



The North Carolina State Bar

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April 27, 2005

Mr. Michael S. Hamden
NC Prisoner Legal Services, Inc.
PO Box 25397
Raleigh, NC 27611

Re: Proposed Ethics Decision 05-3

Dear Mr. Hamden:

The Ethics Committee of the North Carolina State Bar met in regular quarterly session on April 14, 2005, and considered your inquiry. In response thereto, the committee has proposed the above referenced ethics decision, a copy of which is enclosed.

An ethics decision is an unpublished opinion of the Ethics Committee. Although it must be finally approved by the full Council at its next quarterly meeting in July, it is advice upon which you may rely in the interim.

In the event that the Council chooses to reject or modify the opinion in July, you will be informed. In the more likely event that the decision is adopted by the Council upon the Ethics Committee's recommendation, you will receive no notice and may assume that the decision has been approved.

If you have any questions or comments, please let me know.

Sincerely yours,

Alice Neece Mine
Assistant Executive Director

Enclosure

Proposed Ethics Decision 05-3
Disclosure of Client-Lawyer Relationship
April 14, 2005

Opinion rules that the identity of a client is considered confidential information; however, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, unless the lawyer determines that disclosure of the lawyer-client relationship would likely be detrimental to the client.

Inquiry: The North Carolina Department of Correction (DOC) recently promulgated new regulations governing lawyer meetings with inmates. As a prerequisite to a client-lawyer meeting, the lawyer must disclose to the facility supervisor that the inmate has designated the lawyer to “represent him/her in a matter now pending or which may be pending before a court of law. . . .” State of North Carolina Department of Correction, Division of Prisons Policy & Procedures, Chapter D, § .0202(a). The regulation is scheduled for state-wide implementation beginning October 1, 2004.

Prior to the regulation’s effective date, North Carolina Prisoner Legal Services (NCPLS) lawyers, paralegals and interns routinely met with inmate clients in the correctional setting. Inmates might express a desire to meet with an attorney by writing letters or communicating with NCPLS through family members. Thereafter, meetings were arranged by giving correctional officials twenty-four hour advance notice (by telephone or facsimile) that a NCPLS representative wished to arrange a meeting with a particular inmate. The nature of the relationship between the inmate and the NCPLS representative would not be disclosed. Based upon this communication, prison officials would know that a meeting would occur but not whether the inmate was a client, a potential client, a witness or a potential witness.

NCPLS believes that the new DOC regulations require that a lawyer or his agent to disclose not only the fact of the meeting with an inmate, but also the nature of the relationship between the inmate and the lawyer prior to visitation. Disclosure of the fact that legal counsel has been sought may sometimes be embarrassing or harmful to the inmate/client. The DOC regulation also restricts the nature of the discussions between inmates and lawyers or paralegals to “pending legal proceedings only.” § .0202(a). The regulation specifically prohibits legal solicitation.

A lawyer who does not represent an inmate (but may want to obtain information relevant to a client’s legal claim) or who does not disclose to a facility supervisor that he represents an inmate in a pending matter under § .0202(a), may still arrange a meeting with an inmate, but must follow “special procedures” to do so. These special procedures require the lawyer to communicate with the inmate prior to the visit. The inmate must then make a written request to allow the special visit. § .0202(c). NCPLS believes these special procedures may delay the time of a meeting or penalize those inmates who are illiterate.

Where a client is in custody of correctional officials and disclosure of the fact that legal counsel has been sought will sometimes be embarrassing or harmful to the client, does Rule 1.6 and the duty of confidentiality prohibit NCPLS lawyers from disclosing the nature of the relationship in order to obtain access to the clients for purposes of meeting with them?

Opinion: Rule 1.6 of the Rules of Professional Conduct prohibits a lawyer from revealing any information acquired during the course of the professional relationship unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or one of the exceptions to the rule applies. The confidentiality rule applies, not merely to harmful or embarrassing information, but to all information acquired during the representation. *See* Rule 1.6 cmt. [3]. The identity of a client or the fact that a client has retained legal counsel is considered confidential information under Rule 1.6.

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. If a lawyer determines that disclosure of the lawyer-client relationship would likely be detrimental to the client, a lawyer must not disclose that information unless authorized to do so by the client or until otherwise permitted to do so by Rule 1.6. *See* RPC 21. The client's authorization to disclose must flow from informed consent. Under circumstances in which the client is in custody and the client's custodians condition a lawyer-client consultation upon such disclosure, it may not be possible to obtain such authorization.

The Ethics Committee cannot interpret the DOC regulations nor should it opine as to the effect of such regulations on the lawyer-client relationship.

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