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Informal Opinion 09 – 02

The Lawyer's Ethical Obligations While Engaging in Civil Disobedience

An opinion has been requested regarding the exposure to sanctions under the Rules of Professional Conduct of an attorney who seeks to engage in an act of what he describes as civil disobedience, more specifically protesting acts and policies of the federal government prosecuting a war in Iraq by withholding payment (as opposed to not filing a return) of all or part of his income tax. Not presented here are the duties owed by the lawyer as counselor or advisor to a client who seeks to engage in civil disobedience.

At the threshold it must be determined whether the lawyer's peculiar status as an officer of the court and someone subject to the Rules of Professional Conduct permits him to engage in acts of civil disobedience at all. Civil disobedience has been defined as "the public and nonviolent violation of law for which the actor accepts punishment willingly."¹ Accordingly, no citizen engaged in such conduct does so with the expectation that the conduct will be excused. Indeed to the contrary, the citizen fully expects and willingly accepts the punishment as part of his action. In the case of the lawyer, like any other citizen, his behavior is subject to the sanctions available under the law that he intentionally breaks. Yet, due to the lawyer's unique status vis-à-vis the law generally, he is exposed to additional sanctions under the Rules of Professional Conduct. The Preamble to the Rules offers a number of observations regarding the role of the lawyer. "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." "A lawyer's conduct should conform to the requirements of the law both in professional service to clients and in the lawyer's business and personal affairs." Thus the lawyer who by his personal conduct would engage in acts of disobedience submits to the sanctions of the law by virtue of his role as a citizen and further to the Rules of Professional Conduct that bind his profession and status as an officer of the court.

The lawyer has obligations to maintain justice within the legal system but is also ethically obliged to conform to the law. It is where the law is or is perceived as unjust to

¹Prof. Judith A. McMorrow, "Civil Disobedience and the Lawyer's Obligation to the Law." Boston College Law School Research Paper series, Paper No.1991-01 January 1 1991, at page 140. See also J. Rawls, A Theory of Justice 364 (1971), where civil disobedience is defined as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."

the point that the attorney feels morally constrained to act to the contrary that these obligations no longer run parallel but in fact collide and the lawyer, like any citizen, may be guided by conscience even while risking sanctions beyond those encountered by his fellow citizens. It remains, however, not an unusual case for the lawyer alone or in conjunction with others to challenge what is perceived to be an unjust law. Indeed, in some instances, the Rules of Professional Conduct permit latitude sufficient to resolve the conflict between the lawyer's competing duties. Novel arguments to change the law made in good faith before an appropriate forum which are not frivolous are permissible. *See* Rule 3.1. Similarly, what have been referred to as test cases are recognized ways of challenging unjust laws. To be sure such test cases were used with success in the civil rights arena and led to the demise of poll taxes and literacy tests and other obstructions to voting rights. In such cases, the Rules of Professional Conduct contemplate the activities and as they are permitted, the lawyer is not in jeopardy of sanctions.

Open disobedience to law, in situations not covered by Rule 3.1, is another matter. That is not to say that every violation of the law committed in civil disobedience carries sanctions under both the law involved and the Rules of Professional Conduct. Historically, the lawyer is subject to sanctions under the Rules of Professional Conduct for violations of the law that reflect on the fitness to practice law. Rule 8.4(3) provides that the lawyer not "engage in conduct involving dishonesty, deceit, or misrepresentation. Subsection 2 states that the lawyer shall not engage in a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." As the commentaries state, it is those violations of the law that constitute acts of moral turpitude that lead to professional discipline in addition to the same sanctions faced by the ordinary citizen. The commentaries point further to instances where failures of personal morality such as adultery may not be the basis for discipline, but acts of violence, dishonesty and breach of trust will.

It has been stated in the commentaries to Rule 8.4 that a willful failure to file a tax return, a criminal offense, is also one that will lead to professional discipline. Where there exists precedent that identifies violations of the law that have resulted in professional discipline, the consequences of those acts are obvious. Here however there is no precedent, at least in Connecticut, for the consequences to a lawyer attributable to his refusing to pay all or a portion of his federal income tax as a matter of conscience. The commentaries do not discuss whether the failure to pay the tax in whole or in part is an act of moral turpitude and there is no law on point in this state. It is difficult to predict how the issue might be settled. Certainly reasonable minds might differ; the determination must be left ultimately to the body that determines probable cause or adjudicates a grievance. Returning to the definition of civil disobedience, the act of defiance is one for which the actor expects to be punished. The lawyer engaged in civil disobedience is prepared to accept the consequences of his actions for violation of the specific law involved. However absent controlling authority to the contrary he must also at least anticipate that the consequences of his disobedience could result in his having to defend himself against allegations that the same acts are punishable under the Rules of Professional Conduct. The exercise of conscience is never without cost, nor has it ever been so considered.

THE COMMITTEE ON PROFESSIONAL ETHICS

By Wick R. Chambers

Wick R. Chambers, Chair