Advisory Opinion 1988-8

Background:

1. The requesting attorney, while representing a party in an arbitration proceeding, received sworn statements from employees of his client that the opposing counsel had offered a cash "donation" to such employees if they would shade or slant testimony in favor of the position of the opposing attorney's client.

2. The requesting attorney states that he has no other facts to either support the sworn statements or to refute the sworn statements, and has no facts which would independently reflect adversely upon the credibility of the two witnesses who provided the sworn statements.

3. The conversations relative to the offer to pay the cash donation were not overheard by the requesting attorney, nor any attorney associated with him, were not sound recorded, and were not set forth in any writing signed by the other attorney, or identifiable as in the handwriting of the other attorney.

Opinion:

At the time the information in question was obtained by the attorney requesting this advisory opinion, the old Model Code provision, DR 1-103, was in effect. Since January 1, 1987, the new Model Rule, Rule 8.3 (adopted in New Mexico as Rule 16-803) has been in effect. Both rules refer to 'knowledge" of a violation, such that we believe the same analysis applied to both provisions, insofar as defining "knowledge.' The Model Rules, and particularly Rule 8.3 (New Mexico Rules of Professional Conduct Rule 16-803) does add the clear requirement that the knowledge of violation must be reported only if it is a serious violation, specifically, a violation which "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

First, we conclude that knowledge of an attempt by an attorney to influence testimony of witnesses in a legal proceeding, including an arbitration proceeding, by offer of monetary reward, meets the seriousness requirement of Rule 16-803. *See* Opinion 85-6, Committee on Ethics of the Maryland State Bar Association, at *ABA/BNA Manual on Professional Conduct* 801:4348; and also see *In re Ayala*, 102 N.M. 214, 693 P.2d 580 (1984).

The core issue, necessary to render this opinion, is what quality or quantity of information must come to the attention of a lawyer before the duty to inform the appropriate professional authority is triggered. Stated otherwise, what constitutes 'knowledge" of an ethical violation by another attorney? Before specifically addressing that issue, we make several observations.

1. The duty to inform as adopted in New Mexico is mandatory as recommended by the American Bar Association. (Not all jurisdictions have adopted the mandatory language *shall* inform; rather have adopted the precatory language "should" inform. *See* report on West Virginia's adoption of model Rule 8.3, *ABA/BNA Lawyers Manual on Professional Conduct,* Current Reports, p. 1129, Jan. 22, 1986).

2. The mandatory duty to inform, of course, implicates an ethical breach by an attorney whose mandatory duty is not performed.

3. There is a further ramification; a lawyer who knows another lawyer has failed in a mandatory duty to inform would conceivably be under a duty to inform on the lawyer neglecting this duty.

4. We recognize that a good deal of uneasiness exists in the legal profession, and among commentators, as to the imposition of a duty upon a lawyer to be an 'informer." Such a duty goes far beyond the duty of an ordinary citizen, who, with few exceptions, has no legal duty to report a crime, even a crime committed in the citizen's presence. We are thus aware that in some quarters, the lawyer's duty to inform has been likened to "gestapo tactics" or as a "big brother" provision. 1986 Duke L.J., the Lawyer as Informer, 491-547.

5. Some jurisdictions have not merely removed the mandatory aspect of the duty to inform, they have rejected a duty to report *in toto. See* Opinion 440-51, Ethics Committee of the Los Angeles County Bar Association, *ABA/BNA Lawyers' Manual on Professional Conduct,* 901:1701.

On the other hand, we note that:

a. The New Mexico Supreme Court has created a reason process machinery for investigating and resolving reports of alleged ethical impropriety. Rules Governing Discipline, 17-101 to 17-316.

b. The proceedings before the Disciplinary Board are confidential, unless and until they become matters of public record before the Supreme Court (and other very limited exceptions). Rules Governing Discipline, Rule 17-304.

Having this background and proper context for the request, we address what constitutes "knowledge" of a violation which will trigger the duty to inform the appropriate professional authority.1

The comments to the Model Rules, the articles of commentators, case law and ethics opinions have been fully reviewed and we find very little assistance in ascertaining the proper standard for a definition of "knowledge." The commentators do recognize that although the comments to the Model Rules speak of "actual knowledge" (*see* New Mexico Rules of Professional Conduct, Terminology Judicial Pamphlet 16, at pp. 4,5) actual knowledge is itself a phrase lacking in clarity. *See* 1986 Duke L.J., *supra*, pp. 506-509, and *see* 20 Ariz. L. Rev. 509, note, The Lawyer's Duty to Report Professional Misconduct, n.13, p. 510. The ethics opinions merely distinguish between "suspicion" and "knowledge," defining neither. *See ABA/BNA Manual*, 801:4871, 801:6952.

Lawyers are naturally reluctant to inform on a fellow lawyer unless the facts are clear. See numerous articles cited in *ABA/ BNA Lawyers' Manual on Professional Conduct,* at 101:202. But, lawyers have neither the time nor the investigative resources to investigate, and to actually confront another attorney. (Compare duties of investigation upon attorneys, imposed by Rule 11 FRCP). The standard to be applied might arguably be "personal," "reasonable belief" or some other standard. It is certainly something beyond "mere satisfaction" and should be greater than a probable cause standard. It is the opinion of the committee that a "substantial basis" standard is appropriate. Thus, when a lawyer possesses knowledge that creates a substantial basis for believing that a serious ethical violation has occurred, the lawyer has a duty to report that violation to the appropriate professional authority. We rely on the test contained within rule 16-803 that a violation raises a "substantial question" as to the lawyer's honesty, trustworthiness or fitness as a lawyer to arrive at this standard of knowledge necessary to report a violation.

It is our further opinion that the attorney, whether obtaining information directly or from third party sources:

a. need not actually confront the implicated attorney or attorneys with the information obtained (but would certainly not be prohibited from doing so);

b. need not independently investigate the existence in fact of a violation;

c. may state, in informing the Disciplinary Board, disciplinary counsel, or other authority that he or she makes no statement that a violation has in fact been committed; rather, that he or she is merely informing the authority as mandated by Rule 16-803; but

d. should make the statement that he or she has not subjective awareness, in fact, of probable falsity of the information furnished.

By stating (d) above, we are in effect holding that an attorney who has a 'subjective awareness, in fact, of probable falsity," need not inform the appropriate authority of the information in question. By combing this requirement with a negation of a duty to confront the attorney or attorneys implicated, and the negation of a duty to independently investigate, we intend to remove any argument that subjective awareness, in fact, of probable falsity, may exist if confrontation or independent investigation has not occurred. The term "subjective awareness, in fact, of probable falsity" 2 we borrow from the law of defamation, but we eliminate from argument any case law, in defamation cases or otherwise, which would suggest that failure to confront or failure to investigate would, standing alone, create subjective awareness of probable falsity.

We find nothing in Rule 16-803 of the Rules of Professional Conduct which would require an attorney to inform, to furnish that information to the appropriate professional authority in the form of a "complaint." To the contrary, Rule 16-803 merely requires the attorney to inform. The Disciplinary Board is required to appoint a chief disciplinary counsel and "such other assistant counsel as may be required." Rules Governing Discipline, Rule 17-105A. The Disciplinary Board may also

employ investigators. Rule 17-105D. Chief disciplinary counsel has the authority to initiate investigations by his own complaint, Rule 17-105B(2), as well as a complaint of "any person.' Therefore, when informing the Disciplinary Board of information required by Rule 16-803, the format need not be in the form of a complaint.

We believe that the test for the duty to inform here adopted is not so rigorous as to set an impracticable standard of knowledge. At the same time, we have attempted to set the standard well beyond mere suspicion and above probable cause. By clarifying that information is not tantamount to a complaint, by negating a duty to confront the other attorney, by negating a duty to independently investigate, and by emphasizing the role of the Disciplinary Board, disciplinary counsel and the confidentiality of their proceedings, we have sought to mitigate the big brother stigma which has traditionally rendered the duty to inform as the least observed of the ethical rules governing lawyers.

Summary of opinion:

1. Rule 16-803 of the Rules of Professional Conduct requires a lawyer having "knowledge" that another lawyer has committed a violation of the Rules of Professional Conduct to inform the appropriate professional authority, provided the violation is such that it "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

2. An attempt by an attorney to influence testimony by offer of monetary payment for such testimony is a violation which "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.'

3 . The quality and quantity of information which will constitute "knowledge" of a serious violation is such information, whether obtained by the senses as personal knowledge, or obtained from third persons, which would create a substantial basis for believing that the violation had been committed.

4. When information is obtained from third persons, a substantial basis for believing a violation had been committed would not exist if the lawyer receiving that information possessed a subjective awareness, in fact, of probable falsity of the information.

5. A lawyer obtaining information from third persons concerning an alleged serious ethical violation by another attorney is not required to confront the accused attorney with the information, but he may do so.

6. Even if an attorney is not ethically required to report a violation, because a substantial basis is lacking, he nevertheless *may* report the information obtained to the appropriate professional authority.

1 The appropriate professional authority could be the disciplinary board; it might be a judicial body before whom a matter is pending. *See ABA/BNA Lawyers' Manual*, 101:202, 203.

2 " Subjective awareness, in fact, of probable falsity,' precludes a claim of privilege against suit for defamation by a public official or a public figure. *St. Amant v. Thompson*, 390 U.S.
727 (1968) . The awareness of probable falsity is not only required to be a subjective awareness, it is awareness *in fact,* of probable falsity, not merely whether a reasonable man "should" have entertained doubt as to truth. *See* Sanford, *Libel and Privacy*, § 1.2 n.15, p. 6. The test i's employed where the credibility of a source of information is reasonably subject to disbelief, but only when doubted in fact. A fabricated source, an unverified anonymous telephone call, inherently improbable information or other obvious reasons to doubt veracity of an informant or the accuracy of reports, will constitute circumstantial proof of subjective awareness of probable falsity.