

Reporting Your Adversary's Misconduct During Litigation

BY ROY SIMON

A question that often arises is whether a lawyer is obligated to report an opposing lawyer who engages in misconduct during litigation. As with many questions that seem simple at first blush, the answer is complex and unsettled. This column addresses the question.

A Hypothetical

To put some flesh on the problem, let's start with a hypothetical based on an inquiry recently presented to the Professional Ethics Committee of the Bar Association of Nassau County. (The Committee gave me permission to use the inquiry, but I have altered it slightly.) Suppose your client is an antique dealer. He buys some antiques outright and accepts others on consignment. Your client is always careful to provide receipts to those who sell or consign antiques to him. You were therefore surprised when your client was recently sued for several hundred thousand dollars based on alleged nonpayment for some rare Seventeenth Century French furniture that the executor of a famous collector's estate had sold or consigned to your client. The complaint attached receipts from your client describing and assigning value to each piece.

Fortunately, your client had kept meticulous carbon copies of the original receipts proving that he had paid for all of the pieces – the kind of carbon paper receipts that cannot be altered without detection. You called the opposing lawyer – the one who signed the complaint – and told him you had the original carbon paper receipts proving that the receipts attached to the plaintiff's complaint were fraudulent. For example, the carbon of a receipt for \$1,500 had been altered to read "\$31,500" in the receipt attached to the complaint. You found many similar discrepancies, and the plaintiff's forgeries appear amateurish and obvious.

You immediately sent copies of your client's originals to the opposing lawyer, and you invited him to visit your office to look at the original documents and see for himself that your client's receipts were genuine. The opposing lawyer said he would get back to you. A few days later he called back, and without coming over to look at the documents, he accused your client of fraud.

That raises our first question: do you have a duty to report opposing counsel for violating the Code of Professional Responsibility?

The Text of DR 1103 (A)

The first place to turn, of course, is to the Code of Professional Responsibility, and specifically to DR 1103, entitled "Disclosure of Information to Authorities." Before 1990, DR 1103 was a very stark rule, stating simply: "A lawyer possessing unprivileged knowledge of a violation of DR 1102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

(DR 1102, entitled "Misconduct," is the litany of things that a lawyer is not allowed to do, starting with the command that a lawyer shall not "[v]iolate a Disciplinary Rule.") Thus, the pre-1990 version of DR 1-103 required a lawyer to report every violation of the Disciplinary Rules by another lawyer unless the knowledge of the violation was "privileged." That was not a very realistic rule and was widely flouted. Few lawyers reported any violations, and most lawyers ignored minor violations. See Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, 18 *Fordham Urban L. J.* 283, 295 (1990). As the Comment to Rule 8.3 of the ABA Model Rules of Professional Conduct says: "If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable." That was the situation in New York before 1990. The rule cried out for amendment.

In 1990, upon the recommendation of the Jones Committee (chaired by former New York Court of Appeals Judge Hugh R. Jones), the Appellate Departments amended DR 1103 to essentially its present form. As it reads today, DR 1103 provides as follows:

- A. A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bonafide lawyer assistance or similar program or committee, of a violation of DR 1102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
- B. A lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

We can quickly clear away some of the brush here. We are not talking about information gained in the lawyer's capacity as a member of a lawyer assistance committee or similar program, so that branch of DR 1103 (A) does not apply. Nor are we talking about a request from a tribunal or other authority, so DR 1103 (B) is not relevant. Also, we can assume that if the opposing attorney is indeed knowingly using fraudulent documents, this would violate the prohibition in DR 1102(A)(4) against "dishonesty, fraud, deceit, or misrepresentation" and would raise a "substantial question" as to the opposing lawyer's "honesty, trustworthiness or fitness as a lawyer," so I do not plan to address that issue. Thus, the question boils down to whether you would have a duty based on the facts in our hypothetical to report the situation to the tribunal or to some other authority empowered to investigate or act upon the conduct of lawyers.

Before we can answer this question, we have to hurdle three main difficulties in the language of DR 1103 (A). First, do you have "knowledge" of a violation of DR 1102? Second, if you do have knowledge, is that knowledge "protected as a confidence or secret"? Third, if you have knowledge that is not protected as a confidence or secret and that raises a substantial question about the opposing lawyer's honesty, trustworthiness or fitness as a lawyer – when do you have to report that knowledge to the tribunal or other authority? Those hurdles are not easy.

The only Ethical Consideration that illuminates DR 1103 is of low candle power. EC 14 states:

The 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 knowledge, other than knowledge protected as a confidence or secret, of conduct of another lawyer which the lawyer believes clearly to be a violation of the Disciplinary Rules that raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness in other respects as a lawyer. ... [Emphasis added.]

This EC basically just repeats the text of the rule, leaving us to surmount the series of hurdles using whatever interpretive devices we can find. Fortunately, those sources include two venerable but still helpful New York ethics opinions – N.Y. State Bar Op. 635 (1992) and N.Y. City Bar Op. 19903 (1990) – and a couple of more recent but less helpful ABA ethics opinions – ABA Op. 04431 (2004) and ABA Op. 94383 (1994).

I will cite to these only occasionally but I have drawn heavily on their guidance throughout the article.

“Knowledge”

On our facts, do you have “knowledge” regarding the opposing lawyer’s misconduct? The New York Code of Professional Responsibility does not define the term “knowledge,” and N.Y. City 19903 notes that “[w]hat constitutes ‘knowledge’ sufficient to trigger the reporting obligation of DR 1103(A) is not apparent from the text of the rule.” However, the City Bar’s opinions have consistently relied on the phrase “believes clearly” in EC 14, *supra*, as support for the proposition that DR 1103(A) requires “actual knowledge” of professional misconduct.

The State Bar ethics committee is in agreement. N.Y. State 635 states that DR 1103(A) “would not be triggered unless the lawyer has a clear belief, or possesses actual knowledge, as to the pertinent facts.” The ABA also appears to agree. ABA Model Rule 1.0(i) (“Terminology”) provides that the terms “[k]nowingly,” “known,” or “knows” denote “actual knowledge of the fact in question. A person’s actual knowledge may be inferred from circumstances.”

Thus, all of the sources demand “actual knowledge,” not just a possibility, probability, suspicion, or belief.

Has the “actual knowledge” standard been met in our hypothetical about the antique dealer? Initially, let’s list the facts that you believe you know. Unless you define what facts you believe you know, you can’t say whether you have actual knowledge. Here, the facts that you believe are that the opposing lawyer has used fraudulent or altered receipts as the basis for a lawsuit, and that he is persisting in prosecuting the suit against your client even though you can prove to him that his client’s “receipts” are fraudulent. These facts, if true would violate DR 7102(A)(4)’s prescriptions against knowingly using “false evidence” and assisting his client in conduct the opposing lawyer knows to be fraudulent. Does this evidence in your possession satisfy the “actual knowledge” standard?

I doubt it. The very heart of the pending litigation is whether the receipts attached to the plaintiff’s complaint are valid. You may have absolute faith in your client, but the opposing lawyer may also have absolute faith in his client. Anyone with a receipt book can make a receipt for any amount dated any

time. How do you know that your client didn't forget the supposed "original" receipts and destroy the real originals? When the opposing lawyer spoke to his client (the plaintiff) about your reaction to the complaint, the plaintiff may have accused your client of altering or forging the receipts. Unless the opposing lawyer admits to you that his client's receipts are forged or fraudulent, how can you have "knowledge" of the very fact at issue in the litigation? If the very evidence that is the basis of your supposed "knowledge" is hotly contested by the opposing side, and if you cannot rule out the opposing lawyer's argument on its face, then in my view you do not have the requisite knowledge.

"Protected As a Confidence or Secret"?

Even if you have "knowledge" of the opposing lawyer's violation of DR 7102, you are not expected to report him to the authorities if your knowledge is "protected as a confidence or secret." I'm sure you know the definition of confidences and secrets, but bear with me while I quote it because I always tell my students that they should read the actual text of a rule every time they interpret it and should not rely on their memories. The definition is found in DR 4101 (A), which provides as follows:

"Confidence" 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.

Under "applicable law," the attorney-client privilege consists of communications in confidence between client and counsel for the purpose of obtaining or giving legal advice. Because most of your information comes from documents that were created for a business purpose and have been shown to the opposing side, your knowledge is probably not a "confidence." But your knowledge was "gained in the professional relationship," so it will be a secret if (a) your client has requested that you keep it secret, or (2) disclosing the information would embarrass your client, or (3) disclosing the information would be likely to harm your client.

It may be tempting to rule out the second and third categories because one of the purposes of disclosing the information to the tribunal or to the grievance committee would be to put a stop to the lawsuit and perhaps punish the opposing lawyer and party with sanctions, hopefully including your client's attorney fees for defending against a frivolous suit. But before we leap headlong to the conclusion that disclosure would not embarrass or harm your client, let us pause to reflect. There are three main questions you have to answer.

First, is it possible that your client's documents are forged or fraudulent, and that the opposing party's documents are true and reliable? If so, using your client's documents in an official report accusing the opposing lawyer of using false evidence and assisting a client in fraudulent conduct will simply dig a deeper hole for your client. Before you rush to judgment, you should investigate further (maybe a lot further) with your client to satisfy yourself that reporting the opposing lawyer's supposed professional misconduct will not boomerang and harm your client instead.

Second, even if your client's documents are genuine, will premature disclosure of the documents be likely to harm your client's defense? For example, will you be giving up the element of surprise, or tipping your hand in a way that will enable the plaintiff to find a way around your defense? If so, the information is

arguably a secret now even if it may lose its status as a secret at some later time. (I will discuss this more below when I discuss the timing of a mandatory report.)

Third, even if disclosure will not embarrass or harm your client, has your client instructed you to keep all information related to the representation “inviolable”? If so, then your knowledge is a secret no matter how much it would help your client. If you have promised your client that you will keep all information related to the representation inviolable, as many attorneys routinely do in an initial interview, then in my view that is the same as a request from your client to keep the information inviolable. (A typical lawyer’s explanation of the duty of confidentiality would be along these lines: “What you tell me and what I learn about this lawsuit during my investigation of the facts will stay with me unless I have your consent or some other exception permits me to disclose without your consent.”) Here, it would seem unlikely that your client has asked you to keep the receipts and related information inviolable because, presumably with the client’s permission, you have sent copies of the documents to opposing counsel and have invited him to your office to see your client’s originals.

In many other cases, however, your client will instruct you (or you will promise) to hold all information inviolable. In those instances, yet another question arises: if your client gives informed consent to the disclosure of particular information, does that remove the exception for confidences and secrets? That depends. If disclosure will not be likely to embarrass or harm your client, then the client’s informed consent removes all protection otherwise conferred by DR 4101, and your report becomes mandatory pursuant to DR 1103(A) (assuming the remaining elements are met). But if disclosing your knowledge of the opposing lawyer’s misconduct is likely to embarrass or harm your client, and you therefore advise your client not to disclose, do you have to follow your client’s contrary instruction? In other words, can your client force you to report opposing counsel’s misconduct even though you believe the report will embarrass or harm your client?

We can argue either side of that question. On one hand, EC 77 provides:

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. ...

Arguably, refusing to report an opposing lawyer’s misconduct will neither affect the “merits” of the client’s case nor substantially prejudice the client’s rights to assert a defense. Therefore, we could argue that the decision whether to report remains in the province of the lawyer’s authority and that the lawyer does not have to follow a client’s instruction to make a report. On the other hand, the purpose of disclosure is to protect the public interest by disciplining or deterring the opposing attorney so that he cannot harm others. If the client is willing to sacrifice his own interests for the good of the public, a lawyer should not stand in the way and the report under DR 1103(A) should therefore become mandatory.

Here is how I split this baby: if a client expressly instructs his lawyer to report knowledge of an opposing lawyer’s serious professional misconduct, then the lawyer must honor the client’s instruction to report. But the timing of the report remains within the lawyer’s discretion.

When Must You Report?

Various authorities have addressed the question of timing. In N.Y. City 903, the committee said that if a lawyer determines that he possesses knowledge of misconduct by another lawyer that must be reported under DR 1103 (A), “generally” the lawyer must report that knowledge “promptly.” The committee also recalled an earlier opinion, N.Y. City 8279, in which it had opined that despite a lawyer’s duty under Canon 7 to represent a client loyally and zealously and to avoid prejudicing the client’s interest, “a report of misconduct must be made promptly upon discovery in order to protect the public.”

But the committee was plainly troubled by this easy solution, and said it did not believe the desirability of prompt reporting would necessarily “exclude the possibility of some delay in reporting when a lawyer’s ethical obligation to a client necessitates such a delay.” In some situations, it might be “appropriate for a lawyer to balance a client’s interest, which may be furthered by a delay in reporting, against the public’s interest in prompt reporting of misconduct by a lawyer who may engage in similar misconduct again if not disciplined.” In determining whether there is “room for judgment as to how promptly a report must be made,” the committee suggested the following factors:

[A] lawyer should balance the severity of the misconduct engaged in by the other lawyer and the likelihood that he or she will engage in such misconduct again in the future to the detriment of other clients against the degree of prejudice that the reporting lawyer’s client will suffer from prompt reporting.

But while certain “limited circumstances” might justify postponing a mandatory report for “a brief period of time,” the bottom line was that “once a lawyer decides that he or she must disclose under DR 1103(A), any substantial delay in reporting would be improper.”

In my view, the City Bar’s position is correct in most situations but is off the mark when the opposing attorney’s wrongdoing is bound up with the merits of litigation. The lawyer is in the best position to determine when the report will do the least damage to the client and the most damage to the opposing party’s case. If the best time to bring the opposing counsel’s misconduct to the court’s attention is during the cross-examination of the plaintiff or in a summary judgment motion based on substantial discovery, then the attorney should be permitted to wait until that point even if it is long after the attorney first obtains knowledge of the misconduct.

Indeed, if you file a report “promptly” after you attain the requisite level of knowledge, the report may well be premature. If you were to file a report with the court, the court might say, “I’m not going to sanction the other lawyer until I’ve heard his side of the story and determined whether he has a non-frivolous basis for maintaining the suit, and I won’t know that until we get to the merits.” If you file a report with the grievance committee, the committee will say, “We’re going to hold this grievance in abeyance until the court sorts out the facts and issues a judgment. We don’t have the resources to duplicate the factual inquiry that is going to occur in due course during the litigation.”

Thus, when the opposing attorney’s misconduct is integrally bound up with the very facts at issue in the litigation, reporting promptly may serve no positive purpose and may instead prejudice your client in the litigation. Perhaps for that reason, Massachusetts has written a unique comment to Rule 8.3, its mandatory reporting rule. That comment says:

[3A] In most situations, a lawyer may defer making a report under this Rule until the matter has been concluded, but the report should be made as soon as practicable thereafter. An immediate report is ethically compelled, however, when a client or third person will likely be injured by a delay in reporting, such as where the lawyer has knowledge that another lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.

Conclusion

It seems plain that DR 1103 (A) applies to an opposing lawyer's misconduct during litigation. Otherwise, the option to report to a "tribunal" would make little sense. Ethics opinions in New York and elsewhere have therefore consistently expressed the view that a lawyer who possesses knowledge of an opposing lawyer's misconduct that is not protected as a confidence or secret and that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer must file a report. But the timing of the report is another question. While a report ordinarily must be filed "promptly" after the criteria of DR 1103 (A) have been met, I believe an exception to that rule applies if the facts underlying the opposing lawyer's misconduct are the same facts that are disputed in the litigation and there is no reason to believe that the lawyer is likely to injure others if a report is delayed. In that rare situation, I believe the lawyer has discretion to delay the report until the facts regarding the opposing lawyer's misconduct come out in due course during the litigation, at the appropriate time and in the appropriate form. A client's desire to report the opposing lawyer may make a report mandatory, but it does not require that the report be immediate.

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