Ethics Opinion No. 85-6

Disclosure of Client Names by Public Officials Pursuant to Campaign Disclosure or Conflict of Interest Statutes.

The Committee has been requested to give an opinion regarding the ethical propriety of identifying legal clients pursuant to provisions of applicable financial disclosure laws. We have also been asked whether an attorney has an ethical duty to consult with each client prior to disclosure of his identity and whether a duty exists to seek an exemption from disclosure requirements.

It is the opinion of the Committee that an attorney who holds, or is a candidate for, public office may disclose the identity of clients when that information is required by applicable disclosure laws without obtaining the consent of the client, unless the client is likely to be embarrassed or suffer other detrimental effects by such disclosure as a result of other facts or circumstances known to the attorney. Prior to disclosing the identity of clients, the attorney must become sufficiently informed with regard to the services rendered and related facts to permit a reasoned decision as to whether disclosure of the clients' identity may cause embarrassment or other adverse effects to the clients.

The request presented to the Committee relates to attorney members of the Alaska Judicial Council. Under Article IV, Section 8, of the Alaska Constitution, three of the members of the Alaska Judicial Council are private attorneys. AS 39.50.200 (p)(15) includes the Alaska Judicial Council in the definition of "State Commission or Board" as used in the Alaska conflict of interest statute. That statute requires each member of a State commission or board to file a statement within 30 days after taking office, giving information regarding income sources and business interests. As defined by statute, the "source of income" of a person self-employed by means of the sole proprietorship, partnership, professional corporation or a corporation in which the person, the person's spouse or children, or a combination of them, holds a controlling interest, includes the client of the proprietorship, partnership or corporation.

Disciplinary Rule 4-101(B) prohibits a lawyer from knowingly revealing a confidence or secret of the client. The terms "confidence" and "secret" are defined by DR 4-101 as follows:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

The attorney-client privilege, as set forth in Rule 503 of the Alaska Rules of Evidence, protects "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client." The rule does not specifically include or exempt the identity of a client, and no guidance is given by commentary to the Rules of Evidence or Alaska cases interpreting the rule.

In the absence of specific Alaska authority, we must be guided by interpretations from other jurisdictions. The general rule in other jurisdictions is that the identity of the client is not protected by the attorney-client privilege. A case in point is *Chamberlain v. Missouri Elections Comm.*, 540 S.W.2d 876, 880 (Mo. 1976), which was an action for declaratory judgment and injunction to prevent enforcement of the requirements of the Missouri Campaign Finance and Disclosure Law. The attorney plaintiffs in that case claimed that the disclosure requirements infringed upon the attorney-client privilege. The applicability of the privilege was denied by the court with the following comments:

> We believe that insofar as the disclosure requirements of these subsections are concerned, the attorney-client relationship generally will remain inviolate. We say this because the well-established rule is that *identity* of a client is not within the scope of the privilege. [Citations omitted] There is a very narrow exception to this rule: e.g., the identity of a client may be shrouded and the privilege recognized "when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication." *N.L.R.B. v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965).

See generally, Annot., "Disclosure of Name, Identity, Address, Occupation or Business of Client as Violation of Attorney-Client Privilege," 16 A.L.R.3d, 1047 (1967).

In those cases where the identity of the client has been determined to fall within the "narrow exception," the rationale appears to be a finding by the court of circumstances analogous to the definition of a client "secret" under DR 4-101(A) where disclosure would be embarrassing or likely detrimental to the client.

Although a few courts have indicated that a client's request that identity not be disclosed is sufficient to create an attorney-client privilege with regard to that information, the facts in those cases, almost without exception, involve situations where other information from the client has been communicated with the client's consent, and disclosure of the client's name would have a serious detrimental effect on the client or cause the client embarrassment. In the absence of such circumstances, the identity of the client, which is essential to the creation of the attorney-client relationship, is not confidential or secret

information, even when the attorney has been requested not to divulge that information.

The Committee is, therefore, of the opinion that an attorney may, without consulting the clients, disclose the names of clients who have paid $100 or more to the attorney's firm, if the attorney is required by law to disclose firm clients as "sources of income," unless the nature of the services provided or other circumstances known to the attorney reflect the possibility that disclosure would be embarrassing or likely to be detrimental to the client.

It should be noted that the applicable regulations in 2 AAC 50.100 accommodate those concerns. Subsection (a) states in part that:

> Disclosure of another persons name in a report is not required and should not be made where that disclosure alone would likely result in disclosing sensitive information which the person would want to keep private and which, if made public, would tend to cause substantial concern, anxiety or embarrassment to a reasonable person.

Subsection (a)(5) of that regulation specifically provides for the non-disclosure of the name of a married client who seeks legal assistance without a spouse's knowledge, if disclosure would likely cause substantial embarrassment or opprobrium.

Subparagraph (d) of the regulation recommends that self-employed individuals apprise clients not exempted by section (a) of the reporting requirements under law and the options available under the regulations, which include the opportunity to claim an exemption from the disclosure requirements.

An attorney who is a public official subject to the disclosure requirements with regard to identity of clients has an ethical obligation to become sufficiently familiar with the services provided, or to be provided, to the firm's client and the nature of the attorney engagement so that an informed decision can be made as to whether disclosure of the client's identity would constitute action prohibited by DR 4-101. If a decision is made that the identity of the client is or may reasonably be considered to be subject to the attorney-client privilege or a secret prohibited from disclosure, the attorney must consult with the client to determine whether the client will consent to the disclosure, and if not, the attorney must seek an exemption under the applicable regulations and statutory provisions.

Adopted by the Alaska Bar Association Ethics Committee on November 7, 1985.

Approved by the Board of Governors on November 8, 1985.