

ADVISORY ETHICS OPINION 89-17

SYNOPSIS:

Unless consented to by the client, after full disclosure, an attorney may not correct or challenge a prosecutor's factual representations to the court, favorable to the attorney's client, even when the attorney harbors doubt as to the accuracy of the prosecutor's representations, where the attorney's sole source of information regarding the facts stated by the prosecutor constitutes a secret or confidence of the client.

FACTS:

Immediately prior to a change of plea and sentencing hearing a prosecutor informed the defendant's attorney that restitution had been made to the victim. The attorney then conferred privately with the defendant and learned that the defendant had not paid the restitution. Concluding either that an insurer had compensated the victim or that the prosecutor was mistaken, the attorney told the court that "the prosecutor tells me there is no restitution issue at this time". The prosecutor then informed the court that restitution had been paid and that the prosecutor had checked this fact with the victim advocate. The court proceeded to sentence the defendant without provision for restitution.

Subsequent to the hearing the prosecutor learned that restitution had not been paid.

The attorney requests our opinion as to the attorney's obligation to clarify the record regarding the attorney's knowledge of the status of restitution based upon the information learned from the client.

ISSUE:

Where a prosecutor informs the Court that restitution has been paid to the victim and is not an issue at sentencing, and where the defendant's attorney believes that the prosecutor may be mistaken based on the attorney's privileged discussion with the client in which the attorney learns that the client did not pay the restitution, does the attorney have an obligation to disclose to the court or the prosecutor the information learned from the client which casts doubt on the accuracy of the prosecutor's representation?

ANALYSIS:

Resolution of this issue requires examination of the confidentiality requirements of DR 4-101, the disclosure requirements of DR 7-102 and the requirements of DR 1-102 and the attorney's oath itself:

DR 4-101 bars an attorney's disclosure of a "confidence" or "secret" of the client. A "confidence" is defined as "information protected by the attorney client privilege under applicable law". A "secret" is defined as "other information gained in the professional relationship that the client has requested to be held inviolate *or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.*" (Emphasis added) The information learned by the attorney in this case constitutes a "confidence" because it was gained from a communication with the client. If it were not a "confidence", the information would clearly constitute a "secret" as its disclosure would likely be detrimental to the client.

DR 4-101(C) permits an attorney to reveal a "confidence" or a "secret" with the consent of the client. Under the stated facts, there was no client consent here. The attorney could have discussed with the client the possibility of a consented disclosure, but the Code does not mandate such a discussion. The information gained by the attorney from the client must therefore be held inviolate, absent some overriding and controlling disclosure obligation found elsewhere in the Code.

DR 7-102 contains the relevant disclosure obligations. DR 7-102(A)(3) states that a lawyer shall not "conceal or knowingly fail to disclose that which he is *required by law* to reveal." (Emphasis added.) This provision is not applicable because there is no legal requirement that the attorney reveal the information gained from the client

DR 7-102(A)(4) prohibits an attorney from "knowingly us[ing] perjured testimony or false evidence" and DR 7-102(A)(5) bars an attorney from "knowingly mak[ing] a false statement of law or fact" These provisions do not apply here. Under the facts stated, the attorney did not use perjured testimony and did not present evidence. The facts provided do indicate that the attorney informed the court that "the prosecutor tells me that there is no restitution issue at this time." This statement was literally true as the prosecutor had just informed the attorney of that fact. The attorney recognized the possibility that the prosecutor's

statement may have been based on faulty information, but the attorney had no obligation to discuss his suspicions with the prosecutor.

DR 7-102(A)(7) states that "a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent" This provision is not applicable here. The client's inaction does not constitute "conduct" within the meaning of DR 7-102(A)(7) because the client was under no duty to act. The client merely attended a sentencing hearing in which the prosecutor informed the court that restitution had been paid to the victim. The client was under no duty to respond to the prosecutor's statement. By not revealing the information obtained directly from the client under the circumstances posed, the lawyer did not knowingly participate in a fraud with active intent to deceive or make or participate in the making of a false statement of law or fact DR 7-102(A). It would be different if the client had been asked by the court whether he had made restitution and the lawyer had concealed that fact or counseled the client to do so.

DR 7-102(B) places an affirmative obligation on an attorney to reveal a fraud perpetrated by the attorney's client "except when the information [revealing the fraud to the attorney] is protected as a privileged communication." Here, no fraud was being committed so the disciplinary rule is inapplicable. Under the facts presented the only inaccurate statement was the prosecutor's incorrect assertion that restitution has been paid.

The other disciplinary rule that might be deemed applicable here is DR 1-102(A)(4) and (5). That rule bars an attorney from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation," or "conduct that is prejudicial to the administration of justice." Arguably, the attorney engaged in "conduct" by not clarifying a potentially material misrepresentation made by the prosecutor, and such "conduct" was prejudicial to the fair administration of justice in that the court was deprived of all the facts needed in order to make a just determination; however, these concerns must be reconciled with the lawyer's heavy responsibility to protect client confidences, and the lawyer's and client's right to hold the prosecution to its burden of production and proof at all stages of the prosecution, including sentencing. It may have been preferable for the attorney to have made no comment regarding restitution given the facts the attorney learned from a privileged source; however, where there existed the possibility that restitution had been paid by a party other than the defendant, such as an insurer, and where the prosecutor did not assert that the defendant had paid restitution, but stated merely that "restitution had been paid," it was proper for the defendant's attorney to repeat to the court the prosecutor's statement that there was no issue as to restitution. The provisions of DR 1-102 are thus not implicated under these facts. See EC 8-5 which recognizes that, even in the face of knowledge of "improper conduct", an attorney's obligation to observe the confidences and secrets of his client override his secondary obligation to disclose to appropriate authorities his knowledge of such improper conduct.

Apart from the Code itself, an attorney's conduct is guided by the oath taken at the time of admission to the Bar. The oath requires an affirmation that an attorney "will do no falsehood, nor consent that any be done in court, and if you know of any, you will give knowledge thereof to the judges of the court or some of them, that it may reformed . . ." The committee is unaware of any instance where the oath, by itself, has been used as the basis for disciplining an attorney's misconduct in the absence of some other violation of the Code of Professional Responsibility. Whether the oath alone could furnish the basis for disciplinary sanctions need not be determined, however, since the provisions of the oath and the proscriptions contained within it are subsumed by DR 1-102 and DR 1-103. For the reasons discussed above, the circumstances here do not give rise to a violation of the Code of Professional Responsibility and likewise do not violate the terms of the attorney's oath.

Guidance as to the attorney's obligations in this situation are provided by EC 7-3 which states that:

[w]here the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as an advocate or advisor . . . *While serving as advocate, a lawyer should resolve in favor of his client doubts as to bounds of the law.* (Emphasis added)

Under the circumstances presented, the attorney properly "resolve[d] in favor of his client doubts as to the bounds of the law" and acquiesced in the statement made by the prosecutor.

We wish to emphasize that the issue posed by the facts presented is a difficult one because it is in tension with the attorney's obligation of candor to the court, and to the fair administration of justice.¹ In this connection, we note the advice of EC 7-9:

In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interests of his client seems to him to be unjust, he may ask his client for permission to forego such action.

It may have been the better course for the attorney to have sought the consent of his client to clarify the record, but that course was not required under the Code.

¹ See e.g. *Fite v. Lee*, 11 Wash. App. 21, 28, 521 P.2d. 964, 968 (1974).