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ETHICS ADVISORY PANEL
OPINION #93-56, REQUEST #382
Issued August 25, 1993

The inquiring attorney represented a defendant in a criminal matter in which the defendant was sentenced to prison. A judge later released the defendant from prison on the condition that he participate in a residential drug treatment program. Subsequently, the inquiring attorney was advised that the defendant left the program. The attorney inquires as to whether he/she has a duty to bring this information to the court's attention.

The resolution of this inquiry involves both Rule 1.6 and Rule 3.3 of the Rules of Professional Conduct which provide in pertinent part as follows:

Rule 1.6. Confidentiality of Information. - (a) A lawyer shall not reveal information relating to representation of a client unless, the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may, but is not obligated to, reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) 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.

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Rule 3.3 Candor Toward the Tribunal. - (a) A lawyer shall not knowingly:

(1) make a false statement of material fact of 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;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(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.

With respect to the applicability of Rule 1.6, the information is protected from disclosure because it directly relates to the representation of defendant. In the absence of an exception under Rule 1.6(b), the attorney may not disclose said information unless defendant gives consent after consultation.

Pursuant to Rule 3.3, the use of the word "shall" in paragraph (a)(2) requires disclosure by the lawyer to the tribunal of material facts when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Further, Rule 3.3(b) mandates that 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.

On the facts as presented, the Panel is of the opinion that the attorney has no duty to disclose the information to the Court. As stated above, the duties delineated in Rule 1.6(a) continue to the conclusion of the proceeding. Here, the attorney was apprised that defendant left the program after the conclusion of the proceeding. Accordingly, the provisions of Rule 3.3 do not mandate disclosure by the attorney.