

## NOTICE TO THE BAR

### **REPORT OF THE SUPREME COURT WORKING GROUP ON THE DUTY OF CONFIDENTIALITY AND WRONGFUL CONVICTIONS – COMMENTS REQUESTED**

The Supreme Court Working Group on the Duty of Confidentiality and Wrongful Convictions has submitted its report and recommendations to the Court. The Court created the Working Group to explore and offer recommendations on a potential exception to a lawyer's duty to maintain the confidentiality of information relating to the representation of a client when that information demonstrates that an innocent person has been wrongly convicted of a crime with significant penal consequences.

A majority of the Working Group recommended that Rule of Professional Conduct 1.6 be amended to include an exception requiring lawyers to disclose information that demonstrates that an innocent person has been wrongly incarcerated. A strong minority of the Working Group recommended that Rule of Professional Conduct 1.6 not be amended and that no new exception be adopted.

The Court by this notice requests the legal community and interested members of the public to comment on the Working Group's report and recommendations. Written comments should be submitted by **June 26, 2020**, to:

Hon. Glenn A. Grant, J.A.D.  
Acting Administrative Director of the Courts  
Subj: Working Group on the Duty of Confidentiality and Wrongful Convictions  
Hughes Justice Complex; P.O. Box 037  
Trenton, New Jersey 08625-0037

Comments may also be submitted by e-mail to [Comments.Mailbox@njcourts.gov](mailto:Comments.Mailbox@njcourts.gov).

The Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by e-mail should include their name and e-mail address. Comments submitted are subject to public disclosure.



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Glenn A. Grant, J.A.D.  
Acting Administrative Director

Dated: May 26, 2020

# **WORKING GROUP ON THE DUTY OF CONFIDENTIALITY AND WRONGFUL CONVICTIONS**



## **REPORT AND RECOMMENDATIONS**

**February 12, 2020**

**Chair: Hon. Jack M. Sabatino, P.J.A.D.**

TABLE OF CONTENTS

INTRODUCTION ..... 1

I. BACKGROUND ..... 2

II. RECOMMENDATIONS ..... 7

    A. Majority Position – Amend Rule of Professional  
    Conduct 1.6 to Include an Exception ..... 7

    B. Minority Position: No New Exception to Confidentiality  
    in Rule of Professional Conduct 1.6 ..... 16

    C. Other Considerations ..... 21

CONCLUSION ..... 24

## **INTRODUCTION**

Chief Justice Rabner created the Supreme Court Working Group on the Duty of Confidentiality and Wrongful Convictions to explore and offer recommendations as to potential amendments to Rule of Professional Conduct 1.6. Specifically, the Chief Justice sought recommendations on a potential exception to a lawyer's duty to maintain the confidentiality of information relating to the representation of a client when that information demonstrates that an innocent person has been wrongly convicted of a crime with significant penal consequences.

The Working Group is divided. A majority recommends that Rule of Professional Conduct 1.6 be amended to include an exception requiring lawyers to disclose information that demonstrates that an innocent person has been wrongly incarcerated. Some members of the majority disagree with a mandatory reporting requirement and recommend that lawyers be permitted, but not required, to disclose such information. Some members of the majority disagree with the element of wrongful incarceration and recommend that the exception be triggered when the information demonstrates that an innocent person has been wrongly convicted even if that person has not been incarcerated. Other members of the majority recommend that the exception be triggered only when the innocent person has been wrongly convicted of a crime with significant penal consequences.

A strong minority of the Working Group recommends that Rule of Professional Conduct 1.6 not be amended and no new exception be adopted.

## **I. BACKGROUND**

The Working Group on the Duty of Confidentiality and Wrongful Convictions considered potential amendments to New Jersey Rule of Professional Conduct 1.6 to create an exception demonstrating that an innocent person has been wrongly convicted of a crime with significant penal consequences. The Rule currently prohibits a lawyer from disclosing such confidential information without client consent.

Rule of Professional Conduct 1.6 provides, in pertinent part:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c) and (d).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; or

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

Accordingly, if a client were to tell defense counsel that she committed a crime for which another person has been wrongly incarcerated, that information is confidential and the lawyer may not reveal it without client consent. The exception in paragraph 1.6(b)(1) does not apply because disclosure will not “prevent” the client from committing a prospective criminal act; the act already occurred.

The 1984 version of New Jersey Rule of Professional Conduct 1.6 provided that a lawyer must reveal otherwise confidential information to prevent the client from committing a criminal, illegal, or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm. The 2004 version of the Rule broadened this provision to state that the lawyer must reveal such information to prevent the client or another person from committing the criminal, illegal, or fraudulent act. The Pollock Commission had recommended retaining this crime/fraud exception even though the American Bar Association (ABA), in its 2000 revisions to the Model Rules, removed it.<sup>1</sup> The Court’s 2016 review of the

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<sup>1</sup> Supreme Court Administrative Determinations on the Report and Recommendations of the Commission on the Rules of Professional Conduct (Pollock Commission) (Sept. 10, 2003), reprinted in Michels, New Jersey Attorney Ethics, p. 1247-1248 (Gann 2020).

Rules of Professional Conduct did not produce amendments to this portion of the Rule.<sup>2</sup>

The ABA Model Rule of Professional Conduct 1.6 differs from its counterpart in New Jersey. The Model Rule permits disclosure (“may reveal”) of otherwise confidential information “to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm.” MRPC 1.6(b)(1). As noted above, New Jersey limits disclosure to prevent a criminal or fraudulent act (a crime/fraud exception) that is likely to result in death or substantial bodily harm; disclosure in these circumstances is mandatory (“shall reveal”). Some scholars<sup>3</sup> argue that the Model Rule can be construed to permit a lawyer to disclose information demonstrating wrongful incarceration; the argument is that wrongful incarceration may be considered to comprise “reasonably certain substantial bodily harm.” Research did not disclose case law or disciplinary cases testing this theory.

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<sup>2</sup> Supreme Court Administrative Determinations on the Report and Recommendations of the Special Committee on Attorney Ethics and Admissions (Zazzali Committee) (April 14, 2016).

<sup>3</sup> See, e.g., James E. Moliterno, Symposium: A Roundtable Discussion of the ABA’s Standards for Criminal Litigation: Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client’s Confidences to Rectify the Wrongful Conviction of Another?, 38 Hastings Const. L.Q. 811 (Summer 2011).

Massachusetts and Alaska are currently the only jurisdictions that have adopted explicit exceptions to confidentiality obligations for information pertaining to wrongful convictions. The Massachusetts Rule permits disclosure (“may reveal”) of otherwise confidential information “to prevent the wrongful execution or incarceration of another[.]” Mass. RPC 1.6(b)(1). The Official Comment states that confidential information may be revealed “in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution. This language has been included to permit disclosure of confidential information in these circumstances where the failure to disclose may not involve the commission of a crime” by the client. Mass. RPC 1.6 Comment 6A. Alaska similarly permits, but does not require, disclosure of otherwise confidential information when the lawyer reasonably believes that disclosure is necessary to prevent “reasonably certain” execution or incarceration of an innocent person. Alaska RPC 1.6(b)(1)(C). Research has not disclosed any cases or opinions construing or applying these two states’ rules.

In 2011, the New Jersey Supreme Court Professional Responsibility Rules Committee (PRRC) considered whether Rule of Professional Conduct 1.6 should be amended to create a wrongful incarceration exception. The PRRC did not present a specific recommendation to the Court; while generally amenable to an



exception, it noted practical and procedural difficulties in implementation and questioned “whether a balance can be struck that requires a disclosure in a way that both preserves the integrity of that paramount right [to effective representation of counsel] and alleviates the suffering of a wrongly convicted innocent person.”

In the course of its review, the PRRC sought input from bar groups and other stakeholders. Some stakeholders adamantly opposed the exception, arguing that it would diminish the Sixth Amendment right to effective counsel; erode the lawyer-client privilege; eviscerate trust between lawyer and client; and chill candid and honest communications. Stakeholders also raised special concern about public defenders, who are not chosen by the client and may already have difficulty establishing trust and confidence. One stakeholder opposed the exception in general but supported disclosure after the death of the client.

Other stakeholders strongly supported an exception from confidentiality for information that demonstrates that another person has been wrongly incarcerated. One stakeholder supported an exception only if the client could be granted, by a court, use immunity that would prevent the State from using the client’s statement or any information derived from the client’s statement in a future prosecution against the client.

The PRRC recommended that if an exception were adopted, it should be mandatory (“shall reveal”), rather than permissive (“may reveal”), for consistency in application. The PRRC noted that the information from the client must be sufficiently reliable and credible, and the innocent person must have been subjected to a significant wrong. It also supported a mechanism for granting immunity to the client; immunity would be sought from the Attorney General. The PRRC further suggested that the immunity statute be amended.

The Working Group considered the PRRC’s Report and the positions of the various stakeholders, the scholarly literature, and more recent developments arising from efforts of conviction integrity groups. A majority of the Working Group recommends that Rule of Professional Conduct 1.6 be amended to require lawyers to disclose otherwise confidential information that demonstrates that an innocent person has been wrongly incarcerated. A strong minority of the Working Group recommends that no changes be made to Rule of Professional Conduct 1.6.

## **II. RECOMMENDATIONS**

### **A. Majority Position – Amend Rule of Professional Conduct 1.6 to Include an Exception**

A majority of the Working Group recommends that Rule of Professional Conduct 1.6 be amended to include an exception to require lawyers to disclose

otherwise confidential information that demonstrates that an innocent person has been wrongly incarcerated. The majority finds that disclosure of such information strongly serves the interest of justice and enhances public confidence in the criminal justice system. On balance, an exception for this purpose is justified because the suffering of the wrongly incarcerated person is great, while the universe of confessing clients is likely to be exceptionally small.

Due to evolving technology and the efforts of conviction review groups, it has become apparent that there are too many innocent people in jail. Recent DNA exonerations, in particular, highlight the prevalence of wrongful convictions and demonstrate that more safeguards are required. As Benjamin Franklin stated: “it is better that one hundred guilty persons should escape than one innocent person should suffer.”<sup>4</sup> This country has long been repulsed by the specter of an innocent person wrongly convicted; when such cases come to light, the public loses confidence in the criminal justice system.

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<sup>4</sup>Letter to Benjamin Vaughan, March 14, 1785, from The Writings of Benjamin Franklin, ed. Albert H. Smyth, vol. 9, p. 293 (1906). Franklin may have been restating Voltaire (“that ’tis much more Prudence to acquit two Persons, tho’ actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent”). Zadig, chapter 6, p. 53 (1749, reprinted 1974)). See also Sir William Blackstone (“For the law holds, that it is better that ten guilty persons escape, than that one innocent suffer”). Commentaries on the Laws of England, 9th ed., book 4, chapter 27, p. 358 (1783, reprinted 1978).

The majority acknowledges that lawyers who reveal client confidences to remedy a wrongful incarceration necessarily harm their own client. The decision to support an exception to the confidentiality rule is the result of balancing interests: the exception serves a solemn, fundamental public interest, albeit at the expense of the client. Disclosure will serve justice and remedy a continuing wrong; it is unconscionable to permit an innocent person to remain in jail. The lawyer's client has committed an offense; the innocent person was wrongly convicted of that same offense. The majority accepts that the client is likely to suffer consequences – the same consequences that the innocent person is currently suffering. Given the tension between a weighty moral obligation and the duty of confidentiality, the majority resolves the tension in favor of the moral obligation.

A lawyer's obligation to maintain confidentiality is not ironclad; there are exceptions, grounded on important public policies. Rule of Professional Conduct 1.6(b) requires a lawyer to reveal otherwise confidential information to prevent the client or another person "(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; or (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal."

When the Rule was amended in 1983 to include these exceptions, the Court considered now-familiar arguments from the trial bar about the sacrosanct nature of lawyer-client communications. See Debevoise Committee Report (June 24, 1983), reprinted in Michels, New Jersey Attorney Ethics (Gann 2020), p. 1353.

The Debevoise Committee noted:

In past decades the New Jersey Supreme Court has stated that, in the balancing act needed to resolve the conflicting principles of full disclosure versus confidentiality, public policy demands that full disclosure is the more fundamental principle. In re Kozlov, 79 N.J. 232, 241-42 (1979); In re Richardson, 31 N.J. 391, 396-97 (1960). The Committee further believes that any step less than acceptance by the bar of proposed Rule 1.6 will diminish the public's esteem for the legal profession. . . . We studied the [American College of Trial Lawyers] report with care and fully understand the College's concern that clients not be inhibited from making full disclosure to the lawyers. In our view, however, the balance of all interests involved tips heavily in favor of the [ABA] proposals [to create an exception]. Lawyers cannot be permitted to be the instruments of their clients' criminal and/or fraudulent activities. If the price is a lessening of their clients' willingness to make full disclosure to their lawyers, so be it.

[Debevoise Committee Report (June 24, 1983), reprinted in Michels, New Jersey Attorney Ethics (Gann 2020), p. 1354.]

The Court decided to accept the recommendation and adopted the existing exceptions to confidentiality.

These exceptions require a lawyer to breach client confidentiality to prevent a client not just from engaging in criminal conduct that is likely to result in substantial bodily harm, but also to prevent an act that would cause substantial

injury to the financial interest or property of another. RPC 1.6(b)(1). This reflects a public policy to prevent harm – including financial harm – to another even though the lawyer’s obligation to disclose such information could negatively affect the lawyer-client relationship. The current exceptions to confidentiality already affect the lawyer-client relationship; lawyers know, at the inception of the relationship, that the client may tell them things that they will be compelled to disclose. The majority finds it to be only an incremental step to add an exception to require a lawyer to disclose confidential information to remedy a wrongful incarceration, which is a harm far greater than financial injury.

The majority also acknowledges that if this new exception to confidentiality were adopted, lawyers would have an obligation to warn the client of its existence at the beginning of the representation, thereby potentially inhibiting open communication. In response to this concern, the majority notes that lawyers already discuss confidentiality and its exceptions with clients, advising clients not to reveal certain information due to existing exceptions. One more related warning is unlikely to significantly diminish open communication.

Lastly, the majority is aware that disclosure of such information may not be admissible in court due to evidentiary rules (primarily lawyer-client privilege and

hearsay)<sup>5</sup>, but it may produce other benefits. The wrongly incarcerated person may gain public support, the disclosure could lead to other admissible evidence, or it could prompt the prosecution to reexamine the case.

After deciding to recommend the adoption of an exception to Rule of Professional Conduct 1.6, the majority considered additional issues.

Mandatory or permissive disclosure. While the majority members were divided on this point, most of them recommend that the obligation to disclose should be mandatory, not permissive. Mandatory disclosure provides some measure of uniformity in application. It also relieves the lawyer from the personal moral burden of deciding whether the suffering of a remote, wrongly incarcerated person justifies the immediate and harmful effect the disclosure will have on the lawyer's own client. These members reason that since the goal of an exception to confidentiality for this purpose is to serve justice, disclosure should be mandatory.

Other members support permissive disclosure. They argue that permissive disclosure allows the defense lawyer to exercise discretion, weigh the various burdens, and examine the entire context of the decision. The members assert that the purpose of an amendment to the confidentiality obligation should be to lift the

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<sup>5</sup> The Committee did not delve into or resolve admissibility issues under Rules of Evidence 504 (privilege) and 803(c)(25) (hearsay declarations against interest), but simply acknowledge that admissibility issues could arise.

threat of an ethics violation from a lawyer who views disclosure of such information as a moral obligation. They recommend a rule change to remove the ethical block to disclosure, not to force lawyers to disclose such information. Further, they question the utility of a mandatory disclosure rule, noting a study that found that lawyers often do not disclose information to prevent wrongful acts by their clients, even when disclosure is mandatory and necessary to prevent substantial harm to others. See Lesley C. Levin, Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others, 47 Rutgers L. Rev. 81 (1994) (survey of New Jersey lawyers regarding mandatory reporting under RPC 1.6(b)(1)).

Reasonable belief standard. The majority recommends that a lawyer considering whether the information is sufficient to trigger a disclosure obligation be governed by the existing “reasonable belief” standard as defined in Rule of Professional Conduct 1.6(e). That paragraph provides: “Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matter[] . . . .” The reasonable belief standard in Rule of Professional Conduct 1.6(e) does not require the lawyer to investigate or corroborate the information, though the lawyer is free to do so. The majority



pondered alternative standards but concluded the existing standard of “reasonable belief” could not be helpfully defined with more specificity.

Actual innocence. The majority recommends that the exception apply when the information obtained by the lawyer demonstrates the actual innocence of the wrongly incarcerated person. The proposed Official Comment incorporates an actual innocence standard.

To whom would the lawyer disclose. The majority considered whether the exception should specify to whom the lawyer would disclose the information. Rule of Professional Conduct 1.6(b)(1) provides that the lawyer shall disclose certain information about future criminal activity to the “proper authorities.” The term “authorities” implies law enforcement or a prosecutor. The majority perceived that disclosure of wrongful incarceration solely to law enforcement is unduly restrictive; disclosure to other people, such as a lawyer for the wrongly incarcerated person, may be more appropriate. The majority recommends that the Rule not restrict the lawyer in this manner; the proposed language does not specify to whom the lawyer shall disclose the information.

Wrongful incarceration; wrongful conviction; or wrongful conviction of a crime with significant penal consequences. While the majority was divided on this issue, most members recommend that the exception apply when an innocent person

is or was wrongly incarcerated. This group acknowledges the injustice and significant repercussions of a wrongful conviction that is not accompanied by incarceration but balanced the harm to the wrongly convicted person against the harm to the lawyer-client relationship and found that the tipping point is wrongful incarceration. A smaller group urged that the exception should apply when the information demonstrates that a person has been wrongly convicted, even if there is no subsequent incarceration. This group argues that a wrongful conviction, even without incarceration, adversely affects employment prospects and may cause other collateral harm, and people on probation are exposed to potential incarceration. Another smaller group places the tipping point at a different spot, arguing that the exception should apply only if there is a wrongful conviction and a “significant penal consequence,” such as incarceration for a certain period of time, civil commitment after criminal conviction, or parole supervision for life.

Language. The majority recommends that a new paragraph (g) be added to Rule of Professional Conduct 1.6, drawing from the language in the Massachusetts Rule. New paragraph (g) would provide:

A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to aid in rectifying the consequences of the wrongful incarceration of another.

If the Court selects an option other than wrongful incarceration, the proposed language is:

A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to aid in rectifying the consequences of [the wrongful conviction of another] OR [the wrongful conviction of another of a crime with significant penal consequences].

The majority recommends that new Rule of Professional Conduct 1.6(g) be accompanied by an Official Comment, again drawing from the Massachusetts comment. The Official Comment would provide:

Official Comment:

Rule of Professional Conduct 1.6(g) requires a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been wrongly incarcerated.

If the Court selects an option other than wrongful incarceration, the proposed language is:

Rule of Professional Conduct 1.6(g) requires a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been [wrongly convicted of a crime] OR [wrongly convicted of a crime with significant penal consequences. Significant penal consequences include incarceration for [period of time], involuntary civil commitment after criminal conviction, and parole supervision for life].

**B. Minority Position: No New Exception to Confidentiality in Rule of Professional Conduct 1.6**

A strong minority of the Working Group, including representatives of the Offices of the Attorney General and Public Defender, opposes a new exception to

confidentiality in Rule of Professional Conduct 1.6. These members adamantly insist that lawyers should not disclose information that is likely to expose their clients to criminal liability. The recommended new Rule would require the lawyer to disclose that the client has committed a crime. This proposed exception would require lawyers not only to betray their clients, but also to inflict direct harm on them.

The minority urges that the Court maintain the sanctity of the lawyer-client privilege and the accompanying ethical requirement of strict confidentiality. The relationship between lawyers and clients is grounded on trust, and confidentiality encourages open and candid communication. “Persons who seek legal advice must be assured that the secrets and confidences they repose with their attorney will remain with their attorney, and their attorney alone. Preserving the sanctity of confidentiality of a client's disclosures to his attorney will encourage an open atmosphere of trust, thus enabling the attorney to do the best job he can for the client.” Reardon v. Marlayne, Inc., 83 N.J. 460, 470 (1980). “So grave is the necessity for full and open disclosure in the case of criminal representation that the court has equated it ‘with an intimacy equal to that of the confessional.’” In re Nackson, 114 N.J. 527, 532 (1989) (quoting State v. Sugar, 84 N.J. 1, 13 (1980)).

Exceptions to confidentiality erode this relationship and trust, impede necessary candid communication, and limit the lawyer’s ability to effectively

counsel the client. The minority expressed special concern about public defenders, who are not chosen by the client and may already have difficulty establishing trust and confidence. An exception that would require a lawyer to betray confidences and inflict direct harm on a client is unfathomable and contrary to the lawyer's oath and duty.

The minority also expresses concern about the effect of such an exception on clients' constitutional rights under the Sixth Amendment of the United States Constitution and Article I, Paragraph 10 of the New Jersey Constitution. These provisions guarantee the right of effective assistance of counsel in criminal prosecutions. "Any interference with the relationship of trust between attorney and client may destroy counsel's effectiveness." State v. Sugar, 84 N.J. 1, 28 (1980).

As the Court stated in State v. Sugar:

When confronted with the awesome power of the criminal process, a client is never more in need of professional guidance and advocacy. In this setting, an instinct for survival compels a defendant to confide in an attorney. The necessity of full and open disclosure by a defendant imbues that disclosure with an intimacy equal to that of the confessional, and approaching even that of the marital bedroom.

[State v. Sugar, 84 N.J. 1, 15-16 (1980) (footnote and internal citations omitted).]

The minority acknowledges that there currently are some exceptions to confidentiality in Rule of Professional Conduct 1.6(b). Lawyers are required to

disclose otherwise confidential information to prevent the client from committing a criminal, illegal, or fraudulent act that will cause serious harm. On hearing such information, the lawyer has the opportunity to counsel the client to refrain from engaging in such conduct; if the client heeds the legal advice after being apprised that the lawyer will be forced to inform the proper authorities, no disclosure need be made. In contrast, an exception requiring a lawyer to disclose that the client has previously committed a crime for which another person is incarcerated furthers no traditional lawyer-client purpose. The lawyer would be compelled to report the client's prior conduct and promptly terminate the lawyer-client relationship.

If such an exception were adopted, lawyers would need to explain to their clients at the beginning of the representation that if they reveal certain information, the lawyer would be obligated to disclose that information. RPC 1.4(c). This warning of the limits of confidentiality could chill candid and open communication. When considering whether to cooperate with government to reduce a potential sentence, defense counsel must have full knowledge of a client's criminal activities; the lawyer must be thoroughly prepared in case the client is granted immunity for one act but then is questioned about other acts for which no immunity agreement is in place. An exception for wrongful incarceration information would impede defense counsel from obtaining full information from the client in preparation for such sessions.

Further, such information, in and of itself, is unlikely to have the desired effect of freeing the innocent person, as the lawyer's statement may not be admitted into evidence due to the lawyer-client privilege. See State v. Macumber, 544 P.2d 1084 (Ariz. 1976) (lawyer for deceased client prepared to testify that the client confessed to crime for which another person was being tried; court ruled that lawyer-client privilege bars such testimony).

If defense counsel learns information that demonstrates that an innocent person has been wrongly convicted, the lawyer may be able to take steps to remedy the situation short of informing on the client. The lawyer can work with the client to bring forward the information by consent, perhaps in connection with a proffer for immunity or a plea bargain.

The minority does not discount the suffering of an innocent, wrongly incarcerated person. Rather, it argues that the burden of remedying the travesty of wrongful incarceration should not be borne by defense counsel in this manner. To the extent additional safeguards must be created to address wrongful incarceration, those safeguards should be focused elsewhere.

The minority concludes that a new exception to confidentiality obligations simply is not worth the resultant erosion of the lawyer-client relationship. The

damage to a defense lawyer's relationship with the client is too great and the utility of the information is too small.

### C. Other Considerations

The Working Group considered recommending that the Rule be changed but only if the State is prevented from using the client's statement or any information derived from the client's statement in a future prosecution against the client (use/derivative use immunity.) There currently is no statutory mechanism for immunity when a person offers information about another's wrongful conviction or incarceration. While use/derivative use immunity offers the greatest protection to the client, the Group decided that a Rule change contingent on enactment of such an immunity statute simply is not viable.

Use/derivative use immunity under the current statute, N.J.S.A. 2A:81-17.3, is inapposite in the confessing client situation since it is limited to witnesses in existing criminal proceedings and is available only on request by the Attorney General or a county prosecutor with the approval of the Attorney General. Judges cannot grant immunity. State v. Cito, 213 N.J. Super. 296 (App. Div. 1986), certif. den. 107 N.J. 141 (1987) (request for judicial grant of immunity denied). Immunity is ordinarily granted only to prosecution witnesses and not defense witnesses.



Other immunity statutes are not limited to an existing criminal proceeding and are not conditioned on approval by a prosecutor. These statutes, however, are applicable only in specific circumstances. See, e.g., N.J.S.A. 9:6-8.13 (person making report of child abuse has immunity); N.J.S.A. 30:1A-3(e) (person reporting nursing home abuse has immunity); N.J.S.A. 2C:35-30 (person seeking medical assistance for someone experiencing a drug overdose has immunity from drug charges).

The Working Group does not recommend that the Court request the Legislature to pass a new immunity statute. An immunity statute for reporting a wrongful conviction is likely to be controversial and is readily subject to abuse. False confessions are not uncommon; a family member – or a gang member – could falsely confess to a crime for which another member is incarcerated and then seek immunity. See, e.g., State v. Miley Anthony Wilson, 1980 Ohio App. LEXIS 9888, 1980 WL 352600 (2<sup>nd</sup> App. Dist. Ohio 1980) (defendant moved for new trial based on newly discovered evidence that fellow prison inmate admitted to him that he committed the crime; fellow prison inmate later testified that he intended to confess to the crime if he was granted immunity and then defendant would sue the State for a wrongful conviction and pay the fellow inmate a portion of the proceeds).

The Working Group further discussed whether lawyers should be permitted to disclose such information only after the client has died. The Group decided that this is not an ideal solution, in part because the wrongly incarcerated person must wait until the confessing client's death. Further, even though the confessing client has died, there may still be repercussions; for example, gangs may target the confessing client's family members.

In sum, a majority recommends that Rule of Professional Conduct 1.6 be amended to include an exception requiring lawyers to disclose information that demonstrates that an innocent person has been wrongly incarcerated. A strong minority of the Working Group recommends that Rule of Professional Conduct not be amended and no new exception be adopted.

## CONCLUSION

This Report and Recommendations of the Working Group on the Duty of Confidentiality and Wrongful Convictions is hereby presented to the Court for its consideration. The Working Group thanks the Court for this opportunity to serve.

Respectfully submitted,

### WORKING GROUP ON THE DUTY OF CONFIDENTIALITY AND WRONGFUL CONVICTIONS

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