

IN THE SUPREME COURT OF THE STATE OF ALASKA
ORDER NO. 1984

Amending Professional Conduct Rule 8.4(c) and Comment concerning dishonesty, fraud, deceit, or misrepresentation; amending Professional Conduct Rule 9.1 concerning the definition of “fraud” and adding a definition for “lawful covert investigation”; and amending cross references to Professional Conduct Rule 9.1 in the Comments to the Professional Conduct Rules.

IT IS ORDERED:

1. Professional Conduct Rule 8.4 is amended to read as follows:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

* * * *

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer’s fitness to practice law;

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COMMENT

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This rule prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer’s fitness to practice law. This rule does not, for example, prohibit a lawyer from advising and supervising

a lawful covert investigation into matters involving criminal law, civil law, or constitutional rights, though the lawyer may not participate directly in the covert investigation. See Rule 9.1 for the definition of “lawful covert investigation.” This rule additionally does not prohibit a lawyer from engaging in lawful forms of deception if the conduct is among their duties of employment as a non-lawyer by a government agency, a law firm, or other entity.~~This rule does not prohibit a lawyer from advising and supervising lawful covert activity in the investigation of violations of criminal law or civil or constitutional rights, provided that the lawyer’s conduct is otherwise in compliance with these rules and that the lawyer in good faith believes there is a reasonable possibility that a violation of criminal law or civil or constitutional rights has taken place, is taking place, or will take place in the foreseeable future. Though the lawyer may advise and supervise others in the investigation, the lawyer may not participate directly in the lawful covert activity. “Covert activity,” as used in this paragraph, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge.~~

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2. Professional Conduct Rule 9.1 is amended to read as follows:

Rule 9.1. Definitions.

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(f) “Fraud” or “fraudulent” denotes conduct (including acts of omission) performed with a purpose to deceive; it does not include negligent misrepresentation or negligent failure to apprise another of relevant information, or advising or

supervising persons who are using deception in a lawful covert investigation.

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(h) “Knowingly,” “known,” or “knows” * * * *

(i) “Lawful covert investigation” means an investigation in which the participants misrepresent or do not disclose their true identity or motivation, but which otherwise conforms to all relevant law, including the Rules of Professional Conduct and all pertinent statutes, constitutional provisions, and decisional law. For purposes of Rule 8.4(c), a lawyer may advise and supervise the people engaged in a lawful covert investigation, but the lawyer must not participate personally.

(Re-letter current (i) “Matter” to (j) and re-letter subsequent subsections.)

ALASKA COMMENT

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COMMENT

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Informed Consent

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Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person’s consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition

of “writing” and “confirmed in writing,” see paragraphs (v)~~(u)~~ and (c). Other Rules require that a client’s consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of “signed,” see paragraph (v)~~(u)~~.

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3. The following Comments to the Professional Conduct Rules are amended to update cross references to Rule 9.1 subsections:

Rule 1.6. Confidentiality of Information.

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ALASKA COMMENT

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

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Rule 1.7. Conflict of Interest; Current Clients.

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COMMENT

Prohibited Representations

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Paragraph (b)(3) describes conflicts that are not waivable because of the institutional interest in vigorous development of each client’s position when the clients are aligned directly against each other in the same litigation or other proceeding

before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule ~~9.1(u)~~~~9.1(f)~~), such representation may be precluded by paragraph (b)(1).

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Consent Confirmed in Writing

Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 9.1(c). See also Rule ~~9.1(v)~~~~9.1(s)~~ (writing includes electronic transmission). * * * *

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Rule 1.10. Imputation of Conflicts of Interest: General Rule.

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ALASKA COMMENT

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Principles of Imputed Disqualification

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The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if

the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 9.1(q)~~9.1(e)~~ and 5.3.

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Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees.

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COMMENT

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Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 9.1(q)~~9.1(e)~~ (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

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Rule 1.12. Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral.

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COMMENT

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Requirements for screening procedures are stated in Rule 9.1(q)~~9.1(e)~~. Paragraph (c)(1) does not prohibit the screened

lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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Rule 1.18. Duties to Prospective Client.

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COMMENT

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Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule ~~9.1(q)~~9-1(e) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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Rule 2.4. Lawyer Serving As Third-Party Neutral.

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COMMENT

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Lawyers who represent clients in alternative dispute resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 9.1(u)~~9.1(r)~~), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.3. Candor Toward the Tribunal.

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COMMENT

This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 9.1(u)~~9.1(r)~~ for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

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Rule 3.5. Impartiality and Decorum of the Tribunal.

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COMMENT

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The duty to refrain from disruptive conduct applies to any proceeding of a tribunal. See Rule 9.1(u)~~9.1(r)~~.

Rule 4.4. Respect for Rights of Third Persons.

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COMMENT

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Paragraph (b) recognizes that lawyers sometimes receive a writing or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. * * * * For purposes of this Rule, “writing or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. See Rule 9.1(v)~~9.1(t)~~. * * * *

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DATED: October 5, 2022

EFFECTIVE DATE: October 5, 2022

/s/
Chief Justice Winfree

/s/
Justice Maassen

/s/
Justice Carney

/s/
Justice Borghesan

/s/
Justice Henderson