

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2003-162**

ISSUE: What ethical issues are raised when a California attorney publicly advocates civil disobedience, including violations of law, in furtherance of her personally-held political, moral, or religious beliefs, and simultaneously practices law?

DIGEST: While attorneys have rights under the First Amendment to express political, moral, and religious beliefs and to advocate civil disobedience, attorneys must follow their professional responsibility when acting upon their beliefs and when advising clients. At a minimum, attorneys' performance of their professional duties to clients must not be adversely affected by the attorneys' personal beliefs or exercise of First Amendment rights. In selecting areas of legal practice, types of cases and particular clients, attorneys should be cognizant of the possibility that their moral, social, and religious beliefs, and their exercise of their First Amendment rights, could adversely affect the performance of their duties to clients.

AUTHORITIES

INTERPRETED: Rules 3-110, 3-210, and 3-310 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code sections 6067, 6068, subdivisions (a) and (c), and 6103.

STATEMENT OF FACTS

An attorney (Attorney) maintains a law practice emphasizing business transactional work, estate and tax planning services, and tax controversy matters. She believes sincerely that the entire state and federal tax system is immoral, and has joined an association (Association) that opposes taxation of individuals and family businesses.

She has spoken at Association conferences and advocated resistance to the state and federal tax systems. In these speeches, she has proposed that individuals and small businesses refuse to report to the Franchise Tax Board and the Internal Revenue Service any transaction or event that might lead to the imposition of income, capital gains, or estate taxation, and has advocated that they also refuse to pay taxes.

Attorney has never represented Association, but she receives a substantial number of client referrals from her speeches on behalf of and through her contacts in the organization. While she has publicly advocated civil disobedience, Attorney advises lawful behavior in counseling her clients.

What ethical considerations govern Attorney's activities?

DISCUSSION

I. Is it ethically permissible for Attorney to publicly advocate the refusal to pay taxes?

The facts do not identify the existence of a law prohibiting advocacy of violations of state or federal tax laws. Even if there were such a law, it might well violate the First and Fourteenth Amendments guarantees of free speech and assembly. A state may not forbid or proscribe the advocacy of a violation of law except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. (*Brandenburg v. Ohio* (1969) 395 U.S. 444 [89 S. Ct. 1827].)

Attorney's status as a lawyer does not change the analysis. To the extent speech is constitutionally protected, Attorney has the First Amendment right to advocate political and social change through the violation of law, even though the First Amendment rights of lawyers are limited in certain respects. (See *Standing Committee on Discipline v. Yagman* (9th Cir. 1995) 55 F.3d 1430 and *In re Palmisano* (7th Cir. 1995) 70 F.3d 483, cert. denied, 116 S. Ct. 1854 (1996) [both dealing with the special problem of discipline for attorneys who publicly criticize judges].)

The Committee notes, however, the distinction between advocating and engaging in violations of law. Attorneys are subject to discipline for illegal conduct even if their conduct occurs outside the practice of law and does not involve moral turpitude. As the California Supreme Court stated in the seminal case of *In re Rohan* (1978) 21 Cal.3d 195, 203 [145 Cal.Rptr. 855], explaining why discipline was appropriate for an attorney's criminal conviction of wilful failure to file tax returns: "An attorney as an officer of the court and counselor at law occupies a unique position in society. His refusal to obey the law, and the bar's failure to discipline him for such refusal, will not only demean the integrity of the profession but will encourage disrespect for and further violations of the law. This is particularly true in the case of revenue law violations by an attorney." (See also *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375] [discipline imposed for two drunk driving convictions, the second while on probation from the first]; *In re Morales* (1983) 35 Cal.3d 1 [96 Cal.Rptr. 353] [discipline imposed for failure to withhold or pay taxes and unemployment contributions].)

II. Is it ethically permissible for Attorney to advise her clients not to pay taxes that are due under applicable law?

It is important to distinguish between Attorney's exercise of her First Amendment rights and her performance of her duties as a lawyer for clients. By virtue of her participation in and speech on behalf of the Association, Attorney has been retained by clients because of the political and social views she publicly has taken regarding the payment of taxes. Although a lawyer may *advocate* political and social change through the violation of tax laws, she may not *advise* a client to violate the law unless she believes reasonably and in good faith that such law is invalid and there is a good-faith argument for the modification or reversal of that law.^{1/}

III. Does Attorney have an ethical duty to disclose her relationship with Association and her position on taxation to prospective and existing clients?

An attorney may not accept or continue the representation of a client, if the attorney has any of the several potential or actual conflicts of interest listed in rule 3-310 of the California Rules of Professional Conduct, absent "written disclosure" to and, in many instances, "informed written consent" from, the client or potential client. Together, the written disclosure requirements in paragraphs (B)(1) and (B)(2) of rule 3-310 apply when a lawyer has or had "a legal, business, financial, professional or personal relationship with" a party or witness in the same matter in which the lawyer represents the client.^{2/} Paragraph (B)(4) of the rule applies when a lawyer "has or had a legal, business, financial, or professional interest in the subject matter of the representation." As the Association is neither a party or

^{1/} Rule 3-210 of the California Rules of Professional Conduct prohibits a member from advising a client to violate the law "unless the member believes in good faith that such law . . . is invalid." Similarly, rule 3-200 of the Rules of Professional Conduct prohibits a member from accepting or continuing employment if he or she knows that the client's purpose is "to present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law." Further, subdivision (a) of California Business and Professions Code section 6068 requires that California attorneys support the Constitution and laws of the United States and of this state. Subdivision (c) of section 6068 requires that an attorney maintain such actions or proceedings only as they appear to him or her legal or just. Each of these rule and statutory provisions identifies a duty of an attorney; California Business and Professions Code section 6103 in turn provides that an attorney may be disciplined for violation of his or her duties as an attorney.

^{2/} "Disclosure" is defined as "informing the client . . . of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client . . ." (Rules Prof. Conduct, rule 3-310(A)(1).) Disclosure permits clients to make knowing and intelligent decisions about their representation when their attorneys have potential or actual conflicts of interest.

witness in the matters of Attorney's tax clients, no disclosure pursuant to paragraphs (B)(1) or (B)(2) would be required. Similarly, as the Association is not the subject matter of the Attorney's representation of tax clients, no disclosure pursuant to paragraph (B)(4) would be required either.

We recognize that paragraph (B)(3) might appear at first glance to be applicable to Attorney. This part of the rule states that a lawyer shall not accept or continue the representation of a client without providing written "disclosure" to the client or potential client where the attorney has or had a "legal, business, financial, professional, or personal relationship with another person or entity" which the attorney "knows or reasonably should" know would be "substantially affected by resolution of the matter." However, there are no facts that implicate paragraph (B)(3). Whether Attorney "knows or reasonably should know" that the Association would be "substantially affected by the resolution of the matter" depends on the totality of the circumstances. These circumstances might include such things as the scope and object of the client's engagement of Attorney.

IV. Can Attorney competently represent clients in business and taxation matters?

Attorney has publicly advocated that others resist state and federal tax laws by refusing to report transactions and events on which taxation could be imposed, and by refusing to pay taxes. While her constitutional rights of speech and assembly may permit her such advocacy, they do not alter her duties to her clients.

These duties include the obligation to provide competent representation found in rule 3-110 of the California Rules of Professional Conduct.^{3/} Business and Professions Code section 6067 requires that attorneys admitted to practice in California take an oath that includes a promise "faithfully to discharge the duties of an attorney to the best of his [or her] knowledge and ability."

Attorney's personal views and public comments regarding taxation do not necessarily render her unable to competently represent a client in a tax matter. Indeed, it is possible that because of her strong beliefs Attorney has a particularly sophisticated knowledge of the substantive law and the procedures that could be pertinent to her work on tax matters. Despite this possibility, it is important to recognize that the duty of competence includes an emotional component. Rule 3-110 prohibits intentional, reckless or repeated incompetence and defines "competence" as the application of "the 1) diligence, 2) learning and skill, and 3) *mental, emotional* and physical ability reasonably necessary for the performance of legal services." (Italics added.) Thus, if Attorney's mental or emotional state prevents her from performing an objective evaluation of her client's legal position, providing unbiased advice to her client, or performing her legal representation according to her client's directions, then Attorney would violate the duty of competence. (See *Blanton v. Womancare* (1985) 38 Cal.3d 396, 407-408 [212 Cal.Rptr. 151]; *Considine v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, 765 [232 Cal.Rptr. 250]; Cal. State Bar Formal Opn. No. 1984-77; and L.A. Cty. Bar Assn. Formal Opn. No. 504 (2001).^{4/}

^{3/} Rule 3-110 of the California Rules of Professional Conduct provides:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

^{4/} We express no opinion as to whether or not there may be a duty to communicate to clients the possible impact of her views on taxation, or the knowledge of the taxing authorities of those views, on the outcome of the representation.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the state Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility or any member of the State Bar.