

#005

From: JAMES FINCKENAUER <finckena@scarletmail.rutgers.edu>
Sent: Monday, June 1, 2020 12:19 PM
To: Comments Mailbox
Subject: [External]Rule of Professional Conduct 1.6

CAUTION: This email originated from outside the Judiciary organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Judge Grant:

This is in response to your invitation for interested members of the public to comment on the proposed amendment of Rule of Professional Conduct 1.6, relating to lawyer/client confidentiality and wrongful convictions. I support those in the majority in the report who recommend amending the rule to require lawyers to disclose pertinent and relevant information bearing on an innocent person who has been wrongly convicted of a crime. This position is consistent with the legal adage cited in the report – from Voltaire and Blackstone via Benjamin Franklin – that it is better to let the guilty go free than to convict the innocent. My reasoning is as follows:

1. Wrongful conviction in its own right is a significant negative consequence for an innocent person. It can have many negative collateral consequences that are undeserved if the individual has been wrongly convicted. Such consequences are a violation of the “just deserts” sentencing philosophy.
2. Limiting the change to only those who are wrongly incarcerated fails to recognize the critical importance of the potential consequences mentioned above. Being forced to carry an undeserved criminal conviction through one’s life is clearly a miscarriage of justice.
3. Limiting the change to those suffering “significant penal consequences” would make application of the rule subject to wide discretion among decisionmakers and variability across jurisdictions, thus again violating notions of equal treatment and the desert notion that like cases should be treated in like fashion. Significant penal consequences are so interpreted and seen through the eyes of the individual beholder.
4. Discretion on the part of defense attorneys as to whether or not to disclose exculpatory information again would lead to unequal treatment and thus unequal justice. An innocent person’s fate should not depend upon the whims and vagaries of individual attorneys deciding what their moral obligations are in such cases. Further, mandating disclosure removes any moral and legal dilemmas the defense may face in such situations.

Thank you for considering my views, and I look forward to learning the final outcome for the amendment.

Sincerely,

James O. Finckenauer, Ph.D.
Distinguished Professor Emeritus
School of Criminal Justice
Rutgers University