

Final

Rhode Island Supreme Court Ethics Advisory Panel Op. 2024-12 Issued December 17, 2024

FACTS

The inquiring attorney represented a client in a criminal matter which resulted in convictions on numerous charges. The former client is appealing his or her convictions claiming, among other arguments, that the inquiring attorney's representation of him or her was ineffective and incompetent. The inquiring attorney indicates that he or she expects to be subpoenaed to testify regarding this claim.

ISSUE PRESENTED

The inquiring attorney asks whether the Rules of Professional Conduct permit him or her to testify using information relating to his or her representation of the former client?

OPINION

It is the Panel's opinion that the inquiring attorney may testify using information relating to his or her representation of the former client pursuant to Rules 1.6 and 1.9(c) of the Rules of Professional Conduct.

REASONING

Rule 1.6 addresses the confidentiality of information relating to the representation of a client:

(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 principle "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Id. The Panel has historically "interpreted this obligation broadly." Rhode Island Supreme Court Ethics Advisory Panel Op. 97-23; see also Rhode Island Supreme Court Ethics Advisory Panel Op. 95-61; Rhode Island Supreme Court Ethics Advisory Panel Op. 94-42 (determining that even the identity of a client is confidential information protected by Rule 1.6).

"The duty of confidentiality continues after the client-lawyer relationship has terminated." Rule 1.6, Comment [7]. This principle is embodied in Rule 1.9(c):

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Here, the inquiring attorney represented the former client in a criminal matter which resulted in convictions on numerous charges. Any and all information relating to this representation is deemed confidential under Rule 1.6. See Rule 1.6, Comment [1]. Such confidentiality applies even though the representation has been terminated. See Rule 1.6, Comment [7]. Pursuant to Rule 1.9(c), the inquiring attorney can neither "use information relating to the [former] representation to the disadvantage of the former client" nor "reveal information relating to the [former] representation," except as the Rules of Professional Conduct permit.

The Panel finds that under the facts as described by the inquiring attorney, the exception in Rule 1.6(b)(2) applies here. Rule 1.6(b)(2) permits an attorney, in relevant part, to reveal otherwise confidential information relating to the representation of a client to the extent the attorney "reasonably believes necessary" to defend himself or herself "in a controversy between the lawyer and the client" or in response to "allegations in any proceeding concerning the

lawyer's representation of the client" See Rule 1.6, Comment [5] (observing that "[w]here a legal claim or disciplinary charge alleges . . . misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client"). Defending oneself from allegations of ineffectiveness and incompetence, claims the inquiring attorney currently faces, falls squarely within the scope of this exception. See id.; see also Rhode Island Supreme Court Ethics Advisory Panel Op. 1993-02. Notwithstanding, the Panel reminds the inquiring attorney that in using information relating to the representation in his or her defense, such "disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable." Rule 1.6, Comment [5].