Enduring Ethics Opinion #100. Threatening Grievance Action to Influence Malpractice Settlement Negotiations

Ethics Opinion #100 remains applicable following the adoption of the Maine Rules of Professional Conduct. What follows is a revised Opinion addressing the issues presented in Ethics Opinion #100 with current citations to the Maine Rules of Professional Conduct.

This Opinion concerns an attorney’s duty to keep separate the filing of a grievance and a claim of malpractice arising out of the same facts.

Attorney A has acquired written documents prepared by Z, his client’s former attorney, which indicate that many of his client’s legal problems were caused by Z’s negligent conduct. As a result, Attorney A believes that his client has a meritorious legal malpractice case against Z and that Maine Rule of Professional Conduct 1.1 may have been violated by Z’s conduct.

In addition to Z’s allegedly negligent conduct, A’s client strongly contends that at least one of the documents executed by Z was fraudulently prepared. The client has indicated that he has no real interest in initiating disciplinary proceedings against Z under the Maine Rules of Professional Conduct. However, the client has requested Attorney A to negotiate “in any way possible” with Z to maximize his recovery with respect to his malpractice claim. The client has even implied that A should threaten to file a grievance against Z in the course of negotiating with him.

Based on the foregoing facts, Bar Counsel has asked the following questions:

Question #1

To what extent may an attorney make any reference to the possible, intended, or actual filing of a grievance complaint against another attorney in the course of his discussions or negotiations with that attorney (or his counsel) regarding the settlement of a related legal malpractice action against that same attorney?

Brief Answer

Just as it was under the Maine Bar Rules, it would be unethical under the Maine Rules of Professional Conduct for Attorney A to threaten to report a grievance in order to enhance the chances of a favorable settlement of the malpractice claim against Attorney Z.

Discussion

Maine Rule of Professional Conduct 3.1(b) provides that:

A lawyer shall not report or threaten to report misconduct to a criminal, administrative or disciplinary authority solely to obtain an advantage in a civil matter.
Indeed, any mention of the possibility of filing a grievance made in the course of the negotiations concerning the malpractice claim would be suspect if it conveyed a subtle inference that a trade-off might be possible.

Question #2

Does Maine Rule of Professional Conduct 8.3(a) mandate reporting the attorney’s conduct to the Board, where, although the “reporting attorney” has some doubts in his mind as to the facts supporting the mandatory reporting provisions, his affected client is adamant that those facts demonstrate fraudulent conduct on the part of the attorney? For purposes of this question, the client’s present attorney agrees that if his client’s interpretation of the facts is true, then fraud was committed by the former attorney.

Brief Answer

Lacking the requisite “knowledge,” Attorney A has no obligation to report Attorney Z’s conduct to the Board.

Discussion

Rule 8.3(a) states that:

A lawyer who knows that another lawyer has committed a violation of the Maine 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.

In the previous version of Ethics Opinion #100, we reviewed the history of then applicable Bar Rule 3.2(e)(1), and concluded that a lawyer’s “knowledge” of the offense for the purposes of that Rule must be based upon a “substantial degree of certainty and not rumor or suspicion” in order to trigger the mandatory reporting requirement. Based on the similarity of Rule 8.3(a), we find that this same “substantial certainty” rule applies to the type of “knowledge” that triggers a mandatory reporting requirement under Rule 8.3(a). That is, a lawyer is required to report the misconduct of a fellow lawyer only when the “reporting” attorney subjectively “knows,” to a “substantial certainty,” that the offending lawyer has (a) committed a violation of the Maine Rules of Professional Conduct, and (b) such violation raises a “substantial question” as to the offending lawyer’s honesty, trustworthiness or fitness as a lawyer. See Board of Overseers of the Bar v. Warren, 2011 ME 124.

In the present case, Attorney A apparently does not share his client’s conviction that Attorney Z was guilty of fraud. Lacking the requisite “knowledge” of the violation of the Rules of Professional Conduct, Attorney A has no obligation to report it. If his client remains adamant, Attorney A can instruct him how to file his own grievance with Bar Counsel concerning the alleged fraud.
Question #3

If the answer to Question #1 is such that any mention by the present attorney of the potential grievance action in relation to the settlement of the malpractice action is seen as a violation of Rule 3.1(b), then is the present attorney required to withdraw from representation of his client pursuant to Rule 1.16(a)(1).

Brief Answer

Attorney A must withdraw from representation if his client insists upon using the grievance as leverage in negotiating a settlement to the malpractice claim.

Discussion

The Commission is asked whether the ethical restriction upon mentioning the possibility of filing a grievance in the context of negotiating a settlement of the malpractice claim requires him to withdraw from the case. The answer is simply that A must advise his client that the Rules of Professional Conduct forbid him to use the threat of filing a grievance as a negotiating tool. If the client nevertheless insists upon using the grievance as a lever, A should advise him that he will not be able to represent him further.