

NACDL ETHICS ADVISORY COMMITTEE
Formal Opinion No. 03-01 (January, 2003)

Introduction

On December 8, 2002, the NACDL Ethics Committee issued an informal ethics opinion to a public defender in Montana regarding systemic indigent defense impact litigation brought by the ACLU on behalf of several criminal defendants in Montana.¹ *White v. Martz*, No. C DV-2002-133 (Montana 1st Jud. Dist. Ct., Lewis & Clark County (April 1, 2002)). After the informal opinion was issued by e-mail, NACDL's Indigent Defense Committee queried the Ethics Advisory Committee regarding similar issues raised by the litigation. The informal opinion sought advice concerning a civil case in which public defenders in Montana were witnesses.

In its query, the Indigent Defense Committee provided additional information. Specifically, the Indigent Defense Committee provided the Ethics Advisory Committee with the following documents: (1) the First Amended Complaint in *White v. Martz*, (2) (at our request) representative samples of attorney time sheets and billing statements in indigent defense cases that the plaintiffs had obtained through open records requests made to state and local governments in Montana by those appointed to represent indigents in Montana that are already public records under Montana law. We are also informed that NACDL's Indigent Defense Committee and NACDL's Montana affiliate, the Montana Association of Criminal Defense Lawyers, had provided material assistance to the ACLU in bringing the Montana litigation.

As a result of the Indigent Defense Committee's query and the additional information provided, the NACDL Ethics Advisory Committee replaces its informal e-mailed ethics opinion with this Formal Opinion.

Time Sheets

An attorney's time sheet generally is considered confidential because it contains client secrets. It is also privileged from disclosure under the attorney-client privilege, but only if it

¹ NACDL's Ethics Advisory Committee usually issues informal advice by telephone, fax, and occasionally by e-mail. Those opinions are confidential to the degree the recipient requires. We are informed that the e-mailed informal opinion was disseminated. Therefore, confidentiality is no longer an issue.

contains attorney work product.

Work product is information gathered or created in preparation for litigation, and it is ordinarily exempt from disclosure. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 87-92 (2000).² In criminal cases, attorney work product may include: the identities of potential witnesses, places visited and things done in an investigation, information derived from investigation, and legal research topics. It also includes an attorney's mental impressions, opinions, or strategy. See generally *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). It can actually be broader than the attorney-client privilege. *United States v. Nobles*, 422 U.S. 225, 238 & n. 11 (1975). If work product is present in an attorney's time sheet, it most likely will be found in the paragraphs describing the attorney's work justifying the attorney's compensation or use of time.³

That does not mean, however, that all time sheets or summaries of time sheets contain work product.⁴

² RESTATEMENT § 87 states:

(1) Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of further litigation.

(2) Opinion work product consists of the opinions or mental impressions of a lawyer; all other work product is ordinary work product.

(3) Except for material which by applicable law is not so protected, work product is immune from discovery or other compelled disclosure to the extent stated in §§ 88 (ordinary work product) and 89 (opinion work product) when the immunity is involved as described in § 90.

Also recognizing the substantial difference between ordinary and opinion work product are: *Palmer v. Farmers Ins. Exch.*, 261 Mont. 91, 861 P.2d 895 (1993) (showing of need can overcome work-product doctrine but not attorney-client privilege); *Kuiper v. District Court*, 193 Mont. 452, 632 P.2d 694 (1981) (opinion work product has greater protection than ordinary work product).

³ Even attorneys in established public defender offices are usually required to account for their time internally so their office will know how they spend their time and whether they are productive employees.

⁴ In the federal system, for example, the detailed CJA forms submitted by lawyers appointed for indigent defendants are kept under seal from the government, and they are not "public records." The CJA summaries (known in the statute as the "payment voucher"), however, are public records and are disclosed upon conclusion of the case. 18 U.S.C. § 3006A(b)(4)(B-D) (1999 amendment) (also provides for redaction of any work product or privileged information).

Under the CJA, attorneys must provide detailed accounting of their time, consistent with maintaining confidentiality of their purpose in the use of that time, and only the judicial officer(s)

In Montana, the claim forms provided the Ethics Advisory Committee are summary time sheets. One time sheet described the time spent doing particular matters, including the name of a witnesses talked to. Nevertheless, Montana law and regulation for payment of claims may require some limited disclosures for the lawyer to be paid, and this would be consistent with RESTATEMENT §§ 87(3) (exception to work product required by law) & 91 (voluntary waiver). Nothing in the representative sample of claim forms with time sheets provided us shows privileged information with the exception of a name of a witness talked to by the attorney in the course of preparing a defense.

If an attorney's time sheet contains work product, the attorney may not produce the time sheet in litigation without first asserting confidentiality and attorney-client privilege, seeking in camera review by the tribunal and then redaction of all privileged material. Mont. R. Civ. P. 26(b)(3). See *In re Estate of Lande*, 295 Mont. 160, 983 P.2d 308 (1999), *overruled on other grounds*, *In re Estate of Bradshaw*, 305 Mont. 178, 24 P.3d 211 (2001). This is required by the attorney's duty to protect privileged material. Mont. Rules of Professional Conduct, Rule 1.6 (confidentiality); Mont. Code Ann. § 26-1-803 (attorney-client privilege); NACDL Ethics Advisory Committee Formal Opinion 02-1 (Nov. 2002) (part IV: attorney has a duty to assert confidentiality to protect attorney client confidences).⁵

Even where an attorney time sheet contains work-product information, this does not necessarily mean that the entire time sheet will be protected from disclosure. Only the privileged material is protected from disclosure. Once that material is redacted, the non-redacted portions of the document may be produced if otherwise discoverable. *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973); Mont. R. Civ. P. 26(b)(3).

approving the form see it, and it is attached the summary. Approved claims are separate sheets showing the summaries of the time spent on various categories of activities. That summary goes to the AOC for payment. The individual time sheet record remains under seal in the local U.S. District Clerk's Office. The summary, however, is what becomes available to the public upon conclusion of the case.

Another example of required disclosure of time sheets is attorneys fees litigation under 42 U.S.C. § 1988 and other fee shifting statutes. In those cases, the disclosure occurs well after the work is performed and the case has succeeded. There are even cases of civil rights cases defense counsels' time sheets being disclosed when their fees in defense are compared to the fees of the prevailing plaintiff when the plaintiff's fee is challenged as too high.

Another method of disclosure can occur when an attorney's fee is sought as a litigation sanction under Fed. R. Civ. P. 11.

⁵ <http://www.nacdl.org/public.nsf/freeform/attomeyclient?opendocument>.

Nor is it true that all attorney time sheets are privileged and confidential, particularly where state law may require justification for time spent for the attorney to be compensated. An attorney time sheet is not privileged where it contains only non-confidential and non-work-product information, such as the case name, the docket number and the number of hours spent on the case. Nor is a time sheet privileged when it merely breaks down the hours spent by the attorney in a particular case into activity categories, such as correspondence, client meetings, legal research, investigation or in-court and out-of-court time.

A time sheet also will not be privileged and confidential if it is a document that the attorney is required by law to file with a government agency and with the knowledge that, upon filing, the document becomes a public record. Such documents are exempt from disclosure only if other restrictions or protections have been imposed. Filing would be a waiver as to that record if it is a “public record.” RESTATEMENT § 91.

We caution that an attorney being compensated with government funds for indigent defense should insure that the time sheets submitted do not reveal confidential matters or work product to protect client confidentiality. If the judicial officer administering the funds requires detail that the lawyer feels encroaches on confidentiality, it is the lawyer’s duty to insure confidentiality and that the detailed information is kept under seal from the prosecuting attorney and the public.

Depositions

A criminal defense lawyer is not immune from a subpoena to testify, but client confidentiality and the attorney-client and work product privilege must always be maintained. Where litigants seek to depose a lawyer about cases where the lawyer has provided representation, NACDL advises that the lawyer should refuse to answer questions concerning the specific nature of the representation unless ordered to do so by the court or unless the client has waived the attorney-client privilege. *See* Mont. R. Evid. 503 (waiver of privileges). Where a lawyer is ordered to testify about confidential or privileged information, the lawyer should seek a protective order limiting the use of the information to a civil case only and preventing review of the testimony and any associated exhibits by any prosecutor. *See, e.g.,* Mont. R. Civ. P. 26(c) (allowing court to issue protective order for work product in civil litigation). The duty of loyalty to the client requires that the attorney seek to limit disclosure and then seek a protective order of what was disclosed to insure that the required disclosures are strictly limited to the purposes for which they are obtained.

Thus, where questions in a deposition that relate to the general nature of the representation and the state system of providing indigent defense, but do not seek to expose material subject to the attorney-client or the work-product privilege, there is no legal basis upon which to refuse to answer those questions. If the questioning seeks specifics of the representation, the attorney must determine for him or herself whether what is sought is protected by the privilege, and privilege can then be invoked and resolved by the trial court on a motion to compel under Mont. R. Civ. P. 37.

In the First Amended Complaint provided us, the Montana lawsuit is a class-action challenge to alleged systemic indigent defense deficiencies that seeks prospective, systemic relief. Thus, the litigation makes no ineffective assistance of counsel (“IAC”) claim on behalf of any class members. Consequently, if the information being sought by the ACLU is not specific to a client’s case, but rather is related to the general nature of representation and/or the operation of the indigent defense system as a whole in that county or the state, then an attorney should provide that information. Of course, if a client waives the attorney-client privilege, specific case information may be revealed. Mont. Rules of Professional Conduct 1.6(a); Mont. Code Ann. § 26-1-803; Mont. R. Evid. 503.

Should the ACLU prevail in this case, the State of Montana will not be required to retry any criminal cases nor will the litigation necessarily lead to wholesale reversals of convictions. Individual IAC claims would have to be pursued on their individual merit.

Contact with Represented Persons

Where a represented person initiates contact with a lawyer for the purpose of obtaining new representation or collateral representation, there is no ethical rule that prohibits the lawyer from communicating with the represented party without the original lawyer’s knowledge. Mont. Rules of Professional Conduct, Rules 4.2 (and comment), 7.1, 7.3. *See* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 38.5 (3d ed. 2001) (the definition of “represented party” in Rule 4.2 does not prohibit lawyers from contacting persons the clients of lawyers in other matters as long as the contested subject matter is not discussed; “Naturally, the lawyer making the contact must scrupulously avoid discussion of anything that could have an impact on the contested matter.”).⁶ That remains true where, as here, a represented criminal defendant seeks representation for civil litigation, even that which tangentially involves the

⁶ In *Grievance Comm. v. Simels*, 48 F.3d 640, 650-51 (2d Cir. 1995), the Second Circuit refused to broadly define the word “party” so as to chill the ability of any counsel to interview witnesses.

criminal representation.

Here, it our understanding that one or more of the criminal defendants who became the civil plaintiffs in the lawsuit initiated contact with the ACLU or other third parties who then contacted the ACLU on their behalf. In such a circumstance, the ACLU lawyers would not be required to notify a criminal defendant's lawyer before speaking with the defendant about this systemic civil litigation, nor would they be in violation of any ethical rules prohibiting contact with a represented party.