

Nebraska Ethics Advisory Opinion for Lawyers
No. 89-4

AN ATTORNEY POSSESSING UNPRIVILEGED KNOWLEDGE OF A VIOLATION OF THE CODE OF PROFESSIONAL RESPONSIBILITY HAS A DUTY TO REPORT THE VIOLATION TO THE COUNSEL FOR DISCIPLINE. AN ATTORNEY DOES NOT HAVE A MANDATORY OBLIGATION TO REPORT A MERE SUSPICION OF A CODE VIOLATION.

FACTS

The Advisory Committee has received a number of inquiries regarding the obligation of an attorney to report ethical misconduct by another attorney to the Counsel for Discipline.

QUESTION PRESENTED

DR 1-103(A) of the Code of Professional Responsibility provides:

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

DR 1-102 states:

- (A) A lawyer shall not:
1. Violate a Disciplinary Rule.
 2. Circumvent a Disciplinary Rule through actions of another.
 3. Engage in illegal conduct involving moral turpitude.
 4. Engage in conduct involving

dishonesty, fraud, deceit or misrepresentation.

5. Engage in conduct that is prejudicial to the administration of justice.

6. Engage in any other conduct that adversely reflects on his fitness to practice law.

As indicated, the mandatory obligation of DR 1-103(A) applies only if the knowledge of the attorney is unprivileged. Information received from a client may not necessarily fit within the definition of privileged communication.

For example, in the case of *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (Ill. 1988), an attorney was requested by his client to not report the misconduct of another attorney to disciplinary authorities. The court held that attorney Himmel had an obligation to report the misconduct. The court found that the information which indicated misconduct by the other attorney had been disclosed to Himmel by the client in the presence of third parties (the client's mother and fiance) and had been discussed (with the consent of the client) with an insurance company, its lawyers and the offending attorney. The court concluded that the information possessed by Himmel was not protected by the attorney-client privilege and Himmel therefore had an obligation to report the misconduct.

Assuming that the information is not privileged, in order for there to be a duty to report, the attorney must have "knowledge" of a disciplinary violation. EC 1-4 provides:

The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A

lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

The "knowledge" requirement of DR 1-103(A) has been held to mean that a lawyer must possess more than a suspicion.

Alabama Ethics Opinion 85-95 (9-18-85) held that a lawyer must report to proper authorities the unethical conduct of opposing counsel if, after thorough investigation, a lawyer firmly believes that opposing counsel clearly violated one or more of the disciplinary rules. The ethics opinion went on to state that if a lawyer merely suspects opposing counsel has violated the Code, he has no duty to report the alleged misconduct.

Several other opinions have taken the position that a suspicion of misconduct is not enough to make the reporting of an alleged violation mandatory, but that it "may" be reported even if only based on a mere suspicion. See, New York Ethics opinion 80-42 (undated) and Cleveland Ethics Opinion 85-1 (3-29-85).

The Bar Association of the State of New Mexico has also passed on a similar issue regarding when a lawyer should report an alleged violation. The opinion stated that "the duty to report serious misconduct is mandatory and arises when a lawyer has a substantial basis for believing a serious ethical violation has occurred, regardless of the source of that information. This substantial basis rests for knowledge of misconduct is intended to be greater than a mere suspicion or probable cause test." The opinion concluded that there was no duty to report information which lacked a substantial basis for knowledge, although a lawyer may choose to do so. See, New Mexico State Bar Ethics Opinion 1988-8.

CONCLUSION

An attorney possessing unprivileged knowledge of a

violation of the Code of Professional Responsibility has a duty to report the violation to the Counsel for Discipline. An attorney does not have a mandatory obligation to report a mere suspicion of a Code violation.

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