

Nebraska Ethics Advisory Opinion for Lawyers
No. 93-4

AN ATTORNEY MUST EXERCISE HIS OR HER DISCRETION IN DETERMINING WHETHER DISCLOSURE OF A CLIENT'S INTENTION TO COMMIT A CRIME IS NECESSARY OR PERMITTED. IN MAKING THIS DETERMINATION, ONE SHOULD LOOK TO DR 4-101(C) TO DECIDE WHETHER HIS OR HER FACTUAL SITUATION FITS WITHIN ONE OF THE FOUR EXCEPTIONS PERMITTING SUCH DISCLOSURE.

FACTS

Attorney A was approached by Client X who was attempting to find legal representation for his partnership. Attorney A declined the offer of employment and advised Client X that the partnership's proposed business venture was illegal because the actions Client X explained to Attorney A would violate federal law.

Attorney A is concerned that Client X's partnership may proceed with the business venture and may be successful in the scheme. If the partnership is successful, it will not only violate federal law, but there is a possibility it will create a serious threat to public safety.

QUESTION PRESENTED

Whether Attorney A is required to disclose the confidences he obtained about Client X's possible future crime when Client X approached him concerning possible employment.

DISCUSSION

The information Attorney A received during the preliminary consultation with Client X is considered confidential. The fact that Attorney A declined employment does not change that fact.

Confidentiality in the attorney/client relationship is of utmost importance. The assurance of confidentiality enables a client to feel free to discuss all information concerning his or her legal matters. This full disclosure of facts enables an attorney to be able to advise the client effectively. Therefore, disclosing information obtained through the attorney/client relationship is generally prohibited.

DR 4-101(B)(1) provides that an attorney should not knowingly reveal a confidence or secret of his or her client. However, there are exceptions to this rule. These exceptions are provided in DR 4-101(C) which states:

A lawyer may reveal: (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them. (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order. (3) The intention of his client to commit a crime and the information necessary to prevent the crime. (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct. (Emphasis added.)

Applying DR 4-101(A)-(C) to the facts stated, it does not appear that Attorney A is obligated to disclose the information known to him about Client X. However, the fact that Attorney A is not obligated to disclose this information does not mean that he cannot disclose such information. It appears that this factual situation may fit within the exception provided in DR 4-101(C)(3) since the facts stated by the attorney provide that if Client X follows through with his plan, he will be committing a crime.

While the ABA Model Rules of Professional Conduct do not control this situation because they are not enacted in Nebraska, they are instructive on this particular issue. The Model Rules have narrowed the exception concerning disclosure of a client's intent to perform a

criminal act more than Nebraska's version of the Model Code. Rule 1.6 states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents at the 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 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 a 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.

The Model Rules require that the criminal act must be likely to result in death or substantial bodily harm, while the Model Code does not specify how serious the proposed crime must be.

Therefore, it appears that if the criminal actions are so severe that others will be harmed in the process, then disclosure is not prohibited under both the Model Code and the Model Rules. Since the Model Code does not make a distinction concerning the proposed crime, an attorney in Nebraska has a greater degree of latitude in determining whether disclosure of the criminal activity is permitted under DR 4-101(C)(3).

In determining whether to disclose the information, an attorney must analyze the possible outcome of the client's criminal activity. This involves exercising his or her discretion in deciding whether disclosure is permitted based on the specific facts and the totality of

the situation. This discretion may require consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be affected by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. This analysis may also include determining the likelihood that Client X will in fact be successful in completing his plan, the fact that a crime will be committed if he is successful, and the harmful effects this plan, if successful, could have on others.

CONCLUSION

An attorney must exercise his or her discretion in determining whether disclosure of a client's intention to commit a crime is necessary or permitted. In making this determination, one should look to DR 4-101(C) to decide whether his or her factual situation fits within one of the four exceptions permitting such disclosure.