

Final

**ETHICS ADVISORY PANEL**  
**OPINION NO. 96-27, REQUEST NO. 676**  
**Issued November 14, 1996**

**FACTS:**

As a condition for eligibility for government assistance, an individual was required under state and federal law to assign his/her rights against a third party to a state agency. The inquiring attorney, a staff attorney for the state agency, instituted suit against the third party. During the course of the proceedings, the court ordered medical testing, the results of which were to be made available to the parties and to the court. Before the test results were available, the individual ceased receiving the government benefits.

In compliance with federal law, the state agency notified the individual that notwithstanding cessation of government benefits, the agency would continue to provide legal services on the individual's behalf unless he/she notified the agency that he/she did not want the services. The notice also explained the individual's rights to any monies recovered as result of the continuing lawsuit. The individual did not notify the agency or the inquiring attorney that he/she did not want the agency's services.

The inquiring attorney later acquired the results of the medical testing and made them known to the individual. Upon learning the results, the individual advised the attorney that he/she no longer wanted to pursue the action against the third party and directed the attorney not to reveal the test results to the third party or to the court.

**ISSUE PRESENTED:**

The inquiring attorney asks whether he/she may disclose the test results to the court and to the third party, notwithstanding the individual's instruction to the contrary.

**OPINION:**

The inquiring attorney must preserve the individual's confidences under Rule 1.6 of the Rhode Island Supreme Court Rules of Professional Conduct, and therefore, may not reveal the test results to the third party or to the court. The inquiring attorney may no longer pursue the action on the individual's behalf because the individual has directed the attorney to abandon the action against the third party.

**REASONING:**

This inquiry presents a conflict between a lawyer's duty to maintain client confidentiality under Rule 1.6, and a lawyer's duty of candor toward the court under Rule 3.3. The key question is whether an attorney-client relationship has been established between the inquiring attorney and the individual. If so, information relating to the representation is protected by Rule 1.6. Ordinarily, if the facts do not support the conclusion that there is such a relationship, then the information may be disclosed. However, in certain cases where the individual might reasonably have believed that such a relationship did exist and the attorney failed to make reasonable efforts to correct this misunderstanding, then the attorney may be prohibited under Rule 1.6 from disclosing the information. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 89-1528(1989).

The ABA Committee on Ethics and Professional Responsibility, in its Informal Opinion 89-1528(1989), examined similar factual situations. Typically, an individual who was receiving government assistance and who, therefore, had assigned his/her claims to the state, disclosed to the agency lawyer that while receiving government benefits he/she had received payment directly from the responsible party. The issue presented was whether the lawyer could reveal this information to the agency. The ABA Committee reasoned that, although theoretically the attorney's client is the state under the assignment, and the individual is only a witness, the circumstances in such cases introduce such ambiguity regarding the relationship that an individual who has normal expectations of privacy and confidentiality when dealing with an attorney who appears to be working on his/her behalf, may misunderstand the attorney's role. It concluded that in such cases, an attorney is required under Rule 4.3 entitled "Dealing With Unrepresented Person" to make reasonable efforts to avoid the misunderstanding. It further concluded that, when the attorney fails to make the required effort, and then receives information from the individual who misunderstands the attorney's role, the attorney may be prohibited under Rule 1.6 from disclosing the information to the agency.

In the case before the Panel, the facts submitted do not disclose what efforts, if any, the inquiring attorney made to explain the attorney's role. The Panel finds that in the instant case, there is an attorney-client relationship. Even if there were not such a relationship, at the very least, it appears that the individual might have formed a reasonable belief that an attorney-client relationship existed. Such a belief and the attendant expectations of privacy and confidentiality would have been reinforced by the notice which was sent to the individual, advising him/her that legal services would continue on his/her behalf even though government benefits had ceased. Therefore the inquiring attorney has an obligation of confidentiality under Rule 1.6.

Pursuant to Rule 1.6, an attorney "shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation. . . ." This rule of confidentiality applies not only to matters communicated to the attorney in confidence by the client, but also to all information relating to the representation, whatever its source. See Comment to Rule 1.6. In this inquiry, the result of the medical testing is information relating to the inquiring attorney's representation of the individual, and the information is therefore protected from disclosure by Rule 1.6. See In re Ethics Advisory Panel Opinion No. 92-1, 627 A.,2d 317, 322-323 (R.I. 1993) (former counsel's admission of embezzlement of client's money to client's successor counsel was a confidential communication under Rule 1.6 because the information was related to successor counsel's representation of client, and so there was no duty to report under Rule 8.3.)

Rule 3.3 requires disclosure of a material fact to a tribunal if it is necessary to avoid assisting a client's fraudulent act, even if compliance requires disclosure of information otherwise protected by Rule 1.6. See Rule 3.3(a)(2) and Rule 3.3(b). In this case, the individual does not intend to perpetrate a fraud on the court, since the individual, in light of the test results, no longer intends to pursue the claim against the third party.

Rule 4.1(b) imposes a duty to disclose a material fact to a third person when disclosure is necessary to avoid a client's fraudulent act. However, Rule 4.1(b) expressly exempts disclosure of information which is protected by Rule 1.6.

The Panel concludes that the inquiring attorney may not disclose the test results to the third party or to the court, and is obligated under Rule 1.6 to maintain the individual's confidence because the information is related to the representation of the individual. The inquiring attorney may not continue to pursue the action on the individual's behalf because the individual has indicated that he/she does not want to pursue the matter.