

# ADVISORY ETHICS OPINION 92-10

## **SYNOPSIS:**

Absent client consent, an attorney should not report the unethical behavior of another attorney if the first attorney learned of the unethical behavior in a confidential communication, since privileged information is clearly beyond the scope of the mandate of DR 1-103. Absent client consent, an attorney should not report the unethical behavior of another attorney if the first attorney's knowledge of the unethical behavior is a secret, the disclosure of which would be detrimental to the first attorney's client, since such information is "privileged" within the meaning of DR 1-103.

## **FACTS:**

An attorney-husband representing himself in a divorce proceeding persisted in contacting his estranged wife to discuss divorce related issues outside the presence of her attorney, Attorney A. These direct contacts continued even after Attorney A had repeatedly demanded that they be discontinued. Eventually, the attorney-husband caused such extreme emotional distress for his estranged wife, that Attorney A was forced to withdraw when the wife was unable to reasonably consider Attorney A's advice.

## **QUESTION PRESENTED:**

Does Attorney A have an obligation to report the unethical behavior of the attorney-husband when to do so may have an adverse impact on the attorney-husband's law practice and a corresponding adverse impact on the financial interest of the wife, now Attorney A's former client?

## **DISCUSSION:**

DR 7-104 requires that during the course of representation of a client, a lawyer shall not communicate or cause another to communicate with a party on the subject of the representation when the attorney knows that the party is represented by a lawyer. While the policy of this committee prevents us from expressing an opinion as to the conduct of an attorney other than the requesting attorney *See* Opinion Nos. 91-13 and 86-4, we will assume for purposes of this discussion that DR 7-104 is binding on attorneys who represent themselves. We will also assume, without deciding, that the attorney-husband's conduct violated DR 1-102 which prohibits all attorneys from engaging in any conduct that is prejudicial to the administration of justice.

Attorney A's ethical dilemma stems from DR 1-103 which requires attorneys to report *unprivileged* knowledge of violations of the Code of Professional Responsibility either to the Professional Conduct Board or to the appropriate tribunal. Attorney A has expressed concern that any report of the attorney-husband's conduct could result in the imposition of sanctions against him and decrease the value of his law practice. Such a diminution in value would be detrimental to the interest of Attorney A's former client whose financial interests continue to be intertwined with those of her attorney-husband. Since the potential sanctions for attorney misconduct include public reprimand, suspension and disbarment, this committee is inclined to agree that any sanctions imposed could result in a detriment to Attorney A's client.

On the facts before us, we are unable to ascertain whether Attorney A learned of the unethical behavior of the attorney-husband in a confidential communication with the client. If so, the information would be privileged and thus clearly beyond the scope of the mandates of DR 1-103. Even if the information regarding the attorney-husband's unethical behavior was not a confidence, however, it is clearly a secret within the meaning of DR 4-101 which provides that absent the consent of the client, after a full disclosure, an attorney may not reveal information gained in the professional relationship which would be likely to be detrimental to the client.

Assuming, for purposes of this opinion that the information pertaining to the attorney-husband's misconduct is a secret but clearly not a confidence, we must then consider the meaning of the word "unprivileged" in Section 1-103(A). If "unprivileged" refers to matters not privileged under basic principles of law of evidence, a secret would be unprivileged information. If, on the other hand, "unprivileged" refers to matters which are not confidences or secrets as defined in DR 4-101, then information which is either a confidence or a secret would be exempt from the reporting requirements of DR 1-103.

While our prior opinions have not directly addressed this issue, they do suggest that the broader construction is the appropriate one. *See* Opinion No. 90-9 and we hereby adopt that view. On the basis of the foregoing, Attorney A does not have an obligation to disclose the misconduct of the attorney-husband absent the consent, after full disclosure of Attorney A's former client. Nonetheless, in view of the compelling policy considerations underlying the reporting requirement, we would urge

Attorney A to discuss the possibility and potential ramifications of disclosure with Attorney A's former client. In the event that the former client agrees to a report of the misconduct, after full disclosure, Attorney A will be free to bring the misconduct to the attention of either the tribunal or the Professional Conduct Board.