

Ethics Opinion No. 95-3

Obligation of Appointed Defense Counsel to Reveal Change in Client's Financial Position Effecting Eligibility.

The Committee has been asked the following question: Does defense counsel in a criminal proceeding have an obligation to reveal client confidences to the court if relevant to the client's eligibility for appointed counsel? The Committee concludes that Alaska Rule of Professional Conduct 3.3 and Administrative Rule 12(f) each impose an independent obligation on defense counsel to inform the court of changes in the client's financial status which may affect the client's continued eligibility to receive legal services at public expense.

Facts

The facts presented to the Committee are as follows: Client is represented at trial in a criminal case by private counsel. After conviction, Client appeals and applies to the court for appointment of the Public Defender Agency. The court determines that Client is indigent and appoints the Public Defender.

In the course of an interview, Client reveals to his attorney that he has recently completed a business venture, and wants to place \$200,000 in trust to be applied to his restitution, in the event his conviction is upheld. If this information is true, Client may no longer be eligible for appointment of counsel at public expense.

Rules

Administrative Rule 12 and Criminal Rule 39 of the Alaska Rules of Court govern the procedures for appointment of counsel at public expense. Administrative Rule 12 provides, in pertinent part:

Rule 12. Procedure for Counsel and Guardian Ad Litem Appointments at Public Expense

(a) **Intent.** The court shall appoint counsel or a guardian ad litem only when the court specifically determines that the appointment is clearly authorized by law or rule, and that the person for whom the appointment is made is financially eligible for an appointment at public expense.

(b) Appointments under AS 18.85.100(a) (Public Defender Agency)

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(2) *Determination of Indigency.* Determination of indigency or financial inability for appointments under paragraph (b) of this rule must be made in accordance with the provisions of Criminal Rule 39.

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(f) Responsibilities of Appointed Counsel.

(1) An attorney appointed to represent an indigent person must advise the court if the attorney learns of a change in the person's financial status that would make the person financially ineligible for appointed counsel.

(2) An attorney appointed to represent an indigent person must move to withdraw if the attorney reasonably believes that the person has made a material misrepresentation of the person's financial status to the court. A material misrepresentation is a misrepresentation of facts that would make the person financially ineligible for appointed counsel. The attorney is not required to disclose to the court the existence or nature of the misrepresentation unless disclosure is necessary to prevent the person from fraudulently securing the services of appointed counsel.

Alaska R. Crim. P. 39(b)(1) provides:

If defendant desires the aid of counsel but claims a financial inability to employ counsel, the court or its designee shall determine whether defendant is an "indigent person," as defined by statute (endnote 1) by placing defendant under oath and asking about defendant's financial status, or by requiring defendant to complete a signed sworn financial statement. The court shall order defendant to execute a general waiver (endnote 2) authorizing release of income information to the court.

Alaska Rule of Professional Conduct 3.3 provides, in pertinent part:

Rule 3.3. Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

* * *

(2) fail to disclose a material fact to the tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

* * *

(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.

Analysis - Duty to Disclose Under Administrative Rule 12

Although Administrative Rule 12 does not expressly require a criminal defendant to report changes in financial status,(endnote 3) it clearly requires appointed counsel to do so. The Rule requires appointed counsel to advise the court upon learning of a "change in the person's financial status that would make the person financially ineligible" for appointed counsel. Here, Client has received at least \$200,000 since the court made its eligibility determination. While the size of this asset is not dispositive of the issue of indigency,(endnote

4) there is no doubt that in the vast majority of cases, a windfall in this amount would render the client ineligible for appointed counsel. The attorney would then be obligated to report this information under Admin. R. 12(f). (endnote 5)

In the unlikely event that appointed counsel believes the \$200,000 payment would not affect his client's eligibility, the Committee believes a proper reading of the Rule requires counsel to report the financial change to the court, as whether or not the client is indigent is the court's determination to make. AS 18.85.120.

Duty to Disclose Under Alaska Rule of Professional Conduct 3.3

Alaska Rule of Professional Conduct 3.3 (a)(2) prohibits a lawyer from knowingly failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. ARPC 3.3(b) extends the prohibition to the conclusion of the proceeding, and makes it clear that the lawyer's duty of candor toward the tribunal supersedes the duty to protect client confidences. The Comment to Model Rule 1.6 specifically cites RPC 3.3 (a)(2) as an exception to a lawyer's duty to maintain client confidences.

Here, knowledge of the \$200,000 in Client's possession is material (endnote 6) to his or her continued eligibility for legal services. Both Client and defense counsel have a continuing duty to report changes in financial circumstances which may affect the client's eligibility for continued services. The Comment to Model Rule of Professional Conduct 3.3 states, "[under some circumstances, a failure to disclose is tantamount to affirmative misrepresentation."

Failure to report the change defrauds (endnote 7) the state by forcing it to expend limited resources, intended to benefit the truly indigent, on defendants who can bear the cost of their own defense. The lawyer's knowledge of the payment and failure to report it to the court makes the lawyer an accomplice to the client's fraudulent act.(endnote 8) *People v. Nilsen*, 199 Cal.App.3d 344, 351-52, 244 Cal.Rptr. 814, 819 (Dist. Ct. App. 1988); *State of South Dakota v. Dale*, 439 N.W.2d 112, 113 (S.D, 1989).

In reaching its conclusion, the Committee has carefully balanced the lawyer's duty of loyalty to the client and preservation of client confidences, on the one hand, against the conflicting duty of candor toward the tribunal as an officer of the court. As the Comment to ARPC 1.6 points out, the lawyer's duty to maintain confidentiality of information relating to the representation encourages the client to communicate fully and frankly; this in turn facilitates full development of the facts necessary to properly represent the client and avoidance of any violation of the law in the proper exercise of the client's rights.

Notwithstanding the importance of these goals, however, a lawyer's primary duty must be to the law, and the Committee agrees with the authorities cited for that proposition in the Comment to Model Rule 3.3. See, e.g., *State v. Krutchen*, 101 Ariz. 186, 191, 417 P.2d 510, 515 (1966) ("The duty of an attorney to a client . . . is subordinate to his responsibility for the due and proper administration of justice."), *cert. denied*, 385 U.S. 1043 (1967); *Fite v. Lee*, 11 Wash. App. 21, 28, 521 P.2d 964, 968 (1974) ("Where the duties to his client to afford zealous representation conflict with his duties as an officer of the court to further the administration of justice, the private duty must yield to the public duty."); and *Dodd v. Florida Bar*, 118 So.2d 17, 19 (Fla. 1960) ("In our system the courts are almost wholly dependent on members of the bar to marshal and present the true facts . . . When an attorney adds or allows false testimony . . . it (is) impossible for the scales to balance. No breach of professional ethics, or of the law, is more harmful to the administration of justice.").

Conclusion

The Committee believes the proper course of action for the lawyer would be to advise the client of the client's duty to report the financial change to the court. The lawyer should further advise the client that if the client fails or refuses to advise the court, the lawyer will do so. The lawyer has the further obligation to determine whether disclosure to the court has occurred, and if none has been made within a reasonable time, the lawyer has an affirmative duty to make the disclosure.

Approved by the Alaska Bar Association Ethics Committee on January 5, 1995.

Adopted by the Board of Governors on March 17, 1995.

Endnotes:

1. AS 18.85.170 defines an "indigent person" as one who, "at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance. . ." AS 18.85.120 provides that "determination of a person's indigency shall be made by the court in which an action against the person is pending." In making its determination, the court is obliged to consider such factors as "income, property owned, outstanding obligations, and the number and ages of dependents."

2. The General Waiver form utilized by the Alaska Court System appears on CR-205, the Request For Appointed Counsel Form. The form states that the defendant understands that (1) defendant must provide all financial information requested by the court; (2) the information provided may be made available to the Attorney General at the conclusion of the case, and that defendant may be prosecuted for perjury if false information has been provided; (3) in the event that defendant's financial status changes and defendant does not report that fact to the court, that appointed counsel is required by law to do so.
3. Such a requirement can be inferred from the Rule, however, Admin. R. 12(a) provides that only those who are financially eligible should receive appointed counsel. The Rule also requires public counsel to withdraw where "the basis for appointment is not clearly authorized." Admin. R. 12(d). Moreover, Alaska R. Crim. P. 39, which governs determinations of indigency made pursuant to the Administrative Rule, provides for a review of defendant's financial condition "at any time" to determine whether the defendant continues to be indigent. Alaska R. Crim. P. 39(e). Finally, the Request For Appointed Counsel form (CR-205), which defendants are required to execute as a condition of receiving appointed counsel, requires either the defendant or appointed counsel to inform the court of changes in the defendant's financial situation.
4. Since income is only one of the factors to be considered under AS 18.85.120, it is conceivable that a person with \$200,000 might be found indigent, e.g., where he or she had no other income or property, combined with an outstanding child support or IRS obligation substantially in excess of that amount.
5. Upon being informed that there has been a change in the client's financial circumstances, the court would most likely require the client to execute an updated financial affidavit; therefore, the most efficient way to report such a change would be for the client to execute and submit an updated or amended financial affidavit.
6. Facts are "material" if they could affect the outcome of the case, or are necessary in determining an issue in dispute.
7. The Comment to Model Rule 3.3 defines "fraud" as having three components: (1) the client's representations or conduct create a false impression; (2) that impression is material; and (3) the client intends to create a material misconception.
8. Client may also be subject to prosecution for contempt or perjury, in which case defense counsel may be assisting a criminal act, in further violation of Rule 3.3(a)(2). Whether defense counsel could be compelled to testify against the client in a criminal proceeding is an evidentiary issue for the trial court, and the Committee declines to address it here.