

Advisory Opinion 1989-2

ATTORNEY'S DUTY TO REPORT CASH TRANSACTIONS OVER \$10,000 MADE WITH A CLIENT

Attorney's client has been indicted for violation of the controlled substances laws. Client retained attorney to represent him in this case and paid attorney a fee in excess of \$10,000 in cash. Federal law requires attorney to report this transaction. 26 U.S.C. § 6050I provides that, "(a) Any person - (1) who is engaged in a trade or business, and (2) who, in the course of such trade or business, receives more than \$10,000 in cash in 1 transaction (or 2 or more related transactions), shall make the return described . . . [below] (b) A return is described in this subsection if such return - . . . (2) contains (A) the name, address, and TIN of the person from whom the cash was received. Thus, the law requires the return to include the client's identity. Attorney questions whether the report would violate rules regarding client confidence and fears that disclosure would result in undesirable consequences for attorney and client.

Such dilemma is applicable not only to criminal defense lawyers but also to civil lawyers in a variety of situations. Compliance with the law in all these situations could lead to undesirable consequences such as: inquiry or prosecution by taxation authorities; attorney being subpoenaed to give testimony adverse to client regarding client's possession of the cash; or seizure of the fee paid as proceeds of a criminal transaction.

It is the intent of Congress under 26 U.S.C. § 6050I that an attorney who receives \$10,000 or more in cash from a client must report the receipt and the client's identity to the Internal Revenue Service. This law provides no recognition of client confidence. Violation of the law is a felony. On the other hand, SCRA 1986, 16-106(A) provides that, "A lawyer shall not reveal information relating to the representation of a client unless the client consents It appears the intent of the New Mexico Rules of Professional Conduct is that attorney should not reveal exactly what the federal law requires attorney to reveal. Thus, there is a conflict between 26 U.S.C. § 6050I and Rule 16-106(A). Our Committee does not resolve the conflict, but we give guidance to New Mexico attorneys encountering it.

Our guidance begins with the premise that it is the duty of a competent attorney to be aware of the law. At the moment the attorney knows that the client contemplates a reportable cash transaction, before accepting the cash, the attorney has a duty created by SCRA 1986, 16-101 and -102 to advise the client about these apparently conflicting laws. Following compliance with this advisory duty, there are four possible scenarios:

1. Client will complete the cash transaction and attorney will report with client's consent.
2. Client will decline to complete the transaction and withdraw from or terminate the relationship.
3. Client will complete the transaction in a form which creates no duty to report.
4. Client will demand that attorney accept the cash and comply with the professional conduct rule by not reporting the transaction.

If the client chooses the fourth scenario, New Mexico law would permit the attorney to decline the representation (SCRA 1986, 16-102(E)); or, if a relationship already exists, to withdraw in view of the apparent conflict and threat of prosecution for both attorney and client (SCRA 1986, 16-116(B)(3) or (6)).

There is another possibility for an attorney whose client chooses the fourth scenario. While no attorney is ethically obligated to pursue it, for the reasons stated later in this opinion, we believe pursuit of it would be consistent with the highest ideals of the profession. Since we have identified a conflict between the New Mexico ethical rules and the federal law, an attorney may, with the client's consent, agree to "make a good faith effort to determine the validity, scope, meaning or application" of the law at issue. See SCRA 1986, 16-102(D).

While we do not identify any one precise form of such a challenge, we refer to Chicago Bar Association Professional Responsibility Committee, Opinion 86-2, May 11, 1988, as a possible choice. The opinion suggests a notice to the IRS on the required reporting form that the identity of the payer has been withheld because of a claim of client confidence. This method would put the government on notice of the attorney's "good faith effort" and allow the government to seek judicial relief testing the claim of ethical obligation.

Prior to accepting the cash and filing such a notice or choosing any other particular "good faith effort," the client must be advised of the nature of the effort and given the opportunity to reconsider the choice of scenario 4. Such advice should include the possibility that attorney will ultimately be compelled to reveal the client's identity. Such advice should also include the warning that attorney and client may be subject to prosecution for violation of 26 U.S.C. § 6050I.

While New Mexico attorneys are not required to make this good faith effort, the Committee notes that one commentator suggests the very purpose of laws such as 26 U.S.C. § 6050I is to drive a wedge between lawyer and client with the end result that persons accused of drug offenses will be weakened in their ability to defend themselves. S. Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 Hastings L. J. 889 at 900-904 (1987). The Committee further notes that, throughout the former Code of Professional Responsibility and the current Rules of Professional Conduct, there are provisions requiring a lawyer to be mindful of his obligations to provide legal assistance to those who need it. Former Canon 2 and EC 2-1; SCRA 1986, 16-6-1, -602. Thus, the Committee is of the opinion that an attorney who chooses not to decline the representation and who rather chooses to represent the client while challenging the law would uphold the highest ideals and traditions of our profession.

The above discussion reflects the consensus of all members of the Advisory Opinions Committee. This opinion does not address the dilemma facing an attorney who did not discuss 26 U.S.C. Section 6050I with the client until after accepting more than \$10,000 in cash and whose client then refuses to consent to any type of disclosure. As to this question, the Committee was divided. A number of Committee members felt that an attorney in this situation was prohibited by client confidence rules from filing any sort of informational return lest the client's identity be ultimately required to be disclosed. A like number of Committee members were of the opinion that an informational return omitting the client's identity was required as a compromise between client confidence rules and the attorney's duty to abstain from criminal acts reflecting adversely on the attorney's fitness as a lawyer.