ETHICS ADVISORY OPINION

22-03

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: 1.6 and 1.9.

Facts

Inquirer is a lawyer who worked 43 years in various capacities for his former employer, including 18 years as legal counsel. Inquirer is an active member of the South Carolina Bar, but does not currently practice law. Earlier this year, at the request of a retiring employee of his former employer, who had worked for Inquirer when Inquirer served as an officer for his former employer, Inquirer sat in on a meeting between the retiring employee and the current President for his former employer, for whom Inquirer had not worked. Inquirer was not representing the retiring employee during this meeting and did not otherwise have an attorney-client relationship with her; Inquirer also was not representing either his former employer or its President.

During this meeting, the retiring employee described Title IX sexual harassment investigations by other employees that, in retiring employee's opinion, were performed in a deliberately indifferent manner for reasons of favoritism. One investigation appeared to be, in Inquirer's opinion, especially egregious and could possibly, if the retiring employee's description were accurate, constitute grossly improper activity by the investigator(s), bordering on criminal, that Title IX requires to be reported to the U.S. Department of Education. This particular instance occurred while Inquirer was serving as counsel for his former employer, but Inquirer was never informed of it.

Questions Presented by Inquirer

1. Does Inquirer have a duty, as an officer of the court, to report this event to the appropriate authorities to prevent the University president and possibly himself, since he presently has no official institutional capacity from committing a criminal act (*e.g.*, conspiracy to cover-up possible criminal activity) pursuant to Rule 1.6(b)(1)? Or might the information now be considered generally known under Rule 1.9(c)(1)?
2. Does Inquirer have a duty to advise the current president to report what he heard from the retiring employee to local authorities or to the U.S. Department of Education?
3. Is Inquirer prevented from disclosing anything he heard at the meeting with the president and the retiring employee – as he was not then serving as counsel to either the retiring employee or the institution but was serving as institution counsel at the time the event occurred –

pursuant to Rule 1.9(c)(1), because what he heard is information to the disadvantage of his former client (the institution)?

Summary: The Rules of Professional Conduct impose no duty upon Inquirer to report this event. In the absence of a current attorney-client relationship with either the Institution or its president, Inquirer has no duty to provide legal advice to the president. Inquirer is prohibited under Rule 1.9 from using or disclosing the information unless it has become generally known as provided in 1.9(c)(1) or the institution provides informed consent as provided in Rule 1.6(a).

Duty to Report Information Related to Representation of Client to Prevent Criminal Act

Rule 1.6(a) of the South Carolina Rules of Professional Conduct 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 or the disclosure is permitted by paragraph (b)." Rule 1.6(b) sets out exceptions to this general rule, under which a lawyer may disclose such information, including one related to the commission of criminal acts.[1]

> (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;

Rule 1.6(b)(1) thus provides that a lawyer *may* – but is *not required* to – disclose such information to the extent reasonably necessary to prevent the client from committing a criminal act. Thus, even if Inquirer was engaged in an attorney-client relationship[2] covering the information about the "egregious" Title IX investigation, there is no mandatory duty to disclose.

There are other impediments to disclosure as allowed under Rule 1.6(b) in this instance. First, as worded, Rule 1.6(b) only allows for disclosure during representation and only of ongoing or future criminal conduct. In S.C. Bar Eth. Adv. Op. 90-30, we explained the ongoing or future crime exception in 1.6(b)(1).

> This exception was created because an attorney is not permitted to

[1] In addition, Rule 1.6(b)(3) allows for the disclosure of information to prevent the client from committing more specific types of crime, *i.e.*, crime or fraud "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." This exception would not appear to be implicated here.

[2] The Committee is aware that Inquirer has stated that, at the time of the meeting when the information was learned, Inquirer was not representing either the retiring employee or the institution so there was no then-existing attorney-client relationship. It has decided to answer each of Inquirer's questions as posed by Inquirer, including that related to Rule 1.6, which relates to current representation of a client. A lawyer will be well served by making sure everyone understands whether he is in fact representing someone even if the lawyer himself does not believe he is acting in such a capacity.

> counsel a client to engage in, or assist a client, in any conduct that the attorney knows is criminal or fraudulent. See Rule 1.2(d). Thus, in order to reveal the fraudulent and/or criminal acts of a client two requirements must be met: (1) the representation of the client has not ended; and (2) the fraudulent and/or criminal activity must be discovered during the course of representation. If these two requirements are met, the attorney has the discretion under Rule 1.6(b)(1) to reveal the information. A disclosure pursuant to Rule 1.6(b)(1); however, is limited and should be no greater than the attorney reasonably believes necessary to the purpose. (Comment Rule 1.6.)

Here, even if the institution's conduct at the time of the "egregious" Title IX investigation was criminal, Inquirer was not, at the time the information was learned, engaged in the legal representation of any party and any criminal conduct had already occurred.[3] Rule 1.6(b)(1) does not then provide any basis for disclosure to a third party.

In response to Inquirer's question of his ethical duty to disclose as an officer of the court, it should be noted that the South Carolina Rules of Professional Conduct impose very few mandatory duties upon lawyers, as officers of the court, to subordinate the interests of their clients and disclose even unprivileged information. 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, to not present false testimony from witnesses, and to disclose adverse material facts in an *ex parte* proceeding.[4] *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"). Inquirer has no duty, as an officer of the court, under the Rules to disclose the conduct in question.

Duty to Advise the Institution or Its President to Report

The Rules generally discuss the giving of legal advice only in the context of an attorney-client

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[3] In addition to the "egregious" investigation potentially having constituted criminal activity, Inquirer mentions disclosure to prevent either the institution or himself from committing a crime, such as "conspiracy to cover-up possible criminal activity," but he does not say that he has knowledge of any such activity on the part of the institution or that he has entered or is contemplating entering into any such conspiracy. However, even if he did or is, Rule 1.6(b) still does not apply because he was not engaged in the representation of a client at the time he learned of the information.

[4] The Committee is aware that it has, in S.C. Bar Eth. Adv. Op. No. 76-05, opined an attorney violates Rule 8.4 (General Misconduct) through the "intentional disqualification of a lawyer through deception violates the duties imposed upon a lawyer by virtue of being an officer of the court" because such action removes "discretion from the hands of a tribunal in order to manipulate a more favorable outcome for the client."

relationship.[5] *See, e.g.*, Rules 1.2, Comment [7], 2.1, Comment [5], 2.3, Comment [3], and 3.3, Comment [10]. There is no duty to provide legal advice to non-clients, even if they were formerly clients.

Impact of Inquirer's Prior Representation of Institution on Disclosure of Information

Rule 1.9(c) (Duties to Former Clients) provides

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
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> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
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> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment [8] provides this further guidance on the Rule: "information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client."

Even though Inquirer was not aware of the conduct at issue, it occurred during her service as the institution's counsel. Moreover, Inquirer had a long-term relationship with the institution that spanned 43 years and included 18 years as counsel (both in-house and external). Her service as the institution's lawyer undoubtedly enabled her to acquire knowledge of her client's internal policies, most likely including those related to institutional responses to Title IX complaints and related compliance issues. Under these circumstances, it is difficult to envision a circumstance under which Inquirer can disclose information of the Title IX investigations without it being detrimental to or used to the disadvantage of the institution. For that reason, Inquirer is prohibited under Rule 1.9 from using or disclosing the information unless it has become generally known[6] as provided in 1.9(c)(1) or the institution provides informed consent as

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[5] An exception to statement is reflected in Rule 4.3, which addresses communications with unrepresented persons. It provides that lawyers, when dealing on behalf of a client with someone who is not represented, "shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

[6] While the Supreme Court of South Carolina has not defined "generally known" as used in Rule 1.9(c)(1), definitions are available from other sources.

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record

provided in 1.6(a).

> depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense....
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> A lawyer may not justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known.
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> *Restatement of the Law Governing Lawyers* §59 cmt. d (2000). Some courts have applied a strict definition of "generally known" in the context of a Rule 1.9 analysis. That the information at issue is generally available does not suffice; the information must be within the basic understanding and knowledge of the public. *Pallon v. Roggio*, Nos. 04-3625, 06-0168, 2006 WL 2466854, *7-8, 2006 U.S. Dist. LEXIS 59881, *23-24 (D.N.J. August 23, 2006); *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850, 860 (1995). "[T]he client's privilege in confidential information disclosed to his attorney 'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources.'" *McGraw*, 461 S.E.2d at 860 (quoting *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 572-73 (2d Cir.1973)).

Matter of Tennant, 387 Mont. 105, 110-111, 392 P.3d 143, 148-149 (2017). See also *In re* Gordon Props., LLC, 505 B.R. 703, 707 n. 6 (Bankr. E.D. Va. 2013) **("**Generally known" means information already generally known, not information that someone can find).

This Committee has, in another context, noted that information may be generally known when, for example, it is published in the press. S.C. Bar Eth. Adv. Op. 77-06 ("This is true whether the defect is noted in the public land records or is generally known to the Bar through other means such as publicity in the press."). *See also* S.C. Bar Eth. Adv. Op. 83-19 (1984) (quoting dictionary definition of publish as, *inter alia*, making something generally known).

The Committee does not have sufficient information to opine whether the information in this case is generally known for purposes of Rule 1.9(c)(1).