



Committee on Professional Ethics

Opinion #531 - 4/28/81 (9-81)

Topic: Duty to report violation of Disciplinary Rule; communication to member of rehabilitative committee.

Digest: Member of rehabilitative committee not obligated to report evidence of professional misconduct obtained during course of rehabilitation.

Code: Canons 1 and 4;
EC 1-1, 1-4, 4-4;
DR 1-102, 1-103(A),
4-101(A), (B) and (C).

QUESTION

A bar association has established a committee to interview and counsel lawyers who suffer from drug or alcohol abuse with a view toward their rehabilitation. In the course of such counseling, the lawyers divulge to committee members information establishing instances of their professional misconduct stemming from such abuse.

Under the circumstances stated, are the committee members obligated to report such information to a tribunal or other authority empowered to investigate or act upon the misconduct?

OPINION

DR 1-102 prohibits lawyers from engaging in certain conduct, while DR 1-103(A) provides that a lawyer possessing "unprivileged knowledge" of professional misconduct by another lawyer, within the meaning of DR 1-102, must report that knowledge to a "tribunal or other authority empowered to investigate or act" upon such misconduct. That duty of disclosure is founded upon the first pronouncement of the Code of Professional Responsibility: "A lawyer should assist in maintaining the integrity and competence of the legal profession." Canon 1; cf., EC 1-1 with EC 1-4.

OVER----

Consistent with the requirements of Canon 1 and in recognition of the responsibility which it imposes, the organized bar has established the rehabilitative committees described in the question posed. The relationship between committee members and those they counsel is built on confidence and trust, much as the relationship between a psychiatrist and his patient. That trust would be destroyed and the counseling effort seriously undermined if committee members were required to report to disciplinary authorities evidence of misconduct disclosed to them by those they seek to counsel.

The reference in DR 1-103(A) to "unprivileged knowledge" leads us to DR 4-101, which deals with the preservation of confidences and secrets of a client. It defines a "confidence" as information protected by the attorney-client privilege under applicable law, and a "secret" as other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client. DR 4-101(A). Neither confidences nor secrets of a client may be revealed by a lawyer except in rare, specified circumstances. Cf., DR 4-101(B) with DR 4-101(C).

It has long been recognized that a lawyer's duty to protect his client's confidential communications is considerably broader than the evidentiary privilege. EC 4-4. Indeed, in certain ethical contexts (most notably that of avoiding conflicting interests), it makes little difference whether the lawyer purports to act in a professional capacity. See, e.g., NCK Organization Ltd. v. Bergman, 542 F.2d 128, 133 (2d Cir. 1976) and Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964). On the basis of such authorities, it could well be argued that the communications between the committee members and those they counsel are entitled to the protection of Canon 4. The committee members, after all, are lawyers, acting as members of the organized bar.

In our opinion, however, such a construction would force Canon 4 into an area where it was never meant to apply. All of the foregoing authorities dealt with situations in which the lawyer was acting as a lawyer or was engaged in activities involving a blend of legal and law-related activities. Those who seek counseling are not seeking legal advice from the committee members; they seek understanding and trust and support, but not legal services. The "professional relationship" to which DR 4-101 refers is the relationship between an attorney and his client. A communication is not protected from disclosure by the strictures of Canon 4 if it comes to the attorney while he is acting in another capacity. ABA Inf. 309 (1960).

But, the same regard for the elemental purposes of the Code restrains us from attempting to force DR 1-103(A) into an area where it was never intended to apply. It would thwart the clear intent of the rule to use it to undermine and perhaps destroy a thoughtful, well-conceived effort of the organized bar "to maintain the integrity and improve the competence of the bar to meet the highest standards." EC 1-1; cf., N.Y. State 456 (1977). Within the broad and evident purpose of DR 1-103(A), a rehabilitative committee of the bar stands in a position analagous to that of "a tribunal or other authority empowered to investigate or act" upon information relating to professional misconduct. Since the information has already been imparted to those who may act upon it, and given both the institutional character and public concerns of such committees, it would also seem rather anomalous to require that their members be under a duty to report what they have learned to another body. Thus, despite the literal wording of the rule, we are of the opinion that committee members may with ethical propriety refrain from reporting what they have learned of professional misconduct in the circumstances posited.

For the reasons stated, the question posed is answered in the negative.
