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December 12, 1979

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ATTORNEY GENERAL OPINION NO. 79- 290

Mr. Leonard O. Thomas, Chairman
Kansas Governmental Ethics Commission
Room 504
109 West 9th Street
Topeka, Kansas 66612

Re: Legislature--State Governmental Ethics--Statement
of Substantial Interests

Synopsis: The identity of a client is not generally a "privileged communication" so as to be within the attorney-client privilege, as that privilege is set forth in K.S.A. 60-426. When required to do so under the state governmental ethics law, pursuant to the provisions of K.S.A. 1978 Supp. 46-229 and K.S.A. 1978 Supp. 46-248 (as amended by L. 1979, ch. 164, § 2), an attorney must disclose the name of a client in a "statement of substantial interests."

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Dear Mr. Thomas:

You request our opinion as to whether the attorney-client privilege "overrides" the provisions of K.S.A. 1978 Supp. 46-229, K.S.A. 1978 Supp. 46-247 (as amended by L. 1979, ch. 164, § 1), and K.S.A. 1978 Supp. 46-248 (as amended by L. 1979, ch. 164, § 2), whereby attorneys holding office and employed in state government are required to report the names of certain clients in an annual "statement of substantial interests."

Mr. Leonard O. Thomas, Chairman

Page Two

December 12, 1979

K.S.A. 1978 Supp. 46-247 (as amended) provides that legislators, candidates for nomination or election to the legislature, individuals holding elected office in the executive branch, candidates for nomination or election to elected office in the executive branch, state officers and employees receiving compensation at a rate of \$20,000 per year or more, individuals whose appointment to office is subject to confirmation by the senate, members of state councils, members of state commissions, members of state boards, and general counsels for state agencies shall file a written statement of substantial interests. Subsection (a)(2) of K.S.A. 1978 Supp. 46-248 (as amended) requires that the statement of substantial interests shall disclose each "substantial interest" of the individual making the statement "in such detail and form as is required by the commission." Subsection (e) of K.S.A. 1978 Supp. 46-229 provides, in part, that, where an individual's compensation is a portion or percentage of each separate fee or commission paid to a business or combination of businesses, "such individual has a substantial interest in any client or customer who pays fees or commissions to such business or combination of businesses from which fees or commissions such individual received an aggregate of one thousand dollars (\$1,000) or more in the preceding calendar year." The State Governmental Ethics Commission has adopted a regulation, K.A.R. 19-41-3(e), which states that the disclosure relating to receipts of fees and commissions in a statement of substantial interests "shall include the name of the client or customer and the address."

The attorney-client privilege is set forth in K.S.A. 60-426, which provides, in part, as follows:

"Subject to K.S.A. 60-437, and except as otherwise provided by subsection (b) of this section, communications found by the judge to have been between lawyer and his or her client in the course of that relationship and in professional confidence, are privileged. . . ."

Section (c) of K.S.A. 60-426 defines "communication" as including "advice given by the lawyer in the course of representing the client" and "disclosures of the client to a representative, associate, or employee of the lawyer incidental to the professional relationship."

The adoption, in 1963, of K.S.A. 60-426 as part of the "Rules of Evidence" set forth in Article 4 of Kansas Statutes Annotated

Mr. Leonard O. Thomas, Chairman
Page Three
December 12, 1979

seems to have had little impact upon court decisions wherein issues have been raised as to whether certain communications are "privileged." In In re Elliot, 73 Kan. 151, 156 (1906), the court first enunciated the circumstances under which a communication between an attorney and client would be deemed "privileged":

"In order for a communication from a client to his attorney to be confidential and to impose upon the attorney the duty of not disclosing the same it must be of a confidential character, and so regarded, at least by the client, at the time, and must relate to a matter which is in its nature private and properly the subject of confidential disclosure."

This rule has been consistently followed in subsequent decisions. See Cranston v. Stewart, 184 Kan. 99 (1959), Syl. 2; Pickering v. Hollabaugh, 194 Kan. 804 (1965), Syl. 3; City of Wichita v. Chapman, 214 Kan. 575 (1974), Syl. 3. Further, in Bank v. McDowell, 7 Kan. App. 568, 575 (1898), it was held that the identity of a client is not a privileged communication, since it does not constitute a communication made to an attorney by the client, nor does it constitute legal advice. We are unaware of any other Kansas case wherein it has been contended that the identity of a client constitutes a "privileged communication," but there are numerous cases from other jurisdictions where the issue has been raised.

In 16 A.L.R. 3d 1047, 1050, it is stated that:

"There is general agreement among the courts that where an inquiry is directed to an attorney as to the name or identity of his client the attorney-client privilege is inapplicable even though the information was communicated confidentially to the attorney in his professional capacity, in some cases in spite of the fact that the attorney may have been sworn to secrecy."

The foregoing annotation cites three types of cases, however, wherein some courts have found the identity of a client to be within the attorney-client privilege and not subject to disclosure.

Mr. Leonard O. Thomas, Chairman
Page Four
December 12, 1979

The three types of exceptions to the "general rule" are summarized at 16 A.L.R. 3d 1047, 1050-1051, as follows:

1. "[S]ituations in which so much has been divulged with regard to the legal services rendered or the advice sought, that to reveal the client's name would be to disclose the whole relationship and confidential communications."

2. "[I]f information already obtained by the tribunal, combined with the client's identity, might expose him to criminal prosecution for acts subsequent to, and because of, which he had sought the advice of his attorney."

3. "[I]n tax proceedings, some courts have declared a taxpayer-client's name privileged when so much has been revealed concerning the legal services rendered that the disclosure of the client's identity exposes him to possible investigation and sanction by government agencies."

It is difficult to speculate as to whether a Kansas court would adopt any of these "exceptions" to the general rule and hold that the identity of a client is a "privileged communication" in a particular case. However, it appears that such speculation is unnecessary in determining whether any attorney-client privilege relative to a client's identity must control over the provisions of K.S.A. 1978 Supp. 46-248.

K.S.A. 60-407 provides, in part, as follows:

"Except as otherwise provided by statute . . . (c) no person is disqualified to testify to any matter, and (d) no person has a privilege to refuse to disclose any matter or to produce any object or writing, and (e) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any object or writing. . . ." (Emphasis added.)

This provision abolishes all pre-existing privileges relative to attorney-client relationships, State v. Poulos, 196 Kan. 253, 263 (1966), and leaves the scope of the privilege entirely statutory, as set forth in K.S.A. 60-426. Therefore, it cannot

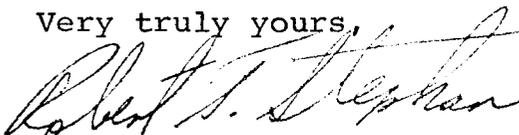
Mr. Leonard O. Thomas, Chairman
Page Five
December 12, 1979

be doubted that the legislature has the power to modify the application of the attorney-client privilege, or to repeal it entirely.

In our judgment, the provisions of K.S.A. 1978 Supp. 46-229 and K.S.A. 1978 Supp. 46-248 (as amended by L. 1979, ch. 164, § 2) modify and control over any attorney-client privilege relative to a client's identity. There is no exclusion in said statutory provisions (relative to the requirement of filing statements of substantial interests) which would permit an attorney who holds office or is employed in state government to refuse to disclose the identity of a client. We must, therefore, conclude that the legislature has determined that the public interest in full disclosure of the "substantial interests" of attorneys holding office and employed in state government justifies the intrusion, if any, on the attorney-client privilege in requiring the disclosure of the names of certain clients of such attorneys.

Finally, it should be noted that an attorney who discloses the names of clients in a statement of substantial interests will not violate the "Code of Professional Responsibility," as set forth in Rule No. 501 of the Supreme Court, K.S.A. 7-125. Disciplinary Rule 4-101 of the Code provides, in part, that "[a] lawyer may reveal . . . confidences or secrets when . . . required by law or court order." K.S.A. 1978 Supp. 46-248 (as amended by L. 1979, ch. 164, § 2) is such a law requiring disclosure.

Very truly yours,



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RTS:BJS:TRH:jm