

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 55

QUESTION PRESENTED

May a criminal defense lawyer whose former client alleges that the lawyer provided constitutionally ineffective assistance of counsel disclose confidential information to the State in the course of any proceeding on the defendant's claim, for the purpose of establishing whether the lawyer's representation was competent?

ANSWER

Yes, a criminal defense lawyer facing allegations of ineffective assistance of counsel from a former client may disclose confidential information relating to representation of the client to the extent the lawyer reasonably believes necessary to defend against the allegations. Any disclosure must be narrowly tailored to the issues raised by the former client.

DISCUSSION

Rule 1.6 of the Nevada Rules of Professional Conduct (NRPC) generally restricts the disclosure of information related to the representation of a client. The Rule applies to lawyers in all contexts, not just criminal defense. The fundamental requirement of confidentiality is set forth in subsection (a):

A lawyer shall not reveal information relating to 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 paragraphs (b) and (d).

This Committee has previously opined that, “[i]n view of the unrestricted language of Rule 1.6, all lawyers should pause and think before revealing any information relating to the representation of a client unless the client has given informed consent.” State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Op. No. 41, June 24, 2009.

The duty of confidentiality continues after the lawyer-client relationship has terminated. Rule 1.9 sets forth a lawyer's duties to former clients, and subsection (c)(2) further provides that “[a] lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . [r]eveal information relating to the representation except as these Rules would permit or require with respect to a client.” Rule 1.9 mirrors the unrestricted language of Rule 1.6, extending the duty of confidentiality broadly to “information relating to representation.”

The principle of lawyer-client confidentiality is further reflected in the statutory privilege set forth in NRS 49.095:

NRS 49.095 General rule of privilege. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer.
2. Between the client's lawyer and the lawyer's representative.
3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

However, the information protected under Rule 1.6 extends beyond the information protected by the attorney-client privilege under NRS 49.095. *McKay v. Board of County Comm'rs*, 103 Nev. 490, 494, 746. P.2d 124, 126-27 (1987) (citing Comment [3] to ABA Model Rule 1.6). The lawyer's ethical duty to preserve a client's confidentiality is thus broader than the evidentiary privilege.

Nevertheless, the ethical duty and the statutory privilege both make an exception when the competency of the lawyer's representation faces a subsequent legal challenge by the client. Subsection (b)(5) of Rule 1.6 permits limited disclosure of otherwise confidential client information under the so-called "self-defense" exception:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . [t]o 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.

Similarly, the statutory lawyer-client privilege does not extend "to a communication relevant to an issue of breach of duty by the lawyer to his or her client." NRS 49.115(3); *see also Tower Homes, Ltd. Liab. Co. v. Heaton*, 132 Nev. ___, 377 P.3d 118, 123 (Nev. 2016).

The self-defense exception to the ethical duty and statutory privilege of confidentiality has been recognized by the Nevada Supreme Court since the earliest years after Nevada's admission to the Union:

We think it safe to say that whenever in a suit between the attorney and client the disclosure of privileged communications becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection.

Mitchell v. Bromberger, 2 Nev. 346, 349 (1866); *see also Molina v State* 120 Nev. 185, 193, 87 P.3d 533, 539 (2004) (citing former Supreme Court Rule 156(3)(b)).

A criminal defense lawyer facing allegations of ineffective assistance of counsel from a former client would fall within the scope of the ethical and statutory “self-defense” exceptions to confidentiality. The first and third clauses of Rule 1.6(b)(5) – permitting disclosure to the extent reasonably necessary “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client” and “to respond to allegations in any proceeding concerning the lawyer’s representation of the client” – specifically apply. Furthermore, in filing a petition for postconviction relief, a defendant is required to comply with NRS 34.735, which specifies in pertinent part: “If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.” Under such circumstances, a criminal defense lawyer may disclose confidential information relating to representation of the former client to the extent the lawyer reasonably believes necessary to respond to the allegations of ineffective assistance.

To prevail on an ineffective assistance claim, a defendant must prove that he was denied “reasonably effective assistance” of counsel to his detriment by satisfying the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that his counsel’s representation fell below an objective standard of reasonableness. Second, the defendant must demonstrate that there is a reasonable probability that, but for counsel’s deficient performance, there would have been a different outcome; for instance, that the defendant would not have pleaded guilty or not have been found guilty at trial. The burden falls upon the defendant to make the requisite showing:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 690.

The reasonableness of the representation may turn upon what both the lawyer and the defendant did or did not do, or did or did not communicate to one another, in the course of representation. This may require an inquiry as to what extent the lawyer considered and discussed with the defendant matters that might reasonably be expected to have a material impact on the case, such as the nature of the charges, potential defense strategies, evidentiary issues, what options might be in the defendant’s best interest, the consequences of pleading guilty, and whether the defendant had any basis to appeal a conviction. “Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy.” *Martinez v. Ryan*, 566 U.S. 1, 11 (2012). The lawyer’s actions and decision-making process at every stage of the proceedings may be reviewed, including whether he conducted a reasonable and independent investigation of the case. “Ineffective-assistance claims often depend on evidence outside the trial record.” *Id.* at 13.

The defendant's conduct throughout the lawyer-client relationship may also demand scrutiny, including whether he or she was forthcoming with all relevant information and whether he or she followed the advice of counsel:

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions . . . [an] inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, 466 U.S. at 691. Consequently, a meaningful evaluation of defense counsel's performance cannot be conducted without the lawyer's disclosure to some extent of confidential information relating to representation of the client, which is expressly permitted under the first and third clauses of Rule 1.6(b)(5) and NRS 49.115(3).

The Committee notes that the American Bar Association Standing Committee on Ethics and Professional Responsibility has taken a conflicting position in ABA Formal Opinion 10-456 (July 14, 2010) (ABA Opinion).¹ The ABA Opinion held that the ABA's Model Rule of Professional Conduct 1.6 precludes communication between former defense counsel and prosecutors in a postconviction proceeding involving an ineffective assistance claim, unless under direct judicial supervision at an evidentiary hearing. The confidentiality mandate in subsection (a) and the self-defense exception in subsection (b)(5) of the ABA Model Rule 1.6 are identical to the language of NRPC 1.6.

The ABA Opinion maintains that the third clause of subsection (b)(5) – permitting disclosure “to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client” – is subject to severe constraints. ABA Opinion, at 3. “[A] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences.” *Id.* (quoting *Restatement (Third) of the Law Governing Lawyers* §64 cmt. c (2000)). Based primarily on concerns that extrajudicial disclosure in a postconviction proceeding involving an ineffective assistance claim might prejudice the defendant in the event of a retrial, the ABA Opinion concluded that “it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.”

This Committee reaches a different conclusion.

First and foremost, nothing in the express language of Rule 1.6(b)(5) can be inferred to prohibit extrajudicial disclosures to the State in the context of a postconviction ineffective assistance claim. The ABA Opinion even appears to conflict with the ABA's own Comment [10] to Model Rule 1.6, which states that when there is an allegation involving the lawyer's conduct or representation of a former client, “Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding” to respond. While the ABA Opinion contends that

¹ The Committee also notes that there was no consensus on this issue among courts prior to the ABA Opinion.

Comment [10] should be construed narrowly, even a narrow construction cannot justify barring any extrajudicial disclosure when a criminal client has placed his former defense counsel's performance squarely at issue. Significantly, the self-defense exception is tempered in that it only permits disclosure to the extent reasonably necessary to respond to the allegations. Furthermore, subsection (b)(5) is permissive (“[a] lawyer *may* reveal information”) and accords the lawyer the professional discretion to refuse to assist the State against the former client's ineffective assistance claim.

Furthermore, the position taken by the ABA Opinion could undermine both the truth-finding function of the judicial process and the principle of fairness that sustains our legal system. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (characterizing “the very nature of a trial as a search for truth.”); *Abbott v. Abbott*, 560 U.S. 1, 20 (2010) (noting that nations “rely upon their domestic courts to enforce just laws by legitimate and fair proceedings.”). The self-defense exception to confidentiality promotes these objectives of truth and fairness. A convicted defendant alleging ineffective assistance of counsel contends his lawyer's handling of his case was deficient and affected the outcome. The lawyer should be given a fair opportunity to protect his professional reputation by demonstrating that he provided reasonably effective representation under the circumstances. The State has a responsibility to ensure the integrity of the conviction.² The lawyer's extrajudicial disclosure of confidential information relating to the representation may be a necessary predicate to ascertaining the truth and maintaining fairness in the process.

These concerns may explain why other jurisdictions have rejected the ABA Opinion. In *State v. Montgomery*, 997 N.E.2d 579 (Ohio Ct. App. 2013), the Ohio Court of Appeals held:

[W]e differ with the ABA's opinion that an attorney who is the subject of an ineffective assistance of counsel claim who may have a reasonable need to disclose relevant client information should do so only with prior judicial approval in the proceeding in which the claim is joined. . . . the very narrow scope of the information allowed to be disclosed suggests that the rule can be enforced without prior judicial intervention.

Id. at 590. *See also United States v. Wilson*, 2018 U.S. Dist. LEXIS 171611, __ F. Supp. 3d __, 2018 WL 4828400 (D.D.C. October 4, 2018) (“[T]he Court will not prohibit counsel for the United States from communicating and meeting with [the petitioner's] former counsel outside the presence of [the petitioner's] current counsel — so long as the disclosures made by former counsel during those communications and meetings are “reasonably necessary to respond to specific allegations” of ineffective assistance of counsel.”); *United States v. Straker*, 258 F. Supp. 3d 151, 157 (D.D.C. 2017) “[C]ourts in this District have regularly permitted the government to communicate with former counsel without the need for supervision by the court or current counsel.”); *Courtade v. United States*, 243 F. Supp. 3d 699, n.5 (E.D. Va. 2017) (declining to “prohibit *ex parte*

² “The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935), cited in *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

communications between the government and former counsel in this situation, given the obvious need to fully develop and clarify the record in collateral proceedings.”); *Office of Lawyer Regulation v. Thompson (In re Thompson)*, 847 N.W.2d 793, 800 (Wis. 2014) (“Wisconsin’s confidentiality rule does not limit permitted disclosures to a ‘court-supervised’ setting.”); *Melo v. United States*, 825 F. Supp. 2d 457, n. 2 (S.D.N.Y. 2011).

The argument against the ABA’s position in the context of post-conviction claims of ineffective assistance is perhaps best articulated in *United States v. Ball*, 2017 U.S. Dist. LEXIS 120459 (E.D. Mich. 2017):

[T]his Court is not persuaded that Formal Opinion 10-456 champions the correct policy. In advising that prosecutors and former defense counsel should not be permitted to communicate without court supervision, the ethics opinion fails to strike the appropriate balance between protecting confidentiality interests and ensuring "fair proceedings" by allowing the prosecution to fully develop its case.

United States v. Ball, 2017 U.S. Dist. LEXIS 120459 at *6.

Several state bar entities have also issued formal opinions rejecting the ABA Opinion. The District of Columbia Bar in Ethics Opinion 364 (Jan. 2013) concluded:

[The Rule] permits a defense lawyer whose conduct has been placed in issue by a former client’s ineffective assistance of counsel claim to make, without judicial approval or supervision, such disclosures of information protected by Rule 1.6 as are reasonably necessary to respond to the client’s specific allegations about the lawyer’s performance.

See also North Carolina State Bar, 2011 Formal Ethics Op. 16 (Jan. 27, 2012) (The Rule “affords the lawyer discretion to determine what information is reasonably necessary to disclose, and there is no requirement that the lawyer exercise that discretion only in a ‘court-supervised setting.’”); Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Ethics Op. 2013-F-156 (June 14, 2013) (“Exceptions to the confidentiality rules permit, but do not require, the former defense lawyer to make limited voluntary disclosures of information to the prosecution outside the in-court supervised proceeding.”); Cf. Virginia Informal Ethics Op. 1859 (June 6, 2012).³

³ The Bar Association of San Francisco Ethics Committee in Ethics Opinion 2014-1 (Jan. 2014) also cited the ABA Opinion in considering the ability of an attorney to respond to a negative online review by a former client alleging incompetence. California’s former rule on confidentiality at the time of that opinion, Rule of Professional Conduct 3-100, was not based on the ABA Model Rule and contained no self-defense exception. While the San Francisco Ethics Committee concluded that case law on the self-defense exception for California’s statutory lawyer-client privilege, California Evidence Code § 958, limited disclosure to formal or imminent legal proceedings, the Committee nonetheless noted that, “[e]ven in those circumstances where disclosure of otherwise confidential information is permitted, *the disclosure must be narrowly tailored to the issues raised by the former client.*” [Emphasis added].

The Iowa State Bar Association Committee on Ethics and Practice Guidelines in Iowa Ethics Op. 15-03 (June 15, 2015) noted that the ABA Opinion failed to account for the Rule's application in all contexts, not just criminal defense:

ABA Formal Ethics Op. 10-456 appears to apply only to post conviction relief litigation which leaves the question open regarding other forms of adverse claims against a lawyer by a former client and the standard the lawyer should use when invoking the so-called implied self-defense waiver. When client confidences are concerned, there should be no distinction between civil, criminal or disciplinary litigation. A matter is confidential and protected or it is not; the self-defense waiver applies or it doesn't and when it does the procedure for invoking it should be uniform.

This Committee joins other jurisdictions in rejecting ABA Formal Opinion 10-456. A criminal defense lawyer confronted with a former client's allegations of ineffective assistance of counsel should be able to disclose relevant confidential information relating to the representation. Judicial intervention is not a prerequisite for disclosing client information under such circumstances. However, disclosure is permitted only to the extent reasonably necessary to respond to the allegations and must be narrowly tailored to the issues raised by the former client.⁴

CONCLUSION

A criminal defense lawyer facing allegations of ineffective assistance of counsel from a former client may disclose confidential information relating to representation of the client to the extent the lawyer reasonably believes necessary to defend against the allegations. Any disclosure must be narrowly tailored to the issues raised by the former client.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.

AUTHORITIES

NRS 34.735

NRS 49.095

NRS 49.115

NRPC 1.6

NRPC 1.9

Abbott v. Abbott, 560 U.S. 1 (2010)

Berger v. United States, 295 U.S. 78 (1935)

Courtade v. United States, 243 F. Supp. 3d 699 (E.D. Va. 2017)

Martinez v. Ryan, 566 U.S. 1 (2012)

⁴ A practitioner may want to consult another attorney for an opinion as to what extent disclosure is reasonably necessary and can be narrowly tailored to the issues raised by the former client.

McKay v. Board of County Comm'rs, 103 Nev. 490, 746 P.2d 124 (1987)
Melo v. United States, 825 F. Supp. 2d 457 (S.D.N.Y. 2011)
Nix v. Whiteside, 475 U.S. 157 (1986)
Office of Lawyer Regulation v. Thompson (In re Thompson), 847 N.W.2d 793 (Wis. 2014)
State v. Montgomery, 997 N.E.2d 579 (Ohio Ct. App. 2013)
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