

Gail Welt

From: Gail Welt
Sent: Tuesday, February 25, 2014 4:32 PM
To: 'Representative.Bob.Lynn@akleg.gov'; 'Representative.Wes.Keller@akleg.gov';
'Representative.Lynn.Gattis@akleg.gov'; 'Rep.Shelley.Hughes@akleg.gov';
'Representative.Doug.Isaacson@akleg.gov'; 'Representative.Charisse.Millett@akleg.gov';
'Representative.Jonathan.Kreiss-Tomkins@akleg.gov'
Cc: Steve Van Goor; Deborah O'Regan; 'mike@akdefenselaw.com'
Subject: House Bill No. 127
Attachments: Revised.Cmte.Subst.HB127.pdf

TO: House State Affairs Committee Members

Rep. Bob Lynn, Chair
Rep. Wes Keller Vice-Chair
Rep. Lynn Gattis
Rep. Shelley Hughes
Rep. Doug Isaacson
Rep. Charisse Millette
Rep. Jonathan Kreiss-Tomkins

At Steve Van Goor's direction, I am sending to you his attached *revised* letter regarding Committee Substitute for House Bill No. 127.

Gail Welt, Exec. Ass't
Discipline Section
ALASKA BAR ASSOCIATION
P. O. Box 100279
Anchorage, AK 99510-0279
Fax to: 1-907-272-2932
Phone: 1-907-272-7469

ALASKA BAR
A S S O C I A T I O N

February 25, 2014

Rep. Bob Lynn, Chair,
House State Affairs Committee
State Capitol, Room 108
Juneau, AK 99801-1182

Rep. Wes Keller, Vice-Chair
House State Affairs Committee
State Capitol, Room 118
Juneau, AK 99801-1182

Rep. Lynn Gattis, Member
House State Affairs Committee
State Capitol, Room 420
Juneau, AK 99801-1182

Rep. Shelley Hughes, Member
House State Affairs Committee
State Capitol, Room 409
Juneau, AK 99801-1182

Rep. Doug Isaacson, Member
House State Affairs Committee
State Capitol, Room 13
Juneau, AK 99801-1182

Rep. Charisse Millett, Member
House State Affairs Committee
State Capitol, Room 403
Juneau, AK 99801-1182

Rep. Jonathan Kreiss-Tomkins,
Member
House State Affairs Committee
State Capitol, Room 426
Juneau, AK 99801-1182

RE: Committee Substitute for House Bill No. 127

Dear Rep. Lynn, Rep. Keller, and members of the Committee:

Please substitute the following discussion of Sections 3 and 8 for the discussion of Sections 3 and 8 that appears in my February 24, 2014 letter:

Sections 3 and 8

Section 8 of the Committee Substitute advises that the change to Section 3 has the effect of changing Alaska Rules of Evidence 501 and 503 regarding attorney-client privilege. Essentially, there would be no waiver of privilege or work product if that information was disclosed to the ombudsman.

As it applies to Bar Association investigations, this amendment would create significant problems for lawyers responding to grievances and leave clients vulnerable to the disclosure of confidential information.

Alaska Rule of Professional Conduct 1.6(b)(5) permits a lawyer to make reasonably necessary disclosures of client confidences and secrets

in order to respond to a client's allegation of misconduct. Copy attached. This isn't a blank check to reveal anything that the lawyer wants to reveal. The lawyer is ethically bound only to disclose information reasonably necessary to respond to the complaint. However, if that information is reviewed outside of the grievance process by a person not bound by the Rules of Professional Conduct, that protection will be lost.

Public defenders and public advocates are mostly likely to be affected by this since they need to disclose details of their representations in defending ineffective assistance allegations. If they know that a nonlawyer outside the grievance process may have access to client information, they would understandably be reluctant to disclose information that may harm the client in ongoing proceedings or appeals.

I understand that there are three lawyers on the ombudsman's staff, but these lawyers do not have an attorney-client relationship with a public defender's or public advocate's client nor are they specifically authorized in Bar Rule 22 to review confidential information in an attorney grievance file.

Consequently, Sections 3 and 8 of the Committee Substitute would leave clients vulnerable to a loss of the attorney/client privilege.

Sincerely,

ALASKA BAR ASSOCIATION



Stephen J. Van Goor
Bar Counsel

cc: Michael Moberly, President
Deborah O'Regan, Executive Director

Alaska Rule of Professional Conduct 1.6. Confidentiality of information.

(a) A lawyer shall not reveal a client's confidence or secret unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation and disclosures permitted by paragraph (b) below or Rule 3.3. 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 client's confidence or secret to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain:

(A) death;

(B) substantial bodily harm; or

(C) wrongful execution or incarceration of another;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) 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; or

(6) to comply with other law or a court order.

(c) A lawyer must act competently to safeguard a client's confidences and secrets against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client, or by any other persons who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. When transmitting a communication that includes a client's confidence or secret, the lawyer must take reasonable precautions to prevent this information from coming into the hands of unintended recipients.

(SCO 1123 effective July 15, 1993; amended by SCO 1332 effective January 15, 1999; and rescinded and repromulgated by SCO 1680 effective April 15, 2009)

ALASKA COMMENT

The Court decided to continue Alaska's amendment to 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 paragraph (a) has been added to require that a lawyer approach any decision about disclosing confidences or secrets of a client from the standpoint that the information is generally protected from disclosure.

In paragraph (b)(1)(C), the court included an additional limited exception to the normal rule requiring lawyers to preserve the confidences and secrets of their clients. This provision is modeled on the similar Massachusetts rule; its core purpose is to permit a lawyer to reveal confidential information in the specific situation in which that information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution.

The lawyer's decision to disclose information under this rule is governed by objectively reasonable standards (see Rule 9.1(m) and (n)) 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.

Paragraph (c) is taken from the commentary to the ABA version of the rules. The Committee created paragraph (c) because the Committee concluded that standards of professional conduct subject to enforcement through disciplinary proceedings should be stated in the text of the Rules rather than in commentary.

COMMENT

[1] This Rule governs the disclosure by a lawyer confidences and secrets of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal confidences and secrets of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal a client's confidences and secrets. See Rule 9.1(g) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and to ascertain what conduct is legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in the

Rules of Professional Conduct. The attorney-client privilege and work-product doctrine apply 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 also applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all client secrets. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. A determination that disclosure of client information is permitted by the crime-fraud exception to the ethics rule does not necessarily lead to the same result under the crime-fraud exception to the attorney-client privilege. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing confidences and secrets of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other confidences and secrets of a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidences and secrets of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of

the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose client confidences and secrets to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct. To the extent practicable, a lawyer should use hypothetical facts when seeking this legal advice.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary, or other 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. The lawyer's right to respond arises when an assertion of such complicity or other misconduct has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges misconduct, so the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, when a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) 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.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidences and secrets appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal confidences and secrets of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the lawyer should ask the tribunal to limit access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Disclosures Otherwise Required or Authorized

[15] Paragraph (b) permits but does not require the disclosure of confidences and secrets of a client to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

[16] In various circumstances, a lawyer is permitted or required to disclose client confidences and secrets. See, for example, Rules 2.3, 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 or augments Rule 1.6 is a matter of interpretation beyond the scope of these Rules.

[17] The attorney-client privilege is defined differently in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

Withdrawal

[18] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences and secrets, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[19] The duty of safeguarding communications described in Rule 1.6(c) does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the

lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

(20) The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using confidences and secrets to the disadvantage of a former client.