

# **Advisory Opinion 1985-2**

An attorney has requested an opinion from the Advisory Opinions Committee regarding the propriety of disclosing certain information relative to a client to the Federal Bureau of Investigations and the Secret Service.

## **FACTUAL SITUATION**

The attorney was retained to represent the client in a possible investigation being conducted by a State agency. After the representation was concluded and the attorney paid, the Federal Bureau of Investigation informed the attorney that it was investigating the client, had intercepted a letter from the attorney to the client at the post office and requested permission to open the letter. The attorney refused permission upon determining that the letter was the client's copy of a letter the attorney had sent to the State agency. The attorney also determined that although the letter did not contain any information that was intended to be kept "secret," that it was not intended by the client to be distributed to anyone other than the legal entity to whom it was sent.

Approximately one week later the Secret Service advised the attorney that the client was involved in a continuing credit card scam, that the Secret Service was having difficulty locating him, that the name he had used with the attorney was assumed and that the real person who bore the "assumed" identity was cooperating with the FBI, the Secret Service and the Postal authorities. The attorney acknowledged that he had never actually seen the client; all communications evidently being by telephone or written correspondence. The Secret Service requested any information the attorney had that would assist it in finding the client.

## **QUESTION PRESENTED**

1. Should the attorney permit the FBI to open the intercepted letter?
2. Can anyone other than the client waive the attorney-client privilege, including the individual whose identity has been assumed by the client?
3. Can the attorney release information to the Secret Service that would assist it in locating the client?

## **DISCUSSION**

It would appear appropriate to initially discuss the attorney-client privilege, what it entails and who can waive it.

N.M.S.A. § 38-6-6(B) (1978 Comp.) provides in relevant part:

An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.

Rule 503 of the Rules of Evidence provides in relevant part:

(a) Definitions. As used in this rule:

- 1) A "client" is a person, public officer, or corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer or a representative of a lawyer with a view to obtaining professional legal services from him.
- 2) a "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation;
- 3) a "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.

4) a communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.

- 1) between himself or his representative and his lawyer or his lawyer's representative, or
- 2) between his lawyer and the lawyer's representative, or;
- 3) by him or his lawyer to a lawyer representing another in a matter of common interest, or
- 4) between representatives of the client or between the client and a representative of the client, or;
- 5) between lawyers representing the client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

- 1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or
- 2) Claimants through same deceased client. As to a communication relevant to, an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or
- 3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer; or
- 4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
- 5) Joint clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common when offered in an action between any of the clients.

In the instance case it appears that an attorney-client relationship existed between the attorney and the client. No cases have been located which deal with the waiver of the attorney-client privilege if the client uses an alias. Since an attorney-client relationship existed in the instance case, only the client can waive the attorney-client privilege with regard to "confidential" communications. The attorney is presumed to have the authority to claim the privilege on behalf of the client. In the instance case, based upon the information provided by the attorney, it does not appear that any of the exceptions are applicable. Specifically, it does not appear that the attorney was retained to "enable

affected, but only after a full disclosure to them;

- 2) confidences or secrets when permitted under disciplinary rules or required by law or court order;
- 3) the intention of his client to commit a crime and the information necessary to prevent the crime;
- 4) confidences or secrets necessary to establish or collect his fee or defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by Rule 4-101(C) through an employee.

Finally, it should be noted that the Proposed Final Draft of the model Rules of Professional Conduct provide in Rule 1.6 "Confidentiality of Information" as follows:

- (a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure.
- (b) A lawyer may reveal such information to the extent the lawyer believes necessary;
  - 1) To serve the client's interests, unless it is information the client has specifically requested not be disclosed;
  - 2) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;
  - 3) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

the crime or fraudulent conduct committed; and third, if the lawyer learns that the client intends to conduct prospective criminal or fraudulent conduct, the lawyer may have a duty to disclose the same.

Based upon the information provided by the attorney, it appears that an attorney-client privilege existed between the attorney and the client; that the privilege can only be waived by the client, even if he was using an alias (as long as the alias was not intended to "enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud"), and that the information disclosed to the attorney was disclosed in confidence and was not intended to be disclosed to third persons other than those reasonably necessary for the rendition of professional legal services. Therefore, in answer to the first two questions presented, the attorney should not permit the FBI to open the intercepted letter and the privilege cannot be waived by anyone except the client, even the individual obstinately bearing the true identity of the client's alias. An exception would be if the information given to the attorney by the client or contained in the intercepted letter was designed to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud. In light of the fact that the client was using an alias, this matter should be closely reviewed by the attorney.

The third question presented asks whether the attorney can disclose information that would assist the Secret Service in locating the client, such as information as to the manner in which the attorney was paid (presumably bank information) and the client's telephone number. This matter is addressed in an Annotation in 16 ALR 3rd 1047 captioned "Disclosure of Name, Identity, Address, occupation or Business of Client as Violation of Attorney-Client Privilege." It is noted in that annotation that

The address of a client is, in many cases, not privileged information simply because the attorney became aware of it as a collateral fact, and not as a confidential communication in the course of an attorney and client relationship. On the other hand, it is fairly well settled that where the client's address is communicated to the attorney in his professional capacity the information is ordinarily privileged. As a significant exception to this rule, it is generally recognized that, to insure the smooth operation of legal machinery, during a pending action in which

he represents a party whose address is sought, the attorney is obligated to disclose his client's place of residence. Id. at 1051.

In the instant case, there is no indication that the client ever advised the attorney that his address or the information which may lead to his whereabouts was confidential. It therefore appears that the attorney may have become aware of this information as a "collateral fact." It is therefore questionable whether an attorney-client privilege exists with regard to the client's whereabouts. However, it should be noted that the information is being sought by the Secret Service, evidently without subpoena. Based of the foregoing, it appears that although the attorney may be required to divulge his client's address and telephone number in a court proceeding, that he is probably not required to divulge the same to a governmental administrative agency absent a subpoena or specific statute requiring the same.