IOWA ETHICS OPINION

July 15, 2015

A LAWYER INVOKING THE IMPLIED WAIVER OF SELF-DEFENSE MUST FIRST ENSURE THE CLIENT HAS MADE A KNOWING WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE OR RULE OF CONFIDENTIALITY AND THEN LIMIT THE DISCLOSURE TO ONLY THAT INFORMATION WHICH REASONABLY RESPONDS TO THE ADVERSE ALLEGATION.

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Ethics and Practice Guidelines Committee[1]

IOWA ETHICS OP. 15-03

Contents

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Preface

What otherwise protected attorney-client information may a lawyer disclose, in self-defense, when a client threatens or brings a malpractice claim, ethics complaint, claim of ineffective assistance of counsel or other claim attacking the services or performance of the lawyer? Initially Iowa R. Prof'l C. 32: 1.6(b)(5) would appear to answer the question. However applying the rule can be difficult. The Committee has been asked by United States District Court for the Southern District of Iowa, the United States Attorney office for the Northern and Southern Districts and the Federal Defender's Office to give guidance regarding ABA Formal Opinion 10-456 and its applicability in Iowa.

Introduction

ABA Formal Ethics Opinion 10-456 establishes a protocol for release of privileged and confidential information by a lawyer whose client has lodged post-conviction relief action alleging ineffective assistance of counsel. The Opinion requires that where there has been no formal or express waiver and a lawyer is relying on the so-called implied waiver of self-defense that information be released only under court supervision. But applying the opinion has proven to be difficult and, in non-post-conviction matters, almost impossible.

The Committee gives due deference to the opinions of the American Bar Association ethics committee and looks to it for guidance when interpreting and applying the Iowa Rules of Professional Conduct based upon the American Bar Association's Model Rules of Professional Conduct. See Iowa Ethics Op. 13-01 where we changed Iowa's long standing practice regarding "of counsel" relationships and adopted the ABA model. However, as we have in the past, we must be ever vigilant to the needs, customs and standard of practice of the Iowa legal profession. See Iowa Ethics Op. 15-02 where we declined to adopt ABA Formal Op. 11-460 concerning interception of attorney-client communications.

The attorney client privilege and confidentiality are the hallmark of the legal profession. Consequently any non-expressed waiver must be scrutinized with care. In this opinion we focus on the so-called implied self-defense waiver.

Implied Self-Defense Waiver

Lawyer-client communications are afforded two absolute classifications of protection. One is not superior or pre-emptive of the other and each varies in its scope. They are: the statutory attorney-client privilege found in Section 622.10, IOWA CODE 2015 and the rule of confidentiality found in IA. R. Prof's C. 32.1.6. While not relevant

to this opinion, we note that a qualified form of protection is afforded to an attorney's work product by Iowa R. Civ. P. 1.503(3).

We start with the statute:

> 1. A practicing attorney, *** or the stenographer or confidential clerk of any such person, who obtains information by the person's employment, *** will not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.
>
> 2. The prohibition does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred; ***"

Iowa Code § 622.10

The statute prohibits a lawyer from disclosing confidential communications. Keefe v. Bernard, 774 N.W.2d 663, 669 (Iowa 2009) (The prohibition is privileged from disclosure against the will of the client).

The statute grants the evidentiary privilege to the client, not the lawyer, and renders it absolute unless the client waives "the rights conferred". Some states have identified mode and method of waiver, see for example N.C. Gen. Stat. § 15A-1415(e) providing a statutory waiver in claims of ineffective assistance of counsel. Conversely, Iowa has defined the waiver by case law and has held that an implied waiver occurs where the "[client] has placed in issue a communication which goes to the heart of the claim in controversy." Squealer Feeds v. Pickering, 530 N.W.2d 678, 684 (Iowa 1995). When the client places in issue the lawyer's services, the implied waiver is referred to by the bar as the so-called "self-defense" waiver.

Iowa R.Prof'l C. 32:1.6 codifies the self-defense waiver in the rule of confidentiality:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> > (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Comment [2] recognizes that "[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not

reveal information relating to the representation." However the rule recognizes that in certain situations informed consent is "implied" without the necessity of formal written waiver. Comment [9] recognizes that:

> "[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct."

Consent to disclosure, or more appropriately waiver of privilege or confidentiality is also recognized by rule or by implication in Comment [10]:

> [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true regarding a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies where a proceeding has been commenced.

Last, the self-defense waiver is recognized in Comment [11]: "[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary."

Thirty three years ago our predecessor Committee recognized an implied waiver for self-defense in the context to a lawyer's defense of an ethics complaint:

> "You have submitted to the Committee a series of questions concerning the privilege waiver contained in a complaint filed against you. ***
>
> *** the Committee is of the opinion that the privilege between attorney and client remains in effect, except as it is waived only for the purposes of your responses to

this Committee, its counsel or its investigators and for whatever disciplinary procedure develop therefrom."

Iowa Opinion No. 82-07.

Lawyers invoking the implied self-defense waiver must recognize that it is not a wholesale waiver of all communication between the client and lawyer, Squealer Feeds v. Pickering, 530 N.W.2d 678, 684 (Iowa 1995) ([The waiver is] ... limited to attorney-client communications on the matter disclosed or at issue.) and only to that "information relating to the representation of a client to the extent the lawyer reasonably believes necessary..." Iowa R.Prof'l. C. 32: 1.6(b) [Emphasis added].

In determining what is reasonably necessary the lawyer is guided by Iowa R. Prof'l. C. 1.0 (h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."

The Rule makes the targeted lawyer the decision-maker regarding the limits of reasonableness and not the client. There is a certain balance in the rule. Were it otherwise, the client could deprive the lawyer the use of favorable and relevant evidence

ABA Formal Opinion 10-456

The Committee declines to adopt ABA Formal Ethics Opinion 10-456. Instead we follow the lead of other states who have rejected the ABA's opinion, e.g. Tennessee Formal Ethics Opinion 2013-F-156; North Carolina 2011 Formal Ethics Opinion 16; District of Columbia Op. 364 (1/13); Cf. Virginia Informal Ethics Op. 1859 (6/6/12).

ABA Formal Ethics Op. 10-456 appears to apply only to post conviction relief litigation which leaves the question open regarding other forms of adverse claims against a lawyer by a former client and the standard the lawyer should use when invoking the so-called implied self-defense waiver. When client confidences are concerned, there should be no distinction between civil, criminal or disciplinary litigation.

A matter is confidential and protected or it is not; the self-defense waiver applies or it doesn't and when it does the procedure for invoking it should be uniform. The ABA's approach would be inefficient and disruptive when applied to the defense of a legal professional negligence claim. A targeted lawyer could not provide an insurer with the client's file upon receiving notice of claim until litigation had begun and the hearing envisioned by ABA Formal Op. 10-456 held. The procedure would disrupt the attorney disciplinary bar. Absent an express client waiver, upon receiving notice of an attorney disciplinary complaint the lawyer could not respond to the Board and would have to wait until a formal grievance action was filed and the required court hearing held.

While we honor the value and importance the ABA attaches to legal professional privilege, we believe a better way protects the privilege and the lawyer who must implement the implied self-defense waiver. We do this by emphasizing a rule equal in importance to legal professional privilege, the rule of informed consent.

A knowing and express waiver of legal professional privilege and/or confidentiality is far superior to one implied. Central to almost every client's claim against a lawyer is another lawyer who advises or otherwise assists the client in making the claim. While the client may not recognize the privilege and confidentiality is waived by making the claim, the assisting lawyer does.

A lawyer assisting the client has a professional obligation to ensure that the client understands and appreciates the probable and natural consequences of the proposed act. Iowa R. Prof'l C. 32: 1.4(b) places a duty on the lawyer to "...explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment [5] to the rule explains that:

> "[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued; to the extent the client is willing and able to do so."

Iowa R. Prof'l. C. 1.0(e) provides that:

> "(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

A lawyer has a right to rely on the presumption that subsequent counsel has complied with the rules and properly informed the client about losing the privilege and/or confidentiality.

The Client as a *Pro-Se* Litigant

A most difficult situation occurs when the prior client operates *pro se*. Absent evidence to the contrary, it is unreasonable to assume that the pro-se client would know of the waiver of privilege or confidentiality attendant to the threat or actual institution of adverse action against prior counsel. Sometimes the complaint process is self-initiated by the client. In an ethics complaint by a client against the client's lawyer the process begins with filing a written complaint. Frequently the client has not sought independent advice of counsel and simply files a complaint. Upon receipt by the disciplinary board, the lawyer is asked to respond to the client's complaint. Obviously the lawyer has a right

to self-defense but it is difficult to exercise if the client has not waived the legal professional privilege.

A similar situation arises when a client files a *pro se* application for post-conviction relief alleging ineffective assistance of counsel. Counsel has the right of self-defense but as in the prior example, it is difficult to exercise if the client has not waived the privilege.

The issue has the obligation to advise the *pro se* client that by adopting their course of action they automatically waive the attorney client privilege. There are only two options: The entity with which the proceedings are filed or the lawyer subject to the complaint. This Committee has no authority to impose additional processes or procedures on the disciplinary board or the courts. However we recognize that once a complaint is filed, the lawyer cannot advise the prior client because in doing so the lawyer could be accused of attempting to obstruct or tamper with the process for personal advantage.

In the implied self-defense waiver, targeted counsel is justified in relying upon the implied self-defense waiver provided there is evidence that the client has been notified of losing attorney-client privilege. That notification can occur in a written notification on the initial complaint, in a court order authorizing the proceedings, or in other written communication to the client. However, absent evidence of a knowing waiver targeted counsel must honor the privilege until such time as the issue can be resolved by express waiver from the client or court adjudication of the issue after notice to the client.

If the proceedings are being prosecuted by new counsel for the former client, the targeted lawyer, prosecutors defending against a claim for post-conviction relief, and lawyers defending the targeted lawyer against a claim for legal malpractice may justifiably rely on the presumption that new counsel has fully informed and advised the client regarding losing privilege as required by Iowa R. Prof'l C. 32: 1.4(b) and Comment [5] thereto.

Self-Defense Waiver in Relation to Claims by Third Parties

There are situations, usually in attorney-discipline cases and some civil claims for indemnity and contribution where the lawyer's client is not the initiating party. The client's opponent may threaten or file an ethics complaint against the lawyer. Or a claim for indemnity or contribution is brought against the lawyer by a third party. In these and similar situations the client has taken no adverse action against the lawyer and, has not triggered the loss of the legal professional privilege and/or confidentiality. We are mindful that the privilege belongs to the client. Absent a previous expressed written agreement by the client, it cannot be cannot be waived by a non-client third party or the

lawyer who must honor it. In these cases the legal professional privilege and/or rule of confidentiality remains intact and must be honored absent express waiver from the client or court adjudication of the issue after notice to the client.

OPINION

1. A lawyer who represents or otherwise assists a client in threatening or instituting proceedings against prior counsel must reasonably inform the client regarding waiver or loss of the client's legal professional privilege and the implied self-defense waiver.

2. Those defending a lawyer's conduct and the targeted lawyer who is the subject of an adverse threat of or actual proceedings by a client relating to the lawyer's service and knowing that the client is represented by subsequent counsel regarding those proceedings are justified in relying on subsequent lawyer's duty to inform and advise the client regarding losing the legal professional privilege and/or confidentiality.

3. A lawyer who is the subject of an adverse threat of or actual proceedings by a client relating to the lawyer's service and who knows that the client is not represented by or otherwise advised by counsel and whose prior client has not waived the legal professional privilege and/or confidentiality must honor the privilege and rule of confidentiality until it can be established that the former client has received written notification regarding the loss thereof or the court, after hearing, has ordered disclosure.

4. A lawyer must honor the client's legal professional privilege and confidentiality and cannot invoke the implied waiver of self-defense regarding claims made against the lawyer by third parties absent the client's expressed written consent or order of the court after notice to the client[2].

5. In using the implied self-defense waiver, a lawyer must honor the requirements of Iowa R. Prof'l. C. 1.0 (h) in determining the reasonable limits of the waiver.

[2] The issue as to whether a court can declare the privilege waived as a matter of law without notice to and an opportunity for the holder of the privilege to be heard is beyond the scope of the Committee.