February 19, 2009

INQUIRY NO. 2009-010

In an email letter to Victoria White, Ethics Counsel, you asked for an informal opinion by a member of the Pa Bar Association's Professional Responsibility and Ethics Committee. I have been assigned to provide that opinion.

Your email attaches an opinion identified below and you added facts which I summarized for purposes of my analysis: You are an attorney employed as such by Attorney A, also a member of the Bar. Attorney A litigated with Attorney B a dispute over a former partnership. A result of that dispute was an Opinion dated [date], by Judge C, Court of Common Pleas, [D] County, in Attorney B v. Attorney A. You summarize from that opinion specific findings that Attorney B misappropriated firm assets and altered evidence in the case to further Attorney B's position, which evidence would have been helpful to Attorney A's case. You note further a prior history of serious professional misconduct, and conclude that "in light of the Court's findings," Attorney B's actions, "create a serious question as to his ability to practice law honestly."

Your question to the Committee is whether you have a duty to inform the Pennsylvania Disciplinary Board. Of course, your question requires an interpretation and application of Rule 8.3 of the Pennsylvania Rules of Professional Conduct. It requires informing the appropriate authority when a lawyer "knows" that a lawyer has violated the Rules of Professional Conduct that raises "a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer." Your words and the rules are quite closely similar. On that basis I further assume that your stated conclusion means that you believe yourself obligated to act under the requirements of Rule 8.3(a). Indeed your request to the Committee says as much when you conclude: "However, because I am associated with one of the parties in the civil matter, before contacting the Disciplinary Board, I would like an advisory opinion from the Ethics Committee as to my duty to do so."

Thus, your only question asks: are you exonerated from that obligation due to the complicating facts you are employed as a lawyer by the other party to the case, and the Opinion from that case is where you derive your conclusion of the duty to report.

It is a knotty problem due to the factual situation and the fact that Rule 8.3(a) is modified by 8.3(c). The latter subsection does "not require disclosure of information otherwise protected by Rule 1.6."

My conclusion is that you do not have a duty to report Attorney B under 8.3. However, you should discuss this with Attorney A and ask for either Attorney A to report or for Attorney A's permission for you to report.

I start my analysis by assuming that for these purposes you are a part of a law firm representing a client, your employer, Attorney A. I recognize that conflates a situation where the law firm and the client are one and the same, but do so to see if you would be required to do so, under this situation. If so, that would end the question and you would indeed have such a duty.

Rule 1.6 provides that a lawyer "shall not reveal information relating to representation of a client unless the client gives informed consent." If you are a firm representing a client, you may not disclose information unless the client has either formally consented or has "impliedly authorized" disclosure "in order to carry out the representation." Comment [3] explains the meaning of the 1.6 duty. It is different from the attorney-client privilege and the work product doctrines, and is broader than both. It applies, "for example, not only to matters communicated in confidence by the client but also to all information related to the representation." Comment [3]. There is no doubt in my mind that as a lawyer associated with a firm or lawyer representing a client, you would be bound by that prohibition of disclosure if the information is protected by 1.6.

My conclusion is that 1.6 does apply. The fact that you may have learned about Judge C's opinion on your own by reading about it in some outside publication would be immaterial to my reasoning, nor is the fact that it is public knowledge or generally known relevant. Compare 1.9(c) (1) allowing use, under certain circumstances when generally known, of 1.6 information with 1.9(c)(2) prohibiting disclosure and having no such generally known exception. See also Stephen Gillers, Regulation of Lawyers (7th Ed. Aspen 2005)(citing case of public censure and stating that disclosure of a pleading was violation.), Philadelphia Bar Association Professional Guidance Committee Opinion 2008-12 (February 2009)(disclosure to trial judge does not allow disclosure to Disciplinary Board without client consent).

As part of the firm representing a client, again assuming that the firm is representing Attorney A as a client, the information may not be revealed unless in order to carry out the representation, or the client consents. So far neither applies. Thus, no obligation exists to disclose.

The remaining question is whether the fact that Attorney A as both client and lawyer is distinguishing, and it is my opinion that it is not. Attorney A may have reasons to report Attorney B, but if he has done so, I would assume that you are not asking whether you too need to do so or that would have been part of your request. Assuming then that Attorney A has either not considered the issue, or does not believe he has the obligation to report and does not want to do so, I cannot see how you are free to do so.

If this were merely a question of employer-employee relationship, you might not be absolved. Rule 5.2(a) imposes independent duties on a subordinate; only if the supervisor resolves in a "reasonable" way "an arguable question of professional duty" would you be absolved. Rule 5.2(b). Given that you have decided you have such a duty but for the complicating factors, the fact you were employed by Attorney A is insufficient reason. In other words, if you do not see a decision by Attorney A as your supervisor providing a reasonable resolution of an arguable question of professional duty under Rule 5.2(b), then under 5.2(a) you are bound by the rules yourself; whether or not Attorney A wants to report would not matter.

However, Attorney A is not just your supervisor; he is the client as well. As such, Attorney A has the right to decide whether to consent to the revealing of the 1.6 confidential information, meaning information "relating to the representation." As part of the firm representing Attorney A, you are bound by the 1.6 duty, whether you did a stitch of work on this matter or not, a fact you did not disclose, and even if you learned of the opinion through your own actions. The information would still "relate" to the matter. Of course if you worked on the matter or Attorney A provided you Judge C's opinion, that would make the connection easier to see but would not change the analysis.

Your own words suggest this analysis, when as part of the question you note "I am associated with one of the parties in the civil matter." Your association, however, is not just as a friend or business partner or associate, who has learned information not covered by any Rule of Professional Conduct. You have obtained the information as a lawyer, while employed in the law firm, where a client, although admittedly your supervisor, has been in litigation. I do not see how one can separate out Attorney A's right to control the information protected by Rule 1.6, and accordingly conclude that absent consent, you do not have the duty to inform the Disciplinary Board of the actions of Attorney B. See generally Douglas Richman, The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation, 12 Geo. J. Legal Ethics 175, 195-199 (1998-9).

I have specifically in this analysis made clear that you have not asked for my opinion whether the actions of Attorney B meet the standard of Rule 8.3(a); rather I have read your request to mean that you have concluded they do. Second, I provide no opinion on whether Attorney A has an obligation to report Attorney B.

The overlapping capacities of Attorney A as client, lawyer and supervising lawyer in a law firm make for the difficulties of analysis, but by teasing out the distinctions, the Rules resolve the question. Note the policy differences between dealings with the court under rule 3.3, where truth trumps client confidences and rules like 8.3, 1.6, and 4.1(b) where client interests come first absent exceptions not relevant here.

In a broader sense, you are not the only lawyer likely to have read Judge C's opinion. If you are correct as to the duty, any such lawyer reading the opinion would have such an obligation. However, you are the only person – or perhaps one of a few – who have a lawyer client intertwined relationship. One could see policy arguments for the need to disclose, but given that the Rules have set forth the policy that client confidences come

first in this situation of 8.3, my view is that the duty to police the profession is subordinated to the confidentiality duty.

Finally, you should be aware of comment [2] to 8.3. It states that if 1.6 bars the reporting, the lawyer "should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests." Comment [2] thus urges you to consult with Attorney A. It is for Attorney A and you to determine further whether Attorney A has reasons that would be prejudicial to him as the client or for Attorney A to determine whether he has an independent duty.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.