

**ORR & RENO, P.A. ETHICS AND PROFESSIONAL LIABILITY
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**DISCLOSING PRIVILEGED COMMUNICATIONS TO DEFEND A
GRIEVANCE BY A NON-CLIENT**

Defending a grievance frequently involves reliance on otherwise privileged communications between the attorney and his or her client. In cases where the grievance is brought by the client, the disclosure of those communications rarely raises any concern. However, attorneys are often more hesitant to reveal privileged information to defend a grievance brought by a non-client, such as an opposing party. Generally, such material may be disclosed without violating any ethical obligations.

New Hampshire Rule of Professional Conduct 1.6 permits an attorney to reveal otherwise privileged communications to the extent reasonably believed necessary

to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

N.H. R. Prof. C. 1.6 (b)(3). This subsection sets forth three distinct situations in which a lawyer may reveal otherwise confidential information. Notably, the first situation requires a controversy between the lawyer and client, and the second requires a criminal or civil action against the lawyer based on conduct in which the client was involved. However, the third situation is broader. It permits disclosure to respond to allegations in any proceeding concerning the lawyer's representation of the client. The rule makes no distinction between grievances by clients and by third parties. In either situation, the attorney is permitted to reveal confidential information in that attorney's defense. Although not yet addressed by the New Hampshire Supreme Court, this interpretation has been endorsed by the American Bar Association, see ABA/BNA Lawyers' Manual on Professional Conduct 55:708, and the Restatement, see Restatement (Third) of the Law Governing Lawyers §64.

Before disclosing otherwise privileged material to defend a grievance by a non-client, an attorney must take care to ensure there is a reasonable basis to believe the disclosure is necessary to respond to the allegations in the grievance, see N.H. R. Prof. C. 1.0(i), and that the allegations concern the lawyer's representation of the client whose communications are to be disclosed. In many situations, the attorney should also consider seeking a protective order to limit the disclosure and prevent any sensitive communications from becoming part of the public record. See N.H. Sup. Ct. R. 37A(IV)(a)(2)(E). And, as a matter of courtesy and respect, it is often advisable to inform the client prior to disclosure.

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