

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2024-08
Issued July 11, 2024**

FACTS

The inquiring attorney represents a client in a pending civil action seeking a declaratory judgment that a 2011 trust written by a decedent was revoked in 2020 when the decedent wrote certain words on a copy of the 2011 trust's signature page. The 2011 trust had left the decedent's real estate to his daughter. However, a 2015 will left the real estate to the inquiring attorney's client. Following the decedent's death in 2022, the will was probated and the estate closed but title to the real estate continues to be vested with the trustee. The client claims she discovered the 2020 signature page months after the decedent's death, prompting the instant declaratory judgment suit.

The daughter has filed a motion for summary judgment, arguing that the 2020 signature page cannot amount to a revocation of the trust because the trust can only be revoked in the same manner as the execution of a deed. In preparing to respond to the motion for summary judgment, the inquiring attorney reports, he or she has learned that the 2020 signature page was fraudulently produced. However, his or her client denies that the purported trust revocation document was fraudulently produced and wishes to proceed. The inquiring attorney notes that absent the purported trust revocation document, his or her client would still have a viable claim that the trust was revoked by subsequent action. Nonetheless, the inquiring attorney intends to withdraw from the representation.

ISSUE PRESENTED

The inquiring attorney asks whether he or she is required under the Rules of Professional conduct to disclose the fraudulent nature of the document to the court before withdrawing?

OPINION

It is the Panel's opinion that the inquiring attorney is not required to disclose the fraudulent nature of the document to the court before withdrawing under the Rules of Professional Conduct.

REASONING

This matter concerns both Rule 1.6 and Rule 3.3 of the Rules of Professional Conduct. Rule 1.6 addresses 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 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).

Rule 3.3 sets forth 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 governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal.” Rule 3.3, Comment [1]. In this regard, it imposes on lawyers “special duties . . . as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.” Rule 3.3, Comment [2]. The list of such conduct is broad, and includes “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].

Here, the inquiring attorney has learned that a document purporting to revoke a trust—the central issue in the declaratory judgment action in which the inquiring attorney is involved—was fraudulently produced. Because this information pertains to the representation, it is considered confidential under Rule 1.6(a). See Rhode Island Supreme Court Ethics Advisory Panel Op. 2007-06 (finding confidential under Rule 1.6 the fact that the inquiring attorney’s client was overpaid certain federal disability benefits). Disclosure of the document’s nature is, therefore, prohibited under Rule 1.6 unless an enumerated exception applies.

One such exception is “to comply with other law or a court order.” Rule 1.6(b)(4). Comment [6] to Rule 1.6 clarifies that “other law” encompasses 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 must therefore determine whether Rule 3.3 compels the inquiring attorney to disclose his or her knowledge of the purported trust revocation document's fraudulence to the court. The inquiring attorney reports that upon learning that the purported trust revocation document was fraudulently produced, he or she confronted his or her client about this fact. The client has denied that the document was fraudulently produced and wishes to proceed with the litigation. In response, the inquiring attorney intends to withdraw from the representation.

The Panel finds that these facts implicate both Rule 3.3(a)(3) and Rule 3.3(b). Rule 3.3(a)(3) prohibits an attorney from knowingly "offer[ing] evidence that the lawyer knows to be false." This provision effectively precludes the inquiring attorney from introducing the purported trust revocation document into evidence. See Rhode Island Supreme Court Ethics Advisory Panel Op. 92-23 (observing that "[t]he requesting attorney may not proffer to the Probate Court an accounting that the attorney believes to be false and/or fraudulent"); see also Rule 1.2(d)(c) (mandating that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

Next, Rule 3.3(b) requires a lawyer "who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding" to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." In determining whether this provision compels the inquiring attorney to disclose the fraudulent nature of the purported trust revocation document—as opposed to taking some other remedial measure—the Panel asks whether "the inquiring attorney's silence will assist the client in fraudulent or criminal conduct." Rhode Island Ethics Advisory Panel Op. 99-06 (citing ABA Formal Op. 98-412 (1998)). The Panel concludes that the inquiring attorney's silence will not assist his or her client in criminal or fraudulent conduct because the client's response to the opposing party's motion for summary judgment, which will apparently rely upon the purported trust revocation document, has not yet been filed and is, therefore, only prospective. See Rhode Island Supreme Court Ethics Advisory Panel Op. 2014-04 (determining that the inquiring attorney's learning of his or her client's conversion of trust funds for personal use prior to the inquiring attorney filing an accounting with the court did not trigger the inquiring attorney's duty of candor under Rule 3.3); see also Rhode Island Supreme Court Ethics Advisory Panel Op. 99-06 (concluding that Rule 3.3 did not require the inquiring attorney to inform the court that his client had defied the court's order to attend drug counseling). In reaching this conclusion, the Panel also notes the fact that according to the inquiring attorney, the client has alternative avenues of argument that do not rely on the purported trust revocation document.

Accordingly, because the inquiring attorney's duty of candor under Rule 3.3 is not triggered here, Rule 1.6 prohibits the inquiring attorney from revealing the purported trust revocation document's nature to the court. See Rhode Island Supreme Court Ethics Advisory Panel Op. 99-06. The inquiring attorney's appropriate remedy is to counsel his or her client not to utilize the document and, if that fails, to seek to withdraw from the representation. See Rhode Island Supreme Court Ethics Advisory Panel Op. 2014-04; Rhode Island Supreme Court Ethics Advisory Panel Op. 92-23; see also Rules 1.16(a)(1), (b)(2), and (b)(4).