

ADVISORY ETHICS OPINION 87-08

SYNOPSIS:

A lawyer who acquires unprivileged knowledge of a violation of a disciplinary rule shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such a violation.

FACTS:

Attorney A represents the defendant/manufacture in a products liability action and Attorney B represents the plaintiff. The operative facts which allegedly give rise to liability on the theory of strict liability in tort relate to the alleged failure of the defendant/manufacture to have installed various safety devices as a part of the product. The defendant has denied liability.

During the course of discovery, the plaintiff, through his attorney, propounded interrogatories to the defendant inquiring as to the industry standards relating to safety devices to be attached to the product. The defendant responded to this discovery by asserting that its equipment was designed to the specifications of its customer and that it did not call for the particular safety equipment which allegedly made the product defective. The defendant further contended that other manufacturers did not provide similar safety equipment nor were there any industry standards or guidelines relating to such equipment.

Several months after the defendant's responses were filed with the court, the defendant received through the mail an inquiry from a third person requesting that the defendant send to that person any literature or information in the defendant's possession relating to industry requirements and/or use of safety equipment in the same product which was involved in the pending litigation brought by the plaintiff. Upon receipt of the correspondence, the defendant immediately notified Attorney A. Attorney A reviewed the correspondence with his client and in good faith, the client (manufacture) felt that a response should be made if indeed the correspondence had been mailed by a disinterested third person. Accordingly, the manufacture responded to the third party's letter in a manner which was similar to the answers provided to the plaintiff's discovery.

Approximately one month after the response to the correspondence was made, a status conference was held in the action at the court in the county in which the action is pending. At that conference, Attorney A confronted the plaintiff's counsel, Attorney B, with the letter received from the third party. Attorney B admitted on the record that the third party was in fact Attorney B's secretary, but stated that he did not know whether the correspondence had been sent at his (Attorney B's) request. Attorney A advised the court that he was concerned about what appeared to be an unauthorized contact with a party represented by counsel in violation of the Code of Professional Responsibility.

QUESTION PRESENTED:

The question to be addressed in this opinion is whether Attorney A possesses unprivileged knowledge of a violation of a disciplinary rule such that he is required to report such knowledge to a tribunal or other authority empowered to investigate or act upon such a violation as set forth in DR 1-103(A). It is the conclusion of this Committee that Attorney A does in fact possess such knowledge and that a report to the appropriate authority is required.

DISCUSSION:

DR 7-104(A)(1) provides as follows:

During the course of his representation of a Client, a lawyer shall not:

- (1) Communicate *or cause another to communicate* on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

DR 1-103 (A) provides that a lawyer who possesses 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(A)(1) specifically provides that a lawyer shall not violate a disciplinary rule.

In his inquiry to this Committee, Attorney A addressed some concern over whether or not the facts outlined above provided him with "knowledge" of the violation of a disciplinary rule which would require reporting to the appropriate authority.

The quandary of Attorney A, however, as to whether or not he possesses knowledge which would require reporting a violation is somewhat of a more difficult question. It is the position of this Committee, however, that DR 1-103(a) does not require a

lawyer to act as “judge and jury” in determining whether or not opposing counsel has in fact violated a disciplinary rule. DR 1-103(A) specifically provides that the “knowledge” of a violation of a DR shall be reported “to a tribunal or other authority empowered to *investigate* or act upon such violation.” It is therefore clear that the rule contemplates an investigation or action to be taken by the appropriate authorities. It is not the responsibility of the attorney possessing the knowledge to conduct “an investigation” and to make a determination as to whether or not a violation has in fact occurred. This Committee interprets DR 1-103(A) as imposing an obligation to report “knowledge or a violation of DR 1-102” under such circumstances as give rise to a good faith or substantial belief on the part of the attorney possessing the knowledge that a violation has occurred.

A comparison of the language contained in the Vermont Professional Responsibility Code as set forth in Title 12, Appendix IX C2 DR 1-103(A) to the ABA Model Code of Professional Responsibility, Rule 8.3 is perhaps helpful to an understanding of the responsibilities of an attorney with respect to reporting violations of the professional code. Rule 8.3(a) of the Model Code provides “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 honest, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.” The comments to the Model Code recognize that “a measure of judgment” is required in complying with the provisions of the rule. “The term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of the evidence of which the lawyer is aware.” While it is true that the Vermont Code does not on its face require an attorney faced with concerns over potential violations of disciplinary rules to exercise discretion or judgment in deciding whether to report such knowledge, it is this Committee's position that a reasonable reading of the Vermont provisions would allow a lawyer some leeway in terms of judgment when deciding whether it is appropriate to inform the appropriate tribunal of the facts presented in any particular case.¹

On the facts presented to this Committee in the instant situation, however, it appears clear that Attorney A should report his knowledge to the appropriate tribunal for further investigation. The Committee limits its opinion as requiring disclosure under DR 1-103(A) to the facts of this particular case; however, it is the intent of this opinion to provide some guidance as to how lawyers should proceed when faced with situations which call into play the various disciplinary rules addressed in this opinion.

¹ See generally Schneyer, the *Model Rules and Problems of Code Interpretation and Enforcement*, 1980 Am. B. Found Research J. 939, 951-52.