

DIGEST OF ETHICS ADVISORY PANEL  
OPINION #90-5, REQUEST #76  
Issued January 18, 1990

(1977.6)

An attorney seeks Panel advice as to the proper course of action to take in light of certain facts of which he has become aware.

The inquiring attorney first explains that he is both an attorney licensed to practice in Rhode Island and a certified public accountant (CPA). The inquiring attorney states that he was recently hired as a CPA by the administratrix of an estate who we shall refer to as Ms. A to prepare a tax return for the estate of her late brother, Mr. A. Ms. A has retained Lawyer L to represent her as administratrix. The inquiring attorney emphasizes that he was hired as an accountant only.

Mr. A died intestate leaving his sister, Ms. A, and five nephews, children of a deceased sibling. Mr. A did not know about these nephews. The inquiring attorney states that the tax return he prepared for Mr. A's estate showed assets in excess of \$250,000. The inquiring attorney indicates that some of Mr. A's bank accounts were held jointly with Ms. A. The inquiring attorney states that although he never knew Mr. A's intent, Ms. A told him that all the monies were his and that he put her name on accounts so that she could get to the monies if he could not. Lawyer L has informed the inquiring attorney that he sees his role as assisting Ms. A in obtaining as much of Mr. A's estate as possible. The inquiring attorney states that in calculating the proper distribution of the funds in the estate, Lawyer L has first set aside those funds from bank accounts to which Ms. A's name was added. The inquiring attorney states that he informed Lawyer L that Ms. A had told him that the joint accounts were set up for convenience. The inquiring attorney further advises the Panel that the five nephews, who live out of state, are not represented by counsel and have no apparent way of finding out exactly how Lawyer L has set about dividing up Mr. A's estate. The inquiring attorney states that Lawyer L has offered each of the nephews a share of the estate which is far less than they would be entitled to if Mr. A's assets were properly divided. He asks the Panel what he should do under the circumstances.

As a threshold matter, it is important to note that the Rules of Professional Conduct are binding upon a lawyer "whether or not he is acting in his professional capacity." ABA Formal Opinion 336, issued June 3, 1974.

Rule 1.1 entitled "Competence" provides,

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2, entitled "Scope of Representation" provides, in pertinent part:

(d) A lawyer shall not . . . assist a client in conduct that the lawyer knows is criminal or fraudulent . . .

Rule 3.3, entitled "Candor toward the Tribunal provides, in pertinent part:

(A) A lawyer shall not knowingly

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(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

Rule 8.3, entitled "Reporting Professional Misconduct" provides, in pertinent part:

(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.

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(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 [Confidentiality of Information].

Explaining the scope of Rule 8.3, Professor Hazard notes that

[m]erely technical violations . . . would not qualify [under the mandatory reporting provisions of Rule 8.3] whereas destruction of evidence under subpoena, suborning perjury or self-dealing with trust funds would. I. G. Hazard The Law of Lawyering, 556.

Rule 8.3 outlines the scope of mandatory reporting one's fellow attorney. Attorneys may report lesser infractions to the appropriate authorities as they see fit.

The Illinois Supreme Court had occasion to review the application of this reporting requirement as it was formerly embodied in DR 1-103(a) in In re Himmel, 533 NE.2d 790, 125 Ill.2d 531, 127 Ill Dec. 708 (1989). The Court found that Attorney Himmel's failure to report unprivileged information concerning another attorney's fraudulent conversion of client funds warranted suspension of his license. In so holding the court stressed that Himmel's failure to report his brother attorney's misconduct had effectively frustrated any disciplinary authority's investigation and was thus tantamount to interference with the administration of justice.

The Panel can not, of course, rule on the propriety of conduct of an attorney who has not sought its advice. The Panel notes, however, that since the inquiring attorney was retained by the administratrix specifically for the limited purpose of providing accounting services, none of the information he now has concerning the decedent, Ms. A or Lawyer L's conduct is protected by the attorney-client privilege. See 8 J. Wigmore Evidence 2292 (McNaughton rev.2d 1961). Thus if the inquiring attorney elects to reveal the information in his possession to the Probate Court and to the Rhode Island Supreme Court's Disciplinary Office no impropriety will arise. If the inquiring attorney declines to make these revelations, he may or may not have violated the reporting requirement of Rules 3.3 and 8.3.

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.