

**ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 96-3**

Disclosure Of Client Files

The Committee has been asked to define the extent of an attorney's duty to disclose client files pursuant to a subpoena in circumstances where the client has specifically declined the release of those materials, or where it is not possible to obtain the client's consent.

It is the Committee's view that an attorney may, in response to a valid subpoena, disclose non-privileged material without the client's consent. However, care should be taken to remove and/or redact confidential and privileged material or communications. This information should not be disclosed absent a specific court order.

ANALYSIS

Rule 1.6 of the Alaska Rules of Professional Conduct states:

(a) 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 . . .

By design, Rule 1.6 imposes a duty on the lawyer which is much broader than the traditional attorney-client privilege. The broader obligation is derived from agency law governing obligations arising from fiduciary relationships. See Restatement (Second) of Agency § 396 (1957). It is also reflected in other aspects of the Model Code. See e.g. Rule 1.8(b).

The Comment to Rule 1.6 states, in part:

The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. 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. A lawyer may not disclose such information except as authorized or required by the rules of professional conduct or other law.

(Emphasis added).

This important distinction has been recognized by the Alaska courts. In Downie v. Super. Ct., 888 P.2d 1306 (Alaska Ct. App. 1995), a public defender refused to testify whether she had informed her client of a trial date on the basis that it would violate the attorney-client privilege. Downie conceded that the law was uniformly to the effect that the attorney-client privilege does not bar an attorney from testifying as to whether he or she informed a client of a court date, but she nonetheless contended that the scope of the attorney-client privilege must be re-evaluated in light of the adoption of the Alaska Rules of Professional Conduct and, in particular, Rule 1.6. The court of appeals rejected this interpretation. Because Downie was testifying pursuant to a grand jury subpoena, this was not a situation where the client-lawyer confidentiality contemplated by Rule 1.6 applied; i.e. it was a situation “where evidence is sought from the lawyer through compulsion of law.” Accordingly, “in the final analysis . . . the lawyer’s obligation to testify is governed by the attorney-client privilege as defined in that jurisdiction’s law of evidence.” Id. at pg. 1309.

Likewise, in the hypothetical presented to the committee, the attorney’s files relating to his former representation have been subpoenaed.

DISCUSSION

In reaching its opinion in this case, the Committee believes it is important to emphasize several points:

1. This opinion does not address the situation of whether an attorney might be required to voluntarily disclose information if “necessary to avoid assisting a criminal or fraudulent act by the client.” See Rule 3.3(a)(2). This is a far different scenario than that presented to the Committee, and no opinion is offered on the scope of an attorney’s obligations in those circumstances, which may be problematic.

2. Nothing in this opinion should be construed as excusing an obligation on the part of the attorney to seek the client’s consent to disclosure whenever that avenue is available. In the question presented to the

Committee, we have been asked to assume that consent was either declined or was impossible to obtain.

3. This opinion only deals with information and/or material which was not disclosed with the client's implied authorization during the attorney's representation of the client. For instance, in a matter in litigation, the Committee believes that pleadings filed in court or with an administrative body including, for instance, affidavits signed by the client, would be materials which the client "impliedly authorized" for disclosure. Once that material enters the public domain, we see no reason why it would be necessary for an attorney to obtain the client's consent to provide copies of those materials upon request to a third-party.¹

From the premises, the Committee believes an attorney is ethically obliged to follow these steps in responding to a request for client files:

A. If there is an informal request for information relating to representation of a client, the attorney may only reveal that information or materials, if any, which the client "impliedly authorized" the attorney to disclose "in order to carry out the representation . . .".²

B. With respect to all other materials or information, the lawyer must try to obtain the client's consent. If that consent is not forthcoming, the attorney may not honor the informal request.

¹ This approach is consistent with an opinion already adopted by the Board of Governors which discusses the propriety of "shop talk" and providing courtesy copies of pleadings to other lawyers. See Alaska Bar Association Ethics Opinions 95-1.

² In the Committee's view, a practitioner would be well advised to nonetheless inform the client of the request as a courtesy, if nothing else. The Committee notes that in the Comment to Rule 1.6, the following are offered as examples of disclosures "impliedly authorized" by the client: "In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion."

The Committee believes the former situation may be different from the latter. The client who authorizes a concession during a negotiation with a private party may have a reasonable expectation that the disclosure will not go beyond the parameters of that private dispute. On the other hand, a pleading filed in state court or with an administrative body, unless filed and/or maintained under seal, would not support a similar expectation. If there are doubts, the Committee believes the attorney should err on the side of non-disclosure.

C. If the attorney receives a validly issued subpoena, he is authorized under Rule 1.6 to disclose all non-privileged information and/or materials, but the attorney should take care to redact and/or remove privileged information and/or communications.

D. With respect to attorney-client materials and/or communications, that information should never be disclosed absent a specific court order.³

In summary, an attorney has a broad duty to prevent the disclosure of all information relating to representation of a client except those disclosures “impliedly authorized” by the client in order to carry out the representation. With respect to other information and materials in the attorney’s possession, non-privileged information and/or materials may be produced in response to a validly issued subpoena; materials and/or information otherwise within the scope of the attorney-client privilege should not be disclosed under any circumstances without the client’s consent unless there is a specific court order compelling the disclosure.

Approved by the Alaska Bar Association Ethics Committee on March 6, 1996.

Adopted by the Board of Governors on March 22, 1996.

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³ Alaska R. Civ. P. 45 authorizes issuance of a subpoena duces tecum by the clerk of court. Technically, non-compliance with a subpoena is deemed a contempt of the court from which the subpoena issued. The Committee is uncomfortable in allowing attorneys to disclose confidential and privileged communications pursuant to a subpoena. We believe a lawyer has the duty to protect those materials and/or information at all time, unless consent is provided by the client. Absent that consent, an attorney should not disclose that information unless a judge has had an opportunity to evaluate the merits, and otherwise ordered the disclosure.