

## ALASKA BAR ETHICS OPINION 2022-2

### The Scope of a Lawyer's Duties When a Client Provides False Statements or Evidence to the Court

**ISSUE:** If a lawyer is aware a client may make false statements in an adjudicative proceeding, what are the lawyer's ethical duties?

**CONCLUSION:** If the lawyer is participating in that adjudicative proceeding, then the lawyer is obliged to seek to persuade the client not to make false statements during the proceeding. A lawyer must also refuse to offer false evidence in the proceeding. If the client nevertheless makes false statements in a proceeding, the lawyer must take reasonable and timely remedial measures to correct the misstatement, which can include disclosing the misstatement to the court.

**FACTS:** Defendant D asks Attorney A to represent him in a bail hearing. During the course of the initial client interview, D reports that he routinely uses false identities in order to avoid consequences for his conduct and that he plans to make false statements at the upcoming bail hearing with respect to his true identity and his prior criminal record. Attorney A tells D that she cannot represent D if he intends to make false statements at the bail hearing. *See* ARPC 3.3. D decides to proceed with retaining Attorney A. As the bail hearing approaches, however, D gets nervous and alerts Attorney A that, despite Attorney A's earlier admonition, D plans to use a false identity when asked to identify himself or otherwise lie about certain prior offenses in an effort to avoid a bad outcome at the bail hearing. What are Attorney A's ethical duties in this situation? If, despite Attorney A's efforts, D makes false statements during the proceeding, under what circumstances may Attorney A inform the court of D's false statements?

**RULES:** ARPC 3.3, 1.6, 1.2(d).

**ANALYSIS:** ARPC 3.3(a) seeks to ensure candor toward the tribunal by prohibiting a lawyer from knowingly (1) making a false statement of fact or law to the tribunal (or failing to correct false statements of material fact previously made to the tribunal by the lawyer); (2) failing to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the client's position (and not disclosed by opposing counsel); or (3) offering evidence that the lawyer knows is false. ARPC 3.3(b) goes beyond the lawyer's own conduct and imposes obligations where the lawyer represents a client in an adjudicative proceeding and knows that someone—including, but not limited to, the client—intends to engage, is engaging, or has engaged in some criminal or fraudulent conduct related to the proceeding. In that circumstance, the lawyer must take reasonable and timely remedial measures,

which may include disclosure to the tribunal.<sup>1</sup> ARPC 3.3(c) is clear that the lawyer’s duties of candor “apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”

Under the scenario described above, ARPC 3.3 imposes two duties on Attorney A: one prophylactic (refusing to offer false evidence in the first place) and one remedial (remedying prior false testimony). Attorney A’s duties are fairly straightforward.

### 1. The Duty to Refuse to Offer False Evidence

ARPC 3.3(a)(3) “requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes.”<sup>2</sup> Therefore, Attorney A could not offer evidence, including D’s testimony at the bail hearing, that Attorney A knows to be false (e.g., a false identity or other misstatements about D’s prior criminal record). Further, under ARPC 1.2(d), the lawyer may not assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, such as making false statements in an adjudicative proceeding.

Attorney A has an ethical duty to try to persuade D in advance of the bail hearing that D should not offer false testimony. Attorney A should discuss the legal consequences of any such proposed course of conduct.<sup>3</sup> For example, Attorney A may point out the legal consequences to D if and when the misstatement is uncovered, including its impact on future credibility determinations in the case. Attorney A should also explain to D that Attorney A cannot offer the false evidence to the court and that, if D nevertheless offers such false testimony, Attorney A may be required to inform the court about the misstatement.

### 2. The Duty to Remedy Prior False Testimony

If D proceeds to offer false testimony during the bail hearing, Attorney A would have a duty to take reasonable, timely steps to correct D’s misstatements. The appropriate remedial measures will depend on the factual context. The

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<sup>1</sup> The lawyer has additional responsibilities in an ex parte proceeding, but those are not relevant here. *See* ARPC 3.3(d).

<sup>2</sup> ARPC 3.3, Comment.

<sup>3</sup> *See also* ARPC 3.3, Comment (“If the lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence.”).

Commentary to ARPC 3.3 recommends that Attorney A “remonstrate the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence.” This approach seeks to minimize the damage to D’s legal rights, since D would have an opportunity to salvage some credibility by owning up to the earlier misstatement. If D is unwilling to make the necessary withdrawal or correction of the false statement, then Attorney A must either withdraw from the representation (if permitted, and if such withdrawal could somehow undo the effect of the false statement) or make an appropriate disclosure to the tribunal as is reasonably necessary to remedy the misstatement.<sup>4</sup> An example of a withdrawal that may undo the effect of a false statement could be a so-called “noisy withdrawal” in which Attorney A disaffirms work product that the lawyer prepared on the basis of D’s misstatement.<sup>5</sup> Even though this may have the collateral effect of disclosing inferentially client confidences obtained during the representation, it may be necessary in order to effectuate the lawyer’s withdrawal from representation of the client. If the attorney’s withdrawal will not undo the effect of the false statement, the Rules of Professional Conduct expressly recognize that Attorney A may be required to disclose the client’s confidences or secrets in order to comply with the attorney’s ethical obligations under ARPC 3.3: “A lawyer shall not reveal a client’s confidence or secret unless the client gives informed consent, except for . . . disclosures permitted by . . . Rule 3.3.”<sup>6</sup>

Ethics Opinion 83-3 is withdrawn. That opinion from nearly forty years ago dealt with an attorney’s ethical duties under the Disciplinary Rules. The Code of Professional Responsibility—including the Disciplinary Rules—was rescinded in 1993 and replaced by the Alaska Rules of Professional Conduct.<sup>7</sup>

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<sup>4</sup> See *id.* When withdrawal from the representation will not undo the effect of the false statement, disclosure to the tribunal is required. A lawyer may conclude that compliance with ARPC 3.3’s disclosure duty “results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client.” *Id.*

<sup>5</sup> See ABA Formal Op. 92-366 (Aug. 8, 1992); see also ARPC 1.6, Comment (noting that ARPC 1.6 allows the attorney to give notice of the fact of withdrawal, “and the attorney may also withdraw or disaffirm any opinion, document, affirmation, or the like”). Any request for withdrawal that is premised on the client’s misconduct may only reveal confidences and secrets to the extent reasonably necessary to comply with ARPC 3.3.

<sup>6</sup> ARPC 1.6(a).

<sup>7</sup> See *In re K.A.H.*, 967 P.2d 91, 93 (Alaska 1998).

Given that the underlying rule was rescinded, Ethics Opinion 83-3 is accordingly no longer valid.<sup>8</sup>

Approved by the Alaska Bar Association Ethics Committee on October 6, 2022.

Adopted by the Board of Governors on October 28, 2022.

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<sup>8</sup> The now-withdrawn opinion addressed a very uncommon scenario in which a prospective client told a lawyer about plans to engage in perjury, chose not to hire the lawyer, but then the lawyer coincidentally observed (but did not participate in) the very hearing at which the prospective client committed perjury. Because a lawyer's duty under Rule 3.3 is limited to instances where the lawyer is actually participating in a proceeding, rather than acting as an observer, no duty to disclose attaches in this unusual circumstance. The Committee expects that the above opinion will be more helpful to practitioners who wish to understand their ethical obligations when faced with a client (or prospective client) who is considering whether to offer false testimony or evidence.