

Ethics Opinion No. 93-3

Disclosing Information on IRS Form 8300.

The Committee has been asked to render an opinion on whether, under the Alaska Rules of Professional Conduct, an attorney can properly disclose the identity of a client on an IRS Form 8300. Under section 60501 of the Internal Revenue Code, lawyers are required to complete this form whenever they receive cash in excess of \$10,000 from a client. The form calls for information concerning the purpose of the payment and specifically requests disclosure of the client's identity. As the request for an opinion notes, the reporting requirement presents a potential conflict between an attorney's obligations to abide by the law and to protect client confidentiality.

The Committee has concluded

(1) that disclosure of information on a Form 8300 in accordance with the requirements of IRC §60501 is not contrary to the provisions of the Alaska Rules of Professional Conduct; and

(2) that, under the Alaska Rules of Professional Conduct, when a lawyer is offered a cash payment of more than \$10,000 for any purpose connected with his or her practice the lawyer is obligated to explain the reporting requirement imposed by section 60501 to the client in order to provide the client with an opportunity to make the payment without utilizing cash.

It appears that there are two sets of circumstances under which a lawyer might receive more than \$10,000 in cash from a client. First, the client may wish to pay his or her fee in cash. Second, the client may wish the lawyer to hold cash to be utilized in connection with a transaction, such as a real estate acquisition, in which the lawyer is providing representation.

Both situations are governed by ARPC 1.6(a), which provides, in relevant part, as follows:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . .

Two recent U.S. Court of Appeals decisions have addressed the question of attorney disclosures on a Form 8300. See, *U.S. v. Leventhal*, 961 F.2d 936 (11th Cir. 1992); *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir. 1991).

In *Leventhal*, *supra*, the government appealed a District Court decision which approved an attorney's refusal to provide identifying information on the Form 8300 absent an express judicial order. 961 F.2d at 939. The lawyer

argued that simple disclosure of the information in the summons would violate a Florida Bar rule substantially identical to Alaska's Rule 1.6(a). 961 F.2d at 940, note 7. The Eleventh Circuit ruled against the lawyer and followed the Second Circuit, holding as follows:

In *Goldberger* [*supra*], the court first explained that "in actions such as the instant one, which involve violations of *federal* law, it is the federal common law of privilege that applies". . . The court further pointed out that, even if the state law of privilege should apply, "a communication to an attorney would not be considered confidential unless it was made in the process of obtaining legal advice; and fee arrangements between attorney and client do not satisfy this requirement in the usual case . . ." Finally, the *Goldberger* court noted that, even if a conversation concerning fees technically might fall within the scope of the attorney-client privilege, the privilege would yield in the face of "a federal statute that implicitly precludes its application". . . The court identified section 60501 as just such a federal statute, remarking that Congress, in enacting section 60501, had rejected lobbying efforts to exclude the legal profession from that section's reporting requirements.

* * *

We find the Second Circuit's reasoning in persuasive. We have held on numerous occasions that "[t]he identity of a client or matters involving the receipt of fees from a client are not normally within the (attorney-client) privilege."

961 F.2d at 940 (emphasis in original, citations omitted). The Eleventh Circuit appears to have correctly described *Goldberger*, which also involved the payment of a cash fee.

As noted above, situations may arise in which a cash payment is made for reasons unrelated to fee payments. To the extent that *Leventhal* and *Goldberger* hold that communications concerning fees are not privileged, those portions of the holdings would not be applicable in such a context. The Committee does not necessarily accept the proposition that communications regarding fees lie outside the scope of Rule 1.6(a), however. It does find the other grounds for these holdings (i.e., the superseding effect of federal law and Congress' rejection of an exception for the legal profession) to be persuasive. In reaching this conclusion, we note that, inasmuch as section 60501 only requires disclosure where payments are made in cash, clients can easily avoid the disclosure through alternative means of payment. See *Goldberger*, 935 F.2d at 504 ("To avoid disclosure under 60501, they need only pay counsel in some other manner than with cash. The choice is theirs. None of the appellants have advanced a legitimate reason why payment other than in cash cannot be made.").

The Committee is also aware of the fact that, prior to *Goldberger*, Bar Opinions in several other states had held that identifying information sought in a Form 8300 should only be released under the compulsion of an IRS

summons or Court order. See, 76 ABA J. 114 (October 1990). As far as we can tell, none of these rulings took account of the factors discussed by the Eleventh and Second Circuits, and, in any case, the Committee views the decisions in *Leventhal* and *Goldberger* as constituting persuasive countervailing authority.

In view of the foregoing, it is necessary to discuss the appropriate response of a lawyer when a client or prospective client tenders a cash payment in excess of \$10,000. In the *Annotated Model Rules of Professional Conduct* ("Annotated Rules"), the ABA discusses the problem at issue here and states that "[t]his 'Form 8300' requirement creates a duty on the part of the lawyer to fully inform clients of these reporting requirements and their effect on confidentiality considerations." *Annotated Rules* at 104 (2d ed. 1992). (endnote 1) In the Committee's view this requirement is drawn from the provisions of Rule 1.4(b), which states that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Additional support for the requirement is found in Rule 1.2(e), which provides that a lawyer must explain relevant limitations on his or her conduct when the lawyer "knows that a client expects assistance not permitted by the rules of professional conduct *or other law*." (Emphasis added).

Approved by the Alaska Bar Association Ethics Committee on September 2, 1993.

Adopted by the Board of Governors on October 23, 1993.

Endnote #1:

The Commentary in the *Annotated Rules* describes the holding in *Goldberger* without taking any position on the decision's impact on obligations under the Model Rules.