

Nassau Bar Ethics Committee Issues Opinions On Self-Defense, Fraud, And Receiving Referrals From Adverse Parties

BY ROY SIMON

On October 28, 1998, the Nassau County Bar Professional Ethics Committee issued three new opinions. The full text of these opinions should be available soon at the Nassau County Bar's web site, www.nassaubar.org (click on "Nassau Judicial Review," then scroll down to "Ethics Opinions"). In the meantime, here are summaries of the three October opinions.

Defending Against A Suit By A Former Client

Nassau County Bar Op. 98-11 (1998): An attorney was substituted as counsel for a woman in a personal injury action. The file contained a letter from the client to the prior lawyer in which the client described the physical ailments caused by the accident and explained how these ailments adversely affected her life. Shortly after the Inquiring Attorney took over the file (which was about a month after the client wrote the letter describing her injuries), the client came to the Inquiring Attorney's office to discuss her case. Later, after the personal injury suit ended, the client sued the Inquiring Attorney, alleging that she had fallen and hurt herself while visiting the Inquiring Attorney's office. At her EBT in the suit against the Inquiring Attorney, the woman claimed that her supposed fall in the Inquiring Attorney's office led to certain injuries. These were the same injuries she had described in her letter to the first attorney in the personal injury action, which was written before she ever visited the Inquiring Attorney's office. However, she specifically denied that the injuries and adverse effects described in that letter existed prior to her alleged fall in the Inquiring Attorney's office.

The Inquiring Attorney asks two questions: (1) May he use the client's letter to defend himself against the former client's suit alleging injuries in his office? (2) May or must he give the former client's letter to the police or District Attorney's office as evidence that the client made false statements under oath? Under DR 4-101(C)(4), an attorney may use confidences or secrets to protect himself against an allegation of "wrongful conduct," and nothing in DR 4-101(C)(4) requires that the alleged "wrongful conduct" be professional in nature. The only requirements are that (a) the alleged wrongful conduct must arise from a representation of the -client, and (b) revealing the confidence or secret must be "necessary" to defend against the client's claim. An attorney may not reveal a client's confidence or secret simply to embarrass the client. Here, the Inquiring Attorney may reveal the content of the client's letter if he considers it "necessary" to disprove the client's alleged claim against him. As to the second question, DR 5-108(A)(2) permits a lawyer to reveal a former client's confidence or secret only to the extent the lawyer could reveal a current client's confidence or secret under DR 4-101. Under DR 4-101(C)(3), a lawyer may reveal "the intention of a client to commit a crime and the information necessary to prevent the crime." Here, the Inquiring Attorney may show the former client's letter to the police or District Attorney's office only if the lawyer reasonably believes the client intends to commit a future crime (such as perjury), and only to the extent such revelation would prevent the crime. Even in this situation, however, the attorney is not required to reveal the information to the police or D.A.

Fraud By Opposing Party And Attorney

Nassau County Bar Op. 98-12 (1998): During a contested child support proceeding, the opposing attorney submitted notarized papers to the court representing that his client is injured and cannot work or pay more than the statutory minimum amount of child support. After these papers were filed, the Inquiring Attorney's private investigator -- without the attorney's knowledge or approval -- communicated directly with the opposing client. The opposing client told the investigator that he was working "off the books" refinishing floors. The opposing client even gave the name of his attorney as a reference.

What are an attorney's ethical obligations upon learning that an opposing party, and possibly the opposing attorney, may be perpetrating a fraud on a tribunal? If the opposing attorney and the opposing party are violating the Code of Professional Responsibility or the criminal laws, the Inquiring Attorney will have certain obligations. However, while the information from the investigator suggests fraud, the Inquiring Attorney does not yet "know" whether the opposing attorney employed the client in the recent past, or whether the opposing attorney knows that his client is using his name as a reference, or knows that his client is working "off the books." The Inquiring Attorney should bear in mind EC 1-5 which says: "A lawyer should maintain high standards of professional conduct and should encourage other lawyers to do likewise." This ethical consideration suggests that the Inquiring Attorney should confront the opposing attorney and give him a "chance to pursue adequate corrective measures necessary to rectify any misrepresentation" to the court. If the adversary attorney takes corrective measures, "the matter may be resolved without further action on the part of the Inquiring Attorney." If the opposing attorney will not take steps necessary to correct a knowing misrepresentation, the Inquiring Attorney will have "no choice but to bring the matter to the attention of a proper authority in accord with DR 1-103(A) or DR 7-102(B)." In keeping with these obligations, the Inquiring Attorney has discretion either (1) to inform the court or a disciplinary authority within a reasonable time, or (2) to wait until he brings out the facts by cross-examining the opposing party.

The Committee also addressed the implications of DR 7-104(A), which prohibits an attorney from communicating about a matter (or causing another to communicate,) with a party represented by counsel absent that counsel's consent. Here, the information in question was obtained by communicating with a party represented by counsel in the matter without the opposing attorney's consent. However, the investigator "made the communication without the advance knowledge of the Inquiring Attorney, who subsequently learned of the communication when the investigator apprised him of the results of his investigation." Therefore, the Inquiring Attorney may ethically use the information. Finally, the Committee addressed issues arising under DR 7-105, which provides that a lawyer "shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Under DR 7-105, "[t]hreatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges." Apart from that limitation, however, the Inquiring Attorney "has both the right and obligation to use the information however he or she deems most helpful and permissible judgment."

Accepting Referrals From An Opposing Party To A Transaction

Nassau County Bar Op. 98-13 (1998): A home builder maintains a list of attorneys that it recommends to potential buyers who have no attorney. The home builder also makes "price concessions" to buyers to cover certain closing costs, including the buyer's legal fees, whether or not the buyer uses an attorney

from the home builder's list. The Inquiring Attorney's firm is on the home builder's list of recommended attorneys. When the home builder refers a buyer to the Inquiring Attorney, the Inquiring Attorney fully explains these arrangements to his clients. The Inquiring Attorney's firm does not represent the seller, which has its own counsel for all of its legal matters, and does not give anything of value to the seller for recommending the Inquiring Attorney's firm. May an attorney accept referrals from a home builder who recommends attorneys to buyers and reduces the price of a home by the amount needed to cover the buyer's attorney fees? Yes, provided the attorney complies with various rules. Under DR 5-107(A)(1), an attorney must not accept compensation for legal services from one other than the client unless the client consents after full disclosure of all material facts and circumstances. Under DR 5-107(B), an attorney must not "permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services." Under DR 4-101, an attorney must maintain a client's confidences and secrets. The situation posed here is not uncommon — "it is clear from longstanding practice in financial transactions, where lenders frequently require that their attorney's fees be paid by the borrower, that the third party payor may also be a party adverse to the client." To preserve a positive image of the legal profession, however, attorneys receiving referrals or legal fees from adverse parties "should avoid the appearance of being overly attentive to the needs of the payor and referring party" — but "that should not prevent customary professional courtesy." Finally, the Committee noted that if the Inquiring Attorney were simultaneously representing both the buyer and the home builder, then DR 5-105 and all of its restrictions would apply — but that is not the case here.

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