

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 90-4

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[Withdrawn- by Board on October 10, 1997 due to U.S. v. Ritchie, 15 F. 3d 592 (6th Cir. 1994).]

SYLLABUS: An attorney may not reveal the confidences and secrets of a client unless permitted under DR 4-101(C). An attorney whose client pays \$10,000 or more in cash must inform the client of the IRS reporting requirement under 26 U.S.C. §60501 and the risks involved. An attorney may not reveal information which may damage or prejudice a client.

OPINION: We have before us your request for an advisory opinion on whether a criminal defense attorney in Ohio may ethically disclose to the Internal Revenue Service, as required by 26 U.S.C. §60501 on Form 8300, information revealing the identity of the client who pays a cash fee in excess of \$10,000 in one or more related transactions.

A criminal defense attorney who reports cash retainers and the client's identity without the client's consent, risks violating DR 4-101 and DR 7-101 of the Code of Professional Responsibility. An attorney must preserve the confidence and secrets of a client. Code of Professional Responsibility, DR 4-101. An attorney must also zealously represent a client's interest with undivided loyalty and do nothing to damage or prejudice a client. Code of Professional Responsibility DR7-101. A criminal defense attorney who identifies clients on the IRS form may be subjecting the client to further investigation and the possibility of a conviction.

On the other hand, an attorney who fails to comply with the IRS regulations may be subjected to criminal and civil penalties. The common practice of criminal defense attorneys is to report the cash amounts received and withhold the client's identity until the reporting of such would no longer jeopardize the client. Fricker, Doing Time, 76 A.B.A.J. 24 (1990).

The IRS has sent out hundreds of letters to attorneys withholding clients' identities saying that the information must be disclosed and that enforcement action would be initiated. Id. The vast majority of those attorneys who received the IRS letter have declined on ethical, legal and constitutional

grounds to include any information that would identify the client/payor or the circumstances of the payment. Wall Street Journal, Nov. 30, 1989, at B7, col. 1; N.Y. Times, March 9, 1990, at B1, col. 4. This Board has no authority to discuss the constitutional and legal issues enveloping this request. Gov.Bar R. V (2) (b).

The IRS letters were not sent with the advance knowledge or approval of the Department of Justice. The Tax Division of the Department of Justice has assured the National Association of Criminal Defense Lawyers that enforcement proceedings would not be authorized until the issue was thoroughly studied and discussed by the appropriate agencies. Letter from NACDL to Members (Nov. 14, 1989). The Justice Department has, however, initiated actions against two Manhattan law firms for not reporting detailed information about clients who pay their attorneys more than \$10,000 in cash. Wall Street Journal, Nov.30, 1989, at B7, Col. 1.

Disciplinary Rule 4-101 prohibits an attorney from revealing confidences and secrets which may be detrimental to the client, unless the client consents after full disclosure. An attorney may reveal the information if permitted under the Disciplinary Rules, if required by law or court order, if the client intends to commit a crime, if the information is necessary to prevent a crime, or if the information is necessary to defend the attorney against accusations of wrongdoing. Code of Professional Responsibility, DR 4-101 (C) (1) (2) (3) (4).

An attorney may file a completed Form 8300 relying on IRS regulations and DR 4-101 (C) (2). However, "the protection of a client's confidences is so basic a tenet of professional responsibility that it yields only in the rarest of real dilemmas." Butler v. U.S., 414 A.2d 844, at 849 (D.C. 1980). The justification for the strict rules on confidentiality is the desirability of complete candor between client and attorney.

Disclosing the client's identity on the IRS form may provide the list link in a chain of incriminating evidence that would lead to the client being charged with a crime. In our opinion, an attorney who reveals a client's identity on IRS Form 8300 would be violating the duty of confidentiality. In addition, DR 7-101 (A) (3) provides that an attorney must not intentionally prejudice or damage a client during the course of the professional relationship. In our view, a criminal defense attorney must withhold a client's identity if the attorney believes in good faith the disclosure would jeopardize the client.

Criminal defense attorneys should inform their clients of the IRS filing requirement and the risks associated with disclosing the client's identity. The attorneys should further advise their clients that they may ultimately be compelled to reveal the information under federal law. The client must decide what confidential information, other than cash amounts, may be revealed. Code of Professional Responsibility, DR 4-101 (C) (1).

Several state bar associations agree that client confidentiality extends to the IRS reporting requirements. Chicago Bar Assn. Op. 88-2 (1988); State Bar of Georgia Op. 41 (1984); District of Columbia Bar Op. 124 (1983); Kentucky Bar Assn. Op. E-253 (1981). Compare, Arizona Bar Assn. Op. 87-3 (1987) (if required by law, the attorney may fill out and file the form).

In conclusion it is our opinion and you are so advised that an attorney may not reveal the confidences or secrets of his or her clients except when permitted or required under DR 4-101(C). An attorney has the responsibility to reveal the IRS reporting requirements to the client who pays \$10,000 or more in cash and the inherent risks involved. An attorney should not reveal information gained from a client when the revelation might jeopardize or damage the client.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.