NEW YORK STATE BAR ASSOCIATION

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 635 - 9/23/92 (9-92)

Clarifies N.Y. State 531 (1981)

Topic: Conflict of interest; adverse interests of lawyer; lawyer as witness; duty to report violation of disciplinary rule.

Digest: Lawyer may not represent a client believed to have been the victim of legal malpractice committed by the lawyer's former firm if his or her personal interests would substantially impair his or her independent professional judgment on behalf of the client, or if the attorney ought to be called as a witness in the malpractice action. Under DR 1-103(A), the lawyer is not required to report the conduct of the lawyers in the former firm unless he or she has sufficient knowledge of the pertinent facts, that knowledge is not protected as a client confidence or secret, and the conduct of the prior firm both constitutes a violation of a Disciplinary Rule and raises a substantial question as to the honesty, trustworthiness or fitness in other respects of attorneys at the former firm.

Code: Preliminary Statement; DR 1-102(A) (7); 1-103(A); 4-101(A); 5-101 (A); 5-102 (A) and (B); 5-105 (C); 6-101(A); 7-101(A); 7-102(B) (1); 7-105 (A); EC 1-4; 5-2 , 5-10 .

QUESTIONS

(l) May a lawyer who believes that his former firm committed malpractice in representing a client undertake to represent that client in the lawyer's new practice and thereafter counsel and assist the client in the prosecution of a malpractice claim against the lawyer's former firm?

(2) Does the lawyer have an obligation to report to the appropriate authorities his belief that lawyers in his former firm acted improperly?

OPINION

An attorney was employed by Firm X until he recently left to start his own practice. While at Firm X, the lawyer participated in the representation of P, a pedestrian injured by a hit-and-run driver, with respect to, among other things, P's claim against his own insurer for the cost of his medical care. The lawyer believes this claim was settled for an inadequate sum; P is now the defendant in a nonpayment suit brought by the long-term rehabilitation facility in which he resided for several months. The lawyer believes that P's present predicament is the result of the failure of other attorneys at Firm X to anticipate and take into account various factors, including the foreseeable need for and expected cost of long-term medical care, when settling P's claim against his insurer.

Firm X has defended P in the nonpayment lawsuit. When the lawyer advised P that he was leaving the firm, P asked the lawyer to consider handling the matter in his new practice, and further asked the lawyer's opinion as to whether Firm X was responsible for P's situation. The lawyer did not comment to P on either question, but believes that Firm X may have committed legal malpractice in representing P.

A. Accepting the Representation

If the lawyer were to accept the proffered representation of P in the nonpayment lawsuit, he would be obligated to represent P's interests zealously within the bounds of the law. *See* DR 7-101(A). This would include, at a minimum, advising P to consider taking legal action against Firm X, if he believed it to be justifiable and in P's interests (*e.g.*, to provide a source of potential payment to the long-term rehabilitation facility). In these circumstances, however, the lawyer may not be able to counsel or assist P in taking action against Firm X because of his own conflicting financial, business or personal interests. *See* DR 5-101 (A)[1].

If the lawyer was personally involved in the improper handling of the matter while at Firm X, or if he had been a partner in Firm X at the time the acts of malpractice were committed, his potential status as a party defendant, and his interest in avoiding liability or other financial consequences for those acts (such as increased malpractice insurance premiums) would substantially impair his independent professional judgment on behalf of his client. The lawyer would have a similar conflict of interest under DR 5-101 (A) if Firm X responded to P' s malpractice claim by asserting a contractual, tort, or other legal claim

---

[1] DR 5-101 (A) provides that: " [e]xcept with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests."

against the lawyer, whether as a third-party claim or in a plenary action.[2]

While DR 5-101 (A) provides that a client may consent to representation by a lawyer whose financial, business, property or personal interests differ from those of the client, thereby waiving the conflict of interest, consent is ineffective if there is a reasonable probability (viewed objectively) that the lawyer's interests will affect adversely the advice to be given or the services to be rendered to the client. *See* N. Y. State 595 (1988). For example, if it were the case, as hypothesized above, that while associated with Firm X, the lawyer had been personally involved in the acts of malpractice, or if the lawyer had been a partner in Firm X at the time the acts were committed, it would not be obvious that the lawyer could adequately represent P's interests because the lawyer's personal interests would affect adversely his representation of P. In such circumstances, P's consent could not cure the conflict.

In sum, if taking action against Firm X is appropriate and in P's interests, but the lawyer's ability to counsel or assist P in connection with such action is fettered by conflicts of interest under DR 5-101 (A), the lawyer may not represent P in connection with his lawsuit against Firm X unless it is obvious that he could adequately represent P's interests, and his interests will not affect adversely the advice to be given or the services to be rendered to P, and unless P consents after full disclosure of the material facts giving rise to the conflict, and the implications thereof.

The lawyer's ability to represent P also may be impeded by his potential dual status as attorney and witness in the proceedings. He may, for example, foresee the need to testify personally, as a fact witness, concerning allegedly negligent acts committed by Firm X. If the lawyer learns, or if it becomes -- or if it already has become -- obvious, that he "ought to be called as a witness on behalf of his client," he would be precluded from appearing as an advocate in the proceedings, and may be subjected to a disqualification motion, to the disadvantage of P. DR 5-102(A).[3] In this regard, we note that any doubts "should be resolved in favor of the lawyer testifying and against the lawyer's becoming or continuing as an advocate." EC 5-10.

These ethical hindrances to the lawyer's representation of P in the malpractice action also may have an impact on the lawyer's ability to represent P fully in the nonpayment proceeding. At a minimum, if the lawyer truly believes that a claim of malpractice may lie against Firm X, but is unable to assist P in the prosecution of that claim, he should not defend P in the nonpayment lawsuit unless he first advises P: (l) that P may have a claim against Firm X for malpractice in connection with which the lawyer can

---

[2] We express no opinion as to whether such a claim would be supportable as a matter of law or fact.

[3] If the lawyer were affiliated with other lawyers in a firm, the firm could continue to prosecute the case notwithstanding his personal disqualification from serving as an advocate before the tribunal, DR 5-102(A), unless and until it became "apparent that the [lawyer's] testimony is or may be prejudicial to the client," DR 5-102(B).

render no assistance; (2) that P should consult another lawyer for the purpose of evaluating and pursuing such a claim, if warranted; and (3) that P may be better served by having a single, nonconflicted lawyer representing him in both matters.

B. Reporting Attorney Misconduct

A lawyer's obligation to report another attorney's misconduct is governed by DR 1-103(A), as amended effective September 1990, which provides:

> A lawyer possessing knowledge, not protected as a confidence or secret, of a violation of [a disciplinary rule] that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Before discussing DR 1-103(A), and the several reasons why that rule may not be implicated here, we note that the rule only addresses the circumstances in which a lawyer is *obligated* to make disclosure of another lawyer's misconduct, and does not purport to limit the circumstances under which a lawyer is *permitted* to make such a report. As a general proposition, a lawyer is always free to report evidence of what may constitute improper conduct by another attorney, subject to the obligations to preserve client confidences and secrets. The lawyer need not have actual proof of misconduct; a good faith belief or suspicion that misconduct has been committed is a sufficient basis for making a report. *See* N.Y. State 480 (1978).

It bears emphasis that this right to report misconduct, though generally serving the salutary purpose of assisting courts, disciplinary agencies and other authorities in policing members of the bar, is unquestionably susceptible to abuse by attorneys seeking to gain advantages or concessions from other lawyers in the course of litigation, in private business transactions, or in interpersonal relationships, or by attorneys acting purely out of spite. Notwithstanding the confidentiality of disciplinary complaints, *see* Judiciary Law §90, it would be patently improper for a lawyer to make a report of misconduct and subject another lawyer to investigation without having a reasonable basis for doing so, *see* DR 1-102(A)(7), or solely to gain a tactical advantage in a matter, *cf.* DR 7-105(A).

As to whether the lawyer is *obligated* to report the conduct of Firm X to an appropriate authority, he must be satisfied that each of the following four prerequisites in DR 1-103(A) has been met:

1. Does the Lawyer Have "Knowledge"?

The lawyer must possess a sufficient degree of knowledge of ostensibly wrongful conduct on the part of Firm X in order to trigger the reporting obligation of DR 1-103(A). Although absolute certainty is not required under the rule, *see* Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel,* 1988 Ill. L. Rev. 977, 986, a mere suspicion of misconduct does not give rise to an obligation to report. See

N.Y. State 480 (1977); N.Y. City 1990-3, 82-79, 80-92; *see also* Arizona Op. 90-13 (more than a "reasonable belief" is required); Nebraska Op. 89-4 (more than a mere suspicion is required); Philadelphia Op. 90-7 (must have actual knowledge of a violation); *Williamson v. Council of the North Carolina State Bar*, 266 S.E.2d 391 (N.C. Ct. App. 1980). As EC 1-4 counsels, a lawyer should reveal information "which the lawyer *believes clearly* to be a violation of the Disciplinary Rules . . . ." (emphasis supplied). Thus, DR 1-103(A) would not be triggered unless the lawyer has a clear belief, or possesses actual knowledge, as to the pertinent facts.

2. Is the Lawyer's Knowledge Protected as a Confidence or Secret?

The lawyer must next consider whether any knowledge he possesses, and would necessarily include in his report, is a client secret or confidence as defined in DR 4-101(A) ("information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client"). *See generally* N.Y. State 562 (1984), 525 (1980). If his knowledge is so protected, he may not disclose it without P's consent after full disclosure. *See* C. Wolfram, *Modern Legal Ethics* 685 (1986).[4]

3. Did the Conduct in Question Violate a Disciplinary Rule?

Once the lawyer has concluded that he "knows" the relevant facts, and that those facts are not protected as client confidences or secrets, he must satisfy himself that the conduct in question rises to the level of a violation of a Disciplinary Rule. Although "[c]ourts have not hesitated … to apply the mandatory standards of the lawyer codes to lawyers as appropriate measures of required lawyer conduct in malpractice suits," Wolfram, *supra* at

---

[4] In a 1989 decision, the Illinois Supreme Court suspended a lawyer under DR 1-103(A) for failure to report another attorney's misconduct even though his knowledge may have been protected as a client "secret." *See In re Himmel*, 533 N.E.2d 790, 792-94 (Ill. 1989). The decision has been widely criticized, in part for its interpretation of Illinois' DR 1-103(A), which, like the former New York version, required a lawyer to report "unprivileged" knowledge of misconduct. *See, e.g.*, Rotunda, *supra* at 986-91. *See also* Marcotte, *The Duty to Inform,* 75 A.B.A.J. 17 (1989); Burke, *Where Does My Loyalty Lie?: In re Himmel*, 3 Geo. J. Legal Ethics 643, 649-53 (1990). *But see* Lieberman, *A Lawyer's Duty to Report Misconduct Under DR 1-103(A)*, N.Y.L.J., Aug. 21, 1990, at 1, 2, 4 (hereinafter "Lieberman") (arguing that the *Himmel* case would have been decided no differently under New York's new version of DR 1-103[A]). Under the New York Code, information protected by the attorney-client privilege is termed a client "confidence," DR 4-101(A), thereby rendering the term "privileged" in the former DR 1-103(A) ambiguous. Although this Committee never expressly addressed the issue under the superseded New York version of DR 1-103(A), it implicitly defined the term "privileged" as encompassing "confidences and secrets." *See* N.Y. State 531 (1981). In any event, the current version of DR 1-103(A) renders express what was previously implied: A lawyer has a duty to report misconduct only when the lawyer's knowledge is "not protected as a confidence or secret." *See generally* Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility,* 18 Fordham Urb. L.J. 283, 295-96 (1991); Statement of the Executive Committee of the Association of the Bar of the City of New York, *Proposed Amendments to the Lawyer's Code of Professional Responsibility*, 42 Record 323, 328-30 (1987).

212,[5] in many cases negligent conduct that constitutes common law malpractice will not also involve an ethical violation. Thus, the lawyer must believe that Firm X engaged in conduct clearly violative of a Disciplinary Rule such as DR 6-101(A), which provides a basis for sanctioning lawyers for willful incompetence or neglect, or DR 7-101(A), which subjects lawyers to discipline if they fail to seek the lawful objectives of their clients, fail to carry out contracts of employment with their clients, or prejudice or damage the client during the course of the professional relationship.

As noted above, EC 1-4 cautions lawyers to reveal information only in the presence of a clear belief that a violation of a Disciplinary Rule has occurred. This determination must be made by the lawyer. If, however, the lawyer has doubts as to whether a Disciplinary Rule has been violated by attorneys at Firm X, or whether a valid claim for legal malpractice may be asserted at all, he probably does not have the requisite degree of certainty.

We emphasize that nothing contained in this Opinion should be construed as an expression of any view on the part of this Committee as to whether the conduct of Firm X constituted legal malpractice or violated a Disciplinary Rule. Resolution of such issues would require us to resolve issues of fact and law, as well as to evaluate the past conduct of lawyers other than the inquiring attorney.

4. Does the Violation Raise a Substantial Question as to Honesty, Trustworthiness or Fitness to Practice Law?

Finally, assuming the lawyer has concluded that he has knowledge of the violation of a Disciplinary Rule by lawyers in Firm X, and that he may reveal that knowledge consistent with his Canon 4 obligations, DR 1-103(A) only requires disclosure *provided* the violation "raises a substantial question as to [the lawyers'] honesty, trustworthiness or fitness in other respects as a lawyer…." This significant limitation on the reporting requirement, imported from Rule 8.3 of the Model Rules of Professional Conduct,[6] *see* Gross, *supra*, at 296, means that not all violations of Disciplinary Rules must be reported, but only the most serious ones.[7] The Commentary to Model Rule 8.3 is instructive in this regard:

If a lawyer were obliged to report every violation of the Rules, the failure to report

---

5 The New York Lawyer's Code of Professional Responsibility disclaims any undertaking "to define standards for civil liability of lawyers for professional conduct." *See* Preliminary Statement.

6 Model Rule 8.3 provides that "[a] lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

7 Indeed, under Model Rule 8.4(b), a lawyer is not automatically guilty of professional misconduct even if the lawyer commits a criminal act, unless that act "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

> any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

We are not in a position to determine, on the basis of the facts submitted to us, whether the conduct of Firm X rises to the level of seriousness required by DR 1-103(A). Certainly, if the conduct in question consisted of, for example, false statements to a tribunal, civil or criminal fraud, an intentional and material misrepresentation to a client, or mismanagement of client funds, we would not hesitate to conclude that such conduct raised a substantial question as to the lawyer's honesty, trustworthiness, or fitness in other respects as a lawyer.[8]

We emphasize that not every instance of professional malpractice, however, would dictate such a conclusion. *See, e.g.*, Wolfram, *supra,* at 190 & n.36; ABA Inf. Op. 1273 (1973). Furthermore, just as matters of opinion, judgment or strategy upon which competent lawyers could disagree do not necessarily give rise to civil liability for malpractice, such matters would not ordinarily form the basis for attorney discipline, and thus do not involve the kind of conduct the reporting of which is required under DR 1-103(A).

* * *

It is for the lawyer to determine, based on his knowledge of all the pertinent facts and circumstances, whether the foregoing prerequisites have been met. Should he so conclude, disclosure should be made promptly. *See* N.Y. City 1990-3; Lieberman, *supra*, at 4. It should be noted that the lawyer would not be obligated to report *his own* violation of a Disciplinary Rule.[9]

CONCLUSION

The lawyer may not counsel or assist a client in connection with a potential malpractice claim against the lawyer's former firm if the lawyer's personal, financial or business interests would substantially impair his independent professional judgment on behalf of the client. Even with full disclosure, client consent would be ineffective to cure the conflict if, for example, the lawyer had been personally involved in the acts of malpractice

---

8 *See* N.Y. City 1990-3; Lieberman, *supra*, at 2, 4.

9 The prior rule was susceptible to an interpretation that a lawyer was obligated to report his or her own misconduct because it referred only to reporting "unprivileged knowledge of *a violation of DR 1-102*," and did not contain the current limitation on the reporting obligation to violations by "another lawyer." It has been observed that the prior version of DR 1-103(A) did not take into account the attorney's fifth amendment right against self-incrimination if there is a risk of criminal prosecution. *See* Rotunda, *supra*, at 990; N.Y. City 1990-3.

while associated with his former firm, or if the lawyer had been a partner in the firm at the time the acts were committed. Additionally, the lawyer may not accept the representation if he foresees the need to testify personally, as a fact witness, concerning allegedly negligent acts committed by his former firm.

The lawyer is not required under DR 1-103(A) to report the conduct of the lawyers in his former firm to appropriate authorities unless (1) he has sufficient knowledge of the pertinent facts, mere suspicions being inadequate to trigger the reporting obligation; (2) the knowledge he possesses is not protected as a client confidence or secret; (3) the conduct of the prior firm rises to the level of a violation of a Disciplinary Rule, which many acts constituting malpractice may not; and (4) the violation raises a substantial question as to the honesty, trustworthiness or fitness in other respects as a lawyer of attorneys at the lawyer's former firm.