

Becker, Rick

From: Jim Mowbray [jmowbray@ncpa.ne.gov]
Sent: Friday, June 05, 2009 11:12 AM
To: Becker, Rick
Cc: Rita Wesely
Subject: Request for Waiver

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Rick:

I understand our current waiver for NITC 5-201 has expired, and I am again requesting pursuant to NITC 1-103 a new waiver of the policy found in NITC5-201. In support of this request I submit the following:

1. The Nebraska Commission on Public Advocacy is still performing the same duties that it was when the first waiver was approved, and that is, we continue to represent individual clients who are charged with very serious criminal offenses. In other words, we are representing criminal defendants who are being prosecuted by, and in the name of, the State of Nebraska.
2. Our staff consists of six attorneys, two support staff and an investigator. The attorneys and staff are regulated by the Nebraska Rules of Professional Conduct. Rule 1.6 specifically prohibits the release of any attorney/client communications to anyone. Communications that are confidential include written correspondence as well as email. Much of the email correspondence we receive are from the experts that we have hired who are submitting written reports. These reports, which are known as "work product", are extremely sensitive and confidential. No one from outside this office can view or have access to these confidential communications in any form or manner. If these attorney/client communications were to be disclosed the attorney's in this agency would be subject to discipline and could lose their license to practice law.
3. If our email is stored on the state's servers then access is possible by someone other than the staff of this agency, which would clearly violate Rule 1.6 of the Nebraska Rules of Professional Conduct, thus, subjecting someone in this agency to disciplinary action by the Supreme Court. It is no different than when we store our closed files off site. No one, other than staff, can have access to those files. I realize other agencies have attorneys working for them, and they use the state email system, however, that is different from this agency because those state attorney employees do not have an individual client. They represent the State of Nebraska, not a private client, which makes my office unique. In fact, to the best of my knowledge we are the only agency that has attorneys' who represent individual private clients.
4. As I mentioned in our previous request, I again have contacted the Federal Public Defender's Office for Nebraska and they told me that the federal government has a similar requirement regarding emails as the State does, however, the Public Defender's offices have two to three servers around the country that handle all of the defenders' email information and those servers are located and maintained in the offices of the Public Defender. No one in the federal government has access to those emails except the staff of the public defender system. I also inquired with the counsel on discipline for the Nebraska Supreme Court, and he agreed that email is considered attorney/client communication.
5. Our sever that we presently use for our email is in house, in a secure location. It is backed up every evening 5 days a week, and the back up tapes are kept off premises in a locked and fire proof safe in my personal residence. The server is secured from the outside by a firewall with up to date software and hardware to protect the data and to prevent any breach.

Would you please see that this request is brought to the attention of the Technical Panel and ask that it be put on the agenda for the next regularly scheduled meeting. I will be happy to answer any questions, and if asked, I would be happy to attend the next Panel meeting if it is necessary.

James R. Mowbray
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Nebraska Commission on Public Advocacy

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