

Advisory Opinion 1984-2

The question presented to the Advisory Opinion Committee in this instance is the duty of an attorney with regard to a client who may have defrauded certain creditors and who has failed to file income tax returns for several years. Specifically, the attorney is concerned about his role in assisting his client in applying assets towards the accounts of the client's major general creditors and how this relates to the client's failure to pay income tax.

Initially, reference should be made to two rules in the New Mexico Code of Professional Responsibility. Rule 7-102 provides in part:

(A) In his representation of a client, a lawyer shall not:

* * *

(3) conceal or knowingly fail to disclose that which he is required by law to reveal;

* * *

(7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent;

Rule 4-101 governs the confidential information protected by the attorney-client privilege. It states:

(B) Except when permitted under Rule 4-101(C), a lawyer shall not knowingly:

(1) reveal a confidence or secret of his client;

* * *

(C) A lawyer may reveal:

* * *

(3) the intention of his client to commit a crime and the information necessary to prevent the crime;

The attorney has asked whether he may ethically assist his client to pay general creditors during a period of insolvency, even though if the client were in bankruptcy, the tax debts would have priority. The attorney also questions whether in negotiations with the general creditors, some may be paid in such a manner that they are preferred over others. The Committee feels that, if the client is not in bankruptcy proceedings, the lawyer may ethically assist his client to negotiate the manner and amounts of payments to be made to his general creditors with some limitations, as noted *infra*. The fact that certain priorities might exist under bankruptcy law does not alter this result. Should the client file for bankruptcy, then certainly those rules would apply, including as they relate to any payments made within a given amount of time prior to filing.

The attorney has also expressed concern with regard to the fact that his client may have defrauded some of his creditors. Specifically, the attorney has inquired as to whether he may assist his client in paying some amount towards the total debt owed, when this may have the effect of lessening the likelihood of an investigation of his client. Initially, the Committee notes that the attorney can do nothing which in any way reveals the possibility that his client may have committed a fraud upon his creditors. That is a privileged communication of the client. As long as the attorney does nothing to assist his client in perpetuating a fraud, the Committee does not find the proposed assistance in payment unethical. The fact that this may lessen the likelihood of discovery is not, in the opinion of the Committee, illegal or fraudulent.

Finally, the attorney has made two additional inquiries concerning the income tax liability. First, he is concerned about whether he may ethically assist his client in making payments towards the general creditors, when this will impair the client's ability to meet current and past tax obligations. The attorney should, of course, counsel his client concerning the penalties for failure to report income and file income tax returns. In addition, the client should be advised to report and file, for both past and present. However, the assistance in payment is not illegal or fraudulent except to the extent that the attorney knows that the actions will render his client incapable of meeting tax obligations.

The question concerning the revelation of his client's criminal conduct is somewhat more troublesome. As to any past failure to report income and file returns, the attorney cannot reveal that information without the consent of his client. That constitutes past conduct which is protected by the attorney-client privilege, pursuant to Rule 4-101. As to future misconduct, Rule 4-101 provides that a lawyer may reveal that information. However, the Rule does not give the attorney any guidance in when revelation would be appropriate. The Committee notes that the American Bar Association model Rules of Professional Conduct, adopted by the House of Delegates on August 2, 1983, provide the following more specific guidelines:

Rule 1.6: (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;

The confidentiality of client communications is one of the most important and firmly established principles in law. As noted in the comment to the above rule:

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

Based upon the foregoing and the nature of the crime involved, the Committee does not feel that the attorney has a duty to disclose his client's intention concerning future tax liability. Certainly, the attorney cannot participate or assist his client in that regard. However, when weighing the importance of confidentiality with a failure to report income or pay income taxes, it is the Committee's opinion that the confidences of the client should be preserved in this instance.