

Nebraska Ethics Advisory Opinion for Lawyers

No. 02-1

AN OPINION HAS BEEN REQUESTED FROM THE ADVISORY COMMITTEE REGARDING WHETHER OR NOT ACLU NEBRASKA MAY PROPERLY DONATE OLD FILES TO THE NEBRASKA STATE HISTORICAL SOCIETY, AND IF SO, UNDER WHAT CONDITIONS MAY THE FILES BE DONATED. THE FOLLOWING IS THE COMMITTEE'S FORMAL OPINION.

RESTATEMENT OF FACTS

You have indicated that ACLU Nebraska is a private, non-profit membership organization which seeks to preserve and extend constitutional rights through participation in legislation, litigation and community education. ACLU Nebraska is affiliated with the National ACLU, although ACLU Nebraska is a separate entity with its own policies and programs.

ACLU Nebraska provides services directly to private citizens who write or call with complaints regarding their civil liberties. At the present time the process is approximately 500 written complaints per year. Some of the complainants receive representation from ACLU Nebraska to negotiate with governmental entities; others are eventually clients in actual litigation. The bulk of the complainants, however, do not present civil liberties issues or are not within the mission of the program or its resources, and must be turned away.

Cases accepted for litigation are generally assigned to a volunteer attorney. ACLU Nebraska did not have an attorney on staff until 1999. All cases accepted prior to that time for representation were placed with an outside lawyer. ACLU Nebraska has some of those files from outside lawyers, and also has the files from legal work done by ACLU Nebraska's staff attorney since 1999. These files all contain work product and confidential client information. Since the late 1970's, you have simply been storing many of those closed files. It appears that some of the routine, non-civil liberties complaints were destroyed in the routine course of business in the past. However, you still have a large number of files of intake requests and the response to those requests, as well as closed files for those cases which did result in litigation. You have stated that you cannot continue to indefinitely store all of the old documents, and that you wish to either destroy the same or place them in an archived historical collection. The Nebraska Historical Society has expressed an enthusiastic willingness to take ACLU Nebraska files for their collection. You have requested an opinion as to whether any of these documents or files may properly be donated to the Nebraska Historical Society.

STATEMENT OF APPLICABLE CANONS, ETHICAL CONSIDERATIONS

AND DISCIPLINARY RULES

Canon 4: A Lawyer Should Preserve The Confidences And Secrets Of A Client.

EC 4-1. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him or her. A client must feel free to discuss whatever the client wishes with his or her lawyer and the lawyer must be equally free to obtain information beyond that volunteered by the client. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of a client not only facilitates the full developments of facts essential to proper representation of the client, but also encourages lay persons to seek early assistance.

EC 4-4. A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of the lawyer's client after full disclosure, such information for his or her own purposes. Likewise, a lawyer should be diligent in his or her efforts to prevent the misuse of such information by the lawyer's employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 4-6. The obligation of a lawyer to preserve the confidences and secrets of his or her client continues after the termination of the lawyer's employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his or her client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to the client and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DR 4-101 Preservation of confidences and secrets of a client.

(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.

(B) Except when permitted under DR4-101(C), a lawyer shall not knowingly:

- (1) reveal a confidence or secret of the lawyer's client.
 - (2) use a confidence or secret of the lawyer's client to the disadvantage of the client.
 - (3) use a confidence or secret of the lawyer's 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.

DISCUSSION

An attorney is prohibited from disclosing client confidences and secrets, except as set forth in DR 4-101(B). None of those exceptions apply here. The Code of Professional Responsibility contains no exceptions for items of historical significance, nor does it provide for disclosure after a client's death.

Neb. Rev. Stat. § 27-503 sets forth the attorney-client privilege for evidentiary purposes, and defines confidential communication as communication "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Neb. Rev. Stat. § 27-503 (1)(d).

It goes on to state that a privilege "may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of the corporation, association or other organization, whether or not in existence." § 27-503 (3).

Although Neb. Rev. Stat. § 27-503 is an evidentiary statute, EC4-4 explains that "the attorney-client privilege is more limited than the ethical obligations of a lawyer to guard the confidences and secrets of his or her client." Therefore, the ethical obligation is broader than that of the statute.

Without a client's consent or the consent of his or her guardian or conservator, or without the consent of the personal representative in the event the client is deceased, you are unable to donate your closed files pursuant to either § 27-503 or the Code of Professional Responsibility. You likewise may not donate intake files which you have described as requests for legal representation by ACLU Nebraska but which were not accepted for legal representation. These documents also give rise to the obligation of confidentiality.

Discussions preliminary to an actual employment agreement can give rise to the obligation of confidentiality. Liu v. Real Estate INZ Group,

Inc., 771 F. Supp. 83 (S.D.N.Y. 1991) (The duty to preserve confidentiality extends to preliminary consultation by a prospective client even though actual employment does not result). EC 4-1 requires "The preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him or her." Because the privilege applies to confidential communications during preliminary contacts with the attorney, even if employment is declined, it is the opinion of the Committee that you may not disclose the intake files absent the necessary consent of the client.

In order to authorize the type of disclosure of historical documents described in your opinion request, Nebraska's Code of Professional Responsibility would have to be amended to so provide. This Committee provides guidance on ethical issues under Nebraska's Code of Professional Responsibility as it now exists. It is for the Nebraska Supreme Court to determine whether, and under what circumstances, the model code might be amended to include some type of historical disclosure exception.

CONCLUSION

It is the Committee's opinion that, under the facts presented, you have an ethical duty not to reveal the confidences of your clients unless you obtain the consent of your client. Therefore, your legal files and intake files may not be donated to the Historical Society unless the client so consents.

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