Committee Opinion
December 14, 1993
Affirmed
April 11, 1994
Reaffirmed
July 20, 1994

LEGAL ETHICS OPINION 1566

ZEALOUS REPRESENTATION — DUTY TO REPORT: REFUSAL OF LOCAL GOVERNMENT ATTORNEY TO COMPLY WITH FREEDOM OF INFORMATION ACT REQUEST.

You have presented a hypothetical situation in which Taxpayer, resident in County A, has appealed the assessed value on his home to the Board of Real Estate Review and Equalization ("Board") of County A. Pursuant to § 58.1-3386 of the Code of Virginia ("Code"), Taxpayer has asked Board to subpoena witnesses to offer evidence at the hearing. Taxpayer is informed that it is not the "policy" of the Board to subpoena witnesses. Taxpayer continuously asks, in writing, how Board can fulfill its statutory charge to hear the case of Taxpayer and refuse to subpoena the witnesses Taxpayer needs to present his case.

Approximately four months later, Taxpayer asks in writing, pursuant to the Freedom of Information Act ("FOIA"), if Board has ever issued a subpoena and for a copy of all policies and procedures under which Board operates. One day after the written request is made, Taxpayer is informed that there are no records relating to the issuance of any subpoena and is provided with a copy of the policies and procedures of Board. You state that the policies and procedures contained no reference to a policy concerning subpoenae.

Approximately seven months later, Taxpayer is advised by the Assistant Real Estate Director of Board that it is not Board's "policy" to subpoena witnesses. Shortly thereafter, Taxpayer questions that policy, in response to which Attorney X of County A states:

> The Board's policy concerning use of its authority to summons witnesses has been explained to you both last year and this year in previous correspondence. I find no violation of law or procedure in this policy.

Approximately three weeks later, Taxpayer asks Attorney X to provide the date Board adopted its "policy" and a copy of the minutes of that meeting. Taxpayer prompts Attorney X for a response to that request twice in the next month. You state that, three weeks after the last prompt, Attorney X responds, but does not provide the documents originally requested.

Approximately one month later, Taxpayer reminds Attorney X that the explicit FOIA request has not been fulfilled, to which Attorney X informs Taxpayer that he may inspect the records of Board or he may pay $1,450 for a copy of all 38 years of records of Board. Taxpayer then advises Attorney X that that response is not in compliance with the FOIA, to which Taxpayer states as follows:

Committee Opinion
December 14, 1993
Affirmed
April 11, 1994
Reaffirmed
July 20, 1994

> The adoption of the "policy" either predates my dealing with the Board or does not exist. I believe it is the latter and that you are therefore caught with your earlier statements. I am stating that I believe you have been intentionally untruthful to me. You are invited to prove me wrong. You can do so by telling me the date of the adoption of the "policy" and to send me those minutes. Further, your response is incorrect as a matter of law. Re-read Section A. The minutes allegedly exist and you have not been asked to abstract or summarize records or to convert records into another form. A meeting is a discrete, discernible, segregatable event. Section 2.1-342.A provides that "any reasonably segregatable portion of an official record shall be provided to any person requesting the record after the deletion of the exempt portion." Quit wasting my time. Provide me with the minutes of the meeting at which the "policy" was adopted or confirm that such records do not exist.

Shortly thereafter, Attorney Y, supervisor of Attorney X, advises Taxpayer that Attorney X has not been intentionally untruthful. Attorney Y advises Taxpayer, who is a licensed Virginia lawyer, that a lawyer should be temperate and dignified and that Taxpayer should cease making *ad hominem* attacks on Attorney X.

In response to Attorney Y, Taxpayer points out that EC:1-5 of the Virginia Code of Professional Responsibility also encourages obedience to the law. Taxpayer specifically demands compliance with the FOIA as to the "policy" and that the minutes at which the "policy" was adopted be provided. Taxpayer reiterates that demand to Attorney Y six times during the succeeding eight weeks. At the conclusion of that time period, Attorney Y states ". . . in my opinion, the County has complied with your FOIA request." Shortly thereafter, Taxpayer, by certified mail, advises Attorney Y as follows:

> For the first time, you have asserted your "opinion" that the County has complied with my FOIA request. Your "opinion" is not correct and if you do not already know that, you should. You have not been asked to "abstract" or "summarize" a record. The record, minutes of each meeting, exists. You have asserted the existence of a "policy". Therefore, you must be aware that the policy has been adopted. Therefore, you should be able to provide me with the minutes of the meeting at which the policy was adopted. You have not been asked to "create" a record. Additionally, FOIA is full of language about the intent of the Act and about cooperation by the governmental body. Further, you have previously provided me with minutes of meetings. In short, I believe no reasonable person would believe your "opinion" has been arrived at in good faith. Therefore, I believe your "opinion" is yet another deliberate deception as you know it is not correct. It is one thing to represent the County zealously; it quite another to ignore mandatory language in the law and to pretend you are in compliance. Please comply with FOIA.

Committee Opinion
December 14, 1993
Affirmed
April 11, 1994
Reaffirmed
July 20, 1994

You state that the above certified mailing was received by Attorney Y and no response had been received within six weeks.

You have asked the committee to opine under the facts of the inquiry, (1) whether Attorneys X and Y have violated DR:7-102(A)(3) by failing to produce documents covered by FOIA; (2) whether, if the "policy" does not exist, Attorney X or Attorney Y has violated DR:7-102(A)(5); (3) whether, if either DR:7-102(A)(3) or (5) has been violated, Taxpayer, as a licensed Virginia lawyer, has a duty to report such misconduct pursuant to DR:1-103; and (4) whether, if Taxpayer suspects a violation of DR:7-102(A) but cannot prove it because the County refuses to comply with FOIA, Taxpayer must (i) complain to the Bar about Attorneys X and Y, or (ii) bring a FOIA action in County A courts to compel compliance with FOIA to determine the veracity of Attorneys X and Y The appropriate and controlling Disciplinary Rules related to your inquiry are DRs 1-103(A), 7-102(A)(3) and 7-102(A)(5) which state, respectively, that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal or knowingly make a false statement of law or fact; and Disciplinary Rule 1-103(A) which provides that a lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law in other respects shall report such information to the appropriate professional authority.

The committee responds relative to your inquiries as follows:

1. As to whether Attorneys X and Y have violated DR:7-102(A)(3), the committee is of the opinion that Attorneys X and Y responded sufficiently on September 9, 1992, April 12, 1993, and September 17, 1993 to Taxpayer's question as to the issuance of subpoenae. The facts indicate that on September 9, 1992, Board informed Taxpayer that there were no records relating to the issuance of any subpoenae and provided him with a copy of the policies and procedures of the Board. The committee believes, then, that Attorneys X and Y have not violated DR:7-102(A)(3).

2. Regarding your second inquiry, the committee believes that Taxpayer may have adopted an excessively narrow interpretation of "policy". Black's Law Dictionary, 5th Edition, defines "policy" as "the general principles by which a government is guided in its management of public affairs, or the legislature in its measures." There is no reference to "policy" being defined in terms of an official action memorialized in written form. The committee recognizes that while some "policies" may be written, others may more simply be "custom" or "practice" and, thus, not in writing.

The facts indicate that the policies and procedures, provided to Taxpayer by the Board, contained no reference to a policy concerning subpoenae. The committee is of the opinion that even if the "policy" has not been reduced to print, it may still exist. The

Committee Opinion
December 14, 1993
Affirmed
April 11, 1994
Reaffirmed
July 20, 1994

committee believes, then, that Attorneys X and Y have not violated DR:7-102(A)(5), i.e., they have not knowingly made a false statement of law or fact.

3. In the committee's view, therefore, your third inquiry, regarding the obligation to report misconduct under DR:1-103, has been rendered moot, based upon the committee's conclusion that no violation of DR:7-102(A)(3) and (5) has occurred.

4. Finally, you inquire whether Taxpayer must file a complaint with the Bar, or file a FOIA action in County A, if he suspects, but is unable to prove, a violation of DR:7-102(A) by Attorneys X and Y.

The committee opines that Taxpayer is obligated to report misconduct, under DR:1-103(A), if he possesses information, based on a substantial degree of certainty and not on rumor or *suspicion*, that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law in other respects. [emphasis added] Since Taxpayer's information is based on suspicion, the obligation to report misconduct does not arise. *See* LE Op. 1338, LE Op. 1545.

The question as to whether Taxpayer must bring a FOIA action in County A, if he suspects but is unable to prove a violation by Attorneys X and Y, raises a legal issue the determination of which is beyond the purview of the committee.

Committee Opinion
December 14, 1993

Affirmed
April 11, 1994

Reaffirmed
July 20, 1994

Legal Ethics Committee Notes. – Rule 8.3(a) requires a lawyer to report another lawyer’s ethics violation under certain circumstances if the lawyer has “reliable information” about the breach.