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Mr. John McConnell

Office of Court Administration

25 Beaver Street, 11th Floor

New York, NY 10004

November 23, 2015

Disclosure Exemption Rules

Dear Mr. McConnell:

I am writing to you as both a practicing attorney and a sitting commissioner of the New York State Legislative Ethics Commission and the Assembly Ethics & Guidance Committee, with regard to OCA seeking comment of the proposed exemption rules.

I understand that there four (4) areas in which OCA is seeking comments which I will address below.

1. The attorney-client relationship warrants more protections than that of other professions because the relationship requires extreme confidence and privacy because of the sensitivity of some of the matters and legal advice sought. Revelation of that relationship and or its nature can cause embarrassment of a persona/financial nature to a client.

2. Different rules should apply to those being represented as individuals as opposed to corporate clients. It seems that the genesis of these proposed rules is the conduct of some legislators who have misused the position being of counsel to just lend their names and government position to attract clients to a firm with an expectation on behalf of the client that favorable treatment can be obtained. In my opinion if an attorney is taking on a client for himself or the firm the expectation should be that the attorney should be working on the matter and justifying his/her income. Otherwise the attorney is merely selling his/her office.

In the case of the individual client which is the work I do as a solo practitioner I am as they say the chief cook and bottle washer I handle estate planning and probate , trusts, real estate and business contracts I

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do all the work involved. If I have to divulge those clients information that could have a chilling effect on my practice and that information would serve no legitimate purpose in rooting out corruption.

I already disclose my earrings and the nature of the work I do for it. Client disclosure can result in the news media seeking out the clients for verification of the work of questioning the nature of the work no matter how much JCOPE will say it is confidential. They have a poor record on preventing leaks.

Therefore I believe that those legislator/attorneys working of counsel should have to justify their income but not an individual attorney who actually does legal work to earn the income.

3. In addressing the issue of trade secrets, this issue usually arises in the context of zoning and planning and mergers and acquisition. Proof could consist of the general nature of the matter, the geographical area involved and the attorney working on the matter and the time frame involving the matter and an attestation by the attorney that he/she is actually doing the work, and that they are not using their position as an elected official to influence the matter. If need be at the conclusion of the matter further information could be required if really needed.

4. Regarding disclosure v. non-disclosure rules I do not believe they protect the clients against public disclosure. The fact you have to cite their name and address the legal matter and fees exposes the client's personal business for no legitimate reason. If the attorney is doing the legal work, and they are not before or involving a government entity, there should be no reason for the information because even if the information is kept in a lock box there is still a chance that a legal challenge could cause a disclosure.

What would be the case if the legislator were a physician or a psychiatrist how would the HIPPA rules apply?

I hope this information is helpful and if I can be of any further assistance, please do not hesitate to contact me.

Yours truly,

Michael A. Montesano

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December 1, 2015

John McConnell, Esq.
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Re: Comment on Disclosure Rules

Dear Mr. McConnell:

I am not an attorney but am a reader of the New York Law Journal. The New York Law Journal indicated OCA requested comments in four areas regarding the Disclosure Exemption Rules. This letter is a response to OCA's request. I believe that in order to foster transparency, legislators and etc., should disclose all clients unless a Court would "seal" the matter in the normal course. Neither the fees nor the matter giving rise to the client representation should be disclosed. I cannot think of any prejudice to a client if their name appears on a list with tens or hundreds or thousands of other individuals, corporations etc., because individuals and corporations seek counsel on a multitude of matters from multiple firms all the time. If an oversight body, the press or other special interest group thinks something is improper, they can seek additional disclosure through currently available means. Further, if a matter results in a legal action, my understanding is that the Court files are open to the public in most cases, thereby disclosing the relationship. Lastly, some lawyer advertising includes the names of memorable clients in order to attract everyday people to retain their firm, again disclosing the relationship.

Accordingly, there should not be any exemptions to the disclosure rules unless as I indicated above a Court would "seal" the matter in the normal course.

Very truly yours,

Edward Virshup

EMV: sb

NEW YORK
CITY BAR

COMMITTEE ON GOVERNMENT ETHICS

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December 10, 2015

John W. McConnell, Esq.
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Re: Request for Public Comment on Proposed Rule for the Grant of Disclosure Exemptions under Public Officers Law §73-a

Dear Mr. McConnell:

I write on behalf of the New York City Bar Association Committee on Government Ethics in order to provide comments on the proposed rule for the grant of disclosure exemptions. We appreciate the opportunity to provide the Committee's thoughts.

In a 2010 report recommending that disclosure requirements should be extended to legislators who are lawyers, the City Bar wrote:

> There is no basis for excluding lawyers from the public scrutiny to which legislators should be held. Requiring attorney-legislators to make these disclosures will not violate the rules governing attorney conduct and will go a long way toward restoring public confidence in New York State's governing process and the independence of legislators. Similar financial-disclosure requirements have applied to legislators, including those who are attorneys, for decades in other states. The type of information we believe should be disclosed is not, in the ordinary situation, entitled to protection under either a claim of privilege or confidence, and in any event a system can be designed to address particular situations where the public's interest in disclosure is outweighed by a client's interest in secrecy.[1]

[1] Committee on State Affairs, Committee on Government Ethics, Committee on Professional Responsibility, "Reforming New York State's Financial Disclosure Requirements for Attorney-Legislators", New York City Bar

We now turn to the four questions posed by the Office of Court Administration.

1. **In light of the ethical rules governing the attorney-client relationship, should the identities of clients of attorneys be subject to a higher standard of protection from disclosure than clients of other professions under the statute? If so, what is that standard?**

It is beyond the expertise of the Committee to opine as to how the ethical duties of lawyers may differ from the ethical duties of other professionals identified in the statute. Accordingly, we cannot affirmatively state that the attorney-client relationship calls for a *higher* standard of protection vis-à-vis other professions that are governed by ethical rules. That said, certain other professions identified in the statute (e.g., mental health and pharmaceutical) are automatically exempt from disclosing client identity. Since legislators who practice law do not enjoy an automatic exemption from disclosure, the following ethical rules governing the attorney-client relationship will bear on the decision of whether to grant a disclosure exemption:

The Impact of Attorney-Client Privilege

In New York, CPLR 4503(a) defines an attorney-client privileged communication as "a confidential communication made between the attorney or his employee and the client in the course of professional employment." Generally, the privilege covers communications made in confidence by the lawyer to the client (or vice versa) for the purpose of giving or receiving legal advice. Courts have routinely held that the identity of a client does not come within the purview of the attorney-client privilege because the disclosure of representation does not reveal the substance of any such communications between the attorney and client.[2] Courts have limited the attorney-client privilege to encompass only confidential communications, and have consistently held that, absent special circumstances, client identity and fee arrangements are not considered privileged communications.[3]

Association (Jan. 2010), at 2, *available at* http://www.nycbar.org/pdf/report/uploads/20071850-ReformingNYSFinancialDisclosureRequirements.pdf.

[2] See e.g., Colton v. United States, 306 F.2d 633 (2d Cir. 1962); U.S. v. Pape, 144 F.2d 778, 782 (2d Cir. 1944; United States v. Hunton & Williams, 952 F. Supp. 843 (D.C. 1997); Dietz v. Doe, 935 P.2d 611 (Wash. 1997); Splash Design Inc. v Lee, 14 P.3d 879 (Wash. App. 2001). See also Hays v. Wood, 25 Cal.3d 772 (Cal. 1979) (holding that requirements to disclose sources in financial-disclosure statutes do not dilute attorney-client privilege).

[3] See e.g., In Re Kaplan, 168 N.E.2d 660, 661 (N.Y. 1960) (stating that great weight of authority does not recognize client's identity within scope of confidential communications and will not treat identity as privileged information); Colton, 306 F.2d at 637 (stating that, even though "communications" must be interpreted broadly, privilege extends only to those matters communicated to attorney in professional confidence); Lefcourt v. U.S., 125 F.3d 79, 86 (2d Cir. 1997) (stating that client identity and fee information are not privileged, absent special circumstances, because privilege is defined to encompass only confidential communications); United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991) (holding that outside of special circumstances, identification of clients who make substantial cash payments is not disclosure of privileged information); United States v. Liebman, 742 F.2d 807 (3d Cir. 1984); Reiserer v. U.S., 479 F.3d 1160, 1165 (9th Cir. 2007) (stating that attorney-client privilege ordinarily protects neither client's identity nor information regarding fee arrangements reached with that client).

The Impact of Client Confidentiality Rules

Rule 1.6 of the New York Rules of Professional Conduct requires attorneys to preserve the confidences of their client. Rule 1.6(a) defines confidential information as "information gained during or relating to the representation of a client, whatever its source, that is protected by the attorney-client privilege, likely to be embarrassing or detrimental to the client if disclosed, or information that the client has requested be kept confidential."[4] Rule 1.6 (b) permits an attorney to "reveal or use confidential information...to comply with other law or court order."[5] Existing law and practice is entirely consistent with a financial-disclosure law that requires attorney-legislators to disclose client identity, fee information and a description of services.

In the vast majority of circumstances, identifying the name of a client will not breach a client-confidence.[6] While "information" may include the identity of a client,[7] courts have found that revealing client identities does not breach ethical obligations because attorneys may be obligated or permitted by law to provide this information.[8] Indeed, Rule 1.6(b)(6) permits a lawyer to reveal information when required to comply with a law and courts have noted that such a legal obligation would override any claimed ethical duty of secrecy to a client.[9] Furthermore, such information is regularly disclosed during the course of civil-litigation discovery and criminal investigations.

Against this backdrop, we recommend looking to the rules in Washington and California in order to determine an appropriate standard for granting disclosure exemptions.

Under a very narrow set of circumstances, attorney-legislators in Washington State may receive exemptions from the disclosure requirements for "undue hardship." As a general rule, we support the use of an "undue hardship" standard and think it comports with ethical requirements. The Washington Public Disclosure Commission, which is made up of five members from different political parties, is authorized to allow modification or suspensions of the reporting requirements in a particular case when the Commission finds that "literal application" of the chapter "works a manifestly unreasonable hardship" and that the suspension or modification of the reporting requirements "will not frustrate the purpose of the chapter."[10] The Commission issued an interpretation outlining how it will generally consider modification requests from attorneys. The interpretation states that the identity of a client does not fall within the purview of the attorney-client privilege unless there is a "strong probability" that the disclosure would

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[4] 22 NYCRR 1200.1.6(a) (April 1, 2009).

[5] 22 NYCRR 1200.1.6(b) (April 1, 2009).

[6] 22 NYCRR 1200.1.6(a)-(b) (April 1, 2009).

[7] See American Bar Association, Annotated Model Rules of Professional Conduct, 6th Ed. (2007).

[8] U.S. v. Legal Services for New York City, 100 F. Supp 2d 42, 47 (D.D.C. 2000).

[9] U.S. v. Hunton & Williams, 952 F. Supp. 843, 856 (D.D.C. 1997).

[10] Wash. Rev. Code § 42.17.370(10) (1973).

convey the substance of a confidential communication between client and attorney.[11] This interpretation firmly relies on well-established law that, absent special circumstances, the identity of a client of an attorney or law firm is not protected by attorney-client privilege.[12]

California's system is like that of Washington State. Officials may request exemptions from the Act's requirement if the disclosure would violate a legally recognized privilege under California law.[13] Based on California law, the California Fair Practices Commission, which is also an independent, non-partisan body of five members, does not consider a client's identity or fee arrangements to be protected by the attorney-client privilege.[14] Similarly to Washington State's interpretation, a limited exception to the California rule exists where disclosure of representation could implicate the client in unlawful activities.[15]

We would support OCA's adoption of either approach as the standard of protection afforded to a lawyer/legislator's client's identity because both approaches recognize that client identity is considered privileged in only very limited circumstances.

2. **Should a different standard of disclosure apply to clients represented in a matter as individuals, as opposed to clients represented in their commercial or corporate capacity.**

We do not believe there should be a distinction based on the individual or corporate form of the client.

3. **What showing, if any, should be required to support a statement by the filer that the factors set forth in the statute as supporting nondisclosure of a client identity – to wit, that disclosure may reveal trade secrets, or could reasonably result in retaliation against the client, or may result in undue harm to the attorney-client relationship, or may result in an unnecessary invasion of privacy to the client – are applicable in a given matter.**

Given the extensive list of automatic exemptions involving a variety of representations (e.g., bankruptcy, family court, criminal cases, estate planning), there should be a presumption in favor of disclosure of client identities in matters not subject to the automatic carve-outs. In the absence of an automatic exemption, there should be a showing that the public's interest in disclosure is outweighed by a client's interest in secrecy. This exemption would require a showing that the fact of representation itself is privileged, or that disclosure is likely to be

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[11] Washington Public Disclosure Commission 02-03, Requests for Modification of the Requirements to Report Information on the Personal Financial Affairs Statement for Lawyers and Law Firms, (January 28, 2003), *available at* http://www.pdc.wa.gov/archive/guide/pdf/02-03.pdf.

[12] Id. (citing Splash Design Inc. v Lee, 14 P.3d 879 (Wash. App. 2001); Dietz v. Doe, 935 P.2d 611 (Wash. 1997); United States v. Hunton & Williams, 952 F. Supp 843 (D.C. 1997)).

[13] Cal. Code of Regulation § 18740.

[14] Hays, 25 Cal. 3d at 772.

[15] Hays, 25 Cal. 3d at 785.

embarrassing or detrimental to the client, such that it rises to the level of undue harm or undue hardship.

4. **In the absence of a more defined legislative directive, does the standard articulated in section 160.4(c) of the proposed rule for review of exemption requests – the balancing of interests in disclosure against those favoring exemption in light of the "totality of the circumstances" – appropriately effectuate the statute's purpose?**

No, we believe there should be a presumption in favor of disclosure and, for the reasons stated above and in our earlier reports, we believe that there are only limited circumstances where the public's interest in disclosure is outweighed by a client's interest in keeping his, her or its identity secret.

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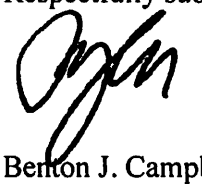
Thank you for the opportunity to submit these comments. As always, we would welcome any questions or comments.

Respectfully submitted,



Benton J. Campbell