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From: KaplanR@gtlaw.com
Sent: Thursday, May 28, 2020 5:34 PM
To: Comments Mailbox
Subject: [External]Attorney Comment re Proposed Change to RPC 1.6 to Require Disclosure of Information that Demonstrates an Innocent Person has been Wrongfully Incarcerated

Submitted To the New Jersey Supreme Court Working Group on the Duty of Confidentiality and Wrongful Convictions:

Please accept this comment with regard the proposed amendment to New Jersey Rule of Professional Conduct ("RPC") 1.6(b), which would *require* a lawyer to disclose confidential information received from a client that demonstrates that an innocent person has been wrongfully incarcerated.

I believe the proposed amendment would do substantial damage to the attorney-client privilege and would inhibit clients from revealing confidential information about *past* and *completed* conduct, which would be a substantial break with the current structure of New Jersey RPC 1.6. Under the existing New Jersey RPC 1.6(b), a lawyer is *required* to reveal confidential information to the proper authorities to prevent *ongoing* or *future* conduct by the client or another person, to prevent the client or another person: (1) from committing an ongoing or future criminal, illegal or fraudulent act that is likely to result in death, substantial bodily injury or substantial financial injury; or (2) from committing an ongoing or future criminal, illegal or fraudulent act that is likely to perpetrate a fraud upon a tribunal. The current *mandatory* exceptions in New Jersey RPC 1.6(b) do not encompass *past* or *completed* criminal, illegal or fraudulent acts. As a result, the proposed amendment would be a very substantial departure from the structure and intent of RPC 1.6(b). It would detrimentally inhibit a client from revealing entirely past and completed conduct to an attorney in the course of seeking legal advice from that attorney.

Similarly, the *permissive* exceptions under New Jersey RPC 1.6(d) involve criminal, illegal, fraudulent or alleged wrongful or unethical conduct in which the lawyer was involved. This permissive exception permits an attorney to reveal confidential information so that the lawyer can prevent, rectify, or defend against claims involving, the conduct of the attorney. The proposed amendment to Rule 1.6, even if permissive, could not be justified on this basis as well because it contemplates confidential information about past and completed conduct in which the attorney was not involved.

The proposed amendment (although narrow) would, for the first time, require (or permit) an attorney to disclose confidential information received from a client seeking legal advice about

past and completed conduct in which the attorney was not involved and played no part, directly or indirectly. As such, it would frustrate a core purpose of the attorney-client privilege – for a client to be completely open and forthcoming when seeking legal advice about past and completed conduct in which the attorney played no part and was not involved. Notwithstanding the proposed amendment's salutary purpose – to correct an unjust conviction of an innocent person being wrongfully incarcerated – the very foundation of the attorney-client privilege is that, for a greater good -- to foster free, open and full communication between client and attorney – society will sacrifice the evidence disclosed by a client to an attorney.

Once the divide between 'ongoing/future crimes' and 'past/completed' crimes is crossed, this is, indeed, a slippery slope. While the amendment addresses the required disclosure of confidential information demonstrating that an innocent person *has been* wrongfully convicted, how different is this from compelling the disclosure of confidential information to prevent an innocent person *from being* wrongfully prosecuted and convicted. Under the reasoning and policy choice of the proposed amendment, there would be little, if any, difference: If an attorney must come forward to *rectify* the wrongful conviction and incarceration of a person, why not require the attorney to come forward to *prevent* the wrongful conviction and incarceration in the first place? -- And save the accused (and the state) the time, effort, expense and emotional distress of a wrongful prosecution and conviction. And, under this reasoning, defense counsel could put another attorney on the stand and *compel* the disclosure of incriminating statements from the testifying attorney's client (e.g., as a statement against penal interest).

The more exceptions to the attorney-client privilege – particularly concerning past and completed conduct in which the attorney played no role– the less useful the privilege is to society. Indeed, if the Supreme Court were to create these kinds of backward-looking exceptions, perhaps the Supreme Court should also require a "Miranda" type warning to a client before any attorney-client communication -- advising the client that certain types of information revealed by the client about past conduct "can and will be used against the client." If the police are required to provide such a warning when there is no expectation of privacy or confidentiality then, perhaps, an attorney should also provide such a warning before a client reveals incriminating information about entirely past and completed conduct to his or her attorney. I do not believe that we should be making attorneys 'agents' of law enforcement for purposes of solving *past* and *completed* crimes -- as opposed to preventing *ongoing* or *future* criminal, illegal or fraudulent acts (or rectifying criminal, illegal or fraudulent acts in which the attorney was involved).

Respectfully submitted,

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