

ADVISORY ETHICS OPINION 90-09

SYNOPSIS:

A lawyer having unprivileged knowledge that his client's prior lawyer neglected the client's case and deceived him about its status must report this information to the Professional Conduct Board, and should do so before negotiating a settlement of the client's claim against the prior attorney.

FACTS:

Attorney A has unprivileged knowledge that a client's prior attorney, Attorney B, neglected the client's case and deceived him about the status of the case. Specifically, Attorney A knows that Attorney B not only missed an important deadline and then tried to cover it up, but also filed a groundless appeal to the Vermont Supreme Court and lied about it to the client. Meanwhile, Attorney B billed the client exorbitantly for these unnecessary and counterproductive actions.

Attorney A has now been retained to represent the client in an action against the prior lawyer, and he states that settlement negotiations are likely to occur concerning the client's claim. The inquiring lawyer inquires as to the need to report the prior attorney to the Professional Conduct Board, and, if so, whether he should report prior to conducting settlement negotiations.

OPINION:

Self-regulation of the legal profession imposes a heavy but critical burden on members of the profession. One of the most difficult aspects of self-regulation requires reporting the misconduct of another lawyer. As advocates, attorneys are accustomed to taking up clients' causes and leaving the courts or the appropriate government bodies, such as grand juries, to initiate or decide whether to pursue an individual. The constant specter of possibly falsely charging a colleague also complicates the issue, but the requirement to report in situations, such as in Attorney A's, is mandatory. DR 1-103(A) states categorically that "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." There is not even an option to discuss the issue with the attorney thought to be violating the Rules before reporting. On the facts presented, there is no question that DR 101(A) applies with full force.

(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 a serious crime.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual.
- (7) Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Attorney A has knowledge that Attorney B violated DR 1-102; the Professional Conduct Board must decide whether a valid defense exists. Further, DR 6-102(A)(3) requires that a lawyer not "neglect a legal matter entrusted to him."

Since Attorney B's conduct is a matter of public record and not a secret or confidence of the client, it is clearly not privileged. It is equally clear that his actions involve "dishonesty, fraud, deceit or misrepresentation" and that the prior lawyer has further neglected a legal matter entrusted to him. In addition, Attorney B has apparently also charged a clearly excessive fee, in violation of DR 2-106. Although Attorney A proposes to negotiate a settlement of the client's claim against Attorney B, Attorney A must first report the conduct to the Professional Conduct Board. Under the Disciplinary Rules, reporting Attorney B's conduct is mandatory. Moreover, the Committee believes that the better practice is to make the report immediately so that there can be no claim thereafter that the inquiring attorney was willing to forebear reporting in exchange for receiving a more generous settlement offer.¹

¹ See Nassau County Bar Association Committee on Professional Ethics Opinion 90-9.