

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2024-07
Issued July 11, 2024**

FACTS

The inquiring attorney represented a father (the “Father”) and son (the “Son”) in several related divorce and probate matters approximately two (2) to three (3) years ago. During the pendency of the proceedings, the Son assisted the Father in moving the Father’s belongings from the former marital domicile the Father shared with his now ex-wife (the “Wife”), who is the Son’s mother, to the Son’s home. Within a few hours of the Father and Son departing the former marital domicile, a fire erupted in the garage causing damage to the structure. The Son subsequently appeared at the local police department, accompanied by the inquiring attorney, and stated that he and the Father had left the former marital domicile hours before the fire started. No criminal charges were filed against either Father or Son.

Approximately two (2) months later, the Father and Son met with the inquiring attorney in his or her office to finalize the divorce. During the meeting, the Father admitted to starting the fire in the garage of the former marital domicile. The inquiring attorney reports that both he or she and the Son were shocked at this news.

The Father died shortly thereafter. Recently, the Son informed the inquiring attorney that the Wife has been charged with first-degree arson for the fire. According to the inquiring attorney, the Son does not want the Wife to face the potential consequences of a crime she did not commit. The inquiring attorney wishes to disclose the Father’s confession but is unsure whether he or she is permitted to do so under the Rules of Professional Conduct.

ISSUE PRESENTED

The inquiring attorney asks whether he or she is permitted under the Rules of Professional conduct to disclose the Father’s confession?

OPINION

It is the Panel’s opinion that the inquiring attorney must disclose the Father’s confession under the Rules of Professional Conduct.

REASONING

The resolution of this inquiry turns on the interplay between Rules 1.6 and 3.3 of the Rules of Professional Conduct. Rule 1.6 pertains to the confidentiality of information relating to a representation:

(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]; see Rule 1.9(c) (prohibiting a lawyer from revealing information related to a former representation “except as these Rules would permit or require with respect to [the] client . . .”).

Rule 3.3 addresses an attorney's duty of candor toward a tribunal:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) 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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

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

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

“This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.” Rule 3.3, Comment [2]. It also imposes upon lawyers “a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.” Rule 3.3, Comment [12]. Such is the importance of candor in the adjudicative process that Rule 3.3 explicitly “qualifies” the lawyer’s duty of zealous advocacy and obligation to protect client confidences. See Rule 3.3, Comment [2].

In this case, the inquiring attorney learned from a former client, the now-deceased Father, that the Father had started a fire in his former marital domicile. Because the inquiring attorney acquired this information during the course of his or her representation of the Father, it is considered confidential information under Rules 1.6(a) and 1.9(c). See Rhode Island Supreme Court Ethics Advisory Panel Op. 95-61; Rhode Island Supreme Court Ethics Advisory Panel Op. 94-42. As such, disclosure of this information is prohibited unless an enumerated exception applies.

One such exception is “to comply with other law or a court order.” Rule 1.6(b)(4); see Rule 1.9(c) (permitting disclosure of information relating to the representation of a former client “as these Rules would permit or require . . .”). Comment [6] to Rule 1.6 clarifies that “other law” includes Rule 3.3. Furthermore, Rule 3.3(c) unequivocally states that a lawyer’s duty of candor “appl[ies] even if compliance requires disclosure of information otherwise protected by Rule 1.6.” Thus, there is no question that a lawyer such as the inquiring attorney may properly disclose information relating to a representation to satisfy his or her obligation of candor under Rule 3.3.

The Panel’s inquiry now turns to whether Rule 3.3 imposes a duty of disclosure here. By its plain language, Rule 3.3 “governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal” or who is “representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition.” Rule 3.3, Comment [1]. Neither of these factual scenarios is present in this case, as the inquiring attorney does not represent the Wife (and, to the extent applicable, no longer represents the Son). Facially, then, Rule 3.3 would appear not to apply here.

The Panel finds that two (2) countervailing interests cut against adopting such a rigid reading of Rule 3.3, however. First, the spirit of Rule 3.3 quite clearly imposes a duty of conscientiousness, truthfulness, and probity on Rhode Island lawyers regardless of technicalities. Comment [2] to Rule 3.3 recognizes that a lawyer “must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.” Comment [12] expresses similar sentiments. Such ideals are in-keeping with those expressed in the Preamble to the Rules of Professional Conduct, which is rife with references to a lawyer’s professional obligation and responsibility to serve the public interest and to “demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.” Preamble to the Rules of Professional Conduct, Paragraph [5].

Second, such considerations are reflected in relevant Rhode Island jurisprudence. In In re Request for Instructions from Disciplinary Counsel, 610 A.2d 115 (R.I. 1992), our Supreme Court relied on similar reasoning in applying Rule 3.3 to a Rhode Island lawyer who was not actively representing a client before a tribunal. In that case, the lawyer undertook to represent an alleged rape victim in a civil suit against the alleged perpetrator on a contingent basis. During the pendency of the related criminal trial, which occurred in another state, the lawyer learned that the alleged victim had failed to disclose the existence of their contingent fee arrangement to the court. The lawyer sought guidance from Disciplinary Counsel regarding whether he should inform the court of the arrangement, who referred the matter to the Court. In ordering the lawyer to disclose the existence of the contingent fee arrangement, the Court reasoned that the lawyer’s duty of candor under Rule 3.3 “superseded his obligation of confidentiality toward his client,” such that his “obligation to assist in the administration of justice . . . require[s] his disclosure of relevant information to the criminal trial court” In re Request for Instructions from Disciplinary Counsel, 610 A.2d 115, 117 (R.I. 1992).

Similarly, in State v. Mawson, 2010 WL 4155234 (R.I. Super. Oct. 18, 2010), the Rhode Island Superior Court considered whether to permit an attorney to testify regarding comments his client made to him about the client’s involvement in a murder. At the first meeting between the

attorney and client, the client denied any involvement in the death. However, at a subsequent meeting at which the client's father was also present, the client admitted to killing the decedent. The attorney urged the client to speak with law enforcement, but he refused; the attorney also did not inform anyone of the confession. Several years after another individual was convicted of the murder, the attorney informed Disciplinary Counsel of his client's confession pursuant to his belief that such disclosure was consistent with "his ethical obligation to his bar licensure, necessary to the interests of justice, and allowed pursuant to In re Instructions from Disciplinary Counsel, 610 A.2d 115 (R.I. 1992)." State v. Mawson, 2010 WL 4155234, at *1 (R.I. Super. Oct. 18, 2010). This revelation led to the Superior Court granting the convicted individual a new trial based upon newly discovered evidence.

In the Panel's view, the foregoing principles and precedents apply here as well. The inquiring attorney has obtained information the disclosure of which would directly affect the Wife's legal rights and, by extension, the outcome of her criminal case. The fair administration of justice therefore demands that the inquiring attorney disclose this information. Accordingly, the Panel finds that the inquiring attorney's duty of candor under Rule 3.3 supersedes his or her obligation to protect the confidentiality of the Father's confession under Rules 1.6(a) and 1.9(c), compelling him or her to disclose the confession to the appropriate tribunal.