



COMMITTEE ON PROFESSIONAL ETHICS

Opinion 822 – 6/27/08

Topic: Lawyer's duty to report violation of disciplinary rule

Clarifies: N.Y. State 531

Digest: A lawyer who satisfies the prerequisites to trigger mandatory reporting of a Disciplinary Rule by another lawyer must report such conduct to an appropriate authority, such as a tribunal (in a litigated matter) or to the appropriate Grievance Committee. Filing a report with a lawyer assistance program is not sufficient.

Code: DR 1-102(A), 1-103(A); EC 1-4

QUESTION

1. If a lawyer has an obligation to report a violation of a Disciplinary Rule by another lawyer, to whom must the lawyer report? Does filing a report with a lawyer assistance program satisfy the reporting requirement?

OPINION

2. In certain circumstances a lawyer is required by the Code of Professional Responsibility to report a violation of a Disciplinary Rule to the appropriate authority. DR 1-103(A) provides:

A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

DR 1-102(A) provides:

A lawyer or law firm shall not: (1) Violate a disciplinary rule. (2) Circumvent a Disciplinary Rule through the actions of another. (3) Engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Unlawfully discriminate in the practice of law

3. The New York State Bar Association has a Lawyer Assistance Program (LAP) to deal with issues of alcohol abuse, substance abuse, and related mental health issues. There are also 17 similar committees formed by local bar associations. According to its statement of purpose, the NYSBA LAP provides education and confidential assistance to lawyers, judges, law school students, and immediate family members who are affected by the problems of substance abuse, stress, or depression. Its goal is to assist in the prevention and early identification of problems that can affect professional conduct and quality of life and to assist in arranging appropriate intervention where such problems are identified. The services provided by the NYSBA LAP, for example, include early identification of impairment; motivating impaired attorneys to seek help; assessing and evaluating the problem and developing an appropriate treatment plan; providing information on training programs on alcoholism, drug abuse and stress management; and referring impaired attorneys to community resources, self-help groups, outpatient counseling, or detoxification and rehabilitation services.¹ Lawyers who serve on committees or programs have no obligation to report a violation of DR 1-102.²

4. This opinion deals with the obligations of lawyers who do not serve on such committees. In N.Y. State 635 (1992) we discussed the four prerequisites that must be met before a lawyer has a reporting obligation under DR 1-103(A). They are:

(1) The lawyer must possess a sufficient degree of knowledge of ostensibly wrongful conduct; a mere suspicion of misconduct is not sufficient.

(2) Any knowledge included in the lawyer's report must not be protected as a confidence or secret.

(3) The conduct in question must violate a Disciplinary Rule.

(4) The violation must raise a substantial question as to the lawyer's honesty, trustworthiness or fitness.

¹ See http://www.nysba.org/Content/NavigationMenu/ForAttorneys /LawyerAssistanceProgramLAP / Lawyer_Assistance_Pr.htm.

² DR 1-103(A); see also Judiciary Law § 499 (treating the confidential information provided to lawyers on such committees as privileged).

For purposes of this opinion we assume that a lawyer has satisfied all four tests; that is, the lawyer has a sufficient degree of knowledge of a violation of a Disciplinary Rule by another lawyer that raises a question about the other lawyer's honesty, trustworthiness or fitness and that knowledge is neither a confidence or secret. Thus, the lawyer has a mandatory reporting obligation under DR 1-103(A). The question this opinion addresses is to whom the lawyer must report.

5. DR 1-103(A) requires a lawyer to report the knowledge of a violation "to a tribunal or other authority empowered to investigate or act upon such violation." The inquirer asks whether reporting to an LAP would satisfy that obligation. In our opinion, while lawyers are to be encouraged to refer to an LAP lawyers who are abusing alcohol or other substances or who face mental health issues, such a referral would not satisfy the ethical reporting requirement.³

6. DR 1-103 requires reporting to a tribunal or other authority empowered to investigate or act upon such violation. Although the Code does not further specify to whom reporting is required, the phrase "investigate or act" suggests that the "authority" must be a court of competent jurisdiction or a body having enforceable subpoena powers. Thus, a violation in the course of litigation could be reported to the tribunal before which the action is pending. In both a litigation and a non-litigation context, the report could be filed with a grievance or disciplinary committee operating under the powers granted to them by the Appellate Division of the State Supreme Court pursuant to Section 90 of the Judiciary Law and court rules.⁴ The report could be filed with the grievance committee in the Appellate Department in which litigation is pending or with the grievance committee in the Department where the lawyer is admitted or where the prohibited conduct occurred.

7. The report need not be made immediately or without some reasonable effort at remediation, particularly where the consequences of reporting the violation may be more harmful to the lawyer's client than some alternative course of action.⁵ Once a

³ We note that lawyers may refer other lawyers to an LAP in situations where the alcohol or substance abuse or mental health issue has not resulted in any violation of a Disciplinary Rule. A lawyer in such a situation may not be so impaired that the lawyer's representation of clients is affected. For example, the lawyer may suffer from stress and depression and need assistance but still be able to perform legal work competently. See generally ABA Formal Op. 03-429 (obligations with respect to mentally impaired lawyer within a law firm); ABA Formal Op. 03-431 (lawyer's duty to report rule violations by another lawyer who may suffer from disability or impairment).

⁴ See, e.g., Nassau County 98-12 (if reporting is required, lawyer can report to the court or to the grievance committee); N.Y. City 1995-5 (misconduct should be reported to the appropriate disciplinary or grievance committee). Cf. *People v. Romero*, 91 N.Y.2d 750, 698 N.E.2d 424, 675 N.Y.S.2d 588 (1998) (holding that N.Y. Jud. Law § 476-a(1) authorized the attorney general to bring a civil action for unauthorized practice of law).

⁵ See, e.g., *U.S. v. Cantor*, 897 F. Supp. 110 (S.D.N.Y. 1995) ("DR 1-103 must be read to require reporting . . . within a reasonable time under the circumstances"); N.Y. City 1990-3 ("While it may be permissible in certain limited circumstances to postpone reporting for a brief period of time, we reiterate our caution . . . that 'once a lawyer decides that he or she must disclose under DR 1-103(A), any
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report has been made to an appropriate authority, notwithstanding the existence of other authorities to which the report could have been made, the reporting lawyer's obligation under the Code will be deemed satisfied.⁶

8. In N.Y. State 531 (1981), the Committee, in holding that members of an LAP may ethically refrain from reporting professional misconduct, noted that the LAP "committee of the bar stands in a position analogous to that of 'a tribunal or other authority empowered to investigate or act.'" In this opinion we clarify that an LAP is not an appropriate authority to which misconduct can be reported. In contrast to a tribunal or grievance committee, an LAP has no formal powers. LAP services are voluntary. Although an LAP may seek to assist a lawyer in need of assistance, the lawyer does not need to respond and may refuse the assistance of the LAP. Furthermore, without the assistance of the affected lawyer, the LAP has no power to investigate whether the impairment has resulted in a violation of a Disciplinary Rule.

9. The purpose of the reporting requirement is to assist courts, disciplinary agencies and other authorities in policing members of the bar.⁷ The focus of an LAP is on assisting in the lawyer's recovery process, not on any code violations that may have resulted from the lawyer's impairment. Disciplining a lawyer for a Code violation may be at odds with the recovery process. The fact that a lawyer's impairment has resulted in a violation of the profession's disciplinary rules may be a lever to convince the lawyer that he or she needs help. The process of obtaining that help, however, will not satisfy the profession's obligation to regulate itself.

CONCLUSION

10. A lawyer who is required under DR 1-103(A) to report knowledge of misconduct "that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer" may report that knowledge to those agencies described above. Reporting the lawyer's conduct to a lawyer assistance program, while salutary, does not satisfy the lawyer's ethical reporting requirement.

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substantial delay in reporting would be improper."); N.Y. City 81-40. *Cf. U.S. v. Turkish*, 470 F. Supp. 903, 909 n.7 (S.D.N.Y. 1978) (prosecutor who believes defense counsel's representation of multiple clients is a conflict problem could "in most instances" satisfy DR 1-103(A) by raising the problem directly with the attorney, and then, if necessary, the clients themselves).

⁶ See Nassau County 88-10 ("The code requires that the matter be brought to the attention of the grievance committee, but does not require that it also be reported to the district attorney or other appropriate prosecuting agency having jurisdiction of such matters").

⁷ EC 1-4 ("The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials"); see also Restatement Third, The Law Governing Lawyers § 5 cmt i (collecting authorities regarding the reporting obligation); *Matter of Wieder*, 80 N.Y.2d 628, 636, 609 N.E.2d 105, 108, 593 N.Y.S.2d 752, 755 (1992) (noting that the legal profession relies upon lawyers to report appropriate cases to protect the public and the integrity of the Bar).

(4-08)

