

Privilege Extended to Lay Advocate

Communications between a New Jersey couple and their lay advocate are protected under the attorney-client privilege, a federal magistrate judge has ruled.

The need for candid communications between an advocate and a litigant "is no less compelling" simply because the advocate is not a licensed attorney, U.S. Magistrate Robert Kugler wrote in his July 2 opinion. The attorneys in the case say they believe it is the first time in New Jersey that the privilege has been extended to a nonlawyer.

Kugler's ruling came on a motion by Marilyn Arons, a lay advocate for parents in special education disputes, in a case involving Donald and Diane Woods. The couple has alleged that Monroe Township and the state had violated the Individuals With Disabilities Education Act by failing to help fund the placement of their handicapped daughter, T.W., in an out-of-state residential education facility. Their daughter now is 20 years old.

When the Monroe school board subpoenaed Arons for a deposition on her representation of the Woods before the Office of Administrative Law, she argued that the subpoena should be quashed because it was irrelevant and because the discovery was protected by the attorney-client privilege.

Kugler rejected Arons' relevancy argument, but agreed on the privilege issue.

Richard Kaplow, an attorney for the school board and a partner with Weinberg and Kaplow in Springfield, says his client was interested in deposing Arons to learn whether she had counseled the Woods on the nature and consequences of a settlement reached earlier in the case.

In his ruling, Kugler said that courts have reached conflicting conclusions on the issue of whether a litigant's communications with his or her lay advocate are privileged. In this instance, however, he said several factors warrant the existence of such a privilege. For one, New Jersey Court Rule 1:1-21(e)(8) specifically

authorizes lay advocacy before the OAL in special education cases. For another, the administrative code provides that lay advocates must follow the Rules of Professional Conduct.

Kugler also said that the purpose of the attorney-client privilege, to encourage uninhibited discourse with one's advocate, is applicable to Arons' representation of the Woods. As a result, Kugler said, communications between the Woods and Arons while she represented them as a lay advocate are privileged.

However, Kugler said that his ruling does not mean that all materials and communications are privileged and, he said, the school board may depose Arons on matters that are not. He denied without prejudice Arons' motion to quash the school board's subpoena.

Kaplow, the school board's attorney, says he does not know whether his client will appeal.

Rebecca Spar, an associate with Cole, Schotz, Bernstein, Meisel & Forman of Hackensack who represented the Woods, said that parents would have been left open to harassment if Kugler had ruled against her clients.

— By Pamela Brownstein