NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #480 - 3/1/78 (130-77)

Topic: Duty to report violation of Disciplinary Rule; former client; conflict of interest.

Digest: Lawyer may divulge his suspicion of another's misconduct to an appropriate authority, but should not communicate same to suspected counsel's present client; actual knowledge of misconduct distinguished.

Code: Canon 1 ;
EC 1-4, 7-18, 9-1, 9-5 ;
DR 1-102(A)(1), 1-103(A)
5-101(A), 5-105(A)
7-104(A)(1).

QUESTION

A lawyer has obtained unprivileged information which causes him to suspect that his former client's present counsel may have interests which conflict with those of the client. Under these circumstances, may the lawyer divulge such information to his former client?

OPINION

The question posed requires us to weigh two principles which appear as countervailing considerations in the present context.

On one hand, there is the principle that a lawyer should respect the sanctity of the attorney-client relationship and refrain from casting unwarranted aspersions upon the conduct of other members of the Bar. Cf., EC 7-18 and DR 7-104(A)(1) with EC 9-1 and 9-5.

On the other hand, there is the principle articulated by Canon 1 of the Code which enjoins lawyers to "assist in maintaining the integrity and competence of the legal profession": a principle that is further elaborated by EC 1-4 and DR 1-103 which require lawyers to report certain instances of misconduct. Herein it will be noted that the kinds of misconduct which lawyers are required to report include the violation of any Disciplinary Rule. Cf., DR 1-103(A) with DR 1-102(A)(1). And, specifically with reference to the circumstances of the question posed, the Disciplinary Rules include various proscriptions against conflicting interests. See, e.g., DR 5-101(A), DR 5-105(A). Hence, if the inquiring lawyer had "unprivileged knowledge of a violation of [those provisions of the Code relating to conflicts of interest]" he would be required to "report

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such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." DR 1-103(A).

The Code, it will be noted, speaks in terms of "knowledge of a violation" and does not expressly relate to suspicions. We believe this omission to be significant and conclude that the Code is intended to require a lawyer to report only where he may reasonably be said to know that a violation has been committed; and, where the lawyer entertains nothing more than a suspicion, he is not obliged to report.

Although the Code does not require a lawyer to report mere suspicions, there would certainly be no impropriety in divulging the same, along with such relevant information as he may possess, to an appropriate authority "empowered to investigate or act" on such information. Little can be lost by this practice and the public, as well as the profession, can be spared future misconduct. See, N.Y. State 456 (1977).

While suspicions may thus properly be divulged to an appropriate authority, there is, however, a substantial danger in permitting a lawyer to approach present clients of the suspected counsel. Herein the sanctity of the attorney-client relationship weighs far more heavily in favor of proscribing the communication. The fact that a former client is involved, as under the circumstances of the question posed, does not diminish the danger. Usually the interests of all can best be served by reporting suspicious conduct to an appropriate authority. The former client's confidence in his present counsel should not be jeopardized unnecessarily.

By so limiting the communication of mere suspicions, we do not mean to suggest that a lawyer may not divulge actual knowledge of a violation of the Disciplinary Rules to any class of persons, including former clients. While the lawyer is not obliged to disclose such information to anyone but an appropriate authority, he may nevertheless do so provided his information is unprivileged and employed in a manner which is not calculated to acquire clients at another's expense. See, N.Y. State 310 (1973), N.Y. State 305 (1973); See also, Drinker, Legal Ethics 190 (1953). In assessing the propriety of such communications, one of the most relevant considerations is the need to avoid irreparable injury to the client's interests through prompt and direct action. Of course, the substantive law of defamation applies to these communications and the lawyer clearly acts at his peril should his information prove incomplete or erroneous.

For the reasons stated, and subject to the qualifications hereinabove set forth, the question posed is answered in the negative.
