

State Bar of South Dakota

Ethics Opinion 2001-1

January 24, 2001

- **Rules: 1.2(d)(e), 1.6(a), 1.6 (b)(3), 1.16(b)(3), 2.1 and 3.3**
- **Subject: Confidential communications; Duty to disclose client's failure to comply with conditions of Suspended Imposition of Sentence**
- **Summary: Lawyer is prohibited from voluntarily disclosing to the Court a client's failure to comply with sentencing conditions; lawyer to advise client of limitations of representation; lawyer must not make false statement to court and must disclose if necessary to avoid assisting in criminal conduct; situation may allow withdrawal.**

FACTS

Lawyer represented client charged with DUI. Client was given a Suspended Imposition of Sentence provided the client complied with certain conditions. While the client has complied with a portion of the conditions, the client has not fully complied. Lawyer is aware of the non-compliance and has repeatedly advised the client to comply with all of the conditions of the sentence and has advised the client of the consequences of non-compliance.

Lawyer asks the Committee whether the lawyer has an ethical duty to advise the court of the non-compliance and/or whether the lawyer must withdraw from further representation.

DISCUSSION

Rule 1.2(d) and (e) prohibits a lawyer from counseling a client to engage, or assisting a client, in conduct the lawyer knows or reasonably knows is criminal or fraudulent. The lawyer, however, may discuss the consequences of the client's course of conduct with the client. Further this Rule requires that the client be advised of the limitations on the lawyer's conduct imposed by the Rules of Professional Conduct.

Rule 1.6(a) prohibits a lawyer from revealing confidential information without client consent subject to certain defined exceptions. Rule 1.6(b)(3) allows disclosure to avoid a criminal or fraudulent act upon the court where the lawyer's service played some part. Under the facts as presented, the lawyer's services have not played a part in the client's conduct and therefore this exception does not appear to apply and the lawyer may not reveal the fact of non-compliance to the court without the client's consent.

A lawyer, however, shall not knowingly make a false statement of fact or fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Therefore, the lawyer may not take any affirmative action to seek or support discharge of the sentence and/or dismissal of the probation or any action that would imply that the client has complied with the conditions of the sentence. Rule 3.3.

While this Committee cannot opine on issues of substantive law, SDCL 23A-27-14 appears to place the affirmative duty on the court services officer assigned to the case to ensure that the conditions of sentencing have been met.

By advising the client of the consequences of non-compliance and advising the client to comply with the Court's conditions, the lawyer has fulfilled the lawyer's ethical obligations. Rule 1.16(b)(3) allows for withdrawal by the lawyer if the lawyer considers the client's conduct repugnant or imprudent.

Susan Brunick Simons, Chair
Ethics Committee