

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS
No. 12-11

A lawyer who has been sued civilly by a federal agency which alleges that the lawyer and two client co-defendants were guilty of fraud and violation of federal regulations relating to the representation, may release confidential information from the representation to the federal agency bringing the action to the extent the lawyer reasonably believes necessary to establish his/her defense to the claim.

Particularly when confidential client information to be released may be adverse to the client's interest, the lawyer should only release what he/she reasonably believes necessary to establish his/her defense to the claim, and then should make every practicable effort to limit access to the information in the judicial action on a need to know basis through appropriate protective orders or other satisfactory arrangements.

QUESTION PRESENTED

Whether the disclosure of certain documents generated in the course of an attorney/client representation, involving information which may be confidential and subject to the attorney/client privilege, can be disclosed by the attorney in defense of fraud allegations in a lawsuit by a third party government agency without violating the Nebraska Rules of Professional Conduct.

FACTS

The attorney requesting this opinion represents another attorney as a client. This request arises out of the formation of an investment club by the client along with two other individuals. The client served as an attorney for the investment club¹. A federal agency has brought a civil lawsuit against client, and the other two individuals, alleging fraud and violation of federal trading regulations. The requester wants to know if his client discloses certain documents generated during the representation to the federal agency to support the client's defense against these charges, will such disclosure violate the Nebraska Rules of Professional Conduct.

The first document at issue is the client's notes of conversations with securities attorneys from whom advice was sought to insure the investment club was in compliance with applicable rules and regulations. During these conversations one or both of the client's co-defendants were present.

The second document at issue is a letter authored by one of the co-defendants to the State of Nebraska, which had also looked into the activities of the investment club. This letter stated that the attorney for the investment club (requester's client) was unaware of any wrongdoing, had

¹ For purposes of this opinion we are assuming that the attorney's clients included not only the investment club but the other two individual members of the club who participated in its formation. Whether the clients are current or former clients does not affect the outcome of this opinion. See 3-501.9(c)(1) and (2).

not been involved in any trading decisions, and advised the club to retain a securities lawyer to insure compliance with all applicable rules and regulations.

The final document contains handwritten notes the client took of a conversation with one of the co-defendants regarding a belief that the other co-defendant may have been involved in inappropriate activity regarding the investor's funds.

The co-defendants, upon request, have refused to waive any applicable attorney/client privilege. The requester indicates a belief that producing these documents will aid in the defense of their attorney client.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

Rule § 3-501.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * *

(3) 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. . . .

COMMENT

[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 professional ethics. 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 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 information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. . . .

Disclosure Adverse to Client

[8] 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 has been made. Paragraph (b)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that 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, where a proceeding has been commenced.

[12] 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 disclosure should be made in a manner that limits 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.

Rule § 3-501.0 Terminology * * *

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

Rule § 3-501.8 Conflict of Interest; Current Clients; Specific Rules * * *

(b) A lawyer shall not use information relating to representation of a client, to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Rule § 3-501.9 Duties to Former Clients * * *

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

DISCUSSION

Section 3-501.6 of the Nebraska Rules of Professional Conduct (the "Rules") governs an attorney's obligation with regard to the confidentiality of information "relating to the representation" of the client. What is confidential is broadly construed under the Rules to apply

"not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." See Comment [3] to 3-501.6. We have noted in previous advisory opinions that this can even include "publicly accessible information." See Neb. Adv. Op. No. 09-10.

The documents at issue in this case, as described in the facts presented to us, appear to fit within the broad parameters of what is considered "confidential" under the Rules. For purposes of this Opinion we will consider them as such. Whether they may or may not be subject to the attorney client privilege is an issue of law not within the scope of these Rules. Nor are we presented with facts where a court has ordered production of confidential information which would require us to consider the applicability of 3-501.6(b)(4) which permits disclosure under certain circumstances "to comply with other law or a court order."

The provision of the Rules which guides us in reaching our conclusion on these facts is 3-501.6(b)(3), which provides:

"(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: .

..

(3) 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 on conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client"

(Emphasis added) More specifically, as stated in Comment [8] to the above Rule, this exception can apply to a charge in a civil case based "on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together."

In this case the civil action is brought by a federal agency, but according to the facts involves charges against the client/lawyer of fraud while presumably acting in concert with his co-defendant clients. These facts therefore appear to fall within the spirit and intent of these Rules which apply to an attorney's need to respond "to allegations in any proceeding concerning the lawyer's representation of the client." (Emphasis added) 3-501.6(b)(3) This exception has been applied by the South Carolina Ethics Advisory Committee under its Rules of Professional Conduct to an investigation and allegation of misconduct against an attorney by a federal agency. So. Car. Ethics Advisory Opinion 94-23. See also Restatement of the Law 3rd, the Law Governing Lawyers, § 64, and the general discussion particularly regarding disclosures of confidential information in claims by nonclients in Comment g.

A lawyer's permission under the Rules to reveal confidential client information is tempered, however, by the requirement that the information "may" be revealed only "to the extent the lawyer reasonably believes necessary" to establish a defense to the claim. 3-501.6(b)(3). "Reasonably believes" is defined under the Rules to mean "the lawyer believes the matter in question and that the circumstances are such at the belief is reasonable." Proper conduct therefore by definition depends on the surrounding facts and circumstances, and the

lawyer's subjective analysis of them. Based upon the facts presented by the requester we see nothing to foreclose a finding in this case that release of the information could be based on a "reasonable belief" by counsel. However, we do not make such a specific finding because we do not believe it necessary to answer the question presented, and the facts presented to us are understandably limited and not all inclusive.

Once it is determined that release of the information is reasonably necessary, the manner and extent of the release must be carefully addressed. This is discussed in Comment [12] to the Rule, quoted above. Particularly where disclosure is or may be adverse to the client's interest the information released should be "no greater than the lawyer reasonably believes necessary to accomplish the purpose." And if disclosure is "made in" a judicial proceeding, as in this case, it "should be made in a manner that limits 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 lawyers to the fullest extent practicable."

CONCLUSION

It is the Committee's opinion that under the limited facts as presented, where a civil action has been filed by a federal agency against a lawyer and his current or former clients, alleging fraud and violation of federal regulations relating to the representation of the clients, the lawyer could reasonably believe it was necessary to establish his/her own defense to the charges by releasing confidential documents relating to the representation to the federal agency even though that information may adversely affect his/her clients.

Particularly where this information may be adverse to the client's interest, the lawyer should only release what he/she "reasonably believes" to be necessary to accomplish the purpose of establishing a defense to the civil claim. Even then, in the context of a judicial proceeding, the lawyer should make every practicable effort to limit access to the information on a need to know basis through appropriate protective orders or other arrangements.