

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2023-11
Issued November 10, 2023**

FACTS

The inquiring attorney represented a client in a criminal matter. During the representation, the inquiring attorney spoke with the client about an adversarial witness being in the “witness protection program.” The inquiring attorney later confirmed with the prosecutor that the witness was, in fact, in the “witness protection program,” and told his or her client this fact. He or she then moved to obtain information about the protective custody from the prosecutor who, the inquiring attorney believes, put said information on the record. The inquiring attorney later withdrew from the representation.

Subsequent to the inquiring attorney’s withdrawal, the client obtained new counsel who represented the client at his or her criminal trial. The client was convicted and, having exhausted his or her appeals, has since filed an action for post-conviction relief. The client claims that his or her trial attorney failed to inform him or her of the fact that the adversarial witness was in the “witness protection program.” The client has not made any such allegations against the inquiring attorney.

The prosecutor wishes to call the inquiring attorney as a witness during the post-conviction relief matter. The prosecutor has asked the inquiring attorney whether the inquiring attorney ever spoke with the client about the adversarial witness being in the “witness protection program.” The inquiring attorney has not responded to the prosecutor.

ISSUES PRESENTED

The inquiring attorney raises four (4) queries: (1) whether attorney-client confidentiality applies to his former representation of the client; (2) if so, whether the client may waive this protection; (3) if the client does not waive the protection, whether the court may order the inquiring attorney to testify about the former representation; and (4) if so ordered, whether the inquiring attorney must then testify.

OPINION

It is the Panel’s opinion that: (1) attorney-client confidentiality applies to the inquiring attorney’s former representation of the client; (2) the client may waive the protection by giving his or her informed consent; (3) if the client does not waive the protection by giving his or her informed consent, the court may order the inquiring attorney to testify; and (4) if so ordered, the inquiring attorney must comply.

REASONING

Rule 1.6 of the Rules of Professional Conduct establishes the standard for attorney-client confidentiality:

(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.

“A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation.” Rule 1.6, Comment [1]. This protection “is broader than the attorney-client privilege, and applies in situations other than those where evidence is sought before a court or tribunal.” Rhode Island Supreme Court Ethics Advisory Panel Opinion 2013-06 (2013). Notably, it “applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” Rule 1.6, Comment [1]. Accordingly, “Rule 1.6 does not distinguish between information that would be considered a confidence or secret. Even information such as a client’s identity, address, or fee amount is information related to the representation and is therefore, confidential under Rule 1.6.” Rhode Island Supreme Court Ethics Advisory Panel Opinion 2013-06 (2013). Such protection may be waived by the client’s informed consent.¹ See Rule 1.6(a).

Based upon this authority, the Panel concludes that the inquiring attorney is prohibited from disclosing any information about his former representation of the client absent the client’s informed consent. Should the prosecutor seek to call the inquiring attorney to testify in the post-conviction relief matter, the inquiring attorney should assert the obligation of attorney-client confidentiality and the attorney-client privilege. However, should the inquiring attorney be ordered by a court of competent jurisdiction to divulge information related to his or her former

¹ Rule 1.9(c) extends the protection of attorney-client confidentiality to former clients.

representation of the client, the inquiring attorney must comply pursuant to Rule 1.6(b)(4). See Rule 1.6, Comment [6] (confirming that “[t]he lawyer must comply with the orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client”).