

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1332

Amending Alaska Rule of Professional Conduct 1.6, the Preamble to the Alaska Rules of Professional Conduct, and Alaska Rules of Professional Conduct 1.8, 1.9, 1.13, 1.17, 2.2 and 5.3.

IT IS ORDERED:

1. Alaska Rule of Professional Conduct 1.6 is amended to read:

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal a confidence or secret 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). For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining

whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.

(b) A lawyer may reveal a confidence or secret ~~such information~~ 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; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ALASKA COMMENT

The Committee has amended this rule to tie the lawyer's confidentiality obligation to a "confidence" or "secret" of the client.

The Committee concluded the language used in Model Rule 1.6 ("information" relating to representation of a client) was excessively broad. The terms "confidence" and "secret" are defined in the amended rule in substantively the same way as those terms were defined in DR 4-101(A) of the ABA Model Code of Professional Responsibility. The Committee expects that court decisions interpreting "confidence" and "secret" under DR 4-101(A) will be persuasive authority for interpreting the amended Alaska rule.

The final sentence of subsection (a) has been added to require that a lawyer approach any decision about disclosing information relating to representation of a client from the standpoint that the information is generally presumed to be protected from disclosure.

The lawyer's decision to disclose information under this rule is governed by objectively reasonable standards (see Rule 9.1(i) & (j)) and by all the facts and circumstances of which the lawyer is aware or reasonably should be aware at the time the decision is made.

COMMENT

* * * *

A fundamental principle in the client-lawyer relationship is that the lawyer maintain the client's confidences and secrets ~~confidentiality of information~~ relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. 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 confidences and secrets ~~information~~ relating to the representation, whatever their ~~its~~ source. A lawyer may not disclose such information except as authorized or required by the rules of professional conduct or other law. See *also* Scope.

The requirement of maintaining confidences and secrets ~~confidentiality of information~~ relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

* * * *

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b) (2) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of confidences and secrets ~~information~~ relating to a representation, to limit disclosure to those having a need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

* * * *

The rules of professional conduct in various circumstances permit or require a lawyer to disclose confidences or secrets information relating to the representation. See Rules 2.2, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a suppression.

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2. The Preamble to the Alaska Rules of Professional Conduct is amended to read:

* * * *

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A

lawyer should keep a client's confidences and secrets ~~in confidence information~~ relating to representation ~~of a client~~ except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

* * * *

3. Alaska Rule of Professional Conduct 1.8(f)(3) is amended to read:

(3) the client's confidences and secrets ~~are information relating to representation of a client~~ is protected as required by Rule 1.6.

4. Alaska Rule of Professional Conduct 1.9(c) is amended to read:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use a confidence or secret information relating to the representation to

the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the confidence or secret information has become generally known; or

(2) reveal a confidence or secret information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

5. Alaska Rule of Professional Conduct Rule 1.13(b) is amended to read:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of

the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing a confidence or secret information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

6. The Comment to Alaska Rule of Professional Conduct 1.13 is amended to read:

COMMENT

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When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the

lawyer. The lawyer may not disclose to such constituents a confidence or secret information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

* * * *

7. Alaska Rule of Professional Conduct 1.17(c) is amended to read:

(c) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);

(3) the client's right to retain other counsel or to take possession of the file;
and

(4) the fact that the client's consent to representation by the purchaser will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera a confidence or secret information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

8. The Comment to Alaska Rule of Professional Conduct 1.17 is amended to read:

COMMENT

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Client Confidences, Consent and Notice

Negotiations between seller and prospective purchaser prior to disclosure of a confidence or secret information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to a client-specific confidence or secret information relating to representation and to the file, however, requires client consent. The rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

* * * *

Other Applicable Ethical Standards

Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (see Rule 1.7); and the obligation to protect confidences and secrets ~~information~~ relating to representation (see Rules 1.6 and 1.9).

* * * *

9. The Comment to Alaska Rule of Professional Conduct 2.2 is amended to read:

COMMENT

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Confidentiality and Privilege

A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required to keep each client adequately informed and to maintain the client's confidences and secrets ~~confidentiality of information~~ relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such

communications, and the clients should be so advised.

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10. The Comment to Alaska Rule of Professional Conduct 5.3 is amended to read:

COMMENT

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose a confidence or secret ~~information~~ relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training

and are not subject to professional
discipline.

DATED: July 9, 1999

EFFECTIVE DATE: January 15, 1999

/s/
Chief Justice Matthews

/s/
Justice Compton

/s/
Justice Eastaugh

/s/
Justice Fabe

/s/
Justice Bryner