IN THE CIRCUIT COURT OF HARDIN COUNTY
AT SAVANNAH, TENNESSEE

ZACHARY RYE ADAMS	]	
PETITIONER	]	
	]	
VS.	]	**NO. 17-CR-10-PC**
	]	
STATE OF TENNESSEE	]	

RESPONSE TO MOTION FOR IN CHAMBERS MEETING and MOTION FOR ORDER

Comes now the Petitioner and responds to the Motion for In Chambers Meeting and Motion for Order authorizing the State to obtain Counsel's File and Compel Cooperation as follows:

I.

Chambers Meeting

Counsel has no objection to an in chambers meeting and reserves all objections raised in such meeting.

II.

Discovery

Attorney File

Counsel has reviewed with the three attorneys involved and submits the following general response:

1. Generally to all attorneys' files:

   a. Petitioner is unsure exactly the legal approach as this is admittedly a unique proceeding. Tenn. Sup. Ct. R. 28 § 3(B) states that neither the Rules of Civil

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BY Tammie Wolfe CLERK

Procedure nor Rules of Criminal Procedure apply to these proceedings "except as specifically provided by these rules."

b. This is important because Counsel find only the following rules of discovery:

   i. §6(C)(7) states that upon review of the Court's preliminary order, "the state shall provide to petitioner discovery of all those items deemed discoverable under Rule 16, Tennessee Rules of Criminal Proceure, if relevant to the issues raised in the post conviction petition, and shall provide any other disclosure required by the state or federal constitution.

   ii. § 7 The state shall provide discovery in accordance with Section 6(C)(7).

   iii. § 8 (C)(3) Each party shall have the right to subpoena witnesses for appearance at the evidentiary hearing.

   iv. It is an interesting question whether Ruel 28 requires the Defendant to comply with Rule 16(b)(1). In this case though, it is an irrelevant question because Counsel for Petitioner never sought discovery from the State and instead relied on receiving the file from Jennifer Thompson.

c. Counsel is attaching 2013-F-156 a TN Formal Board of Professional Responsibility Ethics Opinion that states a lawyer is permitted, but not required, to make limited voluntary disclosure to the prosecution of information related to the representation of the former client outside the in-court proceeding without judicial supervision or approval. However,

indiscriminate, unlimited nor claret blanche disclosure related to the former representation is not permitted.

2. With that in mind, it does appear that the Rule 28 allows the State to subpoena all three witnesses to the trial and may require them to bring to trial the documents they have at the time isolated to specific requests related to the petition. However, that is all the State can do. Turning to each attorney and their feedback provided to Counsel, here is Petitioner's position:

3. Mr. Jim Simmons: Mr. Simmons is in the process of transferring his entire file to Counsel's office. His response mimics Ms. Thompson's.

4. Ms. Jennifer Thompson: Ms. Thompson has provided her entire file to current Counsel. If Rule 16 of the Rules of Criminal Procedure apply, then Counsel suggest that all such documents would be protected under Rule 16(b)(2). **Counsel is prepared to provide a copy of all documents it seeks to introduce at trial pursuant to Ruel 16 (b)(1).** Counsel did offer (and the State was willing) to allow the State to come to its office and inspect everything in his office that belonged to Ms. Thompson. **However, it appears that the dictates of Professional Ethics Option 2013-F-156 bar this.** Short of that, the Court must rule what authority a subpoena can be issued to Counsel, who is not a witness, to prepare these documents in accordance with the dictates ethical responsibility. Should it have to, then Counsel is requesting a continuance of the underlying trial as this will take a significant amount of time to gather and determine what documents are relevant for what grounds of relief and what documents should be withheld and a privilege log possibly prepared.

5. Mr. Jerry Gonzalez: Mr. Gonzalez remains subject to a subpoena and will appear at trial as ordered.

Talk with Prosecution

6. There is absolutely no authority to compel the three former attorneys to talk to the State of Tennessee prior to trial; nor is there any authority to require them to talk with Counsel for Petitioner.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

The undersigned certifies that he has on the 25 day of NOVEMBER 2024, sent a true and correct copy of the following to the person(s) listed below in compliance with the Tennessee Rules of Civil Procedure, Rules 5 and/or 5A, by the following indicated method(s):

ADA Amy Weirich
ADA Christopher Boiano

☐U.S.P.S., first-class postage pre-paid
☐ Via Fax
☑ Via Email
☐ Hand-delivery by:
☐ Certified Mail, Return Receipt Requested

DOUGLAS THOMPSON BATES, IV

The Board of Professional Responsibility will be closed on Thursday, November 28 & Friday, November 29, in observance of the holiday.

2013-F-156 - Criminal Defense Attorney

BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE
FORMAL ETHICS OPINION 2013-F-156

May a criminal defense lawyer alleged by a former criminal client to have rendered ineffective assistance of counsel voluntarily provide information to the prosecutor defending the claim outside the court supervised setting?

QUESTION

A formal ethics opinion has been requested as follows:

> Outside of the court-supervised setting contemplated by ABA 456, may a Tennessee lawyer accused of ineffective assistance of counsel disclose information about the former representation to the extent that the lawyer believes it is reasonably necessary to establish a defense to the accusation? Specifically, in response to prosecutors' inquiries, but before a court has ordered the lawyer to do so, may the lawyer disclose information about the representation of a former client that the lawyer believes is reasonably necessary to respond to a claim of ineffective assistance of counsel in the former client's petition for post-conviction relief?

OPINION

Exceptions to the confidentiality rules permit, but do not require, the former defense lawyer alleged to have rendered ineffective assistance of counsel to make limited voluntary disclosure to the prosecution of information relating to the representation of the former client outside the in-court proceeding without judicial supervision or approval. Indiscriminate, unlimited nor carte blanche disclosure of information relating to the former representation possessed by or in the file(s) of the former defense lawyer is not permitted. The disclosure must be limited only to information (1) which the lawyer reasonably believes necessary to respond to the specific claims or allegations in the petition as required by RPC 1.6(b)(5) or (2) which has become "generally known" as defined in RPC 1.9, cmt. [8a]. The lawyer must carefully evaluate and determine (1) whether it is reasonably necessary to make any disclosure and, if so, (2) narrow the disclosure only to what and how much information is reasonably necessary to meet the merits of the petition in light of the particular facts, the specific allegations of the petition and content of the lawyer's file(s). The disclosure should be no greater than reasonably necessary to accomplish the exceptions purposes. If no disclosure is reasonably necessary, no disclosure can be made outside the in-court proceeding.

Consideration must be given to whether and/or how the information disclosed could subsequently be used by the prosecution against the former client should the former client's claim be successful. Any disclosure which is not reasonably necessary outside the in-court proceeding must be revealed by the former defense lawyer only in the in-court proceeding consistent with RPC 1.6(c)(2)[1] where the disclosure will be subject to objection by the former client and to the supervision and rulings of the court.

DISCUSSION

A former client seeking relief from a criminal conviction on the basis of ineffective assistance of counsel must establish that the former defense lawyer's performance fell below an objective standard of reasonableness and that the performance, or lack thereof, prejudiced the former client. Strickland v. Washington, 466 U.S. 668, 686 (1984). The prosecution is placed in the position of having to defend against the allegations of ineffective assistance by the former defense lawyer to preserve the conviction. Both the prosecution and the former defense lawyer, therefore, have an interest in defending against the claim. The question arises when the prosecution seeks or requests the former defense lawyer to provide information, their file(s) or an informal interview prior to or outside the in-court judicial proceeding. While ABA Formal Op. 10-456 stated "...it is highly unusual" for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying in a judicial proceeding, anecdotally, it does not appear unusual in Tennessee.

Ex 1 + Response 11/25/2018

ABA Formal Ethics Opinion 10-456 (2010) has raised concerns regarding whether the former defense lawyer can voluntarily provide information relating to the former representation outside an in-court proceeding where there would be no judicial supervision and the former client could not raise objections and seek rulings of the court regarding the disclosure. The ABA opinion concluded that it is "highly unlikely" that it will be "justifiable" for the defense lawyer to provide information to the prosecution outside the in-court supervised proceeding, stating, in part, as follows:

> Against this background, 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. It will be rare to confront circumstances where trial counsel can reasonably believe that such prior, ex parte disclosure, is necessary to respond to the allegations against the lawyer. . . . This concern can almost always be addressed by disclosing relevant client information in a setting subject to judicial supervision. . . . If the lawyer's evidence is required, the lawyer can provide evidence fully, subject to judicial determinations of relevance and privilege that provide a check on the lawyer disclosing more than is necessary to resolve the defendant's claim. . . . Thus it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self defense to disclose client confidences to the prosecutor outside a court-supervised setting.

In answering this inquiry, the principles of (1) attorney-client privilege and (2) confidentiality must be considered. Although interrelated and often considered essentially the same, the requirements for and exceptions to the (1) attorney-client privilege and (2) confidentiality are substantively different. The attorney-client privilege and its exceptions are governed by statute [2] and common law. Confidentiality and its exceptions are governed by the Rules of Professional Conduct (RPC). Confidentiality is far broader than the attorney-client privilege. Differences between the two are addressed in RPC 1.6, cmt. [3]:

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.[3]
> (emphasis added)

"It is universally accepted that a defendant who attacks his conviction on the basis of ineffective assistance thereby waives the attorney-client privilege for relevant communications." ABA/BNA Lawyer's Manual on Professional Conduct 55:705-706. See, Bryan v. State, 848 S.W.2d 72, 81-82 (Tenn. Crim. App. 1992).

Even though the former client waives the attorney-client privilege by alleging ineffective assistance of counsel and is denied the right to invoke the privilege to prohibit his former lawyer from disclosing privileged communications between the two in an in-court judicial or similar proceeding, that waiver does not free the former lawyer to voluntarily disclose confidential client information outside the in-court proceeding. Even if the lawyer could be compelled to disclose information in the in-court proceeding because the information does not fall within the attorney-client privilege or because the privilege is waived, the Rules of Professional Conduct (RPC) 1.6(a)4 and 1.9(c)5 prohibit a lawyer from revealing any information relating to the representation of a current and former client outside the in-court proceeding, unless the client or former client gives informed consent or as otherwise provided in the rules. The confidentiality rule applies not only to communications between the client and the lawyer, but "...to all information relating to the representation, whatever its source." RPC 1.6, cmt. [3]. As provided in RPC 1.6, cmt. [2] "a fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship."

Informed consent of the former client is not required if the information relating to the former representation (1) falls within one of the exceptions provided in RPC 1.6(b) or (c) or (2) has become "generally known" as defined in RPC 1.9, cmt. [8a] 6. The question then becomes, are there exceptions to the confidentiality rules which would permit the former defense lawyer to reveal or disclose confidential information prior to and/or outside the in-court proceeding. Neither anger nor retaliation toward the former client for having alleged ineffective assistance of counsel justify the former lawyer to disclose such information outside the in-court proceeding.

RPC 1.6(b)(5)[7] provides a permissive "self-defense" exception to confidentiality. The rule, in applicable part, provides, "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client." (emphasis added). The exception is, by its terms, limited and permits, but does not require, the former defense lawyer to disclose information relating to the former representation, but only to the "extent the lawyer reasonably believes necessary." "Reasonably believes" is an objective standard which "denotes that the lawyer believes the matter in question and that the circumstances are such that a lawyer of reasonable prudence and competence would ascertain the matter in question." RPC 1.0(j) The exception gives the lawyer discretion to determine not only whether to make a disclosure but, if so, what disclosure will be made. "A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule." RPC 1.6, cmt. [14] If a disclosure is made, the exception requires the lawyer to narrow or limit his disclosure only to information that the lawyer reasonably believes necessary to respond to the specific allegations of the petition, no greater than is necessary to accomplish of the exception's purpose. See RPC 1.6, cmts. [13][14]. The exception does not require that the disclosures be made in an in-court supervised proceeding or setting nor with the supervision or approval of the court.

ABA Formal Op. 10-456 stated concerns regarding voluntary disclosure by defense counsel to the prosecution outside the in-court setting, as follows:

> Permitting disclosure of client confidential information outside court-supervised proceedings undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding. Disclosure of such information might

prejudice the defendant in the event of a retrial. Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers.

Two states have considered ABA Formal Op. 10-456, declined to accept its conclusions and held that the self-defense exception to the confidentiality rule permits limited voluntary disclosure by defense counsel to the prosecution outside the in-court proceeding consistent with the limits of the exception. District of Columbia Op. 364 (1/13) ("we do not share the opinion's view that extrajudicial disclosure will not be justifiable."); North Carolina Formal Ethics Op. 16 (1/27/12) ("we decline to adopt ABA Formal Op. 10-456"). District of Columbia Op. 364 concluded that:

> D.C. Rule 1.6(e)(3) 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. Even so, a lawyer should reflect before making disclosures of protected information to prosecutors, courts, or others. . . . Nor does the limited "self-defense" exception to confidentiality in Rule 1.6(e)(3) open the door to unlimited disclosures to prosecutors, courts or others of protected information. The rule allows a lawyer to disclose protected information only to the extent "reasonably necessary" to respond to "specific allegations" by the former client.

North Carolina Formal Ethics Op. 16 concluded:

> In reaching this conclusion, . . . both N.C. Gen. Stat. § 15A-1415(e) and Rule 1.6(b)(5) clearly admonish lawyers who choose to respond to claims of ineffective assistance of counsel, regardless of the setting, to respond in a manner that is narrowly tailored to address the specific facts underlying the specific claim. Simply put, the pursuit of an ineffective assistance of counsel claim by a former client does not give the lawyer carte blanche to disclose all information contained in a former client's file. . . . Disclosure should be no greater than what is reasonably necessary to accomplish the purpose. Therefore, once a lawyer has determined that disclosure of confidential or privileged information is necessary to respond to a claim of ineffective assistance of counsel, and once the lawyer has decided to make that disclosure, the lawyer still has a duty to avoid the disclosure of information that is not responsive to the specific claim. In the same vein, a prosecutor requesting information from defense counsel in relation to an ineffective assistance of counsel claim must limit his request to information relevant to the defendant's specific allegations of ineffective assistance. See Rule 3.8; Rule 4.4.

Virginia Informal Ethics Op. 1859 (6/6/12) addressed the same question in the context of an allegation of ineffective assistance of counsel in a habeas corpus petition. The opinion applied its version of the exception to the confidentiality rule in finding that "it was unlikely that it is reasonably necessary for the lawyer to disclose confidential information when filed, when the court has not made a determination of whether the petition is legally and procedurally sufficient." The opinion discussed that if the same outcome can be reached by disclosing information in the in-court supervised proceeding, it is not reasonably necessary to reveal the information prior to and outside the in-court proceeding.

While the concerns expressed in ABA 10-456 are reasonable, it did not strictly prohibit the voluntarily providing information to the prosecution outside the in-court proceeding. The limitations imposed on such disclosures by the other opinions discussed herein are consistent with the Tennessee Rules of Professional Conduct and are sufficient to limit the disclosure of information relating to the former representation of the former client who has alleged ineffective assistance of counsel, consistent with RPC 1.6.

CONCLUSION

In conclusion, the Tennessee Rules of Professional Conduct do not strictly prohibit a former defense lawyer alleged to have rendered ineffective assistance of counsel from providing information to the prosecution prior to or outside an in-court proceeding. 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. Neither RPC 1.6(b)(5) nor the "generally known" exception to RPC 1.9(c) require that the disclosure be made in an in-court proceeding or supervised or approved by the court for the former defense lawyer to reveal information which falls within those exceptions. Such disclosures may be made only as stated in the OPINION provided herein.

This 14th day of June, 2013.

ETHICS COMMITTEE:

Wade Davies
Eleanor Yoakum
Scott Reams

APPROVED AND ADOPTED BY THE BOARD

[1] RPC 1.6 (c)(2) provides:

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:...(2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or

[2] TCA 23-3-105. Privileged Communications provides:

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury.

[3] Scope [22] of the Tennessee Rules of Professional Conduct provides:

Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation....The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

[4] RPC 1.6(a) provides:
(a) A lawyer shall not reveal information relating to the representation of a client unless:
(1) the client gives informed consent;
(2) the disclosure is impliedly authorized in order to carry out the representation; or
(3) the disclosure is permitted by paragraph (b) or required by paragraph (c).

[5] RPC 1.9(c) provides:
(c) A lawyer who has formerly represented a client in a matter...shall not thereafter reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

[6] RPC 1.9 [8a] provides:
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 depositaries, 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 . . . A lawyer may not, however, 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. Even if permitted to disclose information relating to a former client's representation, a lawyer should not do so unnecessarily.

[7] RPC 1.6 (b)(5) provides:
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:...(5) 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.

Mission Statement

To assist the Court in protecting the public from harm from unethical lawyers by administering the disciplinary process; to assist the public by providing information about the judicial system and the disciplinary system for lawyers; and, to assist lawyers by interpreting and applying the Court's disciplinary rules.