

Final

**Rhode Island Supreme Court  
Ethics Advisory Panel Op. 2013-05  
Issued December 12, 2013**

**FACTS**

The inquiring attorney's client (Client) had signed a revocable living trust and other estate planning documents in 1993. The trust was amended several times and finally amended in its entirety in 2012. The original trust provided that all assets in the trust be left to Client's daughter. Client bequested tangible personal property to Client's daughter in a pourover will. The trust named Client's daughter as successor trustee.

Client was divorced many years ago. In 2012, Client sought the inquiring attorney's legal services to amend the trust to leave Client's home to a female friend. The Client thereafter executed an amendment by the entirety which included a provision leaving Client's home to a female friend. The inquiring attorney and a paralegal attended to the execution of the amended trust. The inquiring attorney states that he/she determined Client to be competent at the time of the execution.

Client died in 2013. Client's assets pass to Client's daughter under the terms of the trust with the exception of Client's home which, under the terms of the trust, passes to Client's female friend.

Client's daughter has requested the inquiring attorney's assistance in settling Client's estate. The daughter is disturbed that Client's home was left to Client's female friend. The inquiring attorney along with another attorney in the inquiring attorney's law firm, advised the daughter about the grounds for setting aside provisions of the trust. The daughter has retained another lawyer to represent her and the trust.

**ISSUE PRESENTED**

The inquiring attorney asks about his/her ethical obligations regarding communications with the successor attorney and with the trustee, as well as regarding testimony at trial or at a deposition.

**OPINION**

The inquiring attorney must assert both the obligation of confidentiality under Rule 1.6, and the attorney-client privilege, if he/she is called as a witness, or is contacted by successor counsel or the trustee. Should the inquiring attorney be ordered by a court

to disclose information relating to the representation of Client, disclosure would be permissible.

### REASONING

Client's daughter, who is both a beneficiary and the successor trustee under Client's trust drafted by the inquiring attorney, challenges a provision of the trust which leaves Client's home to Client's female friend. The inquiring attorney would be a likely witness in a lawsuit challenging the trust, and under Rule 3.7 of the Rules of Professional Conduct, he/she is prohibited from serving as an advocate at the trial.

Rule 3.7 states as follows.

**Rule 3.7. Lawyer as witness.** - (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

In addition to the inquiring attorney's duty to refrain from serving as advocate in a challenge to the trust, the inquiring attorney has an obligation of confidentiality to Client. Rule 1.6 states:

**Rule 1.6. Confidentiality of information.** (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;

(2) to establish a claim or defense on behalf of the lawyer in a 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;

(3) to secure legal advice about the lawyer's compliance with these Rules; or

(4) to comply with other law or a court order.

The inquiring attorney anticipates that he/she will receive telephone calls and letters from the successor attorney and from the daughter/trustee. The inquiring attorney also anticipates that he/she may be deposed and may be called as a witness at trial. The obligation of confidentiality continues after a client's death. Rhode Island Supreme Court Ethics Advisory Panel Op. 96-34 (1996); Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering, §1.6:101, at 130 (2<sup>nd</sup> ed. 1993).

The principle of confidentiality is given effect in two related bodies of law: the rule of confidentiality established in professional ethics, and the attorney-client privilege in the law of evidence. See Comment [1] to Rule 1.6. The scope and applicability of protection of information differs markedly between the privilege and the ethical duty of confidentiality. Annotated Model Rules of Professional Conduct, at 73 (3<sup>rd</sup> ed. 1996). Rule 1.6 protects from disclosure a broader range of information than would be protected under the attorney-client privilege. In re Ethics Advisory Opinion No. 92-1, 627 A.2d 317 (R.I. 1993). Regardless of whether the information requested of the inquiring attorney is protected under the attorney-client privilege, Rule 1.6 prevents the inquiring attorney from disclosing it if it relates to the representation of the client. Id.

The Panel therefore advises the inquiring attorney to assert the obligation of confidentiality under Rule 1.6, as well as the attorney-client privilege, if he/she is called as a witness or is contacted by successor counsel or the trustee. Should the inquiring attorney be ordered by a court to disclose information relating to the representation of Client, disclosure would be permissible. See Comment [6] to Rule 1.6. Even then, the inquiring attorney must seek to limit disclosure. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-385 (1994) (lawyer has professional responsibility to seek to limit subpoena or court order on any legitimate ground, such as attorney-client privilege, work product immunity, burden or relevance, to protect information to which obligations under Rule 1.6 apply.)