

Committee Opinion
September 2, 1988

LEGAL ETHICS OPINION 1133

ACQUIRING AN INTEREST IN
LITIGATION-CONFIDENTIALITY
-DUTY TO REPORT: KNOWLEDGE
THAT ATTORNEY ADVANCED
MONIES TO A CLIENT.

You have stated that you represented an attorney who was the plaintiff in an action against his former law partners. The action involved a disagreement over fees and costs due under the terms of an agreement executed between the parties when they dissolved their former law corporation. Prior to commencement of discovery, the court signed a protective order requiring that information produced during discovery is to be kept in confidence and regarded as privileged, prohibiting its becoming part of the public record without the consent of the parties and their counsel. During discovery it was established through the deposition of a former client of the defendant that the defendant advanced the former client money against the client's anticipated settlement.

You wish to know whether these payments are ethical; if not, whether you are under an ethical obligation to make these transactions known to the State Bar; and what effect, if any, the protective order has on any ethical responsibilities you have.

Disciplinary Rule 5-103(B) states that "while representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client." This prohibition stands unless the advance/guarantee is for the expenses of litigation, and the client remains ultimately liable for such expenses. According to your letter, the advanced funds were repaid from the settlement, so one may assume the client remained ultimately liable for repayment of the money. However, your letter states that the money was sent to the client, so one may assume it was not to cover litigation expenses. The litigation expenses contemplated by the Rule run to third parties (e.g., court reporters) not to the client. Therefore, the action you are concerned with appears to have violated DR:5-103(B).

You have information indicating that another lawyer has committed a violation of the Disciplinary Rules. Therefore, you must report it if (1) the information is not privileged (LE Op. 217), and (2) it raises a "substantial question as to the lawyer's fitness to practice law in other respects." (DR:1-103.) Because the information came to light in discovery depositions and it did not concern your client, the information is not privileged under DR:4-101.

The next question, therefore, is whether the lawyer's violation raises a "substantial question as to the lawyer's fitness to practice law in other respects." EC:1-4 exhorts that:

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

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knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules.

With this as the underlying rationale for Rule 1-103, it is the Committee's opinion that the "substantial" language is to provide exception for a violation which was clearly perpetrated in the heat of the moment (e.g., an outburst against a judge) or so technical as to mean nothing other than that a simple mistake was made. A violation of DR:5-103(B), in the context which you set forth, does not appear to come within the exception excusing the duty to report. Therefore, it is your ethical duty to report it.

The final question you raise is the effect of the Protective Order on this duty to report. Presently, it would appear that the Protective Order might prohibit your reporting the violation. Ultimately, however, this is a question of law which is not within the purview of the Committee. It is the Committee's opinion that, in this situation, you have a duty to seek an order from the court permitting you to disclose this violation to the State Bar. This will enable you to fulfill your ethical responsibilities without violating any law or court order.

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Legal Ethics Committee Notes. – If information about the ethics violation is a client confidence, a lawyer may report the other lawyer's misconduct only if the client consents under Rule 1.6(c)(3); the lawyer considering whether to report must consult with the client under that Rule.