

27 NCAC 02 RULE 8.6 INFORMATION ABOUT A POSSIBLE WRONGFUL CONVICTION

(a) Subject to paragraph (b), when a lawyer knows of credible evidence or information, including evidence or information otherwise protected by Rule 1.6, that creates a reasonable likelihood that a defendant did not commit the offense for which the defendant was convicted, the lawyer shall promptly disclose that evidence or information to the prosecutorial authority for the jurisdiction in which the defendant was convicted and to North Carolina Office of Indigent Defense Services or, if appropriate, the federal public defender for the district of conviction.

(b) Notwithstanding paragraph (a), a lawyer shall not disclose evidence or information if:

- (1) the evidence or information is protected from disclosure by law, court order, or 27 N.C. Admin. Code Ch. 1B §.0129;
- (2) disclosure would criminally implicate a current or former client or otherwise substantially prejudice a current or former client's interests; or
- (3) disclosure would violate the attorney-client privilege applicable to communications between the lawyer and a current or former client.

(c) A lawyer who in good faith concludes that information is not subject to disclosure under this rule does not violate the rule even if that conclusion is subsequently determined to be erroneous.

(d) This rule does not require disclosure if the lawyer knows an appropriate governmental authority, the convicted defendant, or the defendant's lawyer already possesses the information.

COMMENT

[1] The integrity of the adjudicative process faces perhaps no greater threat than when an innocent person is wrongly convicted and incarcerated. The special duties of a prosecutor with respect to disclosure of potentially exonerating post-conviction information are set forth in Rule 3.8(g) and (h). However, as noted in the comment to Rule 3.3, Candor Toward the Tribunal, the special obligation to protect the integrity of the adjudicative process applies to all lawyers. Under Rule 3.3(b), this obligation may require a lawyer to disclose fraudulent testimony to a tribunal even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. Similarly, the need to rectify a wrongful conviction and prevent or end the incarceration of an innocent person justifies extending the duty to disclose potentially exculpatory information to all members of the North Carolina State Bar, regardless of practice area and limited only by paragraph (b). It also justifies the disclosure of information otherwise protected by Rule 1.6. For prosecutors, compliance with Rule 3.8(g) and (h) constitutes compliance with this rule.

[2] This rule may require a lawyer to disclose credible evidence or information, whether protected by Rule 1.6 or not, if the evidence or information creates a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted. To determine whether disclosure is required, a lawyer must not only consider the credibility of the evidence or information and its source but must also evaluate the substance of the evidence or information to determine whether it creates a reasonable likelihood that the defendant did not commit the offense.

[3] The duty to disclose is qualified in paragraph (b) by legal obligations and client loyalty. A lawyer may not disclose evidence or information if prohibited by law, court order, or the administrative rule that makes the proceedings of the State Bar's Grievance Committee confidential (27 N.C. Admin. Code Ch. 1B §.0129). The latter prohibition insures a lawyer's response to a grievance does not inadvertently impose a duty to disclose on the lawyers in the State Bar Office of Counsel or on the State Bar Grievance Committee. In addition, paragraph (b) specifies that a lawyer may not disclose evidence or information if doing so would criminally implicate the lawyer's client or the evidence or information was received in a privileged communication between the client and the lawyer. Disclosure is also prohibited when it would result in substantial prejudice the client's interests. Substantial prejudice to a client's interests includes bodily harm, loss of liberty, or loss of a significant legal right or interest such as the right to effective assistance of counsel or the right against self-incrimination.

[4] When disclosure of information protected by Rule 1.6 is permitted, the lawyer should counsel the client confidentially, advising the client of the lawyer's duty to disclose and, if possible, seeking the client's cooperation.

History Note *Authority* G.S. 84-23;
 Adopted by the Supreme Court: March 16, 2017.