

LEGAL ETHICS OPINION 1859 MAY A CRIMINAL DEFENSE LAWYER DISCLOSE
INFORMATION TO A GOVERNMENT LAWYER
AFTER A FORMER CLIENT MAKES A CLAIM OF
INEFFECTIVE ASSISTANCE OF COUNSEL?

In this hypothetical, a criminal defense lawyer has been contacted by a government lawyer who is responsible for handling a petition for habeas corpus filed by the defense lawyer's former client. The petition alleges that the defense lawyer provided ineffective assistance of counsel to the former client. Citing Virginia Code §8.01-654(B)(6)¹, the government lawyer requests that the defense lawyer provide information concerning his representation of the former client to the government in order for the government to prepare a response to the petition. The defense lawyer asks whether he can reveal this information in response to the government's request prior to any evidentiary hearing on the former client's petition and without a court order requiring disclosure of the information. The former client has not given informed consent to the disclosure of this information. The defense lawyer indicates that, in his experience, habeas petitions are overwhelmingly dismissed on legal or procedural grounds; in those cases, the court never reaches the substantive issues presented.

QUESTION PRESENTED

May a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel disclose confidential information to government lawyers prior to any hearing on the defendant's claim, without a court order requiring the disclosure or the informed consent of the former client, in order to help to establish that the defense lawyer's representation was competent?

APPLICABLE RULES AND OPINIONS

The applicable *Rule of Professional Conduct* is Rule 1.6 (a) and (b)(2)².
ANALYSIS

Pursuant to Rule 1.6(a), a lawyer has a general duty to maintain the confidentiality of information learned during the representation of a client, even after the representation has concluded.³ That duty is subject to the limited exceptions specified in Rule 1.6(b) and (c),

¹ Virginia Code §8.01-654(B)(6) provides that a petitioner who alleges ineffective assistance of counsel as a ground for habeas relief is deemed to waive the attorney-client privilege with respect to communications between counsel and himself "to the extent necessary to permit a full and fair hearing" of the allegation. This statute alone is not dispositive of the lawyer's ethical duties, however, because the duty of confidentiality is broader than the attorney-client privilege. *See* Rule 1.6 Comments [3] and [12].

² Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(2) such information 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 Comment [18], Rule 1.6: "The duty of confidentiality continues after the client-lawyer relationship has terminated."

including the exception that is relevant to this question, found in Rule 1.6(b)(2). Thus, a lawyer may not reveal confidential information without either obtaining client consent or determining that one of the exceptions to the rule applies.

In this hypothetical, the former client has not given consent to the lawyer's release of this confidential information. Thus, the lawyer can disclose the requested information to the government only if Rule 1.6(b)(2) applies to authorize the disclosure.

The Committee opines that Rule 1.6(b)(2) generally does not authorize the disclosure of client confidences under these circumstances. The rule allows the disclosure of confidential information in order to "respond to allegations in any proceeding concerning the lawyer's representation of the client." A habeas petition that alleges ineffective assistance of counsel undoubtedly "concerns" the lawyer's representation of the former client, since it is a claim that the former client's conviction should be set aside because of the lawyer's performance during the representation. However, the lawyer may reveal information only to the extent reasonably necessary to defend against these claims. It is unlikely that it is reasonably necessary for the lawyer to disclose confidential information at the time the petition is filed, when the court has not made a determination of whether the petition is legally and procedurally sufficient. Many habeas petitions fail on legal grounds, and in those cases there is no need for the lawyer to ever reveal information about his representation.

Although a pre-litigation disclosure of all relevant information may make it more likely that the claim of ineffective assistance will be disposed of quickly, that fact alone does not make it necessary that the lawyer reveal the information. In the absence of additional facts and circumstances justifying an earlier release of the information, the lawyer can reach the same outcome by disclosing the information under judicial supervision in a formal proceeding, after a full determination of what information should be revealed, and without the danger of revealing more information than would be permitted by Rule 1.6(b)(2).⁴ Finally, Rule 1.6(b) provides that a lawyer *may* reveal information as permitted by the Rule; but a lawyer does not violate the Rule under these circumstances by refusing to reveal information upon request.

This opinion is advisory only and is not binding on any court or tribunal.

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⁴ See LEO 1433. Even when disclosure is necessary to rebut a former client's accusation that the lawyer committed criminal conduct for which the former client has now been indicted, the lawyer is advised to seek a judicial ruling on the propriety and extent of the disclosure. See also Comment [10] to Rule 1.6, which cautions that, "in any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which 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."