

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2014-2**

**Attorney's Duties When Informed That A Criminal Defendant Client Is In
Violation Of Bail Release Conditions**

Introduction

In Ethics Opinion 2001-1, the Committee addressed whether a criminal defense attorney who is informed by a third-party custodian that the attorney's client is violating his conditions of release has an ethical obligation to notify the court of this communication.¹ The Committee concluded that the attorney does not have an affirmative obligation to inform the court of the custodian's statements. Ethics Opinion 2001-1 specifically analyzed whether former Alaska Rule of Professional Conduct 3.3 imposed a duty of disclosure, and the Committee concluded that it did not.²

ARPC 3.3 was revised subsequent to the publication of Ethics Opinion 2001-1, and the Committee was asked whether the revision to the Rule requires any change to Ethics Opinion 2001-1. For the reasons stated below, the Committee concludes that Ethics Opinion 2001-1 remains sound and the Opinion should not be revised or withdrawn. The analysis and comments below clarify and supplement the conclusions of Ethics Opinion 2001-1.

Background

Ethics Opinion 2001-1 stated the facts as follows:

A criminal defense attorney represents a client who has been released to a third party custodian pending trial. A court order defines the obligations of the third party custodian, but places no specific obligations on the attorney. Later, the third party custodian calls the attorney directly and reports (a) the client is not complying with the conditions of release; and (b) the third party custodian no longer wishes to be a third party custodian for the client. No facts indicate that as a result of his conversations with the attorney, the third party custodian misunderstands the role of the attorney and who the attorney was representing in the case.³

¹ See Attorney's Duties When Advised By Custodian That Criminal Defendant Has Breached Conditions Of Client's Release, Alaska Ethics Op. No. 2001-1 (March 30, 2001).

² See *id.* at 2.

³ *Id.* at 1 (footnote omitted).

In analyzing the attorney's duties in this situation, the Committee distinguished the facts presented – where the attorney learns about a client's misconduct outside of court – from a situation where the attorney learns that the client plans to present, or has presented, a statement in court that is materially false or perjurious. The Committee noted that, if the client were to misinform the judge regarding his custodian's desire to withdraw or to demand that the lawyer not answer truthfully when asked about the custodian's statements, then the lawyer would be ethically obligated to correct the false statements or to withdraw as counsel; otherwise, the lawyer would violate former ARPC 3.3(a)(2), which required that a lawyer not knowingly fail to disclose a material fact to the tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. But, the Committee concluded, where disclosure is not required to prevent or correct false statements to the court, not taking steps to volunteer the custodian's statements would not constitute assisting a criminal or fraudulent act within the meaning of former Rule 3.3.

Discussion

(A) Former ARPC 3.3

Ethics Opinion 2001-1 was adopted in light of the version of Rule 3.3 then in effect. The Rule was titled "Candor Toward the Tribunal," and in pertinent part that version of ARPC 3.3 provided:

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid a criminal or fraudulent act by the client;

* * *

- (4) offer evidence the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity the lawyer shall take reasonable remedial measures.

(b) 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.

As discussed above, Ethics Opinion 2001-1 rested on the Committee's determination that former ARPC 3.3 stated duties regarding the integrity of courtroom proceedings, and therefore it did not impose a duty on an attorney to volunteer information about a client's conduct outside the court that might

be criminal or a violation of a court order but that did not undermine the integrity of the proceedings.

The Alaska Rules of Professional Conduct are based largely on the ABA's Model Rules of Professional Conduct. Former ARPC 3.3 mirrored the version of Model Rule 3.3 that was in effect in 2001. The official legislative history of the Model Rules explains that former Model Rule 3.3(a)(1) and (2) "stated the [lawyer's] general duty of truthfulness in representations to a tribunal."⁴ The history of the former version of the Model Rules mostly stressed the lawyer's duties to protect a client's confidences and did not in any way suggest that Rule 3.3 imposed a duty to prevent or disclose misconduct by the client outside of court that did not result in a false statement to the tribunal.⁵

In reconsidering the conclusion of Ethics Opinion 2001-1, the Committee has reviewed former ARPC 3.3 and its commentary, as well as the legislative history of the comparable Model Rule. Based on all of this, the Committee concurs with the Committee's previous analysis of the purpose and scope of former Rule 3.3. The former Rule and the conclusion in Ethics Opinion 2001-1 struck a deliberate balance between the lawyer's duty of loyalty to the client and duty to protect a client's secrets, on the one hand, and the lawyer's duty to the court, on the other hand.

(B) Current ARPC 3.3

The Alaska Supreme Court rescinded and repromulgated the Alaska Rules of Professional Conduct in 2009. With respect to ARPC 3.3, the Supreme Court retained the title "Candor Toward the Tribunal," but made a number of changes to the text of the Rule and its commentary. In its current form, ARPC 3.3 provides in pertinent part:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

* * *

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable and timely remedial

⁴ See CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 at 432.

⁵ See generally *id.* at 432-48.

measures, including, if necessary, disclosure to the tribunal.

. . .

- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable and timely remedial measures, including, if necessary, disclosure to the tribunal.

One of the comments to the current version of Rule 3.3 expresses the central purpose of this Rule:

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

That is, the current title and commentary both reinforce the conclusion that Rule 3.3 still is focused on the lawyer's obligation to protect the integrity of courtroom proceedings, and is not intended to alter the lawyer's duties to his or her client as set forth in Rule 1.6,⁶ except as necessary to safeguard the integrity of the adjudicative process.

The 2009 changes in the Alaska Rules of Professional Conduct are mostly based on comparable changes to the Model Rules of Professional Conduct, as adopted by the American Bar Association in 2002. In particular, the changes to ARPC 3.3 and its commentary adopted by the Alaska Supreme

⁶ Rule 1.6 establishes the lawyer's duty to protect the secrets and confidences of a client, and instructs that the lawyer shall resolve any uncertainty over whether a secret may be revealed against revealing the information. The communication from the third-party custodian at issue in this opinion is a "secret" within the meaning of ARPC 1.6(a), which provides that a "secret" includes "information gained in the professional relationship . . . if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client."

Court in 2009 match the changes to Model Rule 3.3 and its commentary that were adopted by the ABA in 2002. The legislative history of the Model Rules corroborates the Committee's understanding of the intent and scope of current ARPC 3.3.

The legislative history of the Model Rules includes the Commission Reporter's Explanation of Changes. This Explanation expands on the official commentary and confirms that the ethical obligations established by Model Rule 3.3 refer to a duty to prevent false testimony from being presented in court, not a duty to report on a client who might be violating a court order outside of court, such as not abiding by all the conditions of the client's release:

The Commission has revised and reorganized this Rule to clarify a lawyer's obligation of candor to the tribunal with respect to testimony given and actions taken by the client and other witnesses. . . . In some particulars, the lawyer's obligations to the tribunal have been strengthened. For example, the Rule now makes clear that the lawyer must not allow the introduction of false evidence and must take remedial steps where the lawyer comes to know that material evidence offered by the client or a witness called by the lawyer is false – regardless of the client's wishes. . . . The lawyer's obligation in the existing Rule to avoid assisting client crime or fraud is replaced by a broader obligation to ensure the integrity of the adjudicative process. The lawyer must take remedial measures whenever the lawyer comes to know that any person is engaging or has engaged in criminal or fraudulent conduct related to the proceeding, such as by jury tampering or document destruction.⁷

The Reporter's Explanation goes on to explain ways that the revised Rule *strengthens* the lawyer's obligation to the client in a criminal case.⁸

Notably, all of the examples of "criminal or fraudulent conduct related to the proceeding" stated in the Reporter's Explanation and the official commentary to Model Rule 3.3 involve conduct designed to affect testimony in court. Standard principles of construction establish that wholly different kinds of misconduct – such as noncompliance with bail conditions – are not intended to be covered.

⁷ ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 at 453-54.

⁸ See *id.* at 454.

In short, the Reporter's Explanation of the purpose of the changes in the Model Rules underscores that the changes were not at all intended to place the lawyer in a position of needing to disclose secrets or confidences learned from the client or in connection with the representation where these do not affect the integrity of testimony or evidence presented in court.

Conclusion

For all these reasons, the Committee reaffirms the conclusion of Ethics Opinion 2001-1 that, under the facts presented, the attorney has no ethical obligation to volunteer the third-party custodian's comments to the court. However, the Committee also notes that there are other actions that the attorney should take when the attorney receives a communication from a third-party custodian as described in the facts above.

Under current law, a custodian's failure to "report as directed" a defendant's violation of bail conditions is itself a crime⁹; typically, the custodian is directed by the court to report a violation either to the court or to the District Attorney's Office. If the lawyer believes the third-party custodian intends not to report the defendant's violation as directed by the court, the lawyer may not give legal advice to the custodian but may suggest that the custodian consult an attorney.¹⁰ If the lawyer knows or reasonably should know that the third-party custodian is confused about the custodian's relationship to the lawyer, the lawyer must clarify that the lawyer is not the lawyer for the custodian, that the lawyer will not discharge the custodian's duty to inform the court of the custodian's statements, and that the custodian should seek advice from another attorney.¹¹

Approved by the Alaska Bar Association Ethics Committee on April 3, 2014.

Adopted by the Board of Governors on May 5, 2014.

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⁹ See AS 11.56.758(a) ("A person commits the crime of violation of custodian's duty if the person knowingly fails, when acting as a custodian appointed by the court for a released person under AS 12.30, to report immediately as directed by the court that the person released has violated a condition of release.").

¹⁰ See ARPC 4.3 (Dealing with Unrepresented Person: "When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of that person are or have a reasonable possibility of being in conflict with the interests of the client.").

¹¹ See *id.*