



STATE OF KANSAS

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February 6, 1987

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ATTORNEY GENERAL OPINION NO. 87- 23

Ronald Harper
Acting Secretary
Kansas Department of Aging
610 West 10th
Topeka, Kansas 66612-1616

Re: Courts -- Rules of Supreme Court -- Code of
Professional Responsibility

Synopsis: Since it is the client's intent which governs the distinction between privileged and non-privileged communications, a determination of whether or not information exchanged between attorney and client is privileged requires a case-by-case consideration. To ensure compliance with the dictates of Canon 4 of the Code of Professional Responsibility and K.S.A. 60-426, when a supervising agency requests that an attorney release particular client information for enumerative or evaluative purposes, the attorney may either obtain the client's consent to do so, or, if the client refuses, compile the requested data in a less intrusive manner. If, however, the agency requests the data for purposes of determining a client's financial eligibility or to satisfy funding requirements, the exception to the privilege under DR-4-101(C)(4) would apply, making the aforementioned precautions unnecessary. Cited herein: K.S.A. 45-217; 45-221; 60-426; K.S.A. 1986 Supp. 20-3100, Supreme Court Rule No. 225, D.R. 4-101.

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Dear Mr. Harper:

As acting secretary of the Kansas Department on Aging (Department), you request our opinion on whether the Department may require each Area Agency on Aging (A.A.A.) to report statistical information on recipients of services financed by Older American Act funds. Your specific inquiry concerns whether the attorney-client privilege, as delineated by K.S.A. 60-426 and D.R. 4-101 of the Canons of Professional Responsibility (K.S.A. 1986 Supp. 20-3100, Supreme Court Rule No. 225), precludes Kansas Legal Services of Olathe (K.L.S.O.), as sub-grantee of the Johnson County A.A.A., from completing and submitting intake forms on its clients.

K.L.S.O. qualifies as a public agency under the Open Records Act, which defines a public agency to be: ". . . any other entity receiving or expending and supported in whole or in part by public funds appropriated by the state" K.S.A. 45-217(e)(1). While the Act places a premium on making information maintained by public agencies readily available, K.L.S.O. is not required to provide such records if the attorney-client privilege applies under K.S.A. 45-221(a)(2), which exempts privileged records from open accessibility unless the client consents to disclosure. Before we can determine if this exception is applicable, we must ascertain whether the information on the client intake form utilized by the Department is privileged.

The form, a copy of which was enclosed with your opinion request, elicits such information as the client's name, address, age, income status and ethnic identity. The purpose for which this information is sought is to provide the A.A.A. with an accurate, non-duplicative head count of the people who utilize their services.

Canon 4 of the Code of Professional Responsibility (K.S.A. 1986 Supp. 20-3100, Supreme Court Rule No. 225) governs an attorney's responsibility to a client in regard to confidential communications: "A lawyer should preserve the confidences and secrets of a client." According to D.R. 4-101(A), "'confidence' refers to information protected by the attorney-client privilege under applicable law," while "'secret' refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." D.R. 4-101(B) prohibits the lawyer from revealing client confidences and secrets unless such disclosure is

specifically authorized in one of four circumstances. D.R. 4-101(C) allows disclosure when: 1) the client consents after full disclosure; 2) the attorney is required by law or court order to disclose information; 3) disclosure is necessary to prevent a crime; or 4) disclosure is essential to aid in an attorney's own defense or in collecting a fee.

K.S.A. 60-426 defines privileged communication to be "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." The Kansas Supreme Court in City of Wichita v. Chapman articulated the dimensions of the privilege:

"In order for a communication from a client to his attorney to be confidential, and to impose upon the attorney the duty of not disclosing the same, it must be of a confidential character, and so regarded, at least by the client, at the time, and must relate to a matter which is in its nature private and properly the subject of confidential disclosure." 214 Kan. 575, 582 (1974).

The Court directed that "this rule should also be applied to 'secrets' within the meaning of Canon 4." Id. at 582. Whether or not a matter is considered private in nature often depends upon its particular circumstances and the client's attitude. Given these personal, individual concerns, the attorney-client privilege does not lend itself to the making of general pronouncements. In our opinion, then, such a determination can best be made by considering the circumstances surrounding the matter and the needs and desires of the individual client.

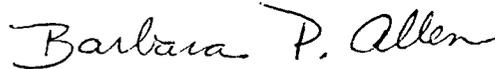
In the situation at hand, we believe K.L.S.O. can comply with the Johnson County A.A.A.'s request and not stray from the boundaries set by Canon 4 and K.S.A. 60-426 by obtaining the client's consent to release the intake form, or, if the client refuses, to convey the statistics impersonally. Duplication could be avoided by asking clients to enumerate other A.A.A. services they have utilized without divulging their identities. If, however, the information sought is essential to the agency's funding, it is our opinion that the exception under D.R. 4-101(C)(4) would apply, thus rendering the above-mentioned precautions unnecessary.

In conclusion, since it is the client's intent which governs the distinction between privileged and non-privileged communications, a determination of whether or not information exchanged between attorney and client is privileged requires a case-by-case consideration. To ensure compliance with the dictates of Canon 4 of the Code of Professional Responsibility and K.S.A. 60-426, when a supervising agency requests that an attorney release particular client information for enumerative or evaluative purposes, the attorney may either obtain the client's consent to do so, or, if the client refuses, compile the requested data in a less intrusive manner. If, however, the agency requests the data for purposes of determining a client's financial eligibility or to satisfy funding requirements, the exception to the privilege under DR-4-101(C)(4) would apply, making the aforementioned precautions unnecessary.

Very truly yours,



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