

Nebraska Ethics Advisory Opinion for Lawyers  
No. 91-4

IF AN ATTORNEY REASONABLY BELIEVES A CLIENT TO BE MENTALLY INCOMPETENT, THE ATTORNEY MAY DISCLOSE CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS TO THE EXTENT NECESSARY TO PROTECT THE BEST INTERESTS OF THE CLIENT.

FACTS

You represent an elderly man who is recently divorced. Your client owns the apartment building in which he resides but he is unable to make the monthly payments on the building. The bank which holds the deed of trust scheduled the property to be sold at auction. On the eve of the sale, you filed a Chapter 13 Bankruptcy on behalf of your client.

The filing of the bankruptcy petition stopped the sale. The Chapter 13 Plan provides that the client would attempt to sell the property by private sale. A buyer has offered to buy the client's building for approximately \$30,000 in excess of the encumbrances. Your client refuses to accept the offer.

You now believe your client to be incompetent. He denies that he has filed a Chapter 13 bankruptcy and refuses to cooperate with the proceedings. For this reason, the bankruptcy will soon be dismissed.

You have been unable to convince your client that it would be in his best interests to sell the property. He is unwilling to waive the attorney-client privilege which would permit you to discuss the situation with third parties.

You are concerned that if you take no action your client's property will eventually be sold at auction and the client will not receive any of the proceeds of the sale. You would like to file a report with Adult Protective Services and ask the committee whether the filing of

such a report would violate the Code of Professional Responsibility.

#### APPLICABLE CODE PROVISIONS

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 DR 4-101 (C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or 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 or wrongful conduct.

EC 7-12. Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

#### DISCUSSION

The Committee has not previously addressed the issue raised by your request. Other jurisdictions, however, have considered similar factual situations.

In Florida Advisory Opinion 85-4, Law. Man. Prof. Conduct, 801:2504, an attorney was advised that if he believed his client was "showing signs" of mental illness he "should do what he can do" to protect the client's interests. This may include seeking the appointment of a legal guardian for his client even if the client objects. In similar fashion, the New York City Bar Association concluded in Opinion 83-1, Law. Man. Prof. Conduct, 801:6343, that a lawyer who had reason to question his client's ability to make rational decisions could "seek the appointment of a representative who would advise the lawyer how to proceed with the client's case".

In Informal Opinion 83-1500, the American Bar Association opined that an attorney may disclose to a third person a client's intention to commit suicide pursuant to DR 4-101 (C) (3) even if suicide is not a crime in that particular jurisdiction. In light of EC 7-12, the ABA reasoned that if a lawyer justifiably concludes that a client is unable to make a considered judgment the lawyer "should be permitted to disclose the information as a last resort when the lawyer's efforts to counsel the client have apparently failed."

ABA Informal Opinion 89-1530 concluded that an attorney with a reasonable belief that a client was incompetent could disclose information relating to the representation to the extent necessary to serve the client's best interests. The Code of Professional Responsibility contemplates a competent client according to the opinion. When a client is unable to make decisions "the lawyer has no alternative but to act in the client's interests as the lawyer can best determine them without client input."

#### CONCLUSION

It is the opinion of the Committee that if an attorney reasonably believes a client to be mentally incompetent, the attorney may disclose confidential attorney-client communications to the extent necessary to protect the best interests of the client.