

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

NO. 24-01

Summary

A PUBLIC DEFENDER'S OFFICE MAY NOT REPRESENT TWO CLIENTS CONCURRENTLY WHEN WHEN CLIENT 1 WILL BE INFORMING ON AND/OR PARTICIPATING IN A STING OPERATION INVOLVING CLIENT 2.

A PUBLIC DEFENDER'S OFFICE INVOLVED IN REPRESENTATION OF CLIENT 1 AND CLIENT 2 SHOULD WITHDRAW FROM REPRESENTING BOTH CLIENTS, IF REPRESENTING THE CLIENTS CONCURRENTLY, AND SHOULD NOT TAKE ON REPRESENTATION OF CLIENT 2, IF NOT YET REPRESENTING CLIENT 2

IF A PUBLIC DEFENDER'S OFFICE IS NOT ALLOWED BY THE COURT TO WITHDRAW FROM REPRESENTATION OF ONE OR BOTH CLIENTS, THE PUBLIC DEFENDER'S OFFICE SHOULD NOT INFORM EITHER CLIENT OF ANY INFORMATION LEARNED DURING THE REPRESENTATION OF THE OTHER

QUESTIONS PRESENTED

1. May the public defender's office represent a client ("Client 2") who is charged with a crime in which the another client of the public defender's office ("Client 1") provided information and/or participated in a sting operation resulting in the charges against Client 2 pursuant to a cooperation agreement worked out for Client 1 by the public defender?

2. If the public defender receives information, under the cooperation agreement, that Client 2 is the subject of information provided by Client 1 must the public defender warn Client 2?
3. What are the public defender's ethical obligations if he/she is not allowed to withdraw by the court during his/her representation of Client 1 or Client 2.

Factual Background

A public defender's office is appointed to represent Client 1 on a charge of distribution of a controlled substance. Client 1 desires to work with law enforcement in providing information on criminal activities and/or working as a confidential informant in purchasing illegal drugs under direction of law enforcement. Client 1 will receive some benefit by these activities including reduced charges and sentence recommendations. As a result, the public defender must negotiate the agreement with law enforcement and Client 1. Client 1's activities will or are likely to implicate another party, Client 2, who is likely to become or already is a client of the public defender's office. In the past, the public defender withdrew from representing both Client 1 and Client 2, but was recently not allowed to withdraw by the court.

Relevant Rules

§ 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).

Comments

[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.... *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. . .

[3] . . . *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. . .*

Former Client

[17] The duty of confidentiality continues after the client-lawyer relationship has terminated. . .

§ 3-501.7. Conflict of interest; current clients.

(a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) *the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;*
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Comments

[1] *Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.* Concurrent conflicts of interest can arise from the lawyer's

responsibilities to another client, a former client or a third person or from the lawyer's own interests. . . .

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable; and (4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

§ 3-501.9. Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. . . .

(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.

Comments

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has

prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

§ 3-501.16. Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

...

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. *When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.*

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance

payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENTS

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

DISCUSSION

The public defender may not represent Client 2 who is charged with a crime in which Client 1 provided information and/or participated in a sting operation pursuant to an agreement with law enforcement negotiated by the public defender resulting in the charges against Client 2.

“It is not proper for the office of public defender to represent two criminal defendants in the same case with conflicting interests.” Nebraska Ethics Advisory Opinion for Lawyers No. 79-6. The Texas Ethics committee addressed a similar question in Opinion 579. That committee determined that a public defender may not represent two clients whose cases arise from the same potential criminal act if the representation of one is likely to adversely limit the representation of the other. The committee determined that the public defender must withdraw from the representation of the second assigned client. The opinion noted that the public defender could continue to represent the first assigned client but only if (1) the lawyer does not adversely use any confidential information of the secondly assigned client that is not already generally known without his consent; and (2) the

representation is not adverse to the second client under Rule 1.09 or, if it is adverse, the second client consents. In deciding whether the representation is adverse, the committee noted that the lawyer would have to consider whether either the first client or the second (now former) client is likely to be a witness against the other.

In the situation described here, there is no doubt that Client 1 and Client 2 have adverse interests. Client 1 is actively engaged in activity that will or could cause legal jeopardy to Client 2 and will likely testify against Client 2. Nebraska Rule of Professional Conduct 3-501.7(a) deals with conflicts of interest; current clients. The rule specifies the representation of one client cannot be directly adverse to another client. Consequently, a public defender cannot be involved in arranging Client 1's law enforcement cooperation agreement against Client 2 if the public defender concurrently represents both clients. Withdrawal from representing both clients will be required.

If Client 2 is not yet a client, but the public defender's office is later appointed to represent Client 2, the public defender's office should decline the representation. If the representation is declined before any meetings or communications occur with Client 2, the public defender's office should be able to continue to represent Client 1.

If Client 2 becomes a client upon appointment, the public defender's office should withdraw from representing Client 2 as soon as it becomes clear that Client 2 is the target of Client 1's law enforcement agreement. Withdrawal from representing Client 1 will also be required.

The conflict between Client 1 and Client 2 is not waivable. Rule 3-501.7 (b) provides:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

While it is true that a concurrent conflicted representation may sometimes be allowed under this rule upon client consent, in this situation, it is not reasonable for the public defender's office to believe that it could provide competent and diligent representation of both clients under subsection (b)(1). The Vermont ethics committee determined a similar conflict was not waivable in Opinion 97-12. In that opinion, a defense attorney had defended a client on a charge of criminal conduct against a minor victim. As part of that representation, the defense attorney developed evidence against a second individual. A year later, that second individual was charged with the crime and contacted the defense attorney for representation. It was apparent to the defense attorney that defense of the second individual would include efforts to establish that the original client was the guilty party. The ethics committee concluded there was a conflict and the conflict was not waivable. The opinion noted that "This is not a circumstance where a waiver of conflict or consent to the second representation by the first client would be reasonable since, from the facts presented, it is fairly predictable that the second client's interests will be directly opposed to the first client's interests and there will be an actual and very significant conflict between the two."

Here, one client may be the reason that another client is accused of a crime. The public defender could easily find herself cross examining Client 1 as a result of a cooperation agreement the attorney negotiated with law enforcement and questioning her own client's credibility in defense of Client 2. This would violate the duty of loyalty to both clients (see 3-501.7 Comment 1) and therefore the conflict is not waivable.

2. If the Public Defender receives information, under the cooperation agreement, that Client 2 is the subject of the information provided by Client 1, the Public Defender must not warn Client 2.

Here the public defender's office suggests that informing Client 2 of Client 1's cooperation activities might be necessary as part of a duty of loyalty to Client 2 and/or as part of an effort to obtain informed consent from both Client 1 and Client 2 to waiver of the concurrent conflict interest. First, the conflict of interest is not waivable (see above) so obtaining informed consent to waiver of the conflict should not be attempted. Second, informing Client 2 would violate the duty of confidentiality to Client 1.

The ethics committee in the state of Illinois addressed a similar situation in Opinion 90-27 (3/9/91). In that opinion the public defender's office was appointed to represent two clients on unrelated matters. The first client (A) was represented by one public defender while the second (B) was represented by another public defender in the same office. B began cooperating with law enforcement to get beneficial sentencing recommendations. B decided to help the police investigate a contract murder. While B is being wired by the police, B's public defender learned that A was the target of the investigation by the police and that A was also represented by the public defender's office on an unrelated matter. The public defender's office withdrew from representing both A and B as soon as possible after that discovery. The public defender's office then requested an opinion from the ethics committee on whether the office owed any duty to inform Client A of the ongoing police investigation of the contract murder allegations.

The committee decided that because the public defender's office learned of the investigation of A as part of its professional representation of B, the public defender's office had no duty to inform A of the murder investigation. In fact, the committee noted that it would be improper to so inform A citing Illinois' version of Model Rule 1.6(a) "...a lawyer shall not. . . use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure." The

committee then cited several other opinions involving client confidences and concluded “These opinions illustrate that a fundamental principle in the lawyer-client relationship is that the lawyer maintain the confidences and secrets of his client.” . . . “On the other hand, there is nothing in the Rules which require a lawyer to disclose information to his client on a matter unrelated to the representation even when it would benefit the client, particularly when to do so would require that lawyer to violate the Rule imposing confidentiality.” *Id.* See also Lawyers' Manual on Professional Conduct: Practice Guides 31 Lawyer-Client Relationship, 31:1201 Duties Upon Withdrawal “The lawyer also must protect client confidences when withdrawing.”

The duty of confidentiality survives the end of an attorney client relationship. See 3-501.6 Comment 17. Keeping client confidences is the “hallmark of the client-lawyer relationship.” *Quoting* 3-501.6 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....”) Here, the public defender’s office must not reveal anything to Client 2 learned during the course of the representation of Client 1.

3. The Public Defender’s ethical obligations if he/she is not allowed to withdraw by the court during his/her representation of Client 1 or Client 2 remain the same.

Nebraska rule § 3-501.16. Declining or terminating representation provides in part (c):

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. *When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.*

(emphasis added) Comment 3 to that rule states:

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. *Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.*

(emphasis added). Rule 1.6 is the rule related to client confidences. See Nebraska Rule 3-501.6. Rule 3.3 is the ethical duty of candor to the tribunal. See Nebraska Rule 3-503.3.

The committee is mindful that the logistics of criminal defense in some counties in Nebraska may mean a court would desire to keep a public defender involved in a matter despite a clear conflict of interest of the public defender that should necessitate allowing the public defender to withdraw. In that situation, the ethics rules do not change. Despite the conflict, the attorney is advised by the rules to be mindful of client confidences. Thus, even if the attorney is not allowed to withdraw, steps should be taken to ensure that the confidences learned in the representation of one client are not shared with another client. In no circumstances should the public defender inform Client 2 of the cooperation agreement negotiated for Client 1.