

ADVISORY ETHICS OPINION 91-13

SYNOPSIS:

An attorney satisfies the attorney's DR 1-103 obligation to report a disciplinary rule violation to "a tribunal . . . empowered to investigate or act upon such violation" where the attorney reports to the court before which litigation is pending conduct of opposing counsel deemed to be unprofessional.

FACTUAL BACKGROUND:

Attorney A has requested our opinion as to whether DR 1-103(A) requires Attorney A to report to the Professional Conduct Board the actions of Attorney B that occurred during the course of litigation and which were the subject of sanctions imposed by the court under Rule 11.

In responding to this inquiry, we decline to analyze the propriety under the Code of Professional Responsibility of Attorney B's actions. To do so would violate a cardinal rule of this Committee that the Committee will not express its opinion on the conduct of an attorney other than the attorney requesting the opinion.¹ This opinion, therefore, will not discuss the factual circumstances of Attorney B's actions.

ANALYSIS:

DR 1-103 (A) states the following:

DR 1-103 Disclosure of Information to Authorities.

- (A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Under the facts presented by the requesting attorney, the conduct of Attorney B has been reported to the court before which the litigation is pending. That court is a "tribunal" within the meaning of DR 1-103(A). The court is empowered to investigate and act upon a violation occurring before it.²

In the 1984 tentative draft analysis of the legal background to the ABA Model Rules of Professional Conduct, the comments note that the language of DR 1-103(A) requiring that professional misconduct be reported to a "tribunal" has been construed "to require a lawyer to report to the court in which he or she is litigating misconduct of the opposing counsel." (Tentative draft at page 416.)

The ABA Model Rule analogous to DR 1-103 is Rule 8.3 entitled "Reporting Professional Misconduct." This model rule uses more restrictive language than DR 1-103, and requires an attorney having knowledge of professional misconduct to "inform the appropriate professional authority." Comments to the model rule indicate that such "appropriate professional authority" refers to "the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in these circumstances." The model rule thus appears to contemplate a more restrictive referral than the disciplinary rule and reflects a substantive change in the reporting procedure authorized by the disciplinary rule.

The view that the term "tribunal" includes the court is supported by reference to the Code of Judicial Conduct. The Code of Judicial Conduct provides in Canon 38(3) that "a judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."

CONCLUSION:

As noted above, this Committee will not express an opinion as to whether the conduct for which Attorney B was sanctioned constitutes conduct that violates the Code of Professional Responsibility; however, if Attorney A has a good faith belief based upon an informed analysis of the Code that Attorney B's conduct does violate the Code, then Attorney A is required to report his knowledge of such conduct to "a tribunal." Under the facts presented, this has been done. Attorney A may also report the conduct of Attorney B to the Professional Conduct Board, but such further action is not required by DR 1-103(A).

¹ See Opinion 86-4.

² See *In Re Wilson*, 391 S.W.2d 914, 917-18 (Mo. 1965) ("the right and power to discipline an attorney, as one of its officers, is inherent in the court . . .").