

You have presented a hypothetical situation in which Attorney A was employed as an associate by Attorney B. For fifteen months prior to terminating employment with Attorney B, Attorney A had represented Client on a personal injury claim against Defendant.

Later, Attorney B was discharged as counsel for Client. Attorney B was specifically notified that Attorney A had been retained by Client to continue representation. After Attorney B was discharged as counsel, and while litigation against Defendant was ongoing, Attorney B, without consent of Client, delivered to trial counsel for Defendant a complete historical bill detailing and describing every professional activity Attorney A had performed on Client's behalf in preparation for the litigation.

You have asked the committee to opine under the facts of the inquiry, (1) whether Attorney B's disclosure of Attorney A's professional services, in specific and complete detail, violates Attorney B's duty to preserve Client's confidences and secrets; and (2) whether Attorney A is obligated to report Attorney B's conduct, in disclosing Client's confidences and secrets, to the Virginia State Bar.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:4-101(A) which defines a "confidence" as "information protected by the attorney-client privilege under applicable law" and a "secret" as "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"; DR:4-101(B) which states that a lawyer shall not knowingly reveal or use the confidences of a client; and 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 provided in DR:4-101. Additional guidance may be found in Ethical Consideration 4-6 [EC:4-6], which emphasizes the continuing nature of an attorney's absolute duty to preserve a client's confidences and secrets, even to a former client.

The committee has repeatedly and consistently opined that an attorney may not disclose confidences and secrets of a client. See LE Op. 378, LE Op. 488, LE Op. 629.

The committee is of the opinion that the professional activities performed by an attorney for a client in pending litigation may be considered "secrets" under DRs 4-101(A) and (B). Thus, the committee opines that Attorney B's disclosure, to opposing counsel, of the nature of Attorney A's professional services rendered to the client may be

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in violation of Attorney B's continuing duty to maintain and preserve Client's confidential information.

As to Attorney A's obligation to report Attorney B's conduct, the committee believes that the attorney may have a duty to report Attorney B's misconduct under DR:1-103(A), since that rule contains a two-prong test. The test first requires that a lawyer must have information indicating that another lawyer has committed a violation of the Disciplinary Rules. Since the committee has opined above that Attorney B's conduct is violative of DR:4-101(B), the committee believes that the first prong has thus been satisfied. Second, the lawyer in possession of information regarding the conduct of another lawyer must determine whether the misconduct "raises a substantial question as to that lawyer's fitness to practice law in other respects." Relevant factors include, but are not limited to: the recency of the conduct; the seriousness of the conduct; the likelihood that the behavior will be repeated; the likelihood that it will affect the attorney's competence; and any mitigating or aggravating circumstances. The committee is of the opinion that if Attorney B knowingly revealed Client's confidences and secrets to Defendant's counsel, a substantial question is raised as to his fitness to practice law in other respects. See LE Op. 1004, LE Op. 1522, LE Op. 1528.

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.