NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS
No. 12-06

IN THE ABSENCE OF THE CLIENT'S WILLINGNESS TO DO SO, A LAWYER "MAY" DISCLOSE TO THE BANKRUPTCY COURT OR TRUSTEE THAT HIS DEBTOR/CLIENT HAS INHERITED AN ESTATE WITHIN A MANDATORY REPORTING PERIOD OF 180 DAYS FROM THE FILING OF THE PETITION, EVEN THOUGH THIS INFORMATION CONSTITUTES CONFIDENTIAL INFORMATION, SO LONG AS THE LAWYER REASONABLY BELIEVES IT IS NECESSARY TO PREVENT THE CLIENT FROM COMMITTING A CRIME OR FOR THE LAWYER TO COMPLY WITH OTHER LAW OR A COURT ORDER. SEE 3-501.6

IF THE DISCLOSURE IS BASED ON THE PREVENTION OF A CRIME, SUCH DISCLOSURE MAY NOT REVEAL PAST OR COMPLETED CRIMES.

WHERE PRACTICAL, WHEN DISCLOSURE IS PROPER, THE LAWYER SHOULD FIRST ATTEMPT TO PERSUADE THE CLIENT TO TAKE SUITABLE ACTION TO AVOID COUNSEL'S NEED TO DISCLOSE. WHERE CLIENT REFUSES, DISCLOSURE ADVERSE TO CLIENT'S INTEREST SHOULD BE NO GREATER THAN NECESSARY TO ACCOMPLISH THE PURPOSE REQUIRED BY LAW OR THE PROFESSIONAL RULES OF CONDUCT.

IF THE LAWYER KNOWS THAT HIS CLIENT DOES NOT INTEND TO DISCLOSE THE INHERITANCE TO THE BANKRUPTCY COURT OR TRUSTEE AND THAT SUCH CONDUCT IS CRIMINAL OR FRAUDULENT, HE "SHALL" TAKE REASONABLE REMEDIAL MEASURES, INCLUDING, IF NECESSARY, DISCLOSURE TO THE TRIBUNAL. SEE 3-503.3(b) HOWEVER, THIS OBLIGATION CONTINUES ONLY "TO THE CONCLUSION OF THE PROCEEDING." 3-503.3(c)

IF AN ATTORNEY WHO PREVIOUSLY ADVISED A CLIENT ABOUT FILING FOR BANKRUPTCY "REASONABLY BELIEVES" THAT FAILURE BY HIS FORMER CLIENT TO DISCLOSE HIS OWNERSHIP OF A HISTORICAL ANTIQUITY TO THE BANKRUPTCY COURT CONSTITUTES A CRIME WHICH CAN BE PREVENTED BY COUNSEL'S DISCLOSURE, OR COUNSEL IS COMPELLED TO DISCLOSE BY ANOTHER APPLICABLE LAW OR COURT ORDER, THEN DISCLOSURE IS PERMISSIBLE UNDER 3-501.6.

THE DUTY TO DISCLOSE TO A TRIBUNAL UNDER 3-503.3 IS ONLY APPLICABLE TO A LAWYER WHO REPRESENTS A CLIENT IN THE PROCEEDING AT ISSUE.

QUESTIONS PRESENTED

Whether, in a Bankruptcy Court setting, a lawyer may, or has any duty to disclose the following confidential client information to the court or other proper person:

(a) That his client the debtor after filing for Bankruptcy became entitled to an inheritance which client should report to the court, but refuses to do so, which facts the attorney learned from the client after discharge in Bankruptcy had been issued and the file closed; (First Fact Situation), and

(b) That a former client whom the attorney had advised must report his ownership of a historical antiquity if he files a Chapter 7 Bankruptcy, failed to report that asset in a Bankruptcy later filed for the former client by another attorney. (Second Fact Situation)

FACTS

This opinion will address two separate fact situations presented by separate attorneys. The opinion is combined because both requests arise out of circumstances involving the bankruptcy court and the obligation of counsel to make certain disclosures to the court or trustee, and whether such disclosures, if advisable, would violate their duty to the client and counsel's commitment to maintain confidentiality of information received in connection with the representation.

1. First Fact Situation.

The firm making the request entered into an attorney/client relationship with Client to represent him in connection with a Chapter 7 Bankruptcy. The firm thereafter filed the Petition in Bankruptcy and at the first meeting of creditors the trustee asked Client whether he received or expected to receive an inheritance within 180 days of the date of filing the Petition. Client responded that he neither received nor expected to receive an inheritance within that time period, and the firm had no reason to believe that its Client was not providing true and accurate information as of that time. Eventually the bankruptcy trustee concluded there were no assets to liquidate and abandoned the bankruptcy estate issuing a discharge to the Client.

More than 180 days after the filing of the Petition in bankruptcy, and more than a year after the discharge the firm received a telephone call from Client to discuss an aspect of the bankruptcy. During the conversation, the firm learned from the Client that his mother had passed away 166 days after the filing of the Petition in bankruptcy, and on or about the day of the discharge. Under Federal Bankruptcy Rules the estate of a bankrupt includes "[a]ny interest in property . . . that the debtor acquires or becomes entitled to acquire within 180 days after [the

filing of the Petition] . . . by bequest, device, or inheritance . . . ." 11 U.S.C. § 541(a)(5). Counsel requesting the opinion also cites § 541(h) which states in part:

> "If . . . the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the Chapter 7 Liquidation case . . . . The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case, ..."

Counsel also cites In Re Scott, 385 B.R. 709, 711 (Bankr. D. Neb. 2008) as authority. There, debtor's mother died within 180 days of filing bankruptcy and under the above statute the estate included the property debtor became entitled to inherit.

As part of the firm's effort to determine its ethical duty it contacted the Nebraska Counsel for Discipline which suggested the attorney advise the Client to disclose the subject of inheritance to the Chapter 7 Trustee, and also suggested counsel request an Ethics Advisory Opinion from this Committee as to whether the firm has a duty to disclose the inheritance to the Chapter 7 Trustee if the Client fails or refuses to do so.

Thereafter counsel wrote a detailed letter to the Client disclosing what the firm had done, and intended to do, to ascertain its ethical responsibilities and further suggested that the Client "contact the Chapter 7 Trustee and disclose the inheritance." As of the time this request was submitted, several weeks after sending the letter, the firm had not received any response from the Client.

2. Second Fact Situation.

Counsel with this request states that Jane and John Doe came into their office for a free bankruptcy consultation. They appeared to qualify for a Chapter 7 Bankruptcy. At the consultation John Doe reveals that he owns a historical antiquity that he purchased for $5,000 and after restoration work believes it would now sell for $8,000. Client is advised that the antiquity would not be exempt from the Bankruptcy Estate. Client then states that he will transfer it to a relative so the trustee will not be aware of it. Counsel advises Client this would be a fraudulent transfer and would amount to a crime if they filed their petition in Bankruptcy and did not disclose the antiquity or its transfer.

After paying a retainer and providing some initial paperwork the Does emailed the attorney's office to state that the antiquity was sold to a relative for $700. The Attorney requested that the Does obtain an appraisal of the property to ascertain its true value, or he cannot represent them. They requested a refund of their retainer and stated they would not file Bankruptcy.

Several months later the attorney's office becomes aware that the Doe's have filed a Chapter 7 Bankruptcy through the services of another attorney. Upon reviewing the Petition they learn that the antiquity, or its transfer has not been listed with the filing even though the transfer fell within the statutory timeframe to disclose such transfers. Counsel believes such an omission could be considered Bankruptcy fraud.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

Rule § 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).

(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;

* * *

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

COMMENT

[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. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. * * *

[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.

[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. * * *

Rule § 3-503.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

* * *

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

* * *

COMMENT

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Rule § 3-501.18 Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

* * *

Rule § 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.

Rule § 3-501.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

* * *

(f) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

DISCUSSION

Circumstances often arise where lawyers are confronted with difficult decisions due to the tension that can exist between his or her duty to the client and the broader duty to the system of justice. The preamble to the Nebraska Rules of Professional Conduct, in Comment [9] recognizes this when it states in part:

> ". . . Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principals underlying the Rules. . ."

The two fact situations presented in this Opinion illustrate the type of tension which can exist between duty to Client and a broader professional obligation to the public and as officers of the court.

We should also preface our opinion with a reminder of the limitations that often confront this Committee. We are not finders of fact, but are limited to considering the facts as stated by the attorney requesting the opinion. Moreover, we cannot interpret law beyond the Rules of Professional Conduct or resolve issues of law. That is the province of the lawyer and the courts.

1. The First Fact Situation.

Here counsel is confronted with the issue of whether to disclose to the Bankruptcy Court or Trustee that his client, whom had already received a discharge, learned that his mother had passed away within 180 days of filing the bankruptcy petition and failed to disclose that fact to the Court, as apparently required by law. It is important to note that the accuracy of previous filings with the Court, at the time filed, were not affected by this later development.

A. The Duty to Maintain Confidentiality.

(1) Confidentiality of Information Under Section 3-501.6.

The first issue is whether this information is confidential and, if so, to what extent it is protected under Section 3-501.6 of the Rules.

What constitutes "confidential" information covered by the Rule is broad in its scope. As stated in Comment [3] to the Rule "[t]he Confidentiality Rule . . . applies not only to matters communicated in confidence to the client but also to all information relating to the representation, whatever its source." As recognized in one of our Opinions rendered under these Rules, maintaining confidentiality in the attorney-client relationship is of "utmost importance" and has been interpreted "broadly" to even include "publicly accessible information." Neb. Opinion No. 09-10 (Client's status as undocumented alien was confidential information entitled to some protection in Worker's Compensation claim, with due regard, however, for counsel's obligation of candor to a Tribunal). The key lynchpin to confidentiality is that the information must be "information relating to the representation of a client . . . ." Section 3-501.6(a).

The information that the client's mother had passed away within the 180 day period certainly has relevance to the bankruptcy handled by counsel requesting our opinion. That fact could potentially lead to an increase in the bankruptcy estate. In that sense it relates to the representation and fits the definition of confidential information.

There is a question, however, regarding the timing of receipt of the information. Arguably, the representation had concluded once the discharge in bankruptcy had been received. Assuming that to be the case, is the information still considered confidential? Nebraska Rules §3-501.9(c)(2) states that confidentiality applies to former clients and "information relating to the representation . . . ." There is no qualification expressed as to when the information is received. A recent Ethics Opinion from the State of New York concluded that: "Information acquired after the termination of a representation can constitute confidential information of a former client." State Ethics Opinion, New York State, Opinion 866 (5/23/11). However, since the information

about the mother's death was received by counsel during a conversation with the client on an apparently unrelated aspect of the bankruptcy, this suggests that the information was revealed during the attorney/client relationship. In either case, the attorney would be obligated to treat the information as "confidential," and entitled to protection.

(2) Propriety of Disclosure Under Section 3-501.6.

Confidential information may only be disclosed if the client gives "informed consent", it is "impliedly authorized in order to carry out the representation", or the disclosure is authorized by subparagraph (b) of 3-501.6. Under the facts provided by counsel, the client has not given an informed consent to reveal his mother's death to the Court or Trustee. It would therefore also be difficult to imply any such authority under these facts.

Subparagraph (b) allows confidential information to be revealed in specific circumstances, only two of which could apply here. Subsection (1) authorizes disclosure "to prevent the client from committing a crime . . . .", or, under Subsection (4) "to comply with other law or court order."

It is important to emphasize that under this Rule disclosure is permissive and not mandatory, because under Subsection (b) the lawyer "may" reveal the information if one of the conditions is met. Furthermore, the Rule requires that the information can be revealed only "to the extent the lawyer reasonably believes necessary" to prevent a crime or to comply with the law or court order. Under Section 3-501.0 captioned "Terminology", it states that "'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."

(a) To Prevent a Crime.

Counsel cites federal statutes which require a debtor who receives an inheritance within 180 days after filing of the Petition to report that fact in a supplemental schedule filed with the Court within 14 days after learning of that information. 11 U.S.C. § 541(a)(5) and 541(h). Determining whether failure to do so would constitute a "crime" which could be prevented by disclosure is not within the province of this Committee to decide. However, if requesting counsel "reasonably believes" such, and the disclosure does not involve a past or completed crime, he may make the necessary disclosure after seeking to persuade his client "to take suitable action to obviate the need for disclosure." Section 3-501.6, Comment [12]. Counsel appears to have made such effort. Then, it is still discretionary with counsel as to whether any such disclosure should be made. Factors to consider in making a decision to disclose are discussed in Comment [13] to the Rule.

It is important to note, however, particularly under the facts of this request that this exception does not apply to allow the disclosure of past or completed crimes. As we stated in a 2009 opinion involving 3-501.6(b):

> "'To prevent a crime' indicates disclosure is allowed if the crime is ongoing or will be committed in the future . . . . It is well settled ethically an attorney may not reveal completed crimes. ABA

Formal Opinion 287; Nebraska Ethics Advisory Opinion No. 78-2."

Nebraska Ethics Advisory Opinion No. 09-10. Therefore, in that opinion we decided that "an attorney who has an ethical obligation to protect his client's status as an undocumented immigrant may not disclose this information under any of the permissive exceptions to confidentiality." However, this had to be carefully balanced against the attorney's obligation of candor to a tribunal.

The ABA Model Rules are considerably broader than Nebraska's Rules in that the exceptions include disclosure to prevent fraud and to "mitigate or rectify" the results of the fraud or crime. Since our Supreme Court chose not to include these exceptions we must be careful to avoid too broad an interpretation of the phrase disclosure "to prevent the client from committing a crime . . . ." 3-501.6(b) See, e.g., Arizona Ethics Opinion 01-14 where it stated regarding its similarly worded rule, in quoting from a previous opinion, that "'a lawyer may not reveal a client's continuing crime if such a disclosure would also reveal a past crime by the client.'"

Based on the facts of this case, in view of the passage of time between the death of the client's Mother, the time required for disclosure, and the lack of any disclosure by the client, counsel must carefully evaluate whether the information he would be disclosing would amount to revealing a past or completed crime.

(b) <u>To Comply With Other Law or Court Order.</u>

Counsel may also reveal confidential information under Subsection (b)(4) if he reasonably believes it is necessary for him to "comply with other law or a court order." This phrase by its nature leaves much to interpretation. Because it is an exception to the Rule of Confidentiality we believe it should be construed strictly to permit disclosure only if the "other law" expressly, or implicitly through the representation, places a duty on counsel. Therefore, in this case the question is whether the cited Federal Statutes, or related procedural rules, apply directly to, and place a duty on counsel under these facts to disclose the information regarding the inheritance to the Court. Again, this is an issue of law beyond the purview of this Committee as stated in Comment [10] to the Rule, quoted in full above in the Authorities section. That comment states "[w]hether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules."[1]

If counsel "reasonably believes" that the Bankruptcy statutes or procedural rules do place a duty of disclosure upon counsel they thereby supersede Rule 1.6 and counsel "may" make such disclosure.

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[1] See, e.g., a North Carolina Ethics Opinion involving a similar issue of whether counsel may disclose confidential information in a Bankruptcy context. The opinion noted: "A number of bankruptcy statutes require disclosure of debtor's assets and liabilities and other financial information. 18 U.S.C. § 152, a federal criminal statute imposes criminal penalties on 'a person who knowingly and fraudulently conceals. . . any property belonging to the estate of the debtor . . . ." Rule 1.6(d)(3) [N.C. version of rule] merely determines whether a lawyer is permitted to disclose confidential information, not whether the lawyer is compelled to do so by law. Whether a lawyer has a duty to disclose confidential information under the circumstances described above is a matter to be determined under 18 U.S.C. § 152 and other relevant law. The determination of that legal issue is beyond the scope of this opinion." *The North Carolina State Bar, 99 Formal Ethics Opinion 15.*

B. The Duty of Candor Toward the Tribunal Under Section 3-503.3.

This Rule under Subsection (a)(1) prohibits a lawyer from knowingly making a false statement of fact or law to a Tribunal, or failing to correct a false statement of material fact or law made by the lawyer.

This portion of the Rule does not appear to have application because, under the facts as presented, previous representations to the Court were true and accurate. The client's mother had not passed away and there was no expectation of an inheritance.

Subsection (b) of Section 3-503.3 presents a more difficult issue under these facts. That Rule mandates that "[a] lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the Tribunal."

Obtaining a bankruptcy discharge is certainly an "adjudicative proceeding" and the Bankruptcy Court is a "Tribunal" as defined by the Rules. See, Section 3-501.0(m) defining "Tribunal." The key issue is, therefore, is counsel's knowledge that client's mother passed away within 180 days of filing the Petition, combined with his knowledge that the client apparently does not intend to disclose this to the Court or the Trustee, sufficient to mandate remedial measures and possible disclosure under Subsection (b) of the Rule?

If client's conduct is "criminal or fraudulent" it is a wrong of omission rather than affirmative misconduct. This, however, does not excuse the obligation imposed by Subsection (b) which, according to Comment [12] under the Rule (quoted in full above in Authorities section) applies to "failing to disclose information to the Tribunal when required by law to do so." Moreover, it is clear that client's conduct is "related to the proceeding" in that any inheritance could potentially increase the size of the bankruptcy estate.

The Committee cannot, however, decide whether the client's conduct is or could be considered "criminal or fraudulent". This involves legal issues beyond the scope of our duty as a Committee to interpret the Rules of Professional Conduct. But, if counsel requesting this opinion "knows"[2] client's failure to disclose this information to the Court or Trustee amounts to criminal or fraudulent conduct then Subsection (b) requires that he take "reasonable remedial measures, including, if necessary, disclosure to the tribunal." Counsel has already properly informed client of his concern in a detailed letter, and warned of the potential consequences of failure to disclose.

One final but important consideration is left. The obligation imposed by this Rule is limited in duration. Subsection (c) states that the duties in Paragraph (a) and (b) "continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." Comment [13] further addresses this "practical time limit on the obligation . . . ." It states:

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[2] Under the Terminology section of the Rules it states: " 'Knowingly,' 'known' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

> "The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed."

Unfortunately, the facts of this case do not fit neatly within the normal procedural pattern. While a discharge in Bankruptcy was issued, and the Bankruptcy case closed suggesting finality to the proceeding, the Bankruptcy Code states in mandatory terms that any entitlement to property (including an inheritance) arising within 180 days of the Petition date shall give rise to "[t]he duty to file a supplemental schedule . . . notwithstanding the closing of the case . . . ." 11 U.S.C. § 541(a) and (h). This, in the Committee's judgment, makes that contingency by definition part of the original proceeding. It is "supplemental" thereto in order to insure that the creditors receive the benefit of the entire estate of the debtor. Therefore, as a procedural matter, the proceeding cannot be deemed concluded until the 180 days has expired because additional assets to be administered may become available during that period.

However, in the case before this Committee counsel did not learn about the inheritance until more than a year after the discharge in bankruptcy had been issued and the 180 day statutory period had expired. The facts presented do not indicate that there has been an appeal or that any portion of the bankruptcy case remains open or subject to review as described in Comment 13 to Rule 3-503.3. Under these circumstances the Committee believes that by the time counsel learned of the critical information the proceeding had concluded and any obligation he may have had under § 3-503.3 was terminated under subsection 3(c) and Comment 13 of the Rule.

Other Ethics authorities have reached similar results. For example, in a Montana State Ethics Opinion, Opinion 112314 (undated), three scenarios in bankruptcy were considered. In the first of the three scenarios "after the bankruptcy was complete", the client returned to the same attorney for work on a different matter and then disclosed he had not revealed his valuable baseball card collection as an asset during bankruptcy. The opinion concluded that under these facts the attorney had no obligation to disclose because the bankruptcy was now complete, although the committee said it "believes that best practices dictate that the attorney should explain to the client the repercussions of the client's fraud and potential for future criminal charges . . . ."

The North Carolina State Bar, in 98 Formal Ethics Opinion 20 (April 23, 1999) reached a similar result. There, a discharge in bankruptcy had been entered and the case closed when the attorney learned from another source (still deemed confidential information) that his bankruptcy client had inherited an estate after discharge. The client had not reported this new asset to the bankruptcy court even though the reporting period had not elapsed and "the trustee has one year to reopen the case and distribute assets." Even under these circumstances the North Carolina State Bar held that under Rule 3.3 relating to an attorney's duty of candor to a tribunal the attorney had no duty to report the inheritance because the proceeding had concluded "[n]otwithstanding a trustee's ability to reopen the case . . . ." The "duty to disclose arises only during the proceedings and not thereafter."

The North Carolina State Bar did add, however, that disclosure may be made to the appropriate authority under its Rule 1.6 as an exception to the confidentiality rule "when required by law." Or, as that opinion stated, "[b]ecause property of the estate includes property acquired by the debtor within 180 days of commencement of the case, attorney A may determine that, under 18 U.S.C. § 152, he has a legal duty to reveal information regarding the client's estate, and that there may be criminal consequences for his failure to do so." As discussed by us in the previous section of this Opinion, such a conclusion is beyond the scope of this Committee and we express no opinion on whether such a duty is imposed by "other law." Suffice it to say that if such a duty is imposed, disclosure is permissive under 3-501.6.

While this Committee may not be quite so rigid as the North Carolina State Bar in its determination as to when the bankruptcy proceeding concluded, nevertheless, under the facts of the case now before us the proceedings had already been completed by the time counsel learned of the inheritance. He therefore does not have a duty to disclose under Rule 3-503.3.

2. The Second Fact Situation.

Under the second fact situation the attorney there is also concerned with his duty, if any, under Nebraska Rules 3-503.3 and 3-501.6. Because of our previous discussion of these Rules regarding the first fact situation, our analysis will be more abbreviated here.

A. The Duty to Maintain Confidentiality Under Section 3-501.6.

The Does, the client in this fact situation, sought advice from counsel but later terminated the relationship and requested a refund of the retainer they paid. Other counsel was hired later to handle their bankruptcy. The Does are therefore either prospective or former clients. For purposes of this opinion it does not matter since in either case the Rules pertaining to the protection of confidential information still apply. See § 3-501.18(b) and § 3-501.9(c)(2).

The information relating to the historical antiquity owned by the Does was confidential since it related to the representation, and could not be disclosed unless permitted by § 3-501.6. As in the first fact situation, the two exceptions which may apply here are "to prevent the client from committing a crime" or "to comply with other law or a court order." § 3-501.6(b)(1) and (4).

As previously discussed, while we cannot opine as to whether a "crime" may result from the Does' apparent failure to list the historical antiquity or its transfer in the bankruptcy petition or schedules, counsel requesting this opinion states such an omission "constitutes bankruptcy fraud." If counsel "reasonably believes" this is a crime and a disclosure of confidential information will "prevent" its consummation rather than reveal a past crime then § 3-501.6 permits disclosure but does not mandate it.

Similarly, if counsel reasonably believes that another law applicable to him requires disclosure then he "may" disclose that information without violating Rule 3-501.6. Whether the bankruptcy statutes or rules, or other law, indeed create such an obligation is for counsel or the courts to decide.

In an Ethics Opinion previously discussed, the North Carolina State Bar considered a similar case. *North Carolina State Bar, 99 Formal Ethics Opinion 15.* There, client sought advice from attorney A on filing bankruptcy. After learning that he would have substantial problems with preferential payments and other obstacles to filing, client left attorney A's office. Several weeks later at a first meeting of creditors, attorney A learns that his former client has retained attorney B who has filed bankruptcy for him. Attorney A believed that his former client intentionally failed to disclose to attorney B obstacles to filing bankruptcy that had previously been discussed with attorney A. While it is not clear that the language of North Carolina's Rule 1.6 is the same as Nebraska's, the opinion did refer to two exceptions similar to the ones at issue here in Nebraska Rule i.e. to prevent a crime or comply with another law. The State Bar ruled that if attorney A "knows" that the bankruptcy petition is fraudulent he may reveal the confidences of the former client to rectify the fraud. The opinion suggested the proper procedure would be to write the client first urging him to rectify the fraud and, if that was unsuccessful to disclose it to client's current lawyer and if necessary the court.

A similar result, but different approach was taken in the Montana State Ethics Opinion, Opinion 112314 (undated) discussed earlier. There, in scenario 3, a potential bankruptcy client was told by counsel his prized baseball card collection would have to be disclosed in bankruptcy. He told counsel he was going to "hold off" on the bankruptcy since he didn't want to lose the cards. Six months later counsel saw his former potential client at a bankruptcy hearing with another attorney testifying about his assets but not mentioning the baseball cards. Relying on the wording of its Rule 1.6 (Confidential Information) and Rule 3.3 (Candor Toward the Tribunal) this opinion held that "[a]n attorney who witnesses a former potential client lie to the tribunal has an obligation to discuss the matter with the former potential client's current attorney and, if that fails, with the tribunal." Contrary to North Carolina's approach, direct communication with the former client who was now represented was discouraged based on Rule 4.2 (Communications with Person Represented by Counsel). See Nebraska Rule 3-504.2.

This Committee is more comfortable with the Montana approach to avoid direct contact with the former client on this issue. Nebraska's § 3-504.2 may not literally have application since counsel requesting this opinion is not representing a client in this matter.[3] Nevertheless, former counsel should be able to depend on current counsel to fulfill his or her ethical responsibilities to fully explain the circumstances and potential consequences to his current client, the Does.

Nor do we believe on these facts that it is necessary for counsel to insist on disclosure to the tribunal by current counsel or, in the absence thereof, he will inform the court. Current counsel is as bound by the Rules of Professional Conduct as the counsel requesting this opinion.[4] Moreover, he or she should be in a better position to investigate the facts and take the proper course of action.

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[3] Rule 3-504.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

[4] A lawyer may not assist a client in conduct that the lawyer knows is criminal or fraudulent. 3-501.2(f) The Rules of Professional Conduct mandates that counsel who violate these rules are subject to being reported to the "appropriate professional authority." § 3-508.3.

Therefore, if counsel reasonably believes that disclosure of confidential information is necessary to prevent a crime or to comply with another law applicable to him as counsel, he may disclose that information along with his concerns to current counsel handling the Does bankruptcy. This, of course, is not to the exclusion of other disclosure requirements that may be imposed by other applicable law outside of the Rules of Professional Conduct.

B. The Duty of Candor Toward the Tribunal Under Rule 3-503.3.

With regard to the application of Rule 3-503.3 (Candor Toward the Tribunal), we do not find it applicable to counsel requesting this Opinion on these facts. Subsection 3(b), which is the only one potentially relevant here only applies to "[a] lawyer who represents a client in an adjudicative proceeding . . . ." Counsel does not represent the Does, or presumably anyone else, in the Does' bankruptcy and did not initiate that proceeding for them. It may, however, have application to current counsel if, and when the information regarding the historical antiquity owned by the Does is disclosed to him.

CONCLUSION

First Fact Situation

In the absence of the client's willingness to do so, a lawyer "may" disclose to the Bankruptcy Court or Trustee that his debtor/client has inherited an estate within a mandatory reporting period of 180 days from the filing of the petition, even though this information constitutes confidential information, so long as the lawyer reasonably believes it is necessary to prevent the client from committing a crime or for the lawyer to comply with other law or court order. See 3-501.6

If the disclosure is based on the prevention of a crime, such disclosure may not reveal past or completed crimes.

Where practical, when disclosure is proper, the lawyer should first attempt to persuade the client to take suitable action to avoid counsel's need to disclose. Where client refuses, disclosure adverse to client's interest should be no greater than necessary to accomplish the purpose required by law or the Rules of Professional Conduct.

If the lawyer knows that his client does not intend to disclose the inheritance to the Bankruptcy Court or Trustee and that such conduct is criminal or fraudulent, he "shall" take reasonable remedial measures, including, if necessary, disclosure to the Tribunal. These measures, as discussed above, should include reasonable efforts to persuade the client to comply and, in the absence thereof only necessary disclosure. See 3-503.3(b) However, this obligation continues only "to the conclusion of the proceeding." 3-503.3(c)

In the Committee's view, under the facts of this case the proceeding had concluded where counsel did not learn about the inheritance until more than a year after the discharge in bankruptcy and the 180 day statutory reporting period had expired and no appeal or review had been undertaken.

Second Fact Situation

If counsel in this fact situation "reasonably believes" that failure by his former client to disclose the historical antiquity to the Bankruptcy Court constitutes a crime which can be prevented by counsel's disclosure, then disclosure is permissible under 3-501.6. Similarly, disclosure is also permissible if counsel is compelled to do so by another applicable law or court order.

If disclosure is permitted the Committee believes the most appropriate way to do so, under these facts, is to inform the former client's current counsel and trust him to take the proper course of action.

We do not believe 3-503.3 is applicable because it applies to a lawyer who represents a client in the proceeding at issue. That is not the case here.