

You have indicated that a lawyer was retained to represent the ex-wife of an attorney in a domestic relations case. As part of the preparation for the trial, the lawyer subpoenaed the attorney's general and trust account records (only some of which were provided) and reviewed other financial information from other sources. You indicate further that apparent irregularities, including the apparent payment of personal expenses from the trust account and the making of personal loans to the attorney from the trust account, were uncovered through the examination of those records. You advise that there also appears to have been no adherence to DR:9-102 and DR:9-103 regarding record keeping and segregating of funds.

Furthermore, you indicate that it is the client's desire that no disclosure be made regarding her ex-husband's finances or trust accounts and the client has directed the attorney not to do so. The lawyer believes that it is not in the client's best interest to disclose information regarding her ex-husband's trust accounts since the apparent irregularities in those records may cause the attorney business problems, thus reducing or terminating the client's support.

Finally, you indicate that the irregularities have been called to the attention of a Circuit Court judge, to whom the ex-husband/attorney has offered explanations. A seal on the Circuit Court file exists, preventing disclosure of such documentation to the public, and the Circuit Court judge has ordered that no documentation provided to the wife's attorney, as a result of a subpoena to the attorney's partner, shall be publicly disseminated, and that the wife's attorney must return the originals and all copies of such documents in the attorney's possession at the end of the case.

You have asked the Committee to opine, under the facts of the inquiry, (1) whether the seal on the file and the Circuit Court Order alleviates the wife's attorney's duty to report alleged trust violations; (2) whether the wife's attorney may rely on disclosure to the Circuit Court Judge as satisfying the attorney's duty to disclose alleged trust account irregularities; and (3) if the wife's attorney must inform the Bar of the apparent irregularities over the client's direct order not to do so, despite the likelihood that such disclosure would cause the client irreparable harm.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:1-103(A) which mandates that

[a] lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's fitness to practice law in other respects, shall report such information to the appropriate professional authority, except as provided in DR:4-101; [emphasis added]

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DR:4-101(A) and (B)(1) which provide respectively that

"[c]onfidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client; and

[except in limited circumstances] a lawyer shall not knowingly reveal a confidence or secret of his client; and

DR:7-101(A)(3) which precludes a lawyer from intentionally prejudicing or damaging his client during the course of the professional relationship, except as required under DR:4-101(D), i.e., when the client intends to commit a crime or has committed a fraud against the court.

Further guidance is available through Ethical Consideration 1-4 which exhorts that

[t]he 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. [emphasis added]

As indicated by the facts you have provided, the Committee is cognizant of the dilemma which arises as a result of the lawyer's tension between his duty, on the one hand, to report another attorney's misconduct in order to protect the integrity of and encourage public confidence in the profession and his duty, on the other hand, to preserve the client's secrets and confidences and not to intentionally prejudice or damage his client.

The Committee is cognizant that DR:1-103(A) mandates the attorney's reporting of the misconduct only when such misconduct raises a substantial question as to that lawyer's fitness to practice law in other respects. Whether an attorney's conduct is such that it raises a "substantial question as to that lawyer's fitness to practice law in other respects" requires a case-by-case determination which should be made after consideration of the facts and analysis of the impact on the offending lawyer's fitness to practice law. Nevertheless, the Committee is of the general opinion that where an attorney has knowledge of another attorney's misconduct involving a trust account, such misconduct constitutes a per se violation which must be reported.

In the facts you present, the Committee is of the opinion that the information as to the ex-husband/attorney's misconduct does constitute a secret as defined by DR:4-101, since such information was gained in the course of the professional relationship [with the ex-wife]; the ex-wife/client has requested that it be held inviolate; and the disclosure of

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it would be likely to be detrimental to the ex-wife/client.

The Committee has previously opined that it is improper for an attorney to report to the Bar information concerning unethical conduct by another attorney when such information was obtained during the course of the professional relationship and the client refuses to consent to the disclosure thereof or when such disclosure would adversely affect the client's interests. LE Op. 217 and LE Op. 497.

In response to the three questions you raise, under the facts you present, the Committee believes it would be improper and violative of the attorney's ethical responsibility to preserve the client's secret if the attorney disclosed the information in derogation of the client's wishes since DR:1-103(A) exempts from obligatory reporting any information which is protected by DR:4-101. Since the Committee is of the opinion that the attorney's duty to preserve such secret information is paramount to the attorney's duty to report misconduct, precluding the wife's attorney from informing the Bar of the apparent irregularities, your first and second questions, regarding the seal on the file and the wife's attorney's reliance on disclosure to the Court, are rendered moot.

Finally, it appears to the Committee that for the attorney to report the information also might be in violation of the Court's direct Order precluding the attorney from disseminating the information. Such violation of the Order would similarly be improper and violative of DR:7-105(A).

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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.