THIS OPINION IS MERELY ADVISORY AND IS NOT BINDING ON THE INQUIRING ATTORNEY, OR THE COURTS OR ANY OTHER TRIBUNAL.

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Opinion-1991-3
June 18, 1991

A member of the Delaware Bar ("Attorney") has requested the Committee's advice on whether he has an obligation under Rule 8.3(a) of the Rules of Professional Conduct to report possible misconduct by a fellow Delaware attorney.

FACTS

The co-guardian ("Guardian") of an incompetent person approached the Attorney seeking legal representation for the Guardian's ward in connection with felony charges pending against the ward. The Guardian is the ward's daughter; the ward's wife was, at the time, a co-guardian.[1] During the course of the meeting, the Guardian told the Attorney that the Guardian and the Guardian's former attorney ("Prior Attorney") had engaged in what appears to be a fraudulent scheme in connection with the guardianship proceeding.[2] According to the Guardian, the Prior Attorney suggested and the Guardian agreed that the Prior Attorney would file an inflated fee petition in the guardianship proceeding. The Guardian and the Prior Attorney would then split the amount received in excess of actual legal fees and costs.[3] The Guardian went along with the scheme because she

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1 As noted below, the wife/co-quardian is now the ward's sole legal guardian.

2 At the time of the conduct, Prior Attorney was representing both the Guardian in the hip proceeding and the ward on the criminal charges.

3 The Prior Attorney estimated the costs of the guardianship proceeding to be $5,000.

needed the money. The coguardian (i.e., the ward's wife) was unaware of the agreement.

Attorney does not know why the Guardian disclosed the information to him. She did not seek his advice with respect to it. She did not and never has asked the Attorney to represent her either personally or in her capacity as Guardian. The sole purpose of the meeting between Attorney and Guardian was to discuss Attorney's possible representation of the ward.[4] During the meeting, the Attorney told the Guardian several times that if he' were to accept representation, he would represent the ward only and not the Guardian nor the co-guardian. Attorney does not recall specifically if he made such statement before the Guardian disclosed the fee agreement.

After learning of the Guardian's and the Prior Attorney's conduct, the Attorney explained to the Guardian that the Guardian might face criminal prosecution and that the Prior Attorney might also face disciplinary action. The Attorney further explained that he might have an obligation to report the incident to the appropriate authorities. The Guardian said that she understood and agreed that informing the appropriate person or persons was in everyone's best interests. The Guardian further stated that her objective was to obtain competent representation of the ward. The Attorney did not agree to represent the ward at the meeting but he subsequently agreed to the representation. The Attorney now represents the ward whom he considers to be his only client. Attorney does, however, look to the ward's wife, presently the ward's sole guardian, for assistance because of the

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The Prior Attorney and the Guardian Attorney has never paid the Guardian her $2,500 share.

[4] The Attorney had met the Guardian once before. The purpose of that meeting was also to discuss Attorney's representation of the ward. Following the first meeting, Attorney asked Prior Attorney to forward the ward's file to him.

ward's condition.

The ward's wife is now aware of what happened. The Guardian has been removed and the ward's wife is the ward's sole legal representative. Attorney believes that the wife has reported the incident to the Disciplinary Counsel and that an investigation is underway.[5]

ISSUE PRESENTED

Under Rule 8.3(a) of the Rule of Professional Conduct must the Attorney report the Prior Attorney's conduct to the Disciplinary Counsel or is Rule 8.3(c)'s exemption with respect to disclosure of attorney-client confidences applicable?

CONCLUSION

On the facts presented, it is unclear whether an attorney-client relationship existed between the Guardian and the Attorney at the time the Guardian disclosed the fee agreement. No express attorney-client relationship was created and the Attorney does not appear to have intended or agreed to such a relationship. An attorney-client relationship may, however, be implied in certain circumstances. It is the client's (i.e., the Guardian's), belief that controls in an implied attorney-client relationship. Without any objective evidence as to the Guardians belief or understanding, the Committee cannot definitively conclude that no attorney-client relationship existed as between the Attorney and Guardian. Absent such evidence, Attorney should not report the Prior Attorney's conduct. If, however, Attorney has some objective evidence that the Guardian did not intend to

[5] Attorney has no independent verification or substantiation of whether a report was made to the Disciplinary counsel. Accordingly, he still seeks an opinion from the Committee with respect to his duty to report under Rule 8.3(a). The Committee's research has not revealed any authority discussing an attorney's duties under Rule 8. 3 (a) where the misconduct in

create an attorney-client relationship, the Attorney should report the Prior Attorney's misconduct. Any doubt should be resolved in favor of protecting the attorney-client privilege. Alternatively, if Attorney has obtained the informed consent of the Guardian, the misconduct should be reported.

LEGAL DISCUSSION

Rule 8.3(a), mandating disclosure of certain professional misconduct, provides as follows:

> (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.

Under Rule 8.3(a), the duty to report professional misconduct is mandatory in cases of "known violations that directly implicate the integrity of the legal profession." Hazard and Hodes, The Law of Lawyering (2nd. ed. 1990) at p. 939 (hereinafter referred to as "Hazard"). Unlike the old Model Code of Professional Responsibility, the duty to report under Rule 8.3(a) is limited to cases raising a "substantial question" about another lawyer's fitness to practice law. Id.[6] Rule 8.3(c) creates an exemption from the duty to report if disclosure would reveal confidential attorney-client information protected under Rule 1.6. Thus, when a lawyer knows about another lawyer's misconduct only through his dealings with a client, the information is considered privileged and can only be revealed

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question has already been reported.

[6] Under the old Model Code, the duty to report extended to all violations. DR 1-103. Rule 8.3(a) , limiting the duty to report to serious misconduct, restores the provision of Canon 29 of the ABA Canons of Ethics, which stated that "a lawyer should expose . . . corrupt or dishonest conduct in the profession."

if the client consents. Hazard, p. 94. Attorneys who fail to report another lawyer's misconduct face possible disciplinary action themselves. E.g., In Re Himmel, 533 N.E.2d 790 (Ill. 1988).[7]

The Prior Attorney's conduct raises "a substantial question" as to his "honesty, trustworthiness and fitness as a lawyer" within the meaning of Rule 8.3(a). Lynch, The Lawyer as Informer, 1986 Duke L.J. 491, 539-46 (including professional misconduct involving dishonesty toward a client or the legal process as conduct to which Rule 8.3(a)'s duty to report applies). The Prior Attorney's conduct involves dishonesty toward a client since the "extra" money paid to him presumably came from the ward's assets. It also involves dishonesty to the Court that considered the false fee petition.

The pertinent inquiry is, accordingly, whether or not the Prior Attorney's misconduct was revealed during a confidential attorney-client communication. In other words, was there an attorney-client relationship between the Attorney and the Guardian when the Guardian disclosed the fee agreement? If so, Rule 8.3(c) exempts reporting it.

Neither the Rules of Professional Conduct nor the law generally define the identity of the client in any given transaction or situation. Rather, the lawyer-client relationship is fundamentally a contractual relationship the existence of which depends on specific circumstances. Hazard, p. 75; see also ABA/BNA Manual on Professional Conduct, 31:101 (March 15, 1989) (hereinafter "ABA/BNA Manual"); 7A C.J.S. Attorney and Client §169

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[7] But see Los Angeles County Bar Association Ethics Committee Opinion 440 (May 19, 1986) (interpreting Rule 8.3 as imposing a permissive, not mandatory, duty to report unethical conduct).

(1980).[8]Courts normally'look to the intention of the parties to determine if they have entered an attorney-client relationship. Hazard, p. 75. The attorney-client relationship arises when the client consents to the lawyer's acting on behalf of the client and the lawyer agrees to act for the benefit and subject to the control of the client. ABA/BNA Manual, §31:102, citing Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169 (3rd Cir. 1971); Anderson v. Pryor, 53 F.Supp. 890 (W.D.Mo. 1982).

While most lawyer-client relationships are created by express agreement, courts have also inferred the relationship from the parties' conduct. In Re McGlothlen, 663 P.2d 1330, 1334 (Wash. 1983); Farnham v. State Bar, 552 P.2d 445, 449 (Cal. 1976). The standard applied in these circumstances is a subjective one that focuses on the client's belief that such a relationship exists. Slusser v. Billet, 762 P.2d 350, 351 (Wash. App. 1988); In Re Petrie, 742 P.2d 796, 800-01 (Ariz. 1987); In Re McGlothlen, 663 P.2d at 1334. As noted in R. Wise, Legal Ethics p. 284 (2nd Ed. 1970), "[t]he deciding factor is what the prospective client thought when he made the disclosure not what the lawyer thought". The reasonableness of the client's belief depends on the facts and circumstances of each case. See In Re Petrie, 742 P.2d at 801.

On the facts presented, there was no express agreement between the Attorney and the Guardian pursuant to which the Attorney agreed to represent the Guardian. Moreover, it appears that the Attorney never intended to represent the Guardian. The Committee cannot, however, on the facts known to it, determine whether or not the Guardian could have reasonably

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[8] The relationship is also said to be an agency relationship governed by the same rules which apply to other agencies. Anderson v. Pryor, 537 F.Supp. 890, 894 (W.D.Mo.

believed or intended that Attorney would be representing her and the ward as well.

Certain facts suggest that the Guardian could have reasonably believed that Attorney would be representing her. For example, Prior Attorney had simultaneously represented both Guardian and ward in the past. In addition, it is not known whether Attorney's statements that he would represent the ward only were made before or after the Guardian's incriminating statements. Moreover, common sense suggests that the Guardian would not have made the inculpatory disclosures to Attorney unless she had some expectation of confidentiality. Since the standard for determining whether an attorney-client relationship may be implied is largely a subjective one focusing on the client's reasonable belief, the Committee cannot conclude that the Guardian had no actual expectation, or reasonable basis, for believing that her communications to Attorney would not be confidential. Absent some objective indication from Guardian that she knew or understood that Attorney would not represent her in addition to the ward, Attorney should not reveal the Guardian's communications to him. If Attorney has any doubt, he should err on the side of protecting the communication because the protection of client confidences is a basic tenet of an attorney's professional obligations. As noted in the ABA/BNA Manual, close questions over whether an attorney-client relationship existed should be resolved in favor of protecting confidential disclosures. ABA/BNA Manual at §55:301.

If Attorney concludes that there is some basis for implying an attorney-client relationship between himself and the Guardian, he should consider whether or not the Guardian has consented

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1982).

to disclosure.[9] Under Rule 1.6(a), the Attorney may disclose the Guardian's communications with the Guardian's consent. The Comment to Rule 1.6(a) requires that the client's consent be given after "consultation." While the Rule does not identify any specific elements that must be communicated to a client, the terminology section of the Rules defines "consultation" as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." With an unsophisticated client, care must be taken to be sure the client understands that to which she is being asked to consent. ABA Formal Opinion 1287 (May 7, 1974). If the Guardian consented to the disclosure after appropriate consultation, Attorney should report Prior Attorney's conduct pursuant to Rule 8.3(a).

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[9] The Comment to Rule 8.3(a) states that a lawyer "should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests."