ETHICS ADVISORY OPINION

22-05

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

S.C. Rules of Professional Conduct: 1.0, 1.1, 1.2, 1.4, 1.6, 1.16, 2.1, 3.1, 3.3, 4.1, and 8.4.

Facts

Inquirer presents the following hypothetical. John Doe, serving as attorney-in-fact for Jane Roe during Roe's life, transferred certain property owned by Roe to himself. Doe says he did so at Roe's direction and pursuant to the power of attorney that authorized him to make absolute gifts. These transfers resulted, at the time of her death, in Roe's estate being of much less value than the beneficiaries expected. Doe has retained Inquirer to represent him in a lawsuit brought by one of Roe's beneficiaries challenging his actions as attorney-in-fact for Roe during her life and, after her death, as the personal representative of her estate. During his discussion with Doe, Inquirer learns from him that Doe had forged the plaintiff's signature on a beneficiary receipt/release, notarized that forged signature, and then submitted the receipt/release to the probate court to represent that the plaintiff had received the distributions to which she was entitled and released the estate and Doe from any liability or claims. The probate case was ended prior to Doe hiring Inquirer.

Questions Presented by Inquirer

1. May I continue to represent my client, John Doe?

2. I realize I must tell the truth if the issue comes up, but do I need to disclose this information now?

3. Will I be violating client confidentiality or attorney-client privilege by disclosing the information?

Summary: Inquirer may continue to represent the client unless the client intends to use the forged document or make use of its existence in the litigation in any way. The Rules of Professional Conduct *require* disclosure of information, including potentially confidential or privileged information, in very few circumstances. They do, in Rule 1.6 provide circumstances under which a lawyer *may* disclose communications normally considered confidential. The Committee does not express opinions on questions of law, such as whether specific conduct constitutes a violation of federal or state criminal statutes. Any South Carolina licensed attorney whose client engages in or

is planning to engage in conduct that may be criminal should carefully review all applicable state and federal law to determine the legality of the activity for purposes of advising the client and determining whether disclosure is allowed under Rule 1.6. If, however, a lawyer determines a client has engaged in conduct that falls under Rule 1.6(b), the lawyer may – but is not required to – disclose such without violating the Rules. While Rule 1.6(b), does not address the timing of disclosure, the public policy behind the exceptions to the general rule of confidentiality suggest that, if disclosure is made, it should be within a time frame that will allow the other party to take advantage of it for mitigation or prevention purposes. If asked about the receipt/release, Inquirer must respond truthfully.

Continued Representation of Client

Under the facts as presented by Inquirer, the forged receipt/release created by the client and submitted to the Probate Court in closing the estate appears to be central to the client's defense in the present related litigation instituted by the estate's beneficiary whose signature she forged. However, since Inquirer is aware that it is a forged document, the Rules would prohibit any misrepresentation about it, the reliance upon it in any manner, and any other use of it on behalf of the client. *See, e.g.*, Rules 3.1 (Meritorious Claims and Contentions), 4.1 (Truthfulness in Statements to Others), and 8.4 (a), (d), and (e) (Misconduct). These prohibitions would not prohibit Inquirer from continuing his representation but would make it difficult.

Moreover, if the client intends to use the forged document in the current litigation, such may constitute a crime or a fraud upon the court. The Committee believes that, under the South Carolina Rules of Professional Conduct, Inquirer has a duty to discuss the potential criminal conduct or fraud with the client and advise him to stop and authorize the lawyer to disclose or disclose himself, and/or Inquirer should withdraw from representation. *See* Rules 1.1, 1.2(d), 1.4(a)(5) and (b), 1.16(a) and (b)(2)-(3) and Comments [9] and [18], and 2.1, Comment [10], SCRPC; S.C. Bar Eth. Adv. Op. 86-06 (in context of client receiving payments that may constitute a crime or fraud on an insurance carrier, "the lawyer may not counsel or assist the client in such activity, must urge the client to rectify the illegal practice, and may be required to withdraw"). *See also* NE Jud. Eth. Comm. Op. for Lawyers No. 12-06 (2012); Phila. Eth. Op. 2009-09 (2009). Rule 1.16(a)(1) (lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation if representation will result in violation of the Rules or other law).

Duty of Confidentiality and Disclosure of Client's Forgery

The South Carolina Rules of Professional Conduct *require* disclosure of information, including potentially confidential or privileged information, in very few circumstances. Those that exist can be found in Rule 3.3 (Candor toward the Tribunal) and relate to conduct before a tribunal, including the duties to reveal adverse legal authority, not offer false evidence, and disclose adverse material facts in an *ex parte* proceeding. *See* S.C. Bar Eth. Adv. Op. 76-05 ("it was never intended for the confidences of a client to enable a fraud to be worked upon the Courts or other judicial or administrative tribunals"). Under 3.3(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." If Inquirer continues to represent the client, the mandatory duty to disclose under Rule 3.3(b) would apply if the client intends to engage, is engaging or has engaged in criminal or fraudulent conduct "related to the proceeding."[1]

In addition, Rule 1.6 does *allow* for disclosure of confidential information under certain circumstances. Rule 1.6(a) sets out the general rule that a lawyer shall not disclose "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation[2] or the disclosure is permitted by paragraph (b)." Rule 1.6(b) sets out exceptions to this general rule, under which disclosure is permissive but not mandatory, including the following related to the commission of criminal acts or fraud.

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (1) to prevent the client from committing a criminal act;
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> * * *
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> (3) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
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> (4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

"Fraud" is defined in 1.0(f) as "denot[ing] conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or which has a purpose to deceive." The decision on the application of any of the exceptions to the duty of confidentiality is very fact-intensive and must be made on a case-by-case basis. *See* N.J. Eth. Op. 677 (October 17, 1994) ("Each interpretation or application of RPC 1.6(b)(2) involves a fact-sensitive, and, indeed, a

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[1] As previously noted, the determination whether the client's past or future conduct constitutes a crime is beyond the scope of the Committee's work. However, Inquirer would have a duty to determine whether the creation and use of the forged receipt/release is a continuing crime or fraud or if the use of such in the current litigation constitutes a crime or fraud. If the answer to either is yes, then Inquirer must disclose. See Rule 3.3(b) and Comments [6], and [8] – [12].

[2] One circumstance under which disclosure is impliedly authorized – as well as specifically authorized under Rule 1.6(b)(5) – is when a lawyer seeks confidential advice about the lawyer's compliance with the Rules. See Rule 1.6, Comment [10].

soulsearching examination of the unique facts of a particular case.").

The Committee does not express opinions on questions of substantive or procedural law, such as whether the specific conduct in the hypothetical constitutes forgery, any other crime, or fraud. Any South Carolina licensed attorney who reasonably believes a client is engaged in or planning to engage in conduct that may be criminal or fraudulent has a duty under Rules 1.1 and 1.4 to carefully review applicable state and federal law to determine the legality of the activity for purposes of providing advice to the client, determining whether disclosure under Rule 1.6 is allowed or necessary, and whether the attorney needs to withdraw from representation.

Rule 1.6(b)(1) allows disclosure of information relating to the representation of a client if the lawyer reasonably believes disclosure is necessary to prevent the client from committing a crime. In S.C. Bar Eth. Adv. Op. 90-30, we explained this ongoing or future crime exception was created because a lawyer is not allowed to counsel a client to engage in or assist a client in any conduct the lawyer knows is criminal. See Rule 1.2(d). Therefore, in order to disclose under 1.6(b)(1), we said two requirements must be met: (1) the representation of the client has not ended and (2) the criminal activity must be discovered during the representation. If these two requirements are met, the lawyer then has the discretion to disclose the information. If the lawyer decides to do so, disclosure is limited and should be no greater than the lawyer reasonably believes necessary to the purpose. Rule 1.6, Comment [18].

In this hypothetical, if the conduct of the client in signing the receipt/release, notarizing it, and submitting it to the probate court, under the attendant circumstances, constituted forgery or some other crime, and it was complete upon the submission of the receipt/release, Rule 1.6(b)(1) does not then provide any basis for disclosure of the client's admission to a third party. However, if the conduct constitutes forgery or some other crime, and the crime is an ongoing one or one that is again going to be committed, 1.6(b)(1) would apply and allow Inquirer to disclose the client's admission.

Rule 1.6(b)(3) allows disclosure of information relating to the representation of a client if the lawyer reasonably believes disclosure is necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services. If the conduct of the client in signing the receipt/release, notarizing it, and submitting it to the probate court, under the attendant circumstances, constituted forgery, some other crime, or fraud, and it was complete upon the submission of the receipt/release, Rule 1.6(b)(3) does not provide any basis for disclosure of the client's admission to Inquirer. If, however, the crime or fraud is ongoing[3] or

[3] Although New Jersey's Rule 1.6 is very different from South Carolina's, the New Jersey Supreme Court Advisory Committee on Professional Ethics addressed an issue involving fraud on a tribunal through the provision by the client of information that their counsel learned, after the matter had ended (but while representing them in a different but similar matter), was not true. The Advisory Committee found the conduct, through the failure to rectify, to be ongoing fraud on the tribunal. *See* N.J. Eth. Op. 677 (October 17, 1994).

one that will be repeated, *e.g.*, the client wants to use the document in the lawsuit, and the client is using Inquirer's services to further the crime or fraud that is reasonably certain to result in substantial injury to the plaintiff's or another's financial interest or property, Rule 1.6(b)(3) would allow disclosure.[4]

While disclosure is not mandatory under Rule 1.6(b), the Rule does not address the timing of disclosure. However, in light of the public policy behind the exceptions, see Comments [8] – [10], to the general rule of confidentiality, if disclosure is made, it should be within a time frame that will allow the other party to take advantage of it for mitigation or prevention purposes.

Duty to Respond Truthfully about Client's Conduct

Rule 3.3(a)(1), SCRPC, sets out circumstances under which disclosure is *required* regardless of Rule 1.6(a). The Rule provides as follows.

> (a) A lawyer shall not knowingly:
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> > (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;…
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> > (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.
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> (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.
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> (c) The duties stated in paragraphs (a) and (b) apply when the lawyer is representing a client before a tribunal as well as in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. These duties continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

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[4] Because Inquirer did not represent the client during the probate court matter, the past crime exception in 1.6(b)(4) would not apply to Inquirer's hypothetical. See Rule 1.6, Comment [10].

> (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.

The Comments to the Rule provide further clarification of the prohibitions and duties. Under this Rule, Inquirer must answer truthfully if asked about the document in a judicial proceeding and should not offer the document or testimony or argument about it, even if doing so results in the disclosure of information that might otherwise be protected by Rule 1.6.