

October 2025 WSBA Bar News *Ethics & the Law* Column

**Good Counsel:
New WSBA Advisory Opinion on
Reporting Client Data to Legal Aid Funders**

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The conundrum that confronts legal aid providers over the extent to which they can provide statistical data to funders while preserving client confidentiality is not new. The ABA, for example, first wrestled with this issue in the 1960s and 1970s.¹ The WSBA, too, initially addressed this issue in 1990 in Advisory Opinion 183 and then updated that opinion in 2009. Then as now, funders often ask providers for statistical information to, for example, confirm that funds are being used for their intended purpose. Then as now, there is an inherent tension between those understandable requests and legal aid lawyers' duty of confidentiality toward their clients.²

Most of the opinions nationally on this topic—including WSBA Advisory Opinion 183—resolved this tension by permitting providers to release general information that was not identifiable by client while also concluding that any client-specific information required the client's informed consent for disclosure.³ Since many of those opinions were issued, however, data science has grown more sophisticated—including in some instances the ability to take “anonymous” information, combine it with public data, and essentially “reidentify” the clients.⁴

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To address this emerging issue, the WSBA late last year issued a new advisory opinion—202402—that examines this tension anew. Importantly, the new opinion does not replace the earlier WSBA advisory last amended in 2009. Rather, the new opinion takes the bedrock duty of confidentiality and updates the guidance to account for the intervening changes in data technology. Both opinions are available on the WSBA website.⁵ Advisory Opinion 202402 first surveys the duty of confidentiality in this new setting and then addresses associated questions of client consent. We'll take that same tack here.⁶

Before we do, however, two preliminary observations are in order.

First, although Advisory Opinion 202402 focuses on legal aid providers, the confidentiality issues discussed arise in many other contexts where third parties pay for a client's legal services. The recent advisory opinion, for example, cites another—WSBA Advisory Opinion 195 (1999; rev. 2009)—that grapples with the level of detail that an insurance defense lawyer can provide a carrier on bills.⁷ In short, the principles Advisory Opinion 202402 surveys are applicable well beyond the legal aid context.

Second, this issue is not unique to Washington. Over the past decade, for example, two New York State Bar Association opinions touched on some of these same issues.⁸ Others will likely follow. Having a Washington-specific

opinion, however, is very useful for practitioners and funders alike as they parse these often-nuanced issues.

Confidentiality

Relying on RPC 1.6, its associated comments, and the earlier Washington opinion on legal aid funding, Advisory Opinion 202402 weaves together three basic precepts.

First, RPC 1.6(a), which governs the duty of confidentiality, casts a wide protective net over all “information relating to the representation of a client[.]” Comments 3 and 21 to RPC 1.6 note that this definition encompasses all information regardless of the source, is broader than either the attorney-client privilege or work product standing alone, and includes information that would be likely to be detrimental to the client.

Second, although some disclosures are impliedly authorized to carry out a representation, sensitive information about a client’s legal matter cannot routinely be disclosed to a funder simply by virtue of payment for the services provided.

Third, even with “anonymized” data, a lawyer may only report that information in a form that will not reasonably lead to the discovery of client confidential information. Comment 4 to RPC 1.6, which the opinion cites, puts it this way: “This prohibition [on disclosing confidential information] also applies to

disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.” In other words, given advances in data technology, lawyers should not assume that their confidentiality analysis is over simply because information is reported without client identification if it can reasonably be reassembled into a form that reveals a client’s identity or other confidential information.

Taking these related threads, Advisory Opinion 202402 suggests a dialog with the funder over how statistical information will be used and stored:

In deciding what format to use in reporting information relating to the representation of a client, lawyers should consider engaging in dialogue with the funder about the nature and context of how the funder will protect the client data during transmission and storage. Data disclosure that poses a reasonable risk of reidentification of a client to a third party, discloses personal information about the client, or reveals the nature of legal representation of a client constitutes disclosure of confidential information under RPC 1.6.⁹

Advisory Opinion 202402 then addresses a number of factors that can influence both the analysis of confidentiality issues and associated discussions with a funder. These include the data fields reported, whether the information is reported by general or specific categories, and the level of demographic detail requested. The opinion notes that as a general proposition, the more detailed the data, the greater the risk that it may be culled in a way that effectively reveals

client identities or other confidential information if combined with public databases. The opinion counsels that circumstances will likely vary and “no one size fits all”:

When providing client data for clients who are members of much smaller demographic populations within the overall population of clients served, then the reporting lawyer should consider further limiting the number of fields (if any) that are reported in a disaggregated format. On the other hand, a lawyer reporting for a program that serves a large, diverse population might reasonably provide more data fields in a disaggregated format. In either case, the reporting lawyer may also choose to use an aggregated format to provide whatever demographic information is not submitted in a disaggregated format, resulting in a hybrid report that contains disaggregated data for some data fields and aggregated data for others.¹⁰

Waivers

Advisory Opinion 202402 cautions that waivers of confidentiality should not routinely be sought as a condition of providing services. “Informed consent,” which is the standard for a waiver in this context, is a defined term under RPC 1.0A(e): “[An] explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” The opinion notes the crux of the problem with trying to do this in advance:

It is difficult to obtain informed consent to this type of disclosure before a representation is underway, particularly in the case of vulnerable clients who face, for example, risks to personal safety, immigration consequences (for undocumented persons), or potential liability in another jurisdiction from pursuing reproductive health care.¹¹

Advisory Opinion 202402 finds that once a representation is underway, a client may be sufficiently conversant with the risks that consent can be truly “informed.” The opinion counsels, however, that a lawyer should also explain “when a disclosure benefits the legal aid organization to facilitate continuity of funding, rather than directly benefiting the individual client.”¹²

This last point underscores an observation made in the insurance defense context by Advisory Opinion 195 that Advisory Opinion 202402 cites: it is rarely in an individual client’s interest to waive confidentiality.¹³ One of the generic risks of waiving confidentiality is that the ultimate scope of the waiver is difficult to predict. Borrowing from the analogous issue in evidence law, for example, waiver of privilege is usually deemed to go all communications on the subject involved—not simply a discrete letter or email.¹⁴ Moreover, simply because a court has determined that privilege has been waived does not necessarily relieve a lawyer of the ethical obligation to protect the information from disclosure in other contexts.¹⁵

Therefore, while conceding that there may be circumstances when a client offers truly informed consent, Advisory Opinion 202402 suggests that in many

instances a more prudent practical path is simply to avoid providing data that is either confidential or may lead to the disclosure of confidential information:

In reporting client representation data to funders, therefore, a lawyer must report those data in a manner that ensures the lawyer is neither disclosing confidential information of individual clients nor disclosing information that reasonably could lead to the discovery of confidential information.¹⁶

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¹ See, e.g., ABA Informal Ops. 1081 (1969) and 1394 (1977).

² See ABA, Standards for the Monitoring and Evaluation of Providers of Legal Service to the Poor 49-66 (rev. 2002) (discussing the tension between funder's need for information with

legal service providers' responsibility for client confidentiality); *see also* D.C. Bar Ethics Op. 223 (1991) (including a then-extensive summary of how state bars around the country were approaching the issue).

³ *See* Note 2, *supra*.

⁴ *See generally* Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 U.C.L.A. L. Rev. 1701 (2010) (cited in the new WSBA advisory opinion that is the focus of this column).

⁵ WSBA advisory opinions are available on the WSBA website at: <https://www.wsba.org/for-legal-professionals/ethics/about-advisory-opinions>.

⁶ *See also* Sandra Schilling, "New WSBA Ethics Advisory Opinion on Reporting Client Data," WSBA NWSidebar, Feb. 25, 2025 at <https://nwsidebar.wsba.org/2025/02/03/new-wsba-ethics-advisory-opinion-on-reporting-client-data/>.

⁷ *See also* New York City Bar Op. 2024-2 (2024) (addressing, among other topics, confidentiality issues when dealing with litigation funding companies); ABA Formal Op. 484 (2018) (same).

⁸ *See* NYSBA Ops. 1266 (2024) and 1059 (2015); *see also* ABA Formal Op. 511R (2024) (touching on anonymized data in the context of listserv posts).

⁹ WSBA Advisory Op. 202402, *supra*, at 5.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 5-6.

¹² *Id.* at 6.

¹³ WSBA Advisory Op. 195, *supra*, at 5.

¹⁴ *See generally* Robert H. Aronson, Maureen A. Howard, and Jennifer Marie Aronson, *The Law of Evidence in Washington* 9-27 (rev. 5th ed. 2024) (discussing subject matter waiver); *United States v. Sanmina Corporation*, 968 F.3d 1107, 1116-1126 (9th Cir. 2020) (same); *see also* *U.S. ex rel. Parikh v. Premiera Blue Cross*, 2006 WL 6654604 at *1 (W.D. Wash. Oct. 31, 2006) (unpublished) (same).

¹⁵ *See* ABA, *Annotated Model Rules of Professional Conduct Annotated* 130-31 (10th ed. 2023) (compiling cases nationally on this point); *see also* Thomas R. Andrews and Robert H. Aronson, *The Law of Lawyering in Washington* 6-5 (2012) (noting that information that is not privileged may still be confidential under RPC 1.6).

¹⁶ WSBA Advisory Op. 202402, *supra*, at 6.