

Nebraska Ethics Advisory Opinion for Lawyers  
No. 78-2

A PUBLIC DEFENDER APPOINTED TO REPRESENT A DEFENDANT IN A CRIMINAL PROCEEDING WHO RECEIVES INFORMATION COMMUNICATED TO HIM BY HIS CLIENT IN CONFIDENCE INDICATING THAT THE CLIENT IS NOT INDIGENT MAY NOT DISCLOSE THIS INFORMATION TO THE COURT OR SEEK THE COURT'S PERMISSION TO WITHDRAW FROM REPRESENTATION OF THE CLIENT ON THE GROUND THAT THE CLIENT IS NOT INDIGENT.

FACTS

A county court appointed a public defender to represent the client in a criminal proceeding. The appointment was made pursuant to the provisions of Section 29-1804.05, R.R.S., 1943. The court did not require the defendant to execute an affidavit of indigency. In response to the court's inquiry, the defendant indicated generally that he was not able to afford his own counsel.

Subsequently, the defendant disclosed, in confidence to the public defender, information which indicated that he was not indigent. The public defender inquires if it is a violation of the attorney-client relationship for him to ask the appointing court to interrogate the defendant regarding his financial status or to ask the court for permission to withdraw from representing the defendant because he is not indigent.

DISCUSSION

The general duty of an attorney to protect the confidences and secrets of his client is stated in DR 4-101(B) as follows:

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

(1) Reveal a confidence or secret of

his client."

The-only possible pertinent exceptions are contained in DR 4-101(C)(1), (2) and (3), which state:

" (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."

The information is protected unless an exception applies. Thus, DR 4-101(A) defines "confidence" and "secret" as follows:

"(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 be likely to be detrimental to the client."

We assume that the client will not consent to the disclosure. The remaining possible exceptions are:

1. The disclosure is permitted under the Disciplinary Rules.
2. The disclosure is required by law.
3. The disclosure is required by court order.
4. The disclosure is of the client's intention to commit a crime and the information disclosed is

necessary to prevent the crime.

We are aware of no law or court order requiring disclosure. The only exception authorized by the Disciplinary Rules that might apply is disclosure to prevent the commission of a crime.

A lawyer may reveal information which will prevent the commission of a crime by his client. This does not permit the lawyer, however, to disclose the fact that a crime has been committed. ABA Formal Opinion 287.

Any act by the client involved in this inquiry which might constitute a crime has already been performed. In the absence of the execution of an affidavit by the client, it does not appear that the crime of perjury was committed. See Section 28-701, R.R.S., 1943. But even if the conduct amounted to perjury, disclosure would not be authorized since the crime has already been committed.

Likewise, if the conduct constituted the crime of obtaining money by false pretenses in violation of Section 28-1207, R.R.S., 1943, it would seem that the act constituting the crime has already been committed.

The exception for prevention of the commission of a crime would thus not be applicable.

The troublesome circumstance is that the receipt of legal services at the expense of the county continues. For a number of reasons, however, we do not believe the attorney should be relieved of his duty to maintain the confidences and secrets of a client in this situation.

The definition of indigency is one that permits considerable latitude in interpretation. Section 29-1804.04, R.R.S., 1943, states:

"Indigent as used in sections 29-1804.03 to 29-1804.12 shall mean the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family. \* \*

\* "

The legislature has expressly provided that the court shall make this determination. The public defender is permitted to make the determination in only one specific and very limited situation. Thus, Section 29-1804.04, R.R.S., 1943, states:

"\* \* \* Before a felony defendant's initial court appearance, the determination of his indigency shall be made by the public defender, but thereafter it shall be made by the court."

The court is expected to make proper inquiry about this specific question and may require an affidavit of the client. Section 291804.05, R.R.S., 1943, provides:

"At a felony defendant's first appearance before a court without retained counsel, the court shall advise him of his right to court-appointed counsel if he is indigent. If he asserts his indigency, the court shall make a reasonable inquiry to determine his financial condition, and may require him to execute an affidavit of his indigency. If the court determines him to be indigent, it shall formally appoint the public defender to represent him in all proceedings before the court, and shall make a notation of such appointment and appearances of the public defender upon the felony complaint. The same procedure shall be followed by the court in misdemeanor cases punishable by imprisonment."

The legislature has also provided a means by which an erroneous determination of indigency by the court may be corrected. Section 29-1804.10 provides:

"Whenever any court finds subsequent to its appointment of the public defender or other counsel to represent a felony defendant that its initial determination of indigency was

incorrect, or that during the course of representation by appointed counsel the felony defendant has become no longer indigent, the court may order such felony defendant to reimburse the county for all or part of the reasonable cost of providing such representation."

Another consideration is that the public defender is on a fixed salary and shall, in counties with not more than 200,000 population, be permitted to engage in private practice. Section 29-1804, R.R.S., 1943. There is thus the possibility of a conflict of interest in a disclosure by the public defender.

Ordinarily, one's financial condition is a fact that can be determined without impairment of the attorney-client relationship through disclosure of confidential communications. Likewise, a person of financial means who is charged with the commission of a crime ordinarily will want to select his own counsel.

As pointed out above, the test of indigency is not a precise one and people may differ in their judgments thereon. A specific determination is required on this very point so it is not something that would pass without consideration in the absence of counsel's raising the issue. The court has the duty to make proper inquiry and the right to make the determination.

Under all these circumstances, it is our opinion that the public interest in permitting full and effective assistance of counsel by preserving the confidences and secrets of the client outweighs the interest in having the attorney disclose information regarding the client's financial condition.

This conclusion is consistent with ABA Formal Opinion 287 and ABA Informal Opinions 1314, 1137 and 1141. As stated in ABA Informal Opinion 1314:

"\* \* \* In other words the confidential privilege, in our opinion, must be upheld over any obligation of the lawyer to betray

the client's confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal."

It is also consistent with DR 7-102(B)(1), which states:

" (B) A lawyer who receives information clearly establishing that:

"His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication."

With respect to withdrawal, the facts presented do not bring the case within any of the provisions of DR 2-110(B) relating to mandatory withdrawal. With regard to permissive withdrawal, DR 2-110(C) provides that a lawyer may request permission to withdraw if:

" (1) His client:

\* \* \* \* \*

"(b) Personally seeks to pursue an illegal course of conduct."

The words "to pursue" clearly indicate that the basis for withdrawal is future illegal action. The facts in the inquiry under consideration relate to past conduct. Consequently, this provision would not seem to apply.

In addition, withdrawal is not authorized if it has the effect of disclosing a confidential communication. ABA Formal Opinion 90.

As set out in Section 29-1804.03, "It shall be the duty of the public defender to represent all indigent persons

who are charged \* \* \*."

Section 29-1804.05, R.R.S., 1943, provides:

"If the court determines him to be indigent, it shall formally appoint the public defender to represent him in all proceedings before the court \* \* \*."

Any withdrawal from representation would have to come from the court and undoubtedly would require a truthful statement of the basis for such request. This could not be done without disclosure of the confidential communication. It is our opinion, therefore, that on the basis of the facts set out in this inquiry, such a request would not be permissible.

Our opinion is limited to the factual situation presented in which the improper conduct, if any, is the representation regarding financial condition and where that representation has already been made.

#### CONCLUSION

It is our conclusion that a public defender appointed to represent a defendant in a criminal proceeding who receives information communicated to him by his client in confidence indicating that the client is not indigent may not disclose this information to the court or seek the court's permission to withdraw from representation of the client on the ground that the client is not indigent.