
E-90-3 Disclosure of client identity to IRS

Question

Should a lawyer disclose to the Internal Revenue Service, as required by 26 U.S.C. section 6050I, Form 8300, information revealing the identity of a client who pays a cash fee in excess of \$10,000?

Opinion

A lawyer shall not disclose the identity of a client or information concerning fees paid without the informed consent of the client. SCR 20:1.6(a) and Wis. Stat. section 905.03 (1987-88). Before accepting a fee of more than \$10,000 in cash from a client, a lawyer should consult with the client regarding the lawyer's duties under 26 U.S.C. section 6050I (b)(2) to file a Form 8300 and the risks and implications of omitting the information requested on that form. SCR 20:1.4(b).

It is professional misconduct under SCR 20:8.4(b) to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Under SCR 20:1.2(d), it is professional misconduct for a lawyer to "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent" This committee expresses no opinion on whether it would be a violation of law for a lawyer to file an incomplete IRS Form 8300.

Further, to provide Wisconsin lawyers more detailed guidance on these issues, we find the following portion of Formal Opinion 89-1 of the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers informative:

"The committee believes that unless the attorney-client, Fifth and Sixth amendment privileges are clearly inapplicable under prevailing law, the attorney should assert those privileges and decline to disclose information relating to fees received from a client.

RPC Rule 1.6(a) [SCR 20:1.6(a)] and CPR DR 4-101(c)(1) require that the lawyer consult with the client before any disclosure of a client matter, confidence or secret. Therefore, if a client proposes to pay a lawyer more than \$10,000 in

cash for a fee, the lawyer is obligated to advise the client that the lawyer may have a duty under 26 U.S.C. section 6050I(b)(2) to file a Form 8300 which discloses:

- (A) the name, address and TIN of the person from whom the cash was received;
- (B) the amount of cash received;
- (C) the date and nature of the transaction.

The lawyer should advise the client that reporting the client's identity in this cash transaction might create a risk that the client could be investigated by the federal government. The lawyer should discuss with the client whether such disclosure might in some manner incriminate the client for some past wrongdoing, whether it be the matter for which the client has retained the lawyer or another matter. Criminal defense attorneys should be careful not to say anything that might be construed as advice as to how to circumvent the reporting requirements by 'structuring.' *See* 26 U.S.C. § 6050I(f)(1)(c), 31 U.S.C. § 5322. Further, they are cautioned that acceptance of fees that are known by them to be the proceeds of certain crimes may be considered a criminal offense under 18 U.S.C. sections 1956, 1957, 2113(c) and 2315. The client must, at the minimum be informed of the risks of investigation or prosecution which could derive from disclosure of the client's identity and the fee information; that the lawyer must, under the law, file the required form, even if he or she omits the client's identity, and that, although he or she will resist government efforts to secure such information, the lawyer may ultimately be compelled by a court to disclose the information required on the Form 8300.

Since no court of last resort has yet ruled on these specific issues, the lawyer should be careful not to intimate to the client that the information will remain forever privileged.

The client should then make the decision, after full consultation with the lawyer, whether his or her identity should be disclosed on the Form 8300. If the client cannot be consulted when the money is received by the lawyer, the lawyer should decline to disclose the information until he or she has had an opportunity to discuss the matter fully with the client, which the lawyer should attempt to do as soon as possible. It should be emphasized that the decision whether to refuse to disclose the information sought belongs to the client.

If the client determines that his or her identity should not be disclosed on the Form 8300, the lawyer has a duty not to disclose those facts. Thus, the Form 8300 must still be filed, but the lawyer should insert in the form in place of the client's name, address and tax identification number a statement that the lawyer and the client are asserting client confidentiality, the attorney-client privilege and, if applicable, the Fifth and Sixth amendment privileges, and not disclose the information. Lawyers are presumed to have the authority to do so under the Uniform Rule of Evidence 502(c), and they must.

The requirements of client confidentiality, of course, do not relieve the lawyer of the statutory duty to file a Form 8300 providing the rest of the information. Also, it is noted that filing a Form 8300 with an assertion of privilege will likely result in the IRS sending a computer-generated letter informing the lawyer that the form filed was incomplete and that the failure to supply the omitted information may result in the IRS initiating an enforcement procedure. The lawyer should not voluntarily disclose the client's identity in response to this letter unless the client consents.

When the letter threatening enforcement is received, the lawyer is still presumed to have the authority to continue to assert confidentiality and evidentiary and constitutional privileges and rights. The lawyer should contact the client and advise the client of the situation. Only when the client consents, however, can an amended form be filed. If the client still refuses to disclose, the lawyer must abide by that decision and decline to voluntarily provide the information to the IRS. If the lawyer cannot reach the client, he or she should similarly decline to provide the information.

It is the committee's opinion that the lawyer's duty to protect against disclosure of client matters or confidences extends to any IRS summons or threat of summons seeking to compel the lawyer to disclose the client's identity. Uniform Rule of Evidence 502(c). Disclosure should not be made unless and until a court, preferably an appellate court, considers the validity of the summons and any judicial enforcement orders in this area and that court's ruling requires such disclosure.

It is the committee's opinion that the lawyer should respond to the letter and state in clear and respectful terms the nature of the objection to providing the information and the legal bases for it. It is further the committee's recommen-

dition that any enforcement order be appealed to a higher court before the lawyer complies because of the significant unresolved issues involved.

As stated earlier, however, the attorney-client privilege is not as broad as ethical standards of confidentiality. The IRS may seek judicial enforcement of its efforts to get the lawyer to disclose the client's identity. The lawyer should resist this effort to breach confidences, privileges, and rights and require judicial enforcement of any IRS efforts to gain such privileged information. The lawyer should also notify the client and ask if the client wishes the lawyer to contest the enforcement procedure. The lawyer should consider suggesting to the client that he or she might retain separate counsel to seek to intervene and challenge the IRS action. A challenge by the client would generally be feasible only if he or she is allowed by the court to proceed anonymously. Fed. R. Crim. Pro. 24 (a)(2), *Gravel v. United States*, 408 U.S. 606, 608 n.1 (1972); *Perlman v. United States*, 247 U.S. 7, 13 (1918).

A lawyer may ultimately be judicially compelled to disclose the client's identity. At that point, the lawyer will have to make a personal decision whether to comply with the order, or risk a finding of contempt in order to be able to appeal the order. Generally, a person may not appeal an order to provide evidence without first resisting the order and being found in contempt. *Cobbledick v. United States*, 309 U.S. 323 (1940). Such a 'technical contempt designed solely to obtain appellate review of arguable claims is so common that no reputational injury ... will result.' *Re Dept. of Investigation of City of New York*, 851 F.2d 65 (2d Cir. 1988). See *Re Klein*, 776 F.2d 628, 631 (7th Cir. 1985); *Re Attorney General*, 596 F.2d 58 (2d Cir. 1979)."