

## **NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS**

### **No. 13-04**

AFTER LEARNING THAT CLIENT CONSULTATIONS MAY HAVE BEEN MONITORED BY GOVERNMENT AUTHORITIES, A LAWYER MAY CONTINUE TO REPRESENT A CRIMINAL DEFENDANT HELD IN CUSTODY IF HE REASONABLY CONCLUDES THAT LAW ENFORCEMENT AUTHORITIES ARE NOT EAVESDROPPING ON COMMUNICATIONS WITH HIS CLIENT, AND THAT THE CLIENT HAS GIVEN INFORMED CONSENT TO THE MEANS OF FUTURE CONSULTATIONS THAT THE LAWYER AND CLIENT TOGETHER DEVISE.

### **QUESTION PRESENTED**

DOES A LAWYER VIOLATE RULES OF PROFESSIONAL CONDUCT IF HE CONTINUES TO REPRESENT A CRIMINAL DEFENDANT, INCLUDING CONSULTATIONS WITH HIS CLIENT, AFTER LEARNING THAT LAW ENFORCEMENT AUTHORITIES MAY HAVE EAVESDROPPED ON PREVIOUS CONSULTATIONS?

### **FACTS**

A lawyer who is an officer in the U. S. Marine Corps has been detailed to represent detainees at the Guantanamo Bay facility in Cuba. Lawyers representing detainees are required to consult with their clients in conference rooms located in the facility. Objects resembling listening devices were found in the conference rooms, leading the defense lawyers to conclude that their consultations with their clients were overheard by government

personnel. The devices were removed and the government has assured the lawyers that their confidential consultations with their clients are not being overheard. The lawyer now seeks the opinion of this committee whether his continued consultation with his client and representation in the tribunal proceedings is permitted by the Rules of Professional Conduct.

## **APPLICABLE RULES OF PROFESSIONAL CONDUCT**

§ 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).

### **COMMENT**

[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 information relating to the representation. See Rule 1.0(e) for the definition of informed consent. ...

[15] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[16] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions

to prevent the information from coming into the hands of unintended recipients. This duty, however, 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.

§ 3-501.4. Communications.

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

...

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior

discussions with the client have resolved what action the client wants the lawyer to take....

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved....

§ 3-501.0. Terminology.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

## **DISCUSSION**

Confidentiality of communications, embodied by Rule 501.6, is fundamental to the relation between lawyer and client. A defendant held in a government detention facility, like any other client, is entitled to expect that his communications with his lawyer will be confidential. This discussion will focus on the lawyer's obligations under the rules of professional conduct upon learning that lawyer-client communications may have been overheard by government officials. It should be noted that this discussion will not cover topics related to evidentiary rules regarding privileged communications or issues of constitutional law.

First of all, upon learning there may have been eavesdropping in the past, the lawyer must do what he can to assure that it will not happen any more. Comments [15] and [16] to rule 501.6 draw attention to this obligation. The lawyer must "act competently to safeguard information" and "take reasonable precautions to prevent the information from coming into the hands of unintended recipients." The definitions in rule 501.0 show that the lawyer's actions will be compared to the objective standard of a reasonably prudent and competent lawyer facing the same circumstances. Given the unusual facts presented in this request, the lawyer acts competently by obtaining assurances from government sources that he reasonably concludes are trustworthy.

Second, the rules lead to the conclusion that it is up to the client to decide whether and how to continue future consultations. Comment 16 to rule 501.6 draws attention to this point: "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." Rule 501.2(a) requires the lawyer to abide by the client's decisions concerning the objectives of representation. Securing privacy is essential to the communication between lawyer and client about the "objectives of representation" in any litigated matter, and in the circumstances of this request the client must make the final decision about how to proceed.

Since the question of previous eavesdropping has been raised, the client's suspicion that it will continue may not be eliminated by mere assurances from the government. This then puts the lawyer in the position of inviting

the client to voluntarily expose his future consultations to disclosure. Here again, the rules demand informed consent by the client before proceeding. Rule 501.6(a) requires the client's informed consent to any voluntary disclosure of confidential communications. Rule 501.4(a)(1) requires a lawyer to inform his client about a "decision or circumstance with respect to which the client's informed consent...is required..." The standards for informed consent are spelled out in rule 501.0(e) and comment [6] to that rule. Taken together, these rules require the lawyer to explain the situation to his client in as much detail as necessary to satisfy himself that the client has enough information to make an intelligent decision about whether to proceed with future consultations, and what alternative methods of communication the client may wish to use.

Under the circumstances described in this request, there are two steps the lawyer must take: (1) take every reasonable precaution to assure that no future eavesdropping will occur; and (2) fully inform his client and abide by his client's informed decision about the means of future communications.

## **CONCLUSION**

After learning that client consultations may have been monitored by government authorities, a lawyer may continue to represent a criminal defendant held in custody if he reasonably concludes that law enforcement authorities are not eavesdropping on communications with his client, and that the client has given informed consent to the means of future consultations that the lawyer and client together devise.