

Final

**RHODE ISLAND SUPREME COURT
ETHICS ADVISORY PANEL
Opinion No. 97-19, Request No. 724
Issued October 9, 1997**

FACTS:

The inquiring attorney is undergoing an Internal Revenue Service audit of his/her income tax return. The IRS has requested him/her to provide various documents, including the inquiring attorney's appointment book or calendar of business activities, in support of deductions claimed on the return. Entries in the inquiring attorney's appointment book or calendar include court appointments, court dates, and client meetings.

ISSUE PRESENTED:

The inquiring attorney asks whether providing the IRS with his/her appointment book or calendar will result in a violation of Rule 1.6.

OPINION:

Rule 1.6, which generally requires that lawyers not reveal information relating to the representation of a client unless the client consents, permits the inquiring attorney to produce information to the extent necessary to support his/her deductions. If the inquiring attorney believes that entries contained in the calendar or appointment book are confidential communications between him/her and a client or that providing information relating to a client would be detrimental to a client's interest, Rule 1.6 requires the inquiring attorney to limit the request and to assert that certain information contained in the appointment book or calendar is privileged or is otherwise protected from disclosure under the ethical duty of confidentiality. If ordered by a court to disclose the contents of those items, the inquiring attorney must comply.

REASONING:

The principle of confidentiality is given effect in two related areas of law, the attorney-client privilege in the law of evidence, and the rule of confidentiality established in professional ethics. Comment to Rule 1.6. The question of whether or not the inquiring attorney's compliance with the IRS request violates the attorney-client privilege is a question of law and is therefore not addressed in this opinion. The Panel notes, however, that courts have held that client identity, the fact of consultation, and fee arrangements, absent special circumstances, are generally not privileged. See, e.g. Shargel v. U.S., 742 F.2d 61 (2nd Cir. 1984); In re Grand Jury Subpoena, 680 F.2d 1026 (5th Cir. 1982); In re Grand Jury Subpoena, 694 F.2d 1258 (11th Cir. 1982). The principal exception to this general rule applies where disclosure of client identity or fee arrangements would implicate a client in activities that might

subject the client to criminal or civil liability or would be detrimental to the client's interest. See generally ABA/BNA Law, Man. Prof. Conduct at 55:1315-16 (1997).

Rule 1.6 entitled "Confidentiality of Information" states in pertinent part:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, 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, but is not obligated to, reveal such information to the extent the lawyer reasonably believes necessary:

(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.

Most ethics committees, including this Panel, have stated that a client's identity is protected confidential information. See generally ABA/BNA Law Man. Prof. Conduct at 55:307 (1994); see e.g. R.I. Sup. Ct. Ethics Advisory Panel 95-61 (identity of client is confidential information and firm may not disclose to agency list of accounts receivable which included client names); R.I. Sup. Ct. Ethics Advisory Panel 94-42 (lawyer may not disclose to bank that gave line of credit a list of accounts receivable because names and addresses of clients are protected by Rule 1.6.) However, the Panel is of the opinion that pursuant to the exception stated in Rule 1.6 (b)(2), the inquiring attorney is permitted to reveal to the extent necessary information relating to a client's representation in support of claimed deductions in an IRS proceeding. The Panel notes that the Comment to Rule 1.6(b)(2) limits the permitted disclosure by stating, "[T]he lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure." Comment to Rule 1.6.

The inquiring attorney has stated that he/she recorded court dates, client meetings, and "other important dates" in his/her appointment book or calendar. The inquiring attorney is in the

Final 97-19

best position to determine whether information such as client identity or fee arrangements would be detrimental to a client's interest. Similarly, the inquiring attorney must determine whether any of the entries consist of protected communications between him/her and a client. If in the judgment of the inquiring attorney the attorney-client privilege attaches to any of the entries, he/she has an obligation under Rule 1.6 to limit the IRS request and to assert the privilege. See Comment to Rule 1.6. When in doubt about whether disclosure would be detrimental to a client or whether the attorney-client privilege otherwise attaches, an attorney does not act unethically by refusing to disclose the requested documents voluntarily to the IRS. See Fla. Bar Comm. on Prof. Ethics Op. 72-3 (1972). The Panel believes that the inquiring attorney may properly require the IRS to follow appropriate procedures to secure a judicial determination as to whether any privilege exists. Id.

The Panel concludes that the inquiring attorney may produce information to the extent necessary to support his/her claimed deductions in an IRS proceeding, but that the inquiring attorney has an obligation to limit disclosure and to assert the attorney-client privilege if he/she believes that disclosure would be detrimental to a client or that the privilege may otherwise attach to certain entries contained in the documents requested. Should a court issue an order requiring him/her to disclose the information, the inquiring attorney must comply. See Comment to Rule 1.6.

