

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2001-1**

**Attorney's Duties When Advised By Custodian
That Criminal Defendant Has Breached
Conditions Of Client's Release**

The Committee has been asked the following question: If a third party custodian of a criminal defense attorney's client advises the attorney that the client is failing to comply with the terms of release, does the defense attorney have an obligation to notify the Court? The Committee has concluded that Alaska Rules of Professional Conduct (RPC) do not require the attorney to report the information to the Court.

Facts

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.¹ 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 misunderstood the role of the attorney and who the attorney was representing in the case.

Discussion

An attorney has a duty of undivided loyalty to his client. No specific rule of the Alaska Rules of Professional Conduct requires the attorney to voluntarily report the contents of the conversation with the third party custodian to the Court under the fact situation presented. Since the attorney represents only

¹ See AS 09.50.010 for the third party custodian's obligations to the court under these circumstances.

the client, and does not represent the third-party custodian, the attorney's ethical obligations are only to the client. Placing the third party custodian's interest ahead of the client's interest would violate ARPC 1.7.²

Additionally, there is no obligation to disclose the conversation to the Court under ARPC 3.3. This section states in pertinent part:

(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 assisting a criminal or fraudulent act by the client;

* * *

The duty to disclose does arise in a criminal case where the client insists on providing, or provides, testimony or evidence where the lawyer knows that the testimony is perjurious. For instance, in the face of a question from the court, if a client were to misinform the Court regarding or demand that a lawyer not inform the Court of his custodian's desire, the lawyer would be required to insist on being truthful to the court or withdraw as counsel for the Defendant. Under the circumstances of this case, the lawyer's failure to advise the Court does not constitute "assisting a criminal, or fraudulent act by the client."

The Committee distinguishes Ethics Opinion 95-3 on this basis. In 95-3, the Committee held that an attorney did have a duty to report a change in the client's financial status that affected eligibility for appointed counsel. However, Administrative Rule 12 (f) specifically requires an attorney to report a change in the Client's financial status and it is the existence of the reporting requirement of AdR 12(f) that triggers the duty under ARPC 3.3.

² The attorney must also be mindful of the obligations imposed under ARPC 4.3 (Transactions with Persons other than Clients). Therefore, if the attorney knows, or reasonably should know, the third party custodian does not understand the attorney's role in the matter, or the attorney knows, or reasonably should know, that the third party custodian expects or anticipates the attorney will advise the Court, the attorney cannot simply remain silent.

Conclusion

The Alaska Rules of Professional Conduct do not impose upon an Attorney the duty to inform to the Court where a third party custodian advises the attorney that the attorney's client has violated the conditions of release. In recognition of the duty of loyalty³ of an attorney to a client, the Committee declines to imply such a conflicting duty to inform the Court.

Approved by the Alaska Bar Association Ethics Committee on January 4, 2001.

Adopted by the Board of Governors on March 30, 2001.

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³ Opinion 95-3 contains an extensive discussion of the balancing of the obligation of an attorney to the client with the obligation of the attorney to others, including the obligation of the attorney to "the law". That discussion emphasizes the narrowness of this Committee's opinion.