

Committee Opinion
May 11, 1993

LEGAL ETHICS OPINION 1518

ATTORNEY MISCONDUCT - ZEALOUS
REPRESENTATION - OBLIGATION TO
REPORT MISCONDUCT: ATTORNEY
ADVISING CLIENT TO CIRCUMVENT
CREDITOR'S CLAIM.

You have presented a hypothetical situation in which Law Firm A represents a creditor ("Creditor") with a claim against a person under a disability ("PUD") in the amount of approximately \$23,000.00. The niece of PUD was appointed by PUD as PUD's attorney-in-fact and Law Firm B represents the niece of PUD who is also an employee of Law Firm B.

Law Firm B files a partition suit on behalf on the niece of PUD to have real property owned by PUD and other family members sold. The petition indicates that the niece has been advised by Creditor that the real property in question must be sold to pay the medical bills outstanding to Creditor.

You indicate that shortly after the partition suit is filed in January 1989, Law Firm A files suit against PUD on behalf of Creditor. At the same time, a courtesy copy of the motion for judgment is mailed by Law Firm A to Law Firm B.

On February 27, 1989, the niece, as attorney-in-fact for PUD, executes an assignment conveying to Creditor PUD's share of the proceeds of the partition suit and sale of the real property, less the sum of \$2,500.00. On March 3, 1989, Law Firm A forwards the assignment to Law Firm B so as to advise them of the assignment. You indicate that the assignment is not recorded in the clerk's office for the circuit court where the real property is located.

Subsequently, Law Firm A obtains judgment against PUD and docketes the judgment on April 7, 1989. On April 3, 1989, however, the niece, as attorney-in-fact for PUD, creates a trust for PUD and appoints niece's daughter as trustee. The sole asset transferred into the trust is the real property in question, which is subject to the assignment. Law Firm B prepares all the documentation necessary for its transfer.

Attorney for Law Firm B is ultimately appointed a special commissioner in a partition suit to sell the property. He sells the property and does not honor the assignment previously executed by niece as attorney-in-fact for PUD.

You indicate that, in 1992, Law Firm A inquires as to the status of the assignment and partition suit and learns that the real estate has been sold and money distributed to parties other than Creditor. Upon inquiry by Law Firm A, Law Firm B writes a letter stating as follows:

I enclose a check from my trust account for full settlement [PUD's] account with [Creditor], per the assignment. The reason that this money was not paid sooner was that, on my advice, the property interest of [PUD] was transferred to a trust prior to

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the closing so that actually [PUD] herself did not have an interest in the property at the time of sale to generate money per the agreement. However, also on my advice, the trustee of the trust kept the money in the trust distributed while we waited to see if we could get away with that (not to put too fine a point on it).

When we received your inquiry, I advised the trustee to just go ahead and fork over the money, as I didn't really feel a court would be sympathetic with the violation of the spirit, if not the letter, of the assignment.

The enclosed check is for the entire amount, with interest, minus the \$2,500.00 which the assignment called to be retained. The last sum remains in my trust account pending your agreement that it may be distributed to [PUD's] heirs. No disbursements were made from the trust fund previously.

The letter concludes by showing the calculations indicating that the amounts as indicated above have been paid correctly.

You have asked the committee to opine whether, under the facts of the inquiry, (1) such conduct by Law Firm B violates the Disciplinary Rules, specifically Disciplinary Rules 1-102(A)(3) and (4); and (2) whether Law Firm A has an obligation to report such misconduct pursuant to Disciplinary Rule 1-103.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:1-102(A)(4) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on the lawyer's fitness to practice law; DR:1-103(A) which provides 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 the confidentiality provisions require otherwise; and DR:7-102(A)(7) which states that in his representation of a client, a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

As stated in your facts, a letter allegedly was written by Law Firm B which letter apparently indicates that the firm knew that the transfer of PUD's property interest to the trust was in violation "of the spirit, if not the letter, of the assignment". Based upon the facts you have provided, then, the committee is of the opinion that Law Firm B has counseled or assisted his client in conduct that the firm knows to be illegal or fraudulent, in violation of DR:7-102(A)(7). Assuming that the assignment was in place and that the lawyer set up machinery to avoid honoring the assignment, the committee is of the opinion that such activity did constitute fraud as prohibited under DR:7-102(A)(7). The committee is of the further opinion that such conduct would similarly be per se violative of DR:1-102(A)(4).

As to whether Law Firm A has an obligation to report misconduct by Law Firm B, the committee has adopted a two-pronged test to be satisfied under DR:1-103(A) before the

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obligation to report misconduct arises: (1) the lawyer must have information indicating that another lawyer's conduct has violated one of the Disciplinary Rules; and (2) that violation must raise a substantial question as to that lawyer's fitness to practice law in other respects. See LE Op. 1004.

Since the committee has opined that Law Firm B's conduct violates DR:7-102(A)(7), the first prong of the test has been satisfied. Relevant factors to be considered under the second prong include, but are not limited to, the recency of the conduct, the seriousness of the offense, the likelihood that the conduct will be repeated, the likelihood that it will affect the attorney's competence and any mitigating or aggravating circumstances. LE Op. 1004. The committee advises that the determination of whether a violation must be reported is to be made by the reporting attorney.

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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.