<sup>5</sup>
- **Using contract lawyers and other outside professionals.** If “outside” or contract lawyers (“temps”) are used to assist in the matter and work under the direct supervision of the client’s lawyer, client consent is generally not required for disclosures of information relating to the representation.<sup>6</sup> On the other hand, if the outside lawyer is performing independent work for the client without direct supervision of the referring lawyer, the client’s consent should be obtained concerning what work will be done and the billing rate involved. The same rules apply for other outside professionals and service providers such as investigators, accountants

and the like. In all cases, the lawyer is expected to take measures to ensure that the client’s information is protected.

- **Clients with diminished capacity.** ER 1.14 (Client with Diminished Capacity) deals with clients who, because of age

(very young or very old), mental impairment “or for some other reason,” are not able to make adequately considered decisions regarding the representation. In these situations, when the lawyer reasonably believes the client may be at risk of some harm, the lawyer is allowed to take protective action and is impliedly authorized to reveal, without the client’s consent, otherwise confidential information con-

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cerning the representation, but only to the extent reasonably necessary to protect the client’s interests.<sup>7</sup>


- **Deceased clients.** It is well established that a lawyer’s duties under ER 1.6 continue after the client’s death.<sup>8</sup> The same applies for the attorney–client privilege.<sup>9</sup> Of course, the client’s consent to disclose information is not going to be obtainable, so an implied authorization has been recognized as long as the lawyer reasonably believes that the deceased client would have wanted or expected disclosure, particularly where it would be in furtherance of the client’s interest in settling the estate. The general rule does not apply where the information is sought by an estranged spouse or other party in a domestic relations case, and in any other situation where contested claims are being made against the estate.<sup>10</sup>

Ethics Opinions and the Rules of Professional Conduct are available at [www.azbar.org/Ethics](http://www.azbar.org/Ethics)



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There are other situations where confidential client information is allowed to be disclosed, such as cases of jointly represented clients, where the lawyer seeks ethical advice or where there is a dispute with a client. These are generally covered by other rules.<sup>11</sup> The bottom line is that lawyers need to be mindful of the confidentiality rules whenever an occasion may call for disclosure of any information relating to the representation of a client. 

## endnotes

1. ER 1.6 (Confidentiality of Information), Rule 42, ARIZ.R.S.C.T.
2. “Informed consent” is a defined term. Found at ER 1.0(e), it means the agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to what is being proposed.
3. Comment [5] to ER 1.6.
4. ABA Formal Op. 98-411 (Ethical Issues in Lawyer-to-Lawyer Consultation) (Aug. 30, 1998). Note: This opinion was published before the Arizona Rules of Professional Conduct were amended in 2003.
5. *Id.*
6. ABA Formal Ethics Op. 88-356 (Temporary Lawyers) (Dec. 16, 1988).
7. ER 1.14(c); Comment [8] to ER 1.14.
8. See N.C. Ethics Op. 206 (1995); D.C. Ethics Op. 324 (2004). For an excellent treatment of this topic, see Peter Geraghty, *Testamentary intent and confidentiality after the death of a client*, [www.americanbar.org/publications/youraba/2014/october-2014](http://www.americanbar.org/publications/youraba/2014/october-2014).
9. *Swidler & Berlin v. U.S.*, 524 U.S. 399 (1995).
10. See generally American College of Trust and Estate Counsel (ACTEC), *Commentaries on the Model Rules*, at Rule 1.6 (Obligations After Death of Client).
11. Ariz. Ethics Op. 07-04 (Joint Representation; Conflicts; Communication; Informed Consent) (November 2007); ER 1.6(c)(3) and (4).