

ETHICS ADVISORY PANEL  
Opinion #92-29, Request #241  
Issued June 4, 1992

An attorney inquired as to the applicability of Rule 3.6 of the Rules of Professional Conduct as an attorney serving as a member of the Select Commission To Investigate the Failure of RISDIC and Its Insured Institutions (the "Commission"). The Rhode Island legislature has charged the commission with making investigations, "making a public presentation of the evidence uncovered by the aforesaid investigations at hearings to be conducted by the commission", and making recommendations as to criminal prosecutions, civil litigation and legislation. (RISDIC Commission Enabling Act, 91-H-6680). The attorney is concerned specifically with the ethical responsibilities under Rule 3.6 as to individuals who have been charged with crimes relating to matters under investigation by the Commission.

The purpose of Rule 3.6 is to protect the integrity of the adjudicatory process by proscribing "out-of-court public statements that threaten to influence the proceedings improperly". Hazard, The Law of Lawyering, § 3.6:101. The rule attempts to balance the inherent conflict between first amendment rights of free speech and sixth amendment rights to a fair trial. See, e.g., Ruggieri v. Johns-Mansville Products Corporation, 503 F. Supp. 1036 (D.R.I. 1980). To meet criticism that the Rule's predecessor, Disiplinary Rule 7-107, was overbroad, Rule 3.6 precludes only "public statements by lawyers that have a 'substantial likelihood of materially prejudicing' a proceeding." Hazard, § 3.6:1.02. However, unlike Disciplinary Rule 7-107, Rule 3.6 does not require that the lawyer making the proscribed statement be himself or herself associated with the proceeding or that the proceeding be pending at the time the statement is made.

In the questions posed to this Panel, the application of Rule 3.6 involves confrontation with the legislative mandate that the Commission conduct public hearings and make public recommendations. The Panel notes that the Commission's public hearings are televised and that the Commission's hearings and recommendations receive prominent media coverage. The likelihood of widespread news coverage in the locale of the prospective adjudicatory proceeding is a primary factor in determining the substantial likelihood of materially prejudicing prospective jurors. See Hazard, § 3.6:202.

Rule 3.6 is not, however, a rule for determining whether a given defendant or civil litigant will receive a fair trial. That is a matter for courts to decide as a matter of constitutional law. Rule 3.6 is, rather, a rule for attorneys to guide their own conduct as officers of the court responsible for preserving the integrity of the judicial system.

The Panel's role is to interpret the Rules of Professional Conduct as they apply to prospective conduct of individual attorneys. In that role, the Panel will not ordinarily attempt to resolve conflicts between the judicial branch, which has promulgated the Rules of Professional Conduct and which has appointed this Panel, and the legislative branch. In responding to the inquiry, the Panel does not believe any such attempted resolution is necessary as there is no suggestion that the legislature intended to render the Rules of Professional Conduct inapplicable to the attorney and member of the Commission.

The Panel is of the view that the attorney may as a member of the Commission participate in the Commission's legislatively mandated activities without violating Rule 3.6. The Panel responds to the specific questions as follows:

1. The Panel believes that the term "Statement" as utilized or as set forth in Rule 3.6 does not encompass the asking of questions at a public hearing if such questions are not intended to constitute assertions.

2. Rule 3.6 does not preclude an attorney from attending hearings when testimony is being presented that may bear upon the culpability of persons who have been arrested.

3. To the extent that the attorney member of the Commission may influence the Commission's public statements and reports, he or she should attempt to influence the Commission to satisfy its legislative mandate with the least possible improper influence on pending or probable court proceedings. Specifically, as an attorney member of the Commission he or she should attempt to influence the Commission to:

a) Avoid statements based upon evidence that would clearly be inadmissible in a judicial proceeding.

(b) Avoid comments on the refusal or failure of prospective criminal defendants to make statements to the Commission.

(c) Avoid improper implications as to the authority of the Commission. In this connection, the attorney should attempt to influence the Commission to include in its public statements appropriate disclaimers to the effect that its recommendations are not findings or opinions of criminal guilt or civil liability, that criminal defendants are presumed innocent unless and until proven guilty in a criminal trial, that the Commission is not a court but an investigatory body, that persons charged with crimes are entitled to a trial by jury, and that the Commission's procedures do not permit the presentation of evidence or the cross-examination of witnesses that are necessary under the judicial system to determine criminal guilt or civil liability.

4. Rule 3.6 would preclude the attorney from making statements outside the Commission's reports or as an individual member of the Commission, whether or not based upon the Commission's investigations, that would have a substantial likelihood of materially prejudicing an adjudicative proceeding, except for statements permitted by Rule 3.6(c).

5. While the Panel concludes that Rule 3.6 is applicable to his or her conduct as an attorney while serving as a member of the Commission, the Panel does not view the attorney's role as a member of the Commission

as involving the direct supervisory authority required to make Rule 5.1 applicable to him/herself or that Rule 8.4 imposes any different standard of behavior than the Panel has suggested above under Rule 3.6.

The sole purpose of this Panel's advisory opinion is that "the inquiring attorney who acts in accordance with the advisory opinion shall be conclusively presumed to have abided by the Rules of Professional Conduct." Supreme Court Rules of the Ethics Advisory Panel, Rule 47 of the Court Rules Annotated (Michie Supp. 1989-1990), Rule 5. This advisory opinion is addressed specifically to the inquiring attorney and is not to be interpreted as any attempt to limit the autonomy or to infringe on the powers or authority that the legislature has granted to the Commission.

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.