RHODE ISLAND SUPREME COURT
ETHICS ADVISORY PANEL
GENERAL INFORMATIONAL OPINION NO. 9
Issued December 14, 2023

The Panel has received inquiries regarding the interplay between a lawyer's duty of candor to a tribunal and duty to protect attorney-client confidentiality. This situation may arise when a client informs his or her lawyer of a fact or facts that could affect the client's rights or the outcome of a proceeding and asks the lawyer to keep the information confidential.[1] In such scenarios, multiple Rules of Professional Conduct may be implicated.

On one hand, Rule 3.3 of the Rules of Professional Conduct is germane. It requires attorneys to avoid making "a false statement of fact or law to a tribunal . . ." or offering "evidence that the lawyer knows to be false." Rules 3.3(a)(1), (3). It also requires attorneys to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal" when he or she " represents a client in an adjudicative proceeding and . . . knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding . . . ." Rule 3.3(b). Comment [2] to Rule 3.3 emphasizes that these provisions collectively "set[] forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process," such that the protection of client confidences "is qualified by the advocate's duty of candor to the tribunal" under such circumstances.

Similar sentiments are expressed in Rules 1.2 and 4.1 as well. Rule 1.2(c) declares that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ." In clarifying this prohibition, Comment [13] notes that "[t]he lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent . . . ." Pursuant to Rule 4.1, an attorney must both avoid knowingly "mak[ing] a false statement of material fact or law to a third person; or . . . fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[2] Such misrepresentations may occur when "the lawyer incorporates or affirms a statement of another person that the lawyer knows is false" or when the attorney makes a "partially true but misleading statement[] or omission[] that [is] the equivalent of [an] affirmative false statement[]." Comment [1] to Rule 4.1.

Under all three (3) of these Rules, the attorney may withdraw to avoid participating in, endorsing, or otherwise assisting a client in engaging in fraudulent or criminal conduct. See Comment [13] to Rule 1.2; Comment [15] to Rule 3.3; Comment [3] to Rule 4.1.

On the other hand, a lawyer is also bound by Rule 1.6, which sets forth the general standard for attorney-client confidentiality: "[a] lawyer shall not reveal information relating to

[1] For a discussion of ethical considerations applicable when a lawyer learns either that his or her client plans to offer false testimony to a tribunal or has already done so, please refer to General Informational Opinion No. 2.

[2] Rule 1.6 sets forth the standard for attorney-client confidentiality, discussed in detail below.

the representation of a client unless the client gives informed consent . . . ." Rule 1.6(a). This standard is premised on the idea that "[t]he observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance." Comment [1] to Rule 1.6. In addition, the principle of confidentiality encourages the client "to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Id. Therefore, it is not easily or lightly breached. See id.

Nonetheless, several exceptions may apply to overcome the presumption of confidentiality. First, some "disclosures . . . are impliedly authorized in order to carry out the representation . . . ." Rule 1.6(a). Adumbrative examples include when "a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion." Comment [2] to Rule 1.6.

Second, disclosure of confidential information may be permitted pursuant to one or more of the exceptions listed in Rule 1.6(b):

> (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;
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> (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;
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> (3) to secure legal advice about the lawyer's compliance with these Rules; or
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> (4) to comply with other law or a court order.

Comment [3] to Rule 1.6 clarifies that these exceptions are not compulsory. Rather, the Commentary encourages the lawyer to practice discretion. "The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question." Comment [3] to Rule 1.6. Should the lawyer choose to invoke one or more exception found in Rule 1.6(b), the disclosure "should be no greater that the lawyer reasonably believes necessary to the purpose." Id.; see also Comment [6] to Rule 1.6. In the context of disclosure to a tribunal, "the disclosure should be made in a manner that 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." Comment [6] to Rule 1.6.

Third, Comment [6] to Rule 1.6 explains that other "Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation." Rules 1.13(c), 2.3, 3.3 and 4.1 are cited as examples of Rules which may

compel disclosure of confidential information. Similarly, Comment [3] cautions that the lawyer should consider his or her "duty under Rule 3.3(a)(3) not to use false evidence" and "duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct" when choosing whether to breach the standard of attorney-client confidentiality.

Finally, note that the "duty of confidentiality continues after the client-lawyer relationship has terminated." Comment [7] to Rule 1.6. Thus, after withdrawal or termination of the representation, the lawyer is generally "required to refrain from making disclosure of the clients' confidences" unless one or more of the exceptions to disclosure attaches. Comment [4] to Rule 1.6.

The relative applicability of the foregoing Rules 1.2, 3.3, 4.1 on the one hand and Rule 1.6 on the other in a given case defies easy resolution. The protection of attorney-confidentiality is the necessarily default position for any lawyer. Such a mandate encourages probity and facilitates effective relations between lawyer and client. However, the confidentiality shield may be pierced in deference to other, higher interests pertaining to the integrity of the adjudicative process itself, including ensuring the disclosure of truthful information to a tribunal and discouraging criminal or fraudulent conduct. Ultimately, a careful analysis that turns on the particular facts and circumstances of the matter at hand is needed to balance the competing interests pursuant to the standards set forth above. When such an analysis proves impossible, the lawyer may satisfy his or her ethical obligations by withdrawing from the representation in lieu of breaching one or more of the duties described herein.

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.