LEGAL ASSISTANCE

Duty of Confidentiality and Legal Assistance Matters

You recently asked questions about the duty of confidentiality owed to our legal assistance clients when a member of a Suicide Review Panel asks for information about (i) whether an Airman, who is now deceased, was seen and (ii) if so, the subject matter concerned. We concluded that such information was "information relating to the representation" of a client[1] and as such, was protected by the duty of confidentiality prescribed by Air Force Rules of Professional Conduct (AFRPC) Rule 1.6.

As a supplement to our initial advice, we are providing the following comprehensive opinion on the duty of confidentiality owed to our legal assistance clients.[2] This opinion is intended as guidance for legal offices who receive questions by commanders, first sergeants, personal representatives, suicide panel investigators, family members, etc., who wish to confirm whether an individual, living or deceased, sought legal assistance and information about the assistance provided. We coordinated this opinion with our sister Services in the Navy and Army, and they concur with the conclusion that AFRPC Rule 1.6 controls what, if anything, can be said in response.

Background

Personnel accountability is a key component of the Air Force and inherent in leadership. Commanders, first sergeants, and other third parties routinely attempt to locate personnel, and oftentimes the call goes to the legal assistance or defense counsel offices—"Have you seen Airman X; if so, what did you discuss?" or "Did Airman X have an appointment?" or "Airman X said he was going to be in your office; is he there?" The first question that personnel in these offices[3] should be asking themselves is whether or not they can say anything.

In 2004, the defense community received an advisory ethics opinion, a copy of which is on the AF/JAA Professional Responsibility website, which addressed three common scenarios for that community. To summarize, the opinion found that when the Airman had an attorney-client relationship (the member sought assistance, the area defense counsel (ADC) had been assigned

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[1] While the "client" in the attorney-client relationship is normally the Air Force, there are exceptions specifically authorized. Legal assistance is one of those enumerated exceptions. The "client" with respect to legal assistance is the individual, which is important when other Government personnel seek information or client confidences about the Airman/legal assistance client. AFRPC 1.13(f).

[2] Much can be written about the origins of the attorney-client relationship, in particular in the context of the military, and an attorney's duty of confidentiality. For a detailed discussion about the privilege in the military context, see "The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value," Air Force Law Review, Vol. 49, Fall 2000.

[3] The term "legal assistance office personnel" refers to anyone in the legal office, including the SJA, who may be asked these questions.

to represent the member, the defense counsel's office at the Airman's base was providing logistical/defense paralegal (DP) support to reach the ADC at another base, etc.), the ADC or DP had an ethical obligation to maintain as confidential per AFRPC 1.6 the Airman's whereabouts, whether the Airman had an appointment, when the Airman may have arrived or may have left the appointment, and other related questions. In those situations, it was appropriate for the defense community to adopt a policy of non-cooperation because the ethics rules did not mandate disclosure of information. However, in cases where the Airman had not sought out assistance or the ADC had not been detailed to represent the Airman, the ethics rules allowed cooperation with the Government.

This 2004 informed advisory opinion did not address the issue in the context of a legal assistance office. We agree with the ultimate conclusions in the 2004 advisory opinion,[4] and we believe its analysis and conclusions are applicable for legal assistance clients as well.

Discussion

What is the duty of confidentiality in the Air Force?

The Air Force Rule on confidentiality is as follows:

> Rule 1.6. CONFIDENTIALITY OF INFORMATION
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraph (b).
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1)[Modified] to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system; or
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a lawyer's representation of the client.
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> DISCUSSION
> Subparagraph (b)(1) was expanded to include substantial impairment to national security and readiness, recognizing the realities of the mission of the United States Air Force. A lawyer's duty to a client is a strong one. If it is possible for the lawyer to act to prevent ongoing or potential criminal misconduct without

[4] The author relied on four underlying assumptions in that opinion. As will be discussed further, we do not base our opinion on the first assumption—that the ADC office was not aware that it was being exploited.

> violating a client confidence, those actions should always be considered first. In the circumstances described in the rules, a lawyer is excused from his fundamental obligation to preserve client confidences. See also Rule 1.13, Rule 5.4, and Standard 4-3.7.

The general rule on confidentiality is that a lawyer *may* disclose information relating to representation of a client if the client consents or an exception applies (i.e., to prevent a criminal act likely to result in imminent death or serious bodily harm, or a lawyer's self-defense to alleged wrong-doing relating to the representation of a client). AFRPC Rule 1.6 provides an additional exception for national security reasons. Absent consent or an express exception, a lawyer *may* disclose information relating to the representation when doing so is "impliedly authorized in order to carry out the representation"[5] or when required by a legal duty or court order.

"Information relating to the representation" is not defined in either the AFRPC or the American Bar Association (ABA) Model Rules. ABA and state ethics opinions indicate the duty can extend to protecting client names.[6] The ABA Lawyer's Manual states generally, "The

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[5] *See* Rule 1.6, *Air Force Rules of Professional Conduct*; Comment 5 to ABA Model Rule (ABA-MRPC) 1.6 ("in some situations. . . a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter"); *See generally Restatement (Third) of the Law Governing Lawyers § 61 (2000)* (permitting disclosure that advances client's interests); *ABA Lawyers' Manual on Professional Conduct* (Lawyer's Manual), 55:505; *In re Gloebel*, 703 N.E.2d 1045 (Ind. 1998)(Absent consent or implied authorization, an attorney may not disclose the address provided by a client even when faced with a demanding request by a criminal client and even when the address is known to be false); *Conn. Ethics Op*. 99-35 (1999)(A lawyer cannot disclose names of bankruptcy clients to bankruptcy companies absent the consent of the client after consultation with the attorney even though these bankruptcies may be part of the public record); *Iowa Ethics Op*. 97-4 (1997)(The name of a client may only be included in a firm's newsletter if the client gives written permission); *Mont. Ethics Op*. 050621 (2005)(Absent client consent or a specific order from a judge demanding disclosure, an attorney may not disclose the number or nature of the contacts he has had with his client; criminal defense lawyer may not, without client's prior consent, tell judge or prosecutor whether client has contacted him, even though client's bond conditioned upon regularly phoning defense lawyer); *In Re Mandelman*, 514 N.W. 2d 11 (Wis. 1994)(lawyer violated Rule 1.6 when he asked other lawyers for help on several client matters and transferred client files without seeking clients' consent).

[6] *See* ABA Lawyer's Manual, 55:305 ("The professional obligation of confidentiality prohibits the unauthorized disclosure of a client's identity, unless disclosure would be permitted (or, in some jurisdictions, required) by an exception"); *See also*, *In Re Advisory Opinion* No. 544, 511 A.2d 609 (N.M. 1986)(identity of legal services organization's clients is "information relating to the representation" under Rule 1.6; ABA Informal Ethics Op. 1287 (1974)(name, address, and telephone number of legal services office's clients are 'secrets' within meaning of Dr 4-101 because revelation of representation by such office may embarrass client); ABA Informal Ethics Op. 1188 (1971) (disclosure of judicare clients' names for research study not permissible if disclosure is likely to be detrimental or embarrassing to the client or if client requests it be kept confidential); Alabama Ethics Op. 89-111 (1989) (lawyer may not disclose name of client to

professional obligation of confidentiality prohibits the unauthorized disclosure of a client's identity, unless disclosure would be permitted (or, in some jurisdictions, required) by an exception."[7] For instance, disclosure of a client's name may be required (or implied) to effect the representation, such as in litigation. Some states prohibit disclosure only if the name constitutes a "confidence" or "secret" or where disclosure would embarrass or harm the client.[8] In fact, most of the state ethics opinions cited articulate some harm or embarrassment to the client (e.g., disclosure of the names of a judicare[9] client). The Restatement on the Law Governing Lawyers adopts the view that protecting a client's name is an overly strict interpretation of Rule 1.6 absent evidence of harm to the client.[10] The Air Force rule, however, protects the "information relating to the representation" and does not require that the information be provided in confidence nor that disclosure cause harm or embarrassment. Additionally, requiring potential harm or embarrassment could result in inconsistent results across the Air Force (i.e., harm or embarrassment may be viewed differently by various people). Thus, strictly interpreted, this rule would protect disclosure of a client's appointment unless consent or an exception applies.

The duty of confidentiality applies to information obtained in the representation of a current client even if that information has become generally known.[11] This is in contrast to the attorney-

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funding agency); District of Columbia Ethics Op. 312 (2002) (opinion discussing conflicts check by lawyer contemplating job change pointed out that even client's name may constitute secret); North Carolina Ethics Op. 21 (1987) (client's identity must be kept confidential if disclosure would be detrimental to client); South Carolina Ethics Op. 90-14 (1990) (lawyer may not volunteer identity of client to their party); Texas Ethics Op. 479 (1991) (law firm that obtained bank loan secured by firm's accounts receivable may not tell bank who firm's clients are and how much each owes); Virginia Ethics Op. 1300 (1989) (in absence of client consent, nonprofit legal services corporation may not comply with federal agency's request for names and addresses of parties adverse to certain former clients, since that may involve disclosure of clients' identities, which may constitute secret); ABA Informal Ethics Op. 1411 (1978) (Lawyer may furnish general information required by U.S. Census Bureau for its census of service industries; form seek information regarding lawyer's income not by client name but by broad categories).

[7] ABA Lawyer's Manual, 55:305.

[8] *See* ABA Lawyer's Manual, 55:305 ABA Lawyer's Manual, 55:303-305.

[9] A federally-funded program providing free or low-cost legal services to the poor.

[10] *See* REST 3d LGOVL § 60 Restatement (Third) of Law Governing Law. § 60 (2000) (protection of name is not a proper interpretation of the rule absent an adverse effect on the client.)

[11] ABA Model Rule 1.9 was amended to include confidentiality to former clients. Originally entitled, "Conflicts of Interest: Former Client," the Rule was renamed "Duties to Former Clients" to take into account the duty of confidentiality as well as the duty of loyalty to clients. That rule now prohibits an attorney from revealing "information relating to the representation except as these Rules would permit or require with respect to a client." The annotated edition of that rule states, "Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. *See* Rules 1.6 and 1.9(c)." ABA Model Rule 1.18, Prospective Clients,

client privilege, which is applicable only to communications made "in confidence," and waived upon disclosure. With respect to *former* clients, however, an attorney may use generally known information even if the attorney obtained the information in the representation of the former client.[12]

Is an Airman's visit or call to the base legal office to address a legal assistance matter (appointment or otherwise) a matter which is owed confidentiality?

Some legal offices have policies that legal assistance clients schedule set appointments, and other offices have walk-in hours. In either circumstance, we believe the fact that a member is or was

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(no corresponding Air Force Rule) puts prospective clients on a par with *former*, rather than current clients. The annotated Model Rule 1.18 states, "The difference is this: Although a lawyer may neither use nor reveal information relating to the representation of a current client, she may use information relating to the representation of a former client once it is generally known." In contrast, Rule 1.6 contains no exception permitting disclosure of information previously disclosed or publicly available. *See, e.g., In Re Anonymous*, 654 N.E.2d 1128 (Ind. 1995) (lawyer violated Rule 1.6 by disclosing information relating to representation of client, even though information "was readily available from public sources and not confidential in nature"); *In Re Bryan*, 61 P.3d 641 (Kan. 2003) (lawyer violated Rule 1.6 by disclosing, in court documents, existence of defamation suit against former client); *State ex rel. Okla. Bar Ass'n v. Chappell*, 93 P.3d 25 (Okla. 2004) (lawyer in fee dispute with former employer violated Rule 1.6 by filing motion referring to criminal charges that had been filed and later dismissed against former client): *Lawyer Disciplinary Bd. V. McGraw*, 461 S.E. 2d 850 (W. Va. 1995) ("[t]he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it"); *In Re Harman*, 628 N.W.2d 351 (Wis. 2001) (lawyer violated Rule 1.6(a) by disclosing to prosecutor former client's medical records that he obtained during prior representation; irrelevant whether those records "lost their 'confidentiality'" by being made part of former client's medical malpractice action); Ariz. Ethics Op. 2000-11 (2000) ("lawyer is required to maintain the confidentiality of information relating to representation even if the information is a matter of public record"). *But see In Re Sellers*, 669 So. 2d 1204 (La. 1996) (lawyer violated Rule 4.1 by failing to disclose existence of collateral mortgage to third party; because "mortgage was filed in the public record, disclosure of its existence could not be a confidential communication, and was not prohibited by Rule 1.6"); *Restatement (Third) of the Law Governing Lawyers* § 59 (2000) (definition of confidential client information excludes "information that is generally known").

[12] Rule 1.9, *Conflict of Interest: Former Client*, prohibits lawyers from *using* information relating to the representation of a *former* client to the *disadvantage of* that client, *except as Rule 1.6 or Rule 3.3 would permit* with respect to the client *or when the information has become generally known*. A potential misreading of Rule 1.9(b) could lead an attorney to disclose confidential information as long as it would not disadvantage the former client. However, Rule 1.9 is a conflict of interest rule, intended to assist an attorney in determining whether confidential information obtained in representing a former client now precludes representation of client because of a conflict of interest. If confidential information does not create a conflict, the attorney is permitted to use information that is now generally known in his or her representation of the new client.

at the legal office for legal assistance is a matter which is owed confidentiality within the meaning of AFRPC 1.6. It does not matter if the Airman is in the waiting room or back in the JAG's office. The "appointment" is a matter relating to the representation of the client. Meaning, if an individual wants information as to whether an Airman was at a legal assistance appointment or had been to the legal office for legal assistance, we owe the Airman/legal assistance client confidentiality. AFRPC 1.6 would preclude disclosure of the fact an Airman—living or deceased—had such a consultation.

The date, time, length, and subject of appointments is information that appears to fall squarely within information protected by the duty of confidentiality. Thus, even if an attorney disclosed that an Airman was a client, it would give the person asking the question, such as Suicide Review Panel investigator or a criminal investigator, little information of value.[13]

In the 2004 advisory opinion concerning the defense community, the author made four assumptions, one of which was that "the Government's scheduling of an appointment for USAF member X with the ADC office creates an ADC office/client relationship." It made no difference if the Airman/defense client made the appointment or a representative of the command did; the relationship was created, and ethical obligations naturally flowed, from the time of appointment. Our belief is that this same underlying assumption is accurate for legal assistance clients. At the time of making an appointment, Airmen disclose confidential information.[14] And in situations where Airmen seek guidance in a matter that is outside the scope of the legal assistance program,[15] regardless if legal office personnel can advise, they must afford the information the Airman shares the same degree of confidentiality per AFRPC 1.6.

While researching this subject, our office located an Army legal review article from 1989[16] in which the author discussed military rules of professional conduct and whether a lawyer could disclose information to the chain of command regarding a member's appointment. The author opined that if the attorney had never seen the member, release of information (that the member failed to appear at the appointment) would not violate Rule 1.6. If the attorney had an attorney-client relationship, the author stated that the analysis was more complicated. However, the author believed that the attorney *could* release "information relating only to whether the client has appeared for an appointment" without violating the confidentiality rule; the attorney could not share information about the subject matter. The author wrote, "The central purpose for the rule of confidentiality, to foster full and frank communication, is not furthered by withholding information that a soldier has not appeared for a scheduled appointment."[17] Additionally, the

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[13] The 2004 informal advisory opinion for the defense community also assumed that the Airman/defense client was not using the ADC office as a place for subterfuge.

[14] AFI 51-504, Legal Assistance, Notary, and Preventive Law Programs, sets out the personal civil law matters that are within the legal services program.

[15] For instance, an Airman who received an Article 15 calls to set up an appointment, not necessarily understanding that there is a separate defense office.

[16] "An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers," 124 Mil. L. Rev. 1 (1989).

[17] The author noted that traditionally, the duty of confidentiality was limited to communications and had not been viewed as prohibiting the release of information relating to the identity and

author believed that the information was not related to the representation of the client and should not fall within this rule. Since the time this article was published, the Army JAG Corps revisited this position and believes that the fact of a legal assistance client's appointment, even a no show, is related to the representation and cannot be released. This 1989 article does not reflect the Army's current practice in its legal assistance offices. Additionally, the Navy's position is consistent with the Army's current practice and this Air Force opinion.

What happens if the Airman met with legal office personnel outside the legal office—a "curbside consult" with a JAG, for instance—and is later asked questions about the consult? This is something to consider on a case-by-case basis, depending on the facts and what the individual asked. If the JAG determined that that conversation created or extended the attorney-client relationship, the JAG has the same ethical obligations as he or she would have had as if the consult had been in the JAG's office.

The 2004 informal advisory opinion also assumed that the ADC office was not aware of any exploitation, such as may be the case when an Airman/defense client tells his or her chain of command about a meeting with the ADC when it did not actually occur. Although the legal assistance office should not condone a client's behavior, we do not believe this type of conduct justifies the legal assistance office from breaching confidentiality and sharing information about an appointment or the Airman/legal assistance client's whereabouts.[18] Instead, we advise legal assistance offices to seek to contact the Airman/legal assistance client to discuss the matter in an attempt to get the member to stop. The legal assistance office should also explain the professional responsibility rules regarding clients who use legal services to perpetuate a crime or fraud.[19]

When does an attorney-client relationship end?

The relationship ends when (i) the matter in which the client sought out the attorney ends; (ii) the attorney is able to withdraw from the representation; (iii) the client fires the attorney; or (iv)

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location of a client. *Annotated Model Rules* at 66; *see also In re Grand Jury Proceeding*, 680 F.2d 1026 (5th Cir. 1982); Comment, *The Attorney-Client Privilege as Protection of Client Identity: Can Defense Attorneys be the Prosecution's Best Witness?*, 21 Am Crim. L. Rev. 81 (1983); ABA Comm. On Ethics and Professional Responsibility, Informal Op. 1411 (1978). However, if the client specifically requested that legal assistance personnel withhold the information, they should. *In re Koziov*, 79 N.J. 232, 398 A.2d 882 (1979); *Brennan v. Brennan*, 281 Pa. Super. 362, 422 A.2d 510 (1980).

[18] If an Airman's leadership is concerned that the Airman is using the legal assistance office as an excuse to get out of work, the member's leadership can also require the Airman to have an escort.

[19] AFRPC Rule 1.16(b)(2) provides that except when a tribunal or other competent authority orders continued representation, "a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if. . . the client has used the lawyer's services to perpetuate a crime or fraud." "Competent authority" includes supervising lawyers, such as SJAs, however.

when the client dies.[20] The general rule in most jurisdictions is that the death of the client terminates the relation of lawyer and client. The lawyer therefore may not take any further steps in connection with the matter unless and until he/she is authorized to do so by the deceased's duly qualified personal representative.[21]

Do legal assistance personnel owe a member a duty of confidentiality after the relationship ends?

Yes. And in particular for our discussion, the duty of confidentiality survives the death of a client.[22] Specifically addressing the duty of confidentiality to a deceased client, the ABA Lawyers' Manual states that a lawyer may not disclose information relating to representation (the appointment itself as well as its subject matter) without express consent or court order,[23] unless the attorney has a reasonable belief that disclosure would 1) further the client's interest, and 2) the client would have consented to the disclosure in order to carry out his or her intended objective (i.e., to further his or her estate plan).[24] This appears to be the prevailing view in most

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[20] ABA's Center for Professional Responsibility Formal Opinion 95-397.

[21] *See* 7A C.J.S. Attorney & Client § 224 (1980).

[22] *See* Lawyer's Manual at 55:107. *See* Kan. Ethics Op. 01-01 (2001) (limiting disclosure of information relating to representation of deceased client); N.D. Ethics Op. 95-11 (1995) (unless client gave permission, lawyer may not give notes to family members challenging client's will without court order); Pa. Ethics Op. 94-385 (1994) (lawyer of client who committed suicide may not testify regarding communications with client unless ordered by court); R.I. Ethics Op. 2000-8 (2000) (ethical duty of confidentiality continues after client's death); *see also Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (attorney-client privilege survives death of client).

[23] See generally, ABA AMRPC 1.6. ABA Model Rule 1.6 includes a "by law or court order" exception not found on the AFRPC 1.6. The annotated Model Rule 1.6 states that the exception was not intended as a substantive change and that ultimately, Rule 1.6 defers to a final order of court by a tribunal or government entity with authority to compel disclosure. See ABA Formal Ethics Op. 94-385 (1994) (lawyer receiving court order or subpoena—whether from governmental agency or any other entity or person—for files and records relating to representation of current or former client must seek to limit order or subpoena on any legitimate grounds available to protect confidential documents); Ariz. Ethics Op. 2000-11 (2000) (lawyer who receives subpoena seeking disclosure of confidential client information must raise ethical duty of confidentiality and refuse to disclose information until tribunal enters final order requiring disclosure); United States v. Legal Servs., 249 F.3d 1077 (D.C. Cir. 2001) (appropriation act requiring federally funded legal aid organizations to give client names to auditors triggered required-by-law exception to state's confidentiality rule); N.C. Ethics Op. 2005-9 (2006) (lawyer for public company may reveal confidential information about corporate misconduct to SEC under permissive-disclosure regulations authorized by Sarbanes-Oxley Act, even if disclosure would be prohibited by state's ethics rules); D.C. Ethics Op. 288 (1999) (lawyer subpoenaed by congressional subcommittee to produce client files must seek to quash or limit subpoena on all available grounds; if subcommittee overrides objections and threatens lawyer with contempt, then lawyer may—but not required to—produce documents; threat of fines and imprisonment under federal law meets "required by law" standard).

[24] *See* Lawyer's Manual at 55:506.

jurisdictions.[25] Any disclosure of information relating to the representation of a deceased client based on implied consent must be tailored to avoid any unnecessary disclosure of confidential information. Therefore, the legal assistance office owes a deceased client the same duty of confidentiality as owed to a living client.

How should legal assistance personnel respond to queries about whether or not an Airman, living or deceased, had an appointment and, if so, what the subject matter concerned?

Using the above principles and prevailing views, the following responses are appropriate to inquiries:

--If the Airman had an appointment (i.e., met with an attorney or assistant), the attorney *may* disclose that fact and the subject matter of the appointment only with actual or implied consent, an exception to Rule 1.6, or a court order or other legal obligation. Each legal office should consider how personnel want to obtain actual consent from the client. If this is done, we recommend getting consent in writing, signed by the client. Actual consent is better than relying on implied consent, which would have to be determined, on a case-by-case basis, whether a reasonable belief exists that disclosure would 1) further the client's interest and 2) the client would have consented to the disclosure in order to carry out his or her intended objective of the representation. During the period in time while seeking actual consent from a living legal assistance client, we advise legal assistance personnel to use a Glomar response;[26] otherwise, the requester may be able to gather information that the person sought legal assistance.

--If the Airman did not have an appointment (i.e., did not meet with an attorney or assistant), then the duty of confidentiality does not apply. Nevertheless, disclosing that an Airman did not have an appointment, while refusing to respond to the question when an individual had an

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[25] *Haw. Ethics Op.* 38 (1999) (lawyer may disclose information relating to representation of deceased client if doing so would effectuate client's estate plan); *Kan. Ethics Op.* 01-01 (2001) (lawyer whose client inherited property from former client is impliedly authorized to disclose information from deceased client's file to effectuate inheritance); *See also* the American College of Trust and Estates' (ACTEC) commentary on Model Rule 1.6, *Obligations After Death of Client Obligation After Death of Client* ("In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client's death. However, if consent is given by the client's personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client's dispositive instruments and intent, including prior instruments and communications relevant thereto. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.")
(http://www.actec.org/public/Commentaries1.6.asp).

[26] The term Glomar response refers to a "neither confirm nor deny" response to Freedom of Information Act requests.

appointment frustrates the purpose of confidentiality and non-disclosure. As such, the appropriate policy is also providing a Glomar response. Otherwise, again, the requester may be able to know that a negative response would indicate the person did not have an appointment, and a Glomar response would indicate the person did have an appointment.

--If the Airman scheduled an appointment, but did not appear, the scheduling of an appointment for the purpose of entering into an attorney-client relationship should not be revealed for two reasons: 1) the prevailing view of most jurisdictions would treat the contact by the client as confidential if the individual sought the appointment for the purpose of entering into an attorney-client relationship, even though the attorney-client relationship did not form;[27] and 2) even if the

[27] Although there is no Air Force rule, the ABA and many states have a rule that sets out duties owed to prospective clients. ABA Model Rule of Professional Conduct 1.18 states that a lawyer shall not use or reveal information learned in consultation with a prospective client, who is someone who discusses with counsel the possibility of forming an attorney-client relationship, except as Model Rule 1.9 (concerning former clients) would permit. *See generally* ABA Formal Ethics Op. 90-358, "Protected Information Imparted by Prospective Client" (1990) (Model Rule 1.6 applies to "information imparted to a lawyer by a would-be client seeking to engage the lawyer's services even though no legal services are performed and the representation is declined. Under some circumstances, the provisions of these rules prohibit the lawyer from revealing the identity of the would-be client and the nature for which representation is sought.") *See also*, ABA AMRPC Rules 1.6 (which generally prohibits the disclosure of a client's identity or whereabouts unless the client consents or the disclosure is impliedly authorized to effectuate the representation); Conn. Ethics Op. 99-35 (1999) (lawyer participating in referral program that offers services to bankruptcy clients and pays lawyer for each referral must obtain client consent before disclosing client's name to program); Ill. Ethics Op. 97-1 (1997) (lawyer may provide bank with names of clients as potential bank customers only with clients' consent); Iowa Ethics Op. 97-4 (1997) (law firm brochures and newsletters may contain names of clients if clients give written permission); *see also* Utah Ethics Op. 97-06 (1997) (lawyer accepting credit card payment from client who wishes to keep identity confidential should alert client to possibility of its disclosure to credit card company); A lawyer's duty to maintain client confidences extends to information disclosed by nonlawyer assistants and employees. *See* AFRPC 5.3, Nonlawyer Assistants, extending the rule of confidentiality to JAG Corps personnel who screen potential clients and make appointments. *See State ex rel. Okla. Bar Ass'n v. McGee*, 48 P.3d 787 (Okla. 2002) (lawyer responsible for nonlawyer employee's unauthorized disclosure of client information); Mich. Ethics Op. RI-187 (1994) (information gained by nonlawyer lobbyist employed by firm must be treated as confidential even if representation not undertaken); N.Y. State Ethics Op. 774 (2004) (lawyers must take reasonable care to ensure that conduct of nonlawyer employees comports with lawyers' ethical duty of confidentiality); *see also Commonwealth v. Mrozek*, 657 A.2d 997 (Pa. Super. Ct. 1995) (individual's statement to lawyer's secretary that he needed to speak to lawyer because he had "just committed a homicide" is protected by attorney-client privilege). *See generally* Annotation to Model Rule 5.3 (Responsibilities regarding Nonlawyer Assistants). In the context of litigation, the general rule is that a client's identity and whereabouts are not protected by the attorney-client privilege unless "the net effect of the disclosure would be to reveal the nature of a client communication."

information is not confidential, the same policy of non-disclosure should apply for the reasons discussed above.

As an additional point, legal assistance personnel who correspond with a client via e-mail, assuming state ethics laws permit, must include an appropriate attorney-client disclaimer in the message itself. We also recommend that the email subject line include "Attorney-Client Privileged" and all such emails be encrypted.

Conclusion

A legal assistance client's appointment is a matter relating to representation. As such, legal assistance offices owe the client a duty of confidentiality. A third party who seeks information from the legal assistance office about a client's appointment will not be able to obtain information without consent (actual or implied) or an exception to AFRPC Rule 1.6. This applies whether or not the legal assistance client is now deceased. A third party's inability to obtain information from a legal assistance office would not prevent obtaining this information elsewhere (i.e., member told a friend or First Sergeant that the member went to the legal office to talk to an attorney about his divorce).

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