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Advisory Committee on Professional Ethics

Appointed by the Supreme Court of New Jersey

Opinion 700

Advisory Committee on Professional Ethics

Consent and Barring Disclosure of Protected Information

Inquirer is a not-for-profit corporation which receives public and private funding to provide legal assistance to people with disabilities. One public funding source has required the inquirer to collect and disclose to the public agency various client personal information, some of it relating to a particular disability, AIDS. The required disclosures include “client-identifying information (name, address, phone number), demographic information (ethnicity, race), health status, and biographical data (*e.g.*, how clients became infected with HIV, whether they use intravenous drugs).” According to the inquirer, each client has been preassigned a “unique record number”, or “URN”, by the county HIV consortium, before they come to the inquirer for service, and that number is reported to the county consortium after the client has received service, thus potentially indicating the client’s name and other identifying information. Each client is required to sign a consent to disclosure of the URN to the consortium before they receive services.

In re Advisory Opinion No. 544 of the New Jersey Supreme Court Advisory Committee on Professional Ethics (hereafter *In re 544*), 103 N.J. 399 (1986), represents

the definitive word concerning permissible disclosure in a non-criminal context of information required to be kept confidential under *RPC* 1.6 or the attorney-client privilege, *N.J.S.A.* 2A:84A-20. *In re 544* held that

“... client identity may not be disclosed to any private or public funding agency in the absence of appropriate consent or other legal justification. In so ruling, we determine that a client’s identity constitutes information relating to the representation of a client under the current Rules of Professional Conduct and a secret entitled to non-disclosure, if not a protected confidential communication, under the attorney–client privilege and former Disciplinary Rule 4-101(A), which was relied upon by the ACPE in this case.

Id. at 409

The Court also emphasized that “... the fact that client information that serves to identify the client would clearly be protected under the current Rules of Professional Conduct, *RPC* 1.6. As noted, this rule accords confidentiality to any information relating to the representation of a client. Manifestly this would include a client’s identity.

Ibid.

The Court recognized that there could be exceptions to this bar to disclosure in certain circumstances.

We acknowledge that if by statute or valid rule or regulation information concerning the identity of clients of a legal services organization were clearly required to be reported for legitimate governmental purposes, the analysis and result could well be different. A different conclusion as to the propriety of disclosure might also obtain in the event private funding sources sought client information under enforceable rules or regulations. It can reasonably be assumed that in such a context, the welfare and interests of clients would remain a paramount concern and that the disclosure occasioned by such necessary reporting would be attended by suitable protections reflecting the needs for confidentiality and privacy.

Id. at 411

Under the Court's analysis, an attorney or attorney organization would be required to determine that any disclosure was compelled by "reasonable rules clearly requiring such disclosure for legitimate purposes." *Id.* at 412. The requisite analysis of whether the rules are "reasonable" under *In re 544*, and whether there are "legitimate purposes", need not be reached in the present inquiry, because the inquirer represents that no statute or formally promulgated regulation specifically requires release of the protected information. In the absence of such a valid legal statute or formal rule, an

attorney or attorney organization cannot disclose such protected information.

In the present inquiry, the inquirer uses a client consent form to authorize release of the URN. Two cautions must be made concerning the use of such a consent form.

First, we note a contradiction within the consent form itself. A sentence in its second paragraph declares “Permission [for inquirer] to report the URN to [the county consortium] is required before [inquirer] can provide services to any individual.” The last sentence of the form, however, states that “Refusal to sign will not affect your entitlement to [inquirer’s] services. This contradiction is problematic. Conditioning services upon consent is inherently coercive. When such a condition is permissible is addressed earlier in this opinion, but an attorney and attorney organization owe a duty of complete candor and clarity to any prospective or actual client being asked to consent to a waiver of legal rights. This apparent contradiction must be resolved and removed.

Second, under *In re 544*, any such consent must be “valid”. We observe that utilization of a consent form would not be “valid” if it is inherently coercive (i.e., services are conditional upon execution of the form) in a situation where no law or regulation properly or specifically requires disclosure of the protected information in the first place. If there is such a rule, then such disclosure must be made prior to taking any protected information, and consent must be obtained.