Nebraska Ethics Advisory Opinion for Lawyers
No. 90-2

GENERALLY, AN ATTORNEY MAY NOT REVEAL THE WHEREABOUTS OF A FORMER CLIENT WHERE SUCH INFORMATION WAS RECEIVED DURING THE COURSE OF AND IN FURTHERANCE OF THE PROFESSIONAL RELATIONSHIP. HOWEVER, THE ATTORNEY MAY ETHICALLY DIVULGE THE WHEREABOUTS OF THE CLIENT WHERE THE ATTORNEY DETERMINES THAT IT IS THE INTENTION OF THE CLIENT TO COMMIT A CRIME IN THE FUTURE, THE ATTORNEY HAS OBTAINED THE CONSENT OF THE CLIENT TO MAKE THE DISCLOSURE, OR THE ATTORNEY IS REQUIRED BY LAW OR A COURT ORDER TO DO SO. UNDER THE DISCIPLINARY RULES, IT IS NOT MANDATORY THAT THE ATTORNEY DISCLOSE SUCH INFORMATION.

FACTS

An attorney represented a client in a civil matter, settled the matter, gave possession of the settlement check to the client, and closed the client's file. Two weeks later, representatives from the U.S. Marshal's office came to the attorneys office and indicated that they wished to obtain information concerning how the attorney communicated with the client. The representatives from the U.S. Marshal's office further stated that the client is a multi-state fugitive, wanted on an armed robbery charge.

QUESTION PRESENTED

May the attorney ethically inform the U.S. Marshal's office of the client's location?

DISCUSSION

DR 4-101 provides in part:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and

'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or a secret of his client to the disadvantage of the client.

(3) Use a confidence or a secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) 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.

The Committee further notes Neb. Rev. Stat. § 7-105 (Reissue 1987), which provides in part: "It is the duty of an attorney and counselor: . . . (4) to maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his clients; . . . . "

A literal reading of DR 4-101(C) reveals that even though the attorney has learned of the client's intention to commit a crime, or the attorney has obtained consent of the client to make the disclosure, or is required by a

court order to do so, it is not mandatory, under the Disciplinary Rules, for the attorney to make the disclosure. The Illinois State Bar Association noted that the Code of Professional Responsibility neither requires disclosure of this information nor forbids it, and further stated that lawyers faced with the problem must make their own responsible decisions. Illinois State Bar Association Opinion 538 (8-27-87). However, in two other opinions from other states, it was stated that a lawyer must comply with a court order to disclose the information, even though the attorney was instructed to attempt to invoke the attorney-client privilege before disclosing such information to the court. See, Vermont Bar Association opinion 77-16; and State Bar of Texas Informal Opinion 101 (1979).

A "confidence" as used in DR 4-101 is defined in the Code as information protected by the attorney-client privilege and therefore requires the existence of a professional relationship before giving rise to an ethical duty of secrecy. A "secret" also refers to information "gained in the professional relationship." While the facts before the Committee do not indicate specifically the circumstances under which the client's address was communicated to the attorney, the Committee assumes that the information was communicated in furtherance of the professional relationship between the attorney and the client.

Since DR 4-101 states that the attorney may ethically disclose confidences and secrets of the client under circumstances set forth in the rule, it is at the attorney's discretion to determine whether such information will be disclosed in a particular case. In this case, the information sought to be disclosed is the address of a former client who is a fugitive from justice. While the client may now be committing an ongoing crime, thereby falling within one of the exceptions of DR 4-101, it is not this Committee's function to make determinations concerning rules of law. The attorney will need to determine whether the situation falls within the exception allowing disclosure when the client intends to commit a crime, or any of the other exceptions.

Some authorities have held that the client's whereabouts is not privileged information. See, Commonwealth v. Maguigan, 511 Pa. 112, 511 A.2d 1327 (1986); Dike v. Dike, 75 Wash.2d 1, 448 P.2d 490 (1968). Other courts have held, under certain circumstances, that such information is privileged. See, State v. Kirk, 211 Kan. 165, 505 P.2d 619 (1973), In re Stolar, 397 F.Supp. 520 (S.D.N.Y. 1975). There is also authority for the proposition that only during the pendency of a lawsuit is a party's address subject to disclosure and that the attorney-client privilege prevents disclosure of the client's address in later unrelated proceedings. See, Potamkin Cadilac Corp. V. Karmgard, 100 Misc.2d 627, 420 N.Y.S.2d 104 (1979). See generally, Annot., 16 ALR3d 1047 (1967) (Disclosure of Name, Identity, Address, Occupation, or Business of Client as Violation of Attorney-Client Privilege).

In general, the cases dealing with this issue arise out of refusals by attorneys under subpoena, either in the trial court or before a grand jury, to disclose such information. The question then becomes a legal one in the context of whether or not the attorney should be held in contempt for the refusal to divulge the information. While these cases may be helpful to the attorney in making a determination as to whether the information sought may be disclosed should the attorney be subject to a subpoena or otherwise ordered by a court to elicit the information, the facts presented to the Committee do not indicate that such has occurred. For this reason, and for the reason that the Committee may not make determinations of legal questions, the Committee can offer no opinion concerning whether the attorney should or must disclose the information under those circumstances. However, it is the opinion of the Committee that if the situation falls within the exceptions set forth in DR 4-101, the attorney may ethically disclose such information.

CONCLUSION

Generally, an attorney may not reveal the whereabouts of a former client where such information was received during the course of and in furtherance of the

professional relationship. However, the attorney may ethically divulge the whereabouts of the client where the attorney determines that it is the intention of the client to commit a crime in the future, the attorney has obtained the consent of the client to make the disclosure, or the attorney is required by law or a court order to do so. Under the Disciplinary Rules, it is not mandatory that the attorney disclose such information.