



**ILLINOIS STATE  
BAR ASSOCIATION**

# **ISBA Advisory Opinion on Professional Conduct**

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**ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.**

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**This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.6, 4.1, and 8.4. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.**

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## **Opinion 93-16 Supercedes Opinion No. 93-6**

**Opinion No. 93-16  
May, 1994**

Topic: Confidences of a Client.

Digest: Where lawyer's knowledge of client's past violations of tax laws is either privileged or "secret" under Rule 1.6, the lawyer may not properly voluntarily disclose such violations to tax authorities or other persons without the consent of the client.

Ref: Ill. Rules of Prof. Conduct 1.6; 4.1; 8.4

In re The Marriage of Decker, 153 Ill.2d 298, 180 Ill.Dec. 17, 606 N.E.2d 1094 (1992);

In re Masters, 91 Ill.2d 413, 63 Ill.Dec. 449, 438 N.E.2d 187 (1982)

ISBA Opinion 88-13

CBA Opinion No. 86-4

66 S.Cal.L.Rev. 977 "Symposium Issue on the Matter of Kaye Scholer, Fierman, Hays, and Handler," March 1993

ABA Informal Opinion No. 92-366

## **FACTS**

An Illinois attorney was hired by a European citizen to perform various legal functions regarding the man's business and other interest in the United States. The client is also a legal resident of the United States having received his green card several years ago.

In the course of representing the client, the attorney learned that the client and the client's parents may have violated tax laws in the United States and in Europe. The client has asked the attorney to keep his financial affairs confidential.

## **QUESTION**

Is the attorney under any duty to disclose the information about the possible tax violations to the proper governmental authorities?

## **DISCUSSION**

Based on the facts as stated, the information as to the possible past violations of the tax laws of the United States or any other Country would appear to be privileged information as far as it pertains to the client. Thus it would be improper for the attorney to disclose such information without the client's consent to the authorities or anyone else.

### **Privileged Information**

Since there is no judicial or administrative proceeding pending, the basis for keeping such information confidential is the attorney's duty under Rule 1.6 Confidentiality of Information, of the Illinois Rules of Professional Conduct. If a court or administrative proceeding were brought, the basis for refusing to make such disclosure in those formal proceedings would be that the matters are privileged under the evidentiary privilege that attaches to confidential attorney client communications made for a proper purpose. In re The Marriage of Decker, 153 Ill.2d 298, 180 Ill.Dec. 17, 606 N.E.2d 1094, 1102, 1103 (1992). (Contempt sanction against an attorney vacated where there was no proper showing that crime fraud exception to the attorney client privilege applied; no proper showing that the information communicated in confidence by client to his attorney was not privileged.)

### **"Secret" But Not Privileged Information**

If the information about the tax violations of the client does not qualify as privileged, because it was disclosed to the lawyer in the presence of third parties who were not the confidential agents of the lawyer or client, or for some other reason, the information would still qualify as a "secret" of the client, under Rule 1.6. With respect to this non-privileged secret, the lawyer would be under the fiduciary duty of confidentiality not to voluntarily disclose such information to the authorities or anyone else. In re The Marriage of Decker, 606 N.E.2d 1094, 1103 (1992). ISBA Opinion 88-13 (Lawyer has no duty to reveal secret but not privileged information that is incriminating to his client) See also, Chicago Bar Association Opinion, No. 86-4, (A lawyer is not ethically required to disclose to the government the "secret" information that the government made an error in the client's favor in calculating his tax liability where such failure to disclose does not amount to fraud.)

However, if the lawyer were properly ordered by a court or tribunal to answer questions about such

"secret" but non-privileged information, he would have no proper basis in the rules of professional conduct on confidentiality for refusing to answer proper question. In re The Marriage of Decker.

Where the information is privileged, the lawyer may not properly disclose the information voluntarily nor may he be compelled to disclose it. Where the information is merely "secret" under Rule 1.6, the lawyer still may not voluntarily disclose the information, but he will have to disclose it where "required by law or court order." Rule 1.6, In re The Marriage of Decker.

#### Exceptions to the Rule of Confidentiality

An exception to the attorney client privilege and the attorney's fiduciary duty of confidentiality under Rule 1.6 is the "Crime Fraud" exception. If the client "seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity", Decker, at 1101, the communications to the attorney with respect to such activity would not be privileged nor would the attorney be bound by a fiduciary duty of confidentiality toward them. Decker, at 1104, There is no indication on the facts presented that the client sought, obtained, or was using the services of the attorney to perpetuate a fraud on the government or any other person with respect to these past tax violations. Nor is there any indication that the client has declared his intention to commit such violations in the future, which would render such a declaration not privileged. Rule 1.6 (c)(2). Decker, at 1104-05 (a declaration by the client of his intention to commit a crime is not covered by a duty of confidentiality). Accordingly, there is no indication these exceptions would deprive the information in this case of its confidential character.

The mere possession of this confidential information would not require or permit the lawyer to voluntarily disclose it. However, once a lawyer possesses confidential information about a client's past tax violations, the lawyer must avoid making false representations about such matters in the future on behalf of the client since such representations would expose the lawyer to discipline under the Rules of Professional Conduct (Rule 8.4 Misconduct; Rule 4.1 Truthfulness in Statements to Others; Rule 3.3 Conduct before a Tribunal) and to a civil claim that he was facilitating the perpetration of a fraud by the client on third persons.

One may make a disclosure of otherwise confidential or secret information since it is not "prohibited" under Rule 1.6(c)(3) as drafted. This is obviously a very narrow point tied solely to matters that are "in the course of representation" and is analogous to analysis under the Crime/Fraud exception.

#### "Kaye Scholer" Disclosure Issues

Moreover, once the lawyer has privileged or secret information about a client's past tax law violations, the lawyer should take care that in any future representation of this client, the undisclosed information is not used by the client in a way that subjects the lawyer to a civil claim that the lawyer has helped the client perpetrate a fraud on third persons. Continued representation of this client in future matters not related to resolving the past tax violations but as to which the tax violations may play a role carry a risk of the lawyer being named in any fraud action later brought against the client for failure to disclose such past violations. See Generally, In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers' Ethics,

and the Rule of Law, Johnston and Shecter, "Did Anyone Go Too Far?," 66 S.Cal.L.Rev. 977, et seq. March 1993.

#### Information About the Client's Parents

With respect the knowledge the lawyer has about possible past tax violations by the client's parents, if the parents were not clients then such information would not be covered by a fiduciary duty of confidentiality towards them. However, if activities of the client were substantially linked to the activities of the parents and information about the parents was disclosed by the client in confidence in connection with his seeking legal advice, then the confidentiality owed to the client would oblige the lawyer to keep such information confidential. If the activities of the parents were separate from those of the client, the information about them not obtained by virtue of a confidential communication from the client, the lawyer would still be under no duty to disclose information about such activities to the proper authorities. The offense of misprision of a felony "requires more than mere silence or inaction concerning knowledge of the actual commission of a felony and must be accompanied by 'an affirmative act of concealment.'" In re Masters, 91 Ill.2d 413, 63 Ill.Dec. 449, 438 N.E.2d 187, 192 (1982) (Cooperation by a lawyer with an extortionist's demand on this client was prejudicial to the administration of justice and warranted a one year suspension from the practice of law.)

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