

**ALASKA BAR ASSOCIATION  
ETHICS OPINION NO. 2003-2**

**Responsibilities of the Attorney Representing the Personal Representative of an Estate  
When the Personal Representative is Engaging in Fraudulent or Criminal Conduct**

**Question Presented**

The Committee has been asked whether a personal representative's attorney has an ethical duty to disclose the personal representative's criminal or fraudulent conduct to the court and/or the beneficiaries of the estate in light of the adoption of the Alaska Rules of Professional Conduct (ARPC) in 1993 and the Alaska Supreme Court opinion in the *Matter of Estate of Brandon*, 902 P.2d 1299 (Alaska 1995). The Committee concludes that the personal representative's attorney may disclose the personal representative's fraudulent or criminal conduct to the court or beneficiaries under ARPC 1.6(b)(1), but is not required to do so. Ethics Opinion 91-2 (*Responsibilities of Attorney Representing Personal Representative of Estate When a Conflict Exists Between the Personal Representative and the Heirs of the Estate*) is modified to reflect the permission to disclose a client's fraudulent or criminal conduct as set forth in ARPC 1.6(b)(1)<sup>1</sup>.

**Analysis**

**a. Ethics Opinion 91-2**

The view in the majority of jurisdictions is that the attorney for a personal representative in a probate matter represents the personal representative in his or her capacity as personal representative, not the estate as an entity nor the individual beneficiaries of the estate.<sup>2</sup> Ethics Opinion 91-2 adopted the majority view.<sup>3</sup> Ethics Opinion 91-2 went on to conclude that the personal representative's status as a fiduciary does not change the personal representative's entitlement to the same protections and loyalty to which every client is entitled:

The opinions discussing the prohibition against disclosure of information adverse

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<sup>1</sup> ARPC 1.6(b)(1) provides: "(b) A lawyer may reveal a confidence or secret to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another." Alaska's rule provides for more disclosure than the Model Rules.

<sup>2</sup> See *Succession of Wallace*, 574 So. 2d 348, 357 (La. 1991)(citing cases). Accord Alaska Probate Rule 4 (a) which provides: "**(a) Entry of Appearance.** An attorney representing the personal representative or any other interested person shall file an entry of appearance with the court."

<sup>3</sup> "It is clear, therefore, that the attorney handling a probate proceeding is representing the personal representative and not the estate." Ethics Opinion 91-2 at 2.

to the personal representative make it clear that *a personal representative is entitled to the same protections and loyalty as any other client, notwithstanding the fiduciary relationship to the estate.* [Emphasis added.]

Ethics Opinion 91-2 at 3.

These two key conclusions of Ethics Opinion 91-2 remain valid: (1) when an attorney is retained by a personal representative, the attorney's client is the individual serving as personal representative, not the estate, and (2) the client's fiduciary status as a personal representative does not change the client's entitlement to the protections and loyalty due to all clients.<sup>4</sup>

### **b. Impact of Adoption of Alaska's Model Rules**

ARPC 1.6 provides that a lawyer generally shall not reveal confidences and secrets of a client. ARPC 1.6(b)(1) permits a lawyer to reveal a confidence or secret to prevent a client from committing a criminal or fraudulent act which the lawyer believes is likely to result in substantial injury to the financial interest or property of another. The relevant disclosure language in ARPC 1.6(b)(1) is permissive, not mandatory.<sup>5</sup> The attorney does not commit an ethical violation by choosing not to reveal a client confidence or secret to the beneficiaries or to the court even if such confidence or secret involves criminal or fraudulent conduct by the client.

However, a lawyer may not actively assist any client in pursuing a course of fraudulent or criminal conduct. ABA Formal Opinion 94-380, Counseling a Fiduciary, relying on the Model Rules of Professional Responsibility, explained :

The Model Rules impose a number of limitations on a lawyer representing a fiduciary. For example, a lawyer may not participate in a breach of fiduciary duty by the fiduciary that involves fraud or criminal activity because the lawyer's conduct is limited by Model Rule 1.2(d), which provides that a lawyer may not actively participate in a client's criminal or fraudulent activity. This rule applies to all lawyers, not just those representing fiduciaries. Lawyers are also prohibited from actively concealing client breaches of fiduciary duty, or actively assisting in such concealment, by Model Rules 4.1(a) (a lawyer shall not lie to third parties) and 3.3(a)(1) and (2) (a lawyer shall not lie to or conceal information from a

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<sup>4</sup> Ethics Opinion 91-2 also concluded that the attorney for the personal representative is not per se precluded from representing the personal representative as an individual against other beneficiaries of the estate. This opinion does not address this conclusion.

<sup>5</sup> The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. *See ARPC 1.6 Comment.* Where practical, the lawyer should seek to persuade the client to take suitable action. *See id.* If the attorney does choose to reveal the client's activities, the disclosure should be limited to the minimum the attorney reasonably believes necessary. *See id.*

tribunal).<sup>6</sup> If a lawyer knows that a breach of fiduciary duty has occurred, and that an accounting is misleading in that it hides wrongdoing committed by the fiduciary, the lawyer is expressly prohibited by Model Rule 3.3(a) from presenting the accounting to the court. Further, the lawyer is prohibited by Model Rule 4.1(a) from representing to the beneficiaries that a false accounting is accurate. These rules apply to a lawyer with a fiduciary client to the same extent as, but no farther than, they apply in any other lawyer/tribunal/third party scenario.

ABA Formal Opinion 94-380 at 3 n.6.

ARPC 1.2(d), 3.3(a) (1) and (2), and 4.1(a) are identical to the Model Rules. If a client persists in a course of fraudulent or criminal conduct despite the attorney's advice, and seeks to hide the fraudulent or criminal conduct from the beneficiaries and the court, the attorney may be forced to withdraw as counsel to avoid having the attorney's services involved in the wrongful conduct. ARPC 1.16 (a)(1) requires withdrawal when representation will result in violation of the Rules of Professional Conduct or other law. ARPC 1.16(b)(1) permits withdrawal from representation of a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if "(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent."

ARPC 1.6(b)(1) permits, but does not require, broader disclosure of a client's criminal or fraudulent conduct than provided for in the Model Rules and in Alaska's prior code of professional responsibility. Because of this change in Alaska's ethical rules, it is necessary to modify the portion of Ethics Opinion 91-2 that was based on the Model Rules and the prior code. In pertinent part, Ethics Opinion 91-2 stated:

*The attorney for the personal representative has a duty to advise the client of actions deemed necessary for the proper administration of the estate and to refrain from counseling or assisting the personal representative in conduct the attorney deems inconsistent with the best interests of the estate. Opinion 512, New York State Bar Assn. (July 11, 1979). The attorney does not, however, have a duty to advise heirs or creditors of the estate, and is prohibited from informing beneficiaries or the court of facts that would be adverse to the personal representative, or from taking any position hostile to the personal representative's interests.*

Ethics Opinion 91-2 at 2 (emphasis added).

Because this prohibition on informing the beneficiaries and the court of the personal representative's criminal or fraudulent conduct is inconsistent with ARPC 1.6(b)(1), Ethics Opinion 91-2 is modified to remove the prohibition on the attorney's informing the beneficiaries

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<sup>6</sup> ARPC 3.3(b) provides: "The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

or the court of facts adverse to the personal representative. An attorney for a personal representative is permitted to disclose the client's criminal or fraudulent conduct in accordance with ARPC 1.6(b)(1).

### **c. Impact of *Brandon***

The Alaska Supreme Court in the *Matter of Estate of Brandon*, 902 P.2d 1299 (Alaska 1995), held that:

When an attorney undertakes to perform legal services for a client who is acting in a fiduciary capacity, the attorney has a duty not to affect adversely the interests of the intended beneficiary. *Fickett v. Superior Court of Pima County*, [558 P.2d 998, 990 (Ariz. App. 1977)]; *see also Jenkins v. Wheeler*, [316 S.E.2d 354, 357 (NC 1984)] (“When a client merely represents a class of beneficiaries, the attorney should consider the beneficiaries’ interests, without undue concern for the interests of the legal representative.”)

*Brandon*, 902 P.2d at 1316.

In *Brandon* the issue before the Court was whether the attorneys for the co-personal representatives who were the decedent's non-dependent parents had an impermissible conflict of interest with the actual beneficiary of the estate, the decedent's only child. The parents' attorneys argued that Ethics Opinion 91-2 permitted them to represent the parents both as personal representatives and as individual claimants adverse to the minor beneficiary. The *Brandon* court found that Ethics Opinion 91-2 would not excuse the attorneys' conduct in the case and remanded for further findings concerning the attorneys' possible conflicts of interest. *Id.*<sup>7</sup>

The Committee concludes that the *Brandon* duty “not to affect adversely the interests of the intended beneficiary” does not change the permissive disclosure standard of ARPC 1.6(b)(1). The *Brandon* duty may encourage more attorneys to disclose a personal representative's fraudulent or criminal conduct, but it does not mandate disclosure as a matter of professional ethics.<sup>8</sup>

### **Conclusion**

The personal representative's attorney may not actively participate in or actively conceal the personal representative's fraudulent or criminal conduct. The adoption of the Alaska Rules of

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<sup>7</sup> The *Brandon* court discussed the case under Alaska's code of professional responsibility in effect at the time of the conduct in question. There are no references to the current ARPC.

<sup>8</sup> The question of whether or not an attorney's decision not to make the permissive disclosure of a personal representative's fraudulent or criminal acts constitutes malpractice is beyond the scope of this opinion.

Professional Conduct in 1993 identified circumstances under which disclosure of a personal representative's criminal or fraudulent conduct is permitted, but not required, and Ethics Opinion 91-2 is modified to reflect that change.

The personal representative's attorney has no ethical obligation to disclose the client's criminal or fraudulent conduct to the court or to the beneficiaries. In deciding whether or not to make a permissive disclosure of such conduct pursuant to ARPC 1.6(b)(1), the attorney should be alert to the Alaska Supreme Court's decision in the *Matter of Estate of Brandon*, 902 P.2d 1299 (Alaska 1995).

Approved by the Alaska Bar Association Ethics Committee on March 6, 2003.

Adopted by the Board of Governors on March 14, 2003.