

2011 WL 12708574 (NE.Jud.Eth.Comm.)

Nebraska Judicial Ethics Committee

Nebraska Ethics Advisory Opinion for Lawyers No. 11-05

OPINION FOR LAWYERS No. 11-05

2011

*1 A LAWYER WHO IS APPOINTED GUARDIAN AD LITEM FOR A MINOR IN A JUVENILE COURT CASE MAY NOT REVEAL INFORMATION RELATING TO HER REPRESENTATION OF THE MINOR TO A LEGISLATIVE COMMITTEE WITHOUT FIRST ASSERTING ALL NONFRIVOLOUS CLAIMS THAT THE INFORMATION REQUESTED IS PROTECTED AGAINST DISCLOSURE BY THE ATTORNEY-CLIENT PRIVILEGE.

QUESTION PRESENTED

WHAT ARE THE ETHICAL OBLIGATIONS OF A GUARDIAN AD LITEM WHO HAS BEEN ASKED TO PROVIDE INFORMATION TO THE NEBRASKA LEGISLATURE THAT SHE OBTAINED DURING THE PENDENCY OF A JUVENILE CASE THAT HAS BEEN CLOSED FOR MORE THAN ONE YEAR?

FACTS

An attorney was appointed by the Juvenile Court to serve as guardian ad litem for an infant in a case involving allegations of child neglect and abuse. The case was ultimately dismissed without trial. More than a year later, the attorney has been asked to provide information to a committee of the Nebraska Legislature that is investigating foster care and child welfare issues. The information sought by the committee was accumulated by the lawyer during her investigation of the case while serving as guardian ad litem. The child has not reached the age of majority.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

§ 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:

...

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

§ 3-501.6. Confidentiality of information.

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).

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

...

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

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. See also Scope.

*2 [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.

...

[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.

§ 3-501.0. Terminology.

...

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

§ 3-503.4. Fairness to opposing party and counsel.

A lawyer shall not:

...

(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;

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. ...

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

§ 3-501.14. Client with diminished capacity.

DISCUSSION

Attorneys appointed to serve as guardians ad litem in Juvenile Court proceedings involving allegations of neglect or abuse of children stand *in loco parentis* for the child, [Neb. Rev. Stat. § 43-272.01\(2\)\(a\)](#), but they are also typically required to serve as counsel for themselves as well as the child. [Neb. Rev. Stat. § 43-272\(3\)](#). Thus, the attorney's status as guardian ad litem for an infant does not change the fact that she is subject to all of the applicable Rules of Professional Conduct.

*3 The general rule is that an attorney may not disclose information relating to the representation of a former client. § 3-501.9(c), Rules of the Nebraska Supreme Court. This rule's protection of confidentiality incorporates the obligations of § 3-501.6. Under that rule, confidentiality applies “not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” § 3-501.6, Comment [3]. The rule prohibits “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.” § 3-501.6, Comment [4]. A lawyer's response to a request to provide information to a committee of the Legislature is therefore constrained by this privilege which applies broadly to all of the information that she gathered during her investigation of the juvenile court proceedings.

There are exceptions to this general rule. § 3-501.6(c)(2) refers to other provisions in the rules that would “permit or require” disclosure. The exception that applies to this opinion is found in § 3-501.6(b)(4), which allows disclosure if it is done “to comply with other law or court order.” The phrase “other law or court order” includes a Legislative inquiry. Comment [11] states: “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.” A “tribunal” includes a legislative body. § 3-501(m). The Legislature's rules give its committees the power “to require by subpoena or otherwise the attendance of such witnesses...and to take such testimony, as it deems advisable.” Rule 3, Section 1, Rules of the Nebraska Unicameral Legislature, 102 Legislature First Session, Jan. 12, 2011. This is enforced by the Legislature's power to punish disobedience to its subpoena by contempt proceedings. [Neb. Rev. Stat. § 50-105](#). Thus, a committee of the Nebraska Legislature has the authority to compel a lawyer to disclose confidential information. And of course a lawyer is generally obligated to obey a tribunal's subpoena. § 3-503.4(c). These considerations lead to the conclusion that the exception in § 3-501.6(b)(4) would apply to these facts, and the lawyer may reveal the confidential information to the legislative body.

However, the exception does not permit a lawyer to voluntarily make such a disclosure. § 3-501.6(b) allows information to be revealed “to the extent the lawyer reasonably believes necessary...to comply with other law or a court order.” In other words, a lawyer may not disclose confidential information just because she believes it might be helpful to a Legislative committee's investigation. Instead, the lawyer may only disclose the information when subpoenaed and compelled under oath to do so. Only then would a lawyer “reasonably believe” that disclosure is necessary, and not merely desirable.

*4 Furthermore, the lawyer must resist a subpoena if there is a meritorious reason to do so. Comment [11] states: “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.” Other opinions of this committee concerning disclosures in litigated matters are consistent with the view that a lawyer must make reasonable attempts to protect the confidentiality of her client's information. See Nebraska Ethics Advisory Opinion for Lawyers, Nos. 09-9 and 09-10, each of which ultimately concludes that a lawyer must obey a direct

order issued by a court requiring disclosure. The fact that the tribunal seeking disclosure is the Legislature, instead of a court or opposing counsel in a lawsuit, does not alter the lawyer's duty.

In the legislative arena, the lawyer's ability to resist a subpoena is limited. This is illustrated in District of Columbia Ethics Opinion No. 288(1999), in which the committee observed that there is no direct appeal from a legislative subpoena. That opinion concluded that a lawyer may disclose the requested information when the committee directly threatens contempt. Comment [11] to § 3-501.6 states: "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." By the same reasoning, a lawyer is not obligated to endure a prosecution for contempt of the Legislature by refusing a direct demand to supply the requested information when it is enforced by the subpoena power.

CONCLUSION

Since the former client is a minor, she is not capable of giving informed consent to any disclosure. § 3-501.14. The lawyer is therefore obligated to resist disclosure of confidential information to the Legislative committee by all nonfrivolous means until she concludes that disclosure is necessary in order to obey the direct requirements of a subpoena issued under penalty of contempt.

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