



Committee on Professional Ethics

Opinion 854 (3/11/11)

Topic: Reporting known or suspected violation of Rules of Professional Conduct by another lawyer.

Digest: Lawyer who was employed by another lawyer must report knowledge of former employer's violation of the Rules of Professional Conduct if the violation raises a substantial question about the employer's honesty, trustworthiness, or fitness as a lawyer and if the report does not disclose confidential information. If the former employee lacks knowledge, he may report a good faith belief or suspicion of the former employer's professional misconduct to an appropriate authority if the report does not disclose confidential information, but may not communicate that belief or suspicion to the employer's clients.

Rules: 1.6, 8.3(a) & (c).

FACTS

1. Lawyer A (for "Associate") was formerly employed by another lawyer, Lawyer P (for "Partner"). Lawyer A believes that Lawyer P wrongfully failed to pay wages and premiums on employer-provided health insurance, overbilled clients, and misrepresented to his clients the services that he could perform for them. (Lawyer A does not suggest that any of the clients were his personal clients, and we assume for purposes of this inquiry that they were not.)

QUESTION

2. Lawyer A (the inquirer) has raised two related questions:
 - A. May (or must) Lawyer A report Lawyer P's alleged misconduct to a disciplinary authority?
 - B. May (or must) Lawyer A inform Lawyer P's clients about Lawyer P's alleged misconduct?

OPINION

Question A: May (or must) Lawyer A report Lawyer P's alleged misconduct to a disciplinary authority?

3. The most relevant rule in the New York Rules of Professional Conduct (the "Rules") is Rule 8.3. That rule provides, in pertinent part:

(a) A lawyer who knows 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 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

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- (c) This Rule does not require disclosure of:

- (1) information otherwise protected by Rule 1.6; or
- (2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

4. In N.Y. State 635 (1992), which construed DR 1-103 (the nearly identical predecessor to Rule 8.3), this Committee opined that a lawyer in Lawyer A's situation *must* report professional misconduct by another lawyer (here, Lawyer P) if four criteria are satisfied. Those criteria are consistent with the New York Rules of Professional Conduct that took effect on April 1, 2009. The four criteria are as follows:

- A. Lawyer A has "actual knowledge" or a "clear belief" as to the pertinent facts, *i.e.*, more than a "mere suspicion" or a "reasonable belief";
- B. None of the information that would be essential for Lawyer A's report is protected as confidential information (see Rule 8.3(c)(1)) and none of the information was gained while participating in a bona fide lawyer assistance program (see Rule 8.3(c)(2));

- C. Based upon Lawyer A's knowledge about the facts, Lawyer A knows or has a "clear belief" that Lawyer P has violated one or more Rules of Professional Conduct; and
- D. The violation "raises a substantial question" as to Lawyer P's "honesty, trustworthiness or fitness as a lawyer" (Rule 8.3(a)).

5. As in N.Y. State 635, we express no opinion here on the question whether Lawyer P's alleged conduct was a "violation of the Rules of Professional Conduct" or, if it was, whether the violation raises a "substantial question" as to Lawyer P's "honesty, trustworthiness or fitness as a lawyer ..." Rule 8.3(a). Answering those questions would require us to make factual determinations about circumstances that may well be disputed, and would require us to evaluate the past conduct of an attorney other than the inquirer. As in N.Y. State 635, "It is for [Lawyer A] to determine, based on his knowledge of all the pertinent facts and circumstances, whether the foregoing prerequisites have been met" and, therefore, whether Lawyer A *must* report Lawyer P's misconduct to an appropriate tribunal or disciplinary authority.

6. Even if Lawyer A determines that he is not *required* to report lawyer P, he is nevertheless *permitted* to report his reasonable suspicions of misconduct if the report does not reveal confidential information protected by Rule 1.6. "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." N.Y. State 635 at p. 4, *citing* N.Y. State 480 (1978.) *See also* SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 77 (2008 ed.) ("a lawyer may report another lawyer based on rumor, suspicion, or hearsay, and may report activities raising less-than-substantial questions about a lawyer's fitness as a lawyer").

7. But the freedom to report a good faith belief or suspicion of misconduct should not become a pretext for a report intended "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." N.Y. State 635 at p. 4. Even though disciplinary complaints are confidential under 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 or solely to gain a tactical advantage in a matter." *Id.* (citations omitted). *See also* SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED, *supra*, at 78 (mandatory reporting rule "should not be used as a weapon against opposing lawyers or competing law firms").

Question B: May (or must) Lawyer A inform Lawyer P's clients about Lawyer P's alleged misconduct?

8. Lawyer A is not *required* to inform Lawyer P's clients about Lawyer P's alleged misconduct. However, assuming Lawyer A does not improperly disclose confidential information concerning any client, and assuming Lawyer A acts in good faith, Lawyer A is

permitted to disclose knowledge (as distinguished from a suspicion) of Lawyer P's misconduct to the affected client or clients. (Whether such a disclosure could violate the dictate of § 90 of the New York Judiciary Law that disciplinary complaints shall be confidential unless and until professional discipline is publically imposed is a question of law as to which we offer no opinion.)

9. However, before making any such discretionary report to Lawyer P's clients, Lawyer A should carefully consider the dangers of informing another lawyer's clients about that lawyer's misconduct. As this Committee observed in N.Y. State 480 (1978), the dangers inherent in reporting another lawyer's misconduct to that lawyer's clients are greater than the dangers of reporting the lawyer's misconduct to appropriate authorities. In particular, divulging another lawyer's alleged misconduct to that lawyer's clients may unnecessarily endanger that lawyer's attorney-client relationships.

10. Moreover, a lawyer may not inform another lawyer's clients about mere suspicions of the other lawyer's misconduct. We recognized in N.Y. State 480 that a lawyer may properly report mere suspicions to an appropriate authority, but we perceived "a substantial danger in permitting a lawyer to approach present clients of the suspected counsel" because in that instance "the sanctity of the attorney-client relationship weighs far more heavily in favor of proscribing the communication. ... 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."

11. In deciding whether to disclose either actual knowledge or a clear, good faith belief of misconduct by another lawyer to anyone other than an appropriate tribunal or disciplinary authority, therefore, a lawyer should carefully weigh (i) the certainty or uncertainty of his belief (*i.e.*, whether the belief rises to the level of knowledge or a clear belief, as opposed to a mere suspicion), (ii) the risk of unnecessary and perhaps unwarranted damage to the other lawyer's attorney-client relationships, and (iii) the countervailing risks of irreparable injury to the interests of the other lawyer's clients absent prompt and effective disclosure to them.

CONCLUSION

12. Lawyer A must report the conduct of his former employer, Lawyer P, to an appropriate authority if all four of the following criteria are met: (1) Lawyer A has knowledge or a clear belief concerning the pertinent facts (*i.e.*, he has more than a reasonable belief or mere suspicion); (2) Lawyer A's report will not reveal confidential information protected by Rule 1.6 or information that Lawyer A gained while participating in a bona fide lawyer assistance program; (3) the conduct by Lawyer P constitutes a violation of one or more Rules of Professional Conduct; and (4) the violation raises a substantial question as to Lawyer P's honesty, trustworthiness or fitness as a lawyer.

13. If all four of those criteria are met, Lawyer A may also report such misconduct to the affected clients of Lawyer P – but before informing the clients, Lawyer A should carefully weigh both dangers to Lawyer P's attorney-client relationships if the affected

clients are informed against the countervailing dangers to the clients if they are not informed.

14. Even if Lawyer A is not satisfied that all four criteria have been met, Lawyer A may nevertheless report a good faith belief or suspicion of Lawyer P's alleged misconduct to an appropriate authority, provided that the report of the suspected misconduct does not require the disclosure of confidential information or information that Lawyer A gained while participating in a bona fide lawyer assistance program. But Lawyer A may not inform Lawyer P's clients about mere suspicions of Lawyer P's misconduct.

(17-10)