

Ethics Opinion No. 95-1

Propriety of Shop Talk and Courtesy Copies Under ARPC 1.6 (Confidentiality of Information).

The Committee has been asked whether a lawyer may provide courtesy copies of pleadings or other documents in the public record to other lawyers, or may engage in general "shop talk" about pending or past cases with other lawyers, without first obtaining the express consent of the clients involved in the cases. The Committee's conclusion is that lawyers may provide courtesy copies of public documents upon request and also engage in informal exchanges of information, provided the lawyer reasonably believes the disclosures will not cause harm to the client. Alaska Rule 1.6(a) should be interpreted to bar disclosure of client information when a lawyer would reasonably know that disclosure of the information carries some risk of harm to the client's interest or is a client confidence.

Alaska Rule of Professional Conduct 1.6(a) provides that:

A lawyer shall not reveal information 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 3.3 (a)(2).

Alaska Rule 1.6 is based on ABA Model Rule 1.6. It expresses the lawyer's ancient duty of confidentiality, which is intended to enhance the quality of legal representation by encouraging clients to fully and frankly disclose all matters that may be relevant to the representation. *See, Hazard, An Historical Perspective on the Attorney Client Privilege*, 66 Cal. L. Rev. 1061 (1978) and *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

There are three principal exceptions to the duty of confidentiality under Alaska's Rule 1.6: "crime prevention;" the duty of disclosure to the tribunal when necessary to avoid assisting a client's criminal or fraudulent act; and the right of "self-defense" to a criminal charge or civil claim against the lawyer based on the client's conduct. None of these come into play in this opinion. The issue here is whether a lawyer may generally discuss cases and clients with other lawyers, and provide copies of pleadings or other documents in the public record, without running afoul of the rule.

The scope of Alaska's Rule 1.6 can be interpreted to cover all "information relating to the representation" that comes to a lawyer, no matter whether the information is what are commonly considered client confidences, and no matter whether the information came from the client or from another source entirely:

The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

Commentary, Alaska Rule of Professional Conduct 1.6 (quoting ABA Commentary, Model Rule 1.6).

A literal application of the rule would undoubtedly prohibit the exchange of pleadings and opinions that relate in any manner to a lawyer's representation of a client, as well as forbidding "shop-talk," "war stories," and other such informal exchanges of information between lawyers. As noted by the lawyer who requested our opinion, informal communication has been traditionally employed in Alaska to educate new lawyers, to circulate information about important developments in the law, and to maintain courteous relations between the learned practitioners of our sometimes fractious profession. Literal application of Rule 1.6 would ban these valuable routes of intra-professional communication. (endnote 1)

The literal approach has been the subject of much criticism by the commentators, as best exemplified by Professor Wolfram:

[T]he expectation of confidentiality posited by the rationale of loyalty to client justifies prohibiting a lawyer from revealing information only if it poses a risk of harm to a client's interests. Yet [Model Rule] 1.6, if read literally, goes much farther and prohibits a lawyer from revealing all client information, the good or neutral along with the potentially harmful. The only imaginable reason for such a universal prohibition is to provide prophylactic protection against lawyer misjudgments about which revelations are potentially harmful to a client's interests.

Yet is it hardly imaginable that [Model Rule] 1.6 should be read literally to prohibit a lawyer from revealing absolutely any information about a client except in the limited exceptions explicitly provided in the rule. . . .

[T]o prohibit innocuous talk about a client would be senseless, would create morbid secretiveness among overscrupulous lawyers, and, by trivializing it, would detract from the soundness of the confidentiality principle. Instead, [Model Rule] 1.6 should be read to prohibit those needless revelations of client information that incur some risk of harm to the client.

C.W. Wolfram, *Modern Legal Ethics* S 6.7, at 301 (1986).

The committee agrees with Professor Wolfram's approach to this issue. (endnote 2) The Committee's view is not meant to endorse idle gossip nor to grant license to lawyers to indiscriminately disclose client information for purposes of "titillation or braggadocio." Wolfram, *supra*. Lawyers must always be cautious when disclosing any information relating to the representation of their clients. However, Alaska Rule 1.6 does not prohibit informal communication or the exchange of public documents between counsel. (endnote 3)

Approved by the Alaska Bar Association Ethics Committee on November 3, 1994.

Adopted by the Board of Governors on January 13, 1995.

Endnotes:

1. Literal interpretation of the rule has led to some extreme results. The Rhode Island Supreme Court held that Rule 1.6 precluded a lawyer from reporting embezzlement of client funds by a former lawyer over the client's objection. (*In re Ethics Advisory Panel Opinion*, 627 A.2d 317 (R.I. 1993)). The D.C. Bar ethics committee opined that lawyer misconduct may not be disclosed to discipline counsel if "it would entail a disclosure of information otherwise protected by Rule 1.6," (D.C. Bar Legal Ethics Committee, Op. 246, 4/19/94).
2. N.b., the Alaska Rules Commentary includes the following caveat: A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. Commentary, Alaska Rule 1.6 ("Authorized Disclosure") (emphasis added).
3. The Committee believes that a cautious lawyer should delete from documents and discussions all information that might identify the client and that is not relevant for purposes of the disclosure.