

Committee Opinion
August 12, 1993

LEGAL ETHICS OPINION 1545

DUTY TO REPORT MISCONDUCT;
THREATENING DISCIPLINARY
CHARGES.

You have presented a hypothetical situation in which an attorney represents a mother, who was the custodial parent of a daughter. On January 1, 1991, the father, living in California, refused to return the daughter from visitation. The mother went to California and successfully sued in the California courts to get her daughter back (The California courts also held that custody jurisdiction was in Virginia). The client/mother told the attorney that she had spent all her money on expenses related to the California litigation, having returned to Virginia impoverished, moved in with her parents but moved out again when her father was laid off from his job. The client then lost her own job and was left without funds or a place to live.

The client has related to the attorney that the father's Virginia lawyer then approached her and represented that the father could take the daughter temporarily while the mother found a job. You state that the client was unrepresented at this time and that the client alleges that the father's attorney induced her to sign a consent order by means of numerous misrepresentations. You indicate that the juvenile court consent order that the client signed was extremely disadvantageous to her, giving her very little, and barely enforceable, visitation. The client also has told the attorney that when she tried to insist on provisions which would allow her communication with the child and specified means and dates for making travel arrangements, the father's attorney told her that the inclusion of such clauses was not customary because of her obvious right to such communication. Immediately upon entry of the order, the father began denying the mother both visitation and communication with the child.

The mother then began litigation to get the order reversed. The mother employed two previous attorneys, but neither of them was successful in even getting the matter to trial. Your facts indicate that, since that time, the father has used various delaying tactics to prevent trial. The attorney has recently been retained to appeal a juvenile court ruling which held that because of the child's lengthy stay there, California, rather than Virginia, should now hear the case. The appeal will be heard in circuit court.

The client/mother has volunteered the unsolicited opinion that the father's lawyer's overreaching conduct by means of misrepresentations is unethical. The client has asked the attorney whether or not there is a state agency which could provide her recourse or provide a forum for her complaints. The attorney has not told that client that she may pursue a complaint with the Virginia State Bar.

You have asked the committee to opine under the facts of the inquiry, (1) whether the attorney has an obligation to tell the client that she may make a complaint to the Virginia State Bar; (2) whether the attorney may wait until the current litigation is completed before telling the client how she can report an alleged ethics violation to the Bar; (3) whether the attorney has an obligation to report the father's lawyer's conduct, since

Committee Opinion
August 12, 1993

the attorney does not know the other lawyer and was not then representing the client at the time of the alleged misconduct; and (4) whether, assuming the attorney's obligation to report, the attorney may wait until the completion of the litigation to report the father's lawyer's conduct.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:1-103(A) which requires 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; DR:6-101(B) which states that a lawyer shall attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client; and DR:6-101(C) which states that a lawyer shall keep a client reasonably informed about matters in which the lawyer's services are being rendered.

The committee responds to your inquiries relative to the facts you have presented as follows:

1. The committee is of the opinion that the attorney has an obligation, under DR:6-101(C), to inform the client that she may make a complaint to the Virginia State Bar. Since the attorney is required to keep his client reasonably informed about matters in which his services are being rendered, the committee believes that information as to available recourse the client may have against opposing counsel is related to the matters for which the attorney has been retained.
2. The committee is similarly of the opinion that the attorney may not wait until the completion of the current litigation before informing the client as to the Bar complaint process. Under DR:6-101(B), an attorney shall promptly attend to matters undertaken for a client, which would otherwise prejudice the client's rights if unattended. See also LE Op. 1144. The committee further believes that there is no valid reason to delay informing client of the complaint process and that, in any case, it is the client's decision whether or not to proceed against opposing counsel.
3. As to whether or not the attorney has an obligation to report the father's lawyer's alleged misconduct, the committee refers to DR:1-103(A). Under that Rule, an attorney 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 Bar.

You state, however, that the attorney does not know the father's lawyer and that the alleged misconduct occurred prior to his representation of the client/mother. Your facts, then, raise doubts as to the certainty of the attorney's information regarding the father's lawyer's conduct. The committee has previously opined that the duty to report attorney misconduct attaches when the information possessed by the reporting lawyer is based upon a substantial degree of certainty and not on rumors and suspicion. See LE Op. 1338,

Committee Opinion
August 12, 1993

LE Op. 1528. The committee opines, then, that if the attorney's information is based upon a substantial degree of certainty, and if the information is not construed to be a secret or confidence under DR:4-101, he has an obligation to report the father's lawyer's alleged misconduct. See LE Op. 1468.

In addition, the committee cautions that the reporting lawyer must be vigilant in observing the DR:7-104 prohibition against presenting or threatening to present disciplinary charges solely to obtain an advantage in a civil matter.

4. As to whether the attorney may wait until the completion of the civil litigation to report the ethical violation, the committee believes that LE Op. 1338 is dispositive in that it opines that should an attorney conclude both that opposing counsel's conduct is in fact improper and that the impropriety raises a substantial question as to his fitness to practice law in other respects, the attorney is obligated to report such misconduct without any unnecessary delay. A singular exception to the obligation would exist if the filing of such a complaint would constitute the attorney's intentionally prejudicing or damaging of his client during the course of the professional relationship. See DR:7-101(A)(3); LE Op. 1338.

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.