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September 28, 1978

ATTORNEY GENERAL OPINION NO. 78-303

The Honorable Joseph F. Norvell
State Senator
Box 991
Hays, Kansas 67601

Re: Open Meeting Law--Closed Sessions--Attorney-Client Privilege

Synopsis: Under K.S.A. 75-4319(b)(2) of the Kansas open meetings law, consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client is a permissible basis for an executive or closed session. This exception applies only to communications between the attorney and client which are made in the course of that relationship and which are made in professional confidence. If a body recesses into executive session in order to discuss pending litigation among the members thereof, in the absence of the attorney, that discussion among the board members does not fall within the attorney-client privilege, and is not a permissible ground for holding a closed or executive session.

* * *

Dear Senator Norvell:

You inquire concerning the Kansas open meeting law, K.S.A. 75-4317 *et seq.*, and particularly, concerning the conduct of executive sessions. K.S.A. 75-4319(b) specifies the subjects which may be discussed in executive sessions. In pertinent part, this provision authorizes "consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship."

You inquire whether a governing body may recess for a closed or executive session for the purpose of discussing pending litigation

in the absence of the board attorney who represents the board in that litigation. K.S.A. 60-462(a) provides that subject to certain exceptions not pertinent here, "communications found by the judge to have been between lawyer and his or her client in the course of that relationship and in professional confidence, are privileged." Subsection (c) defines "communication" as including advice given by the lawyer in the course of representing the client and includes disclosures of the client to a representative, associate or employee of the lawyer. . . ." The purpose of the privilege is to encourage freedom and candor of consultation by a client with his or her attorney, and to permit the client to confide fully in his or her attorney, undeterred by fear of embarrassing disclosures to others. 8 *Wigmore of Evidence* § 2291 (McNaughton Rev. 1961).

In the instance which prompts your question, I understand that a board of education recessed into executive session to discuss a pending lawsuit. The board's attorney was not present. I understand that the superintendent of the district was present, and relayed to the board some information concerning the pending litigation which the attorney had furnished to him. "The rule has always been that communications between attorney and client are privileged when made in professional confidence . . . But communications not made in such confidence are not so privileged." *Fisher v. Mr. Harold's Hair Lab, Inc.*, 215 Kan. 515 at 519, 527 P.2d 1026 (1974).

The privilege extends, plainly, to communications between client and attorney which are made in confidence. In this instance, the attorney was not present, and there were no consultations, confidential or otherwise, between the board and its attorney. Apparently, the board counsel did furnish the superintendent some information concerning the status and progress of the pending case, to be relayed to the board.

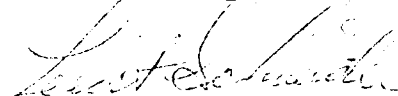
The privilege applies, simply, to communications between persons who stand in the relation of attorney and client, and which are made in confidence. The board's attorney was not present during the executive session in question, we understand, and as a result, the attorney-client privilege may not be relied upon as a justification for the closed executive session. The discussion of pending litigation by the board members among themselves, without the presence of the board attorney, is not a privileged communication.

"It has never been questioned that the privilege protects communications to the attorney's clerks and his other agents (including stenographers for rendering his services." 8 *Wigmore on Evidence* § 2301. The superintendent, of course, is an employee of the

board, and not an agent of the attorney. His discussions with the board of the pending case, and his relating to them information which the attorney had furnished him concerning its status, cannot be construed as communications of the board with its attorney, for it is only confidential communications between the attorney and his agents with the client, here the board of education, which justify the attorney-client privilege.

Accordingly, on the basis of the foregoing, it is my opinion that the attorney-client privilege, as set forth in K.S.A. 75-4319 (b)(2) does not constitute a basis for an executive session as described above. At the same time, I do not believe that there is any basis for invoking the civil penalties provided by K.S.A. 75-4320 in this instance. Any member of a body or agency "who *knowingly* violates the provisions of the act" is liable to a civil penalty not to exceed five hundred dollars. [Emphasis supplied.] I find no reason to believe other than that the members of the board acted in an entirely good faith belief that it was permissible to recess into executive session for the purpose of discussing pending litigation and receiving information on its progress which had been furnished to its superintendent by its attorney. The belief was erroneous, but it was held, so far as I am advised, entirely in good faith, and these facts provide no basis for seeking the civil penalty which is provided for intentional and wilful violations in these circumstances.

Yours truly,



CURT T. SCHNEIDER
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