

ALASKA BAR ASSOCIATION

ETHICS OPINION NO. 2005-1

Responsibilities of the Attorney Representing a Client Who, After Being Charged with a Felony Offense, Informs the Attorney of the Client's Intent to Commit Suicide if Convicted

Question Presented

An attorney represents a client charged with felony sexual assault, but realizes that the client has no credible defense. The client, however, is not interested in a plea bargain and is adamant about taking the case to trial. The client has further informed the attorney that if convicted of the felony sexual assault, the client will commit suicide rather than go to jail.

Must the attorney disclose the client's stated intention to commit suicide rather than go to jail if convicted?

The Committee concludes that under ARCP 1.14, the attorney may disclose the client's stated intent to commit suicide to the proper authorities (*e.g.*, the court, appropriate mental health professionals, or appropriate detention facility personnel) irrespective of the client's custodial status, but is not required to do so.¹

The Alaska Bar Association joins the American Bar Association and the several other state bar associations that have addressed this issue. These associations have determined that disclosure of a client's suicidal intent is permissible.²

¹ ARCP 1.14 provides in pertinent part that a lawyer "may . . . take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

² See ABA Informal Opinion 83-1500 (1983); Alabama Ethics Opinion RO-90-06; 74 Conn. B.J. 238 (2000); Committee on Professional Ethics of the Massachusetts Bar Association Opinion 79-61 (1979); N.Y. St. Bar. Assn. Comm. Prof. Eth. Op. 486 (1978); N.Y.C. Assn. B. Comm. Prof. Jud. Eth. Op. 1997-2 (1997); Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp. Op. 93-43 (1993); S.C. Bar Eth. Adv. Comm.

Analysis

Generally, an attorney may not reveal a confidence or secret concerning the representation of a client without the client's explicit or implicit consent. ARPC 1.6(a).³ Of course, there are exceptions where the client engages in criminal or fraudulent conduct, or raises a claim against the attorney.⁴ Those exceptions, however, do not apply to the facts here because suicide is not a crime in Alaska. Because no crime or fraud is involved, it may appear that Rule 1.6 prohibits the disclosure of the client's suicidal intent.⁵

In our opinion, Rule 1.14(b) permits disclosure of such information and in this particular circumstance, overrides the prohibitions set forth in Rule 1.6. *Cf.* 74 Conn. B.J. at 240.

Rule 1.14(b) comes into play "when the lawyer reasonably believes that the client cannot adequately act in the client's own best interest."⁶ In those circumstances, the lawyer either may seek the appointment of a guardian or "take other protective action." *See* Rule 1.14(b) (emphasis added). The Committee interprets the phrase "take other protective action" to permit disclosure of the client's stated intent to commit suicide if the lawyer reasonably believes that the client intends to carry out the threatened suicide if sent to jail. Put another way, any differing interpretation of "other protective action" would defeat the purpose of Rule 1.14(b) – namely, protecting the health and safety of a client who the lawyer reasonably believes is unable to act in his or her own interest.

Op.99-12 (1999); Utah St. Bar Op. 95 (1989). *See also* Restatement (Third) of Law Governing Lawyers § 66 (2000).

³ Rule 1.6(a) provides, in pertinent part, that a lawyer "shall not reveal a confidence or secret relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b) or Rule 3(a)(2)."

⁴ *See* Rule 1.6(b).

⁵ *But see* Utah State Bar Op. 95 (1989) (explaining that although suicide or other attempted suicide are not criminal, other bar associations that have dealt with the situation "uniformly" deem such acts "to be *malum in se* and treated as unlawful and criminal and therefore, subject to disclosure").

⁶ *See* note 1.

The Restatement recognizes an exception to the general duty of confidentiality and client disclosure based upon “the overriding value of life and physical integrity.” Comment b., Restatement (Third) of the Law Governing Lawyers § 66. Other states that have addressed this issue frame the attorney’s act of disclosure in such a situation as reflective of “certain principles of conduct that a lawyer is obligated to uphold by the very nature of their office and its relationship to society.”

These principles of conduct are the threads of our social fabric. None is more basic than society’s concern for the preservation of human life. A lawyer cannot be unmindful of that concern.

N.Y. St. Bar. Assn. Comm. Prof. Eth. Op. 486 (1978). That basic principle – “society’s concern for the preservation of human life” – is the foundation upon which each of the seven other state bar associations and the American Bar Association have based their conclusion that an attorney *may* disclose to the proper authorities the client’s stated intention to commit suicide.⁷ The American Bar Association has concluded that an attorney could disclose the client’s declared intent to commit suicide to a third person, rationalizing that this was permissible when the attorney has reason to believe that the client cannot adequately act in the client’s own interests. *See* ABA Comm. on Prof’l Ethics and Responsibility, Informal Opinion Op. 89-1530 (1989) (citing ABA Comm. on Prof’l Ethics and Responsibility, Informal Opinion Op. 83-1500 (1983)). *See also* ABA Model Rules of Prof’l Conduct R. 1.14 cmt. at 245 (5th ed. 2003).

The lawyer’s disclosure must be limited to the information the lawyer reasonably believes is necessary to aid the client. *See, e.g.*, Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp. Op. 90-26 (1990); Utah State Bar Op. 95. *Cf.* Comment, ARPC 1.6(b), “Disclosure Adverse to Client,” at ¶¶ 5-6 (explaining that the lawyer has professional discretion to reveal that a client intends

⁷ *See also* note 2.

prospective conduct that is likely to result in imminent death or substantial bodily harm and that such discretion requires consideration of several factors).

If the lawyer decides to disclose the client's stated intention to commit suicide, the question then becomes to whom is the lawyer's disclosure made? It is the Committee's opinion that depending upon the circumstances known to the lawyer at that time, appropriate entities for the lawyer to contact could include mental health authorities as well as law enforcement authorities. In addition to these entities, individuals such as family members or clergy could be appropriate resources for the lawyer to contact. *See, e.g.*, Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp. Op. 93-43 (1993); Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp. Op. 90-26 (1990).

This opinion does not address the issue of what kind of non-legal advice a lawyer might give to a suicidal client. The attorney can recommend that the client seek the services of a mental health professional or contact their own doctor, a crisis hotline, or friend or relative who could help arrange for appropriate intervention or care. The attorney also may seek professional guidance as to what to do under such circumstances. *See* 74 Conn. B.J. at 239 n.2; Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp. Op. 93-43 (1993).

Finally, there is the question of whether the attorney can continue to represent the client after having made such a disclosure. Alaska Rule 1.14 does not provide express guidance on this issue, but rather implies the continuation of the lawyer-client relationship.⁸ The American Bar Association further states that although withdrawal may be an option for the lawyer, depending upon the degree of the client's "impairment," "it is not favored." *See* ABA Model Rules of Prof'l Conduct R. 1.14 cmt. at 242-43 (5th ed. 2003).

⁸ The Comment to Rule 1.14 provides in pertinent part that "if the client has no guardian or legal representative, the lawyer often must act as de facto guardian." Comment, ARPC 1.14. The Comment further provides that "the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication," even if the person has a legal representative. *Id.* Moreover, "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." Comment, ARPC 1.14.

Approved by the Alaska Bar Association Ethics Committee on April 7, 2005.

Adopted by the Board of Governors on May 10, 2005.