

Final

RHODE ISLAND SUPREME COURT
ETHICS ADVISORY PANEL
Opinion No. 99-06 Request No. 773
Issued March 10, 1999

Facts:

The inquiring attorney represents a defendant in a criminal matter in which the defendant admitted guilt. Sentencing was continued for several months to allow the defendant an opportunity to participate in a residential drug treatment program. Successful completion of the program by the defendant would result in his/her release with no further incarceration. The defendant was ordered back to the ACI pending the location of a residential drug treatment facility. The inquiring attorney and the defendant subsequently appeared before the court to report that arrangements had been made for the defendant's placement in such a facility and to request that the defendant be released into the inquiring attorney's custody for the purpose of transporting him/her to the facility. The inquiring attorney states that the court released the defendant on his own recognizance and into the inquiring attorney's custody for immediate transportation to the drug treatment facility. He/she further states that the court did not direct as part of the order that the inquiring attorney make interim reports or notify the court if the client failed to remain in treatment. Pursuant to the court order the inquiring attorney transported the client to the facility and turned him/her over to the facility's intake personnel. A few days later, a representative of the facility notified the inquiring attorney that the client left the facility shortly after arriving there.

Issue Presented:

The inquiring attorney asks whether he/she has an obligation under Rule 3.3 to report the client's actions to the court.

Opinion:

Rule 3.3 does not impose an obligation on the inquiring attorney to disclose to the court the fact that his/her client has left a court-ordered residential drug treatment program.

Reasoning:

This inquiry implicates both Rule 1.6 and Rule 3.3 of the Rules of Professional Conduct which provide as follows:

Rule 1.6. Confidentiality of Information. - (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:

- (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; or
- (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.

Rule 3.3. Candor Toward the Tribunal. - (a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 1.6 applies not only to matters communicated to the attorney in confidence by the client, but also to all information relating to the representation, whatever its source. See Comment to Rule 1.6. In this inquiry, the information that the client has left the court-ordered

treatment program is information relating to the representation. It is therefore protected from disclosure unless the exceptions stated in Rule 1.6(b) apply, or unless permitted or required by court order, other law, or other Rules of Professional Conduct such as Rule 3.3. Pursuant to Rule 3.3, a lawyer has obligations of candor toward the tribunal that apply even if compliance with those duties will require disclosure of information that the lawyer otherwise is prohibited from disclosing by Rule 1.6(a). See Rule 3.3(b). However, the Panel is of the opinion that in this inquiry Rule 3.3 does not impose on the inquiring attorney an obligation to disclose to the court that his/her client has left a court-ordered residential drug treatment program.

The ABA Standing Committee on Ethics and Professional Responsibility recently examined the disclosure obligations of a lawyer who has learned that a client has violated a court order limiting or prohibiting the transfer of assets. In Formal Opinion 98-412 (1998) the committee stated:

[U]nless disclosure is necessary to avoid a false statement by the lawyer to the court or to avoid assisting a client in a criminal or fraudulent act, the lawyer is bound by the obligation of confidentiality in Rule 1.6(a) and may not reveal the client's misconduct to the court without the client's consent. The Committee concludes that is true even if the client's misconduct is a violation of an order entered by a court during litigation in which the lawyer represents the client.

The provision that is pertinent to this inquiry is Rule 3.3(a)(2). Under this provision, a lawyer has an obligation to disclose to the tribunal a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Whether disclosure is required by Rule 3.3(a)(2) in this inquiry depends upon whether the inquiring attorney's silence will assist the client in fraudulent or criminal conduct. See ABA Formal Op. 98-412 (1998). It is the Panel's opinion that under the facts provided the inquiring attorney's failure to disclose his/her client's violation of the court's order does not constitute assistance to the client in committing a crime or fraudulent act. See ABA Formal Op. 98-412 (1998). Accordingly, the inquiring attorney has no obligation under Rule 3.3(a)(2) to disclose the information to the court. Having no such obligation, the inquiring attorney is prohibited from disclosing the information to the court or to others pursuant to Rule 1.6(a), absent the client's consent.

The Panel further advises that at the time of the hearing for the client's sentencing, the inquiring attorney may have a duty under the Rules to assert the attorney-client privilege and the obligation of confidentiality regarding this information. Should a court issue an order requiring disclosure, the inquiring attorney must comply. See Comment to Rule 1.6.

