

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS**  
**No. 09 – 9**

A LAWYER MAY NOT REVEAL INFORMATION CONCERNING A LIFE-THREATENING OR DEBILITATING HEALTH CONDITION OF A CLIENT TO AN ADVERSE PARTY OR ATTORNEY IN THE ABSENCE OF INFORMED CONSENT BY THE CLIENT OR VALID COURT ORDER WHERE THE CLIENT'S INTERESTS HAVE BEEN PROTECTED WITHIN THE BOUNDS OF THE LAW.

**QUESTION PRESENTED**

Whether a lawyer has an ethical obligation to disclose a life-threatening or debilitating health condition of a client who has been designated as a witness, but whose medical condition is not at issue in the case.

**FACTS**

An attorney represented a corporate landlord in a commercial lease dispute whereby the sole shareholder of the corporate landlord was joined as a third party defendant in his individual capacity ("Client"). During the course of litigation, plaintiff's counsel was notified that his Client was diagnosed with cancer and approximately seven months later, the Client was admitted to hospice care. At the time of the inquiry, the Client had not been provided with a time-frame as to his life expectancy.

In response to discovery requests, the Client had been identified as a potential witness. Opposing counsel subsequently expressed an interest in deposing the Client, without any apparent request as to a date for the deposition.

The Client instructed counsel to refrain from disclosing his health condition to the opposing party out of concern that the disclosure would weaken their negotiation posture and that he would perform poorly in the deposition. Opposing counsel had not made any prior inquiry concerning the health condition of the Client nor was the health condition of the Client an apparent issue in the underlying litigation.

The attorney expresses concern that if the Client's adverse health condition is not disclosed, then the opposing party may lose the opportunity to depose the Client and preserve his testimony for trial. The issue in this case is whether plaintiff's counsel has any affirmative duty to reveal the personal health information over the objection of his client.

## APPLICABLE RULES OF PROFESSIONAL CONDUCT

### RULE 1.6 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:

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(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; or

(4) to comply with other law or a court order.

#### COMMENT (Applicable Sections):

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[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. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[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. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

### **Authorized Disclosure**

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

### **Disclosure Adverse to Client**

[10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.

[11] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[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.

[13] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(4). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the nature of the future crime, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(c), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

### **Withdrawal**

[14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal, the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

### **RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL.**

A lawyer shall not

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

*Subparagraph (e) and (f) omitted.*

**COMMENT** (Applicable Sections):

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

#### **RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

**COMMENT** (Applicable Section):

#### **Misrepresentation**

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

## DISCUSSION

### *I. Introduction*

This query underscores the competing ethical considerations associated with Rule 1.6, Confidentiality of Information and Rule 3.4, Fairness to Opposing Party and Counsel.

The obligation of attorneys to maintain the confidences of their clients evolved from the development of the attorney-client privilege to encompass a much broader scope of protected information in order to foster free and open communications between lawyers and their clients. Comment [2] to Rule 1.6 states that the duty “is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.” Consequently, Rule 1.6 prohibits a lawyer from disclosing 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 disclosures are permitted under one of the exceptions enumerated under Rule 1.6. The only exception that would be applicable to this analysis is Rule 1.6(b) which permits the revelation of information relating to the representation of a client to the extent the lawyer reasonably believes is necessary to comply with other law or a court order.

The broad application of the confidentiality rule is further underscored under Comment 3 to Rule 1.6 which provides that it “applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source.”

If a client has expressly or impliedly authorized the release of confidential information, then disclosure must be no greater than the express or implied authorization. In the absence of informed consent of the client, the lawyer must pursue all non-frivolous avenues in order to protect the client’s confidential information including the pursuit of an appeal if authorized by the client following consultation concerning that alternative.

The importance of protecting a client’s confidential information must be balanced with Rule 3.4 which prohibits an attorney from unlawfully obstructing another party’s access to evidence or unlawfully altering, destroying or concealing evidence, among other tactics. Clearly, a lawyer may not protect the confidential information of the lawyer’s client by engaging in acts of misrepresentation concerning the confidential information or from concealing facts which may create a false impression to opposing counsel as to the existence of confidential information as further addressed below.

### *II. Non-Compulsory Disclosure of Information*

In the present case, the client made it clear that his cancerous health condition was personal, confidential and should not be disclosed. The confidential information was within the representation of the client because the client determined that it was important enough to share with his attorney and in doing so, expressed concern as to his ability to endure the mental and physical stress of a deposition as well as his perception that the knowledge of his tenuous condition by opposing counsel would impair his negotiating position. The attorney was therefore

duty-bound to protect the confidential information of the client in the absence of a law compelling disclosure or court order.

As the health of the client does not appear to have been a direct issue in the case, the committee is not aware of any rule which would create an affirmative duty by an attorney to volunteer confidential health information about the client that could have a bearing upon the client's availability for deposition or trial in the absence of a direct inquiry by opposing counsel. Comment 1 to Rule 4.1 provides that "a lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." If an inquiry is made that that would lead to the disclosure of the health conditions, then the lawyer is duty bound to protect the information by declination, objection or by initiating or defending an adversary proceeding.

Lawyers must be mindful that a "[m]isrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements." Comment 1, Rule 4.1. In Nebraska State Bar Association v. Addison, 226 Neb. 585, 412 N.W.2d 855 (1987), an attorney was suspended for obtaining a release of a hospital lien in exchange for a portion of a negotiated settlement under two insurance policies without disclosing the existence of a third policy to the hospital claim representative. The attorney became aware that the representative was under a false impression as to the existence of only two policies and violated former DR7-102(a)(5) by failing to correct the false impression. While opposing counsel in this case was not under any false impression concerning the availability of the client as a witness or as to any matters concerning his health, the Addison case illustrates the delicate balancing of the confidences of a client against justice and fair play.

To be sure, a client, lay witness or expert witness may become unavailable at any time for a variety of reasons, including those resulting from adverse health conditions. Both the Nebraska and Federal Rules of Discovery contain the tools necessary for attorneys to, among other things, preserve the testimony of witnesses and to secure information which may or may not be deemed confidential. It is the duty of all attorneys, pursuant to Rule 1.1, to competently pursue the interests of their clients through the use of such tools. The Committee believes it would create an unreasonable burden to require lawyers to disclose information that has not been sought by opposing counsel that is not otherwise mandated by law, such as, for example, the initial disclosures required under FRCP 26.

### ***III. Compulsory Requests***

The Committee believes it is important to distinguish between the unpermitted disclosure of confidential information of a client that has not been sought by the opposing party as opposed to the unpermitted disclosure of confidential information that has been sought through direct inquiry by opposing counsel or by compulsory means. Under such circumstances, an attorney remains duty-bound to seek procedural protection of the confidential information by objecting to the discovery request or by way of a motion for protective order. The Committee believes the same to be true with respect to informal requests of confidential information without the express

or implied consent of the client by either declining to provide the confidential information or by seeking an appropriate protective order from the court.

In the foregoing regard, the Philadelphia Bar Association Professional Guidance Committee, Opinion 95-19 (1996), opined that the proper procedure for an HIV positive client who did not want his condition revealed in response to medical history discovery requests in a personal injury case should either object to the discovery requests or seek appropriate protective orders from the court. In Pennsylvania Bar Association Ethics Committee, Opinion 96-178, the committee opined that a lawyer for a plaintiff in an automobile accident case must disclose, in response to the defendant's interrogatories, the fact that the plaintiff has contracted non-Hodgkins lymphoma since the accident occurred. If the client's medical condition is in issue and the client refuses to allow the confidential information to be disclosed, the attorney should again determine whether there are any meritorious procedural protections available to limit the nature or extent of the disclosure and pursue such relief through proper objection or motion. In the event the client refuses to consent to the production of the confidential information in the face of a clear rule or court order, then the attorney should withdraw from further representation in the case. See also, Opinion 2006-10 issued by the North Carolina State Bar, wherein it was stated "A lawyer must exercise reasonable care to protect the confidentiality of a client's health information gathered, for example, in connection with a medical malpractice or personal injury case. It is encouraged to handle the health information of third parties with the same care as that of clients." In such cases, the interests of Rule 1.6 and 3.4 are balanced because the confidential information of the client is protected while the opposing party is given a fair opportunity to discover the existence of potential relevant information and an opportunity to compel the disclosure of such information through an adversary proceeding.

## **CONCLUSION**

A lawyer may not reveal information concerning a life-threatening or debilitating health condition of a client to an adverse party or attorney in the absence of informed consent by the client or an order to comply with a valid court order or compulsory process where the client's interests have been protected within the bounds of the law.