

# *The Supreme Court of Ohio*

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

## **OPINION 2007-1**

Issued February 9, 2007

**SYLLABUS:** A lawyer's ethical duty to report professional misconduct under Rule 8.3 is fulfilled by informing Disciplinary Counsel or a certified grievance committee of a bar association. A lawyer's ethical duty to report professional misconduct under Rule 8.3 is not fulfilled by informing a tribunal. However, a lawyer's duty of candor to a tribunal under Rule 3.3 requires a lawyer to disclose to the tribunal any information required by Rule 3.3, thus, there will be instances in which a lawyer's misconduct must be reported to Disciplinary Counsel or a certified grievance committee of a bar association pursuant to a lawyer's duty to report under Rule 8.3 *and* disclosed to a tribunal pursuant to a lawyer's duty of candor toward a tribunal under Rule 3.3.

The duty to report professional misconduct under Rule 8.3 arises when a lawyer has unprivileged knowledge of a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer.

Privileged knowledge refers to the information imparted in a representation of a client that would be protected by the attorney-client privilege and to the information that Rule 8.3(c) specifically identifies as privileged.

A lawyer must use professional judgment in determining what misconduct raises a question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer. If a lawyer has doubts as to whether misconduct raises questions as to honesty, trustworthiness, or fitness as a lawyer, he or she should err on the side of reporting.

A mere suspicion of misconduct need not be reported. Actual knowledge is the standard, not mere suspicion.

A lawyer is not required to report to disciplinary authorities information regarding another lawyer's professional misconduct revealed through a privileged communication by a client to a lawyer during a representation; but, a lawyer should encourage a client to consent to reporting the misconduct if it would not substantially prejudice a client's interests to do so.

A lawyer who is retained to represent another lawyer whose professional conduct is in question does not have an ethical duty to report the lawyer's professional misconduct because that information is privileged; in addition, the confidentiality of that information is protected under Rule 1.6.

A lawyer who receives information while serving as a member of a bar association committee or subcommittee, or as a member, employee, or agent of a bar association established non-profit corporation designed to assist lawyers with substance abuse or mental health problems does not have a duty to report such information to disciplinary authorities because that is privileged knowledge under Rule 8.3(c).

A lawyer is required to self-report his or her professional misconduct, as well as report others' misconduct that raises a question as to honesty, trustworthiness, or fitness as a lawyer.

A lawyer, licensed in Ohio, also has a duty under Gov.Bar R. V(11)(F)(1), to provide written notification to the Disciplinary Counsel and to the Clerk of the Supreme Court of Ohio of the issuance of a disciplinary order in another jurisdiction. The notification is to be made within thirty days of the issuance of the disciplinary order.

**OPINION:** This opinion addresses a question regarding the duty of a lawyer to report to an appropriate disciplinary authority the misconduct of a lawyer.

Does a lawyer fulfill the ethical duty to report another lawyer's misconduct in a case pending before a tribunal by reporting the alleged misconduct to the judge presiding over the case?

Reporting lawyer misconduct is a solemn responsibility of the legal profession. Lawyers are reminded of this responsibility by the Preamble to the Rules of Professional Conduct, Comment [11]:

The legal profession is self-governing in that the Ohio Constitution vests in the Supreme Court of Ohio the ultimate authority to regulate the profession. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The duty of a lawyer to report professional misconduct is governed by Rule 8.3 of the Ohio Rules of Professional Conduct, adopted August 1, 2006, effective February 1, 2007. That rule is set forth in its entirety.

### **RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT**

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.

#### **Part 1: Where to report misconduct**

To fulfill the duty to report professional misconduct, a lawyer must know where to report misconduct and what misconduct to report.

Pursuant to Rule 8.3(a), a lawyer's ethical duty to report professional misconduct is fulfilled by informing "a disciplinary authority empowered to investigate or act upon such a violation."

In Ohio, Disciplinary Counsel and the certified grievance committees of bar associations are the authorities empowered by the Supreme Court of Ohio to investigate and initiate complaints. See Gov.Bar R. V(3)(B) and Gov.Bar R. V(3)(C).

Thus, under Rule 8.3(a) of the Ohio Rules of Professional Conduct, a lawyer's reporting duty is fulfilled by reporting professional misconduct to either the Office of Disciplinary Counsel *or* to a certified grievance committee of a bar association.

The reporting duty is not fulfilled by reporting a lawyer's misconduct to a tribunal. A tribunal is not a disciplinary authority empowered to investigate or act upon reports of lawyer misconduct. A tribunal has authority to supervise members of the bar appearing before it, including the power to disqualify attorneys in specific cases, but that authority is distinct from the exclusive disciplinary authority vested in the Supreme Court of Ohio through its inherent and constitutional powers. See, *Buck v. Maloney*, 102 Ohio St.3d 250, 252, 2004-Ohio-2590, *Morgan V. North Coast Cable Company* (1992), 63 Ohio St.3d 156, 161; *Mentor Lagoons, Inc., v. Rubin* (1987), 31 Ohio St.3d 256, 259-60; *Royal Indemnity Company v. J.C. Penney Co.*, (1986), 27 Ohio St.3d 31, 34; *Melling v. Stralka* (1984), 12 Ohio St.3d 105, 106-07. See also, *Smith v. Kates* (1976), 46 Ohio St. 2d 263, 265-66.

But, a lawyer also has a duty of candor to a tribunal. A lawyer's duty of candor toward a tribunal is distinct from a lawyer's duty to report professional misconduct to a disciplinary authority. The duty of candor toward a tribunal is set forth in Rule 3.3.

### **RULE 3.3: CANDOR TOWARD THE TRIBUNAL**

(a) A lawyer shall not *knowingly* do any of the following:

(1) make a false statement of fact or law to a *tribunal* or fail to correct a false statement of material fact or law previously made to the *tribunal* by the lawyer;

(2) fail to disclose to the *tribunal* legal authority in the controlling jurisdiction *known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer *knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to *know* of its falsity, the lawyer shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer *reasonably believes* is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who *knows* that a person, including the client, intends to engage, is engaging, or has engaged in criminal or *fraudulent* conduct related to the proceeding shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*.

(c) The duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest *tribunal* that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by [Rule 1.6](#).

(d) In an *ex parte* proceeding, a lawyer shall inform the *tribunal* of all material facts *known* to the lawyer that will enable the *tribunal* to make an informed decision, whether or not the facts are adverse.

A lawyer must comply with Rule 3.3 and make the required disclosures to a tribunal. So, there may be instances in which a lawyer's professional misconduct will be reported to Disciplinary Counsel or a certified grievance committee of a bar association pursuant to a lawyer's duty to report under Rule 8.3 *and* disclosed to a tribunal pursuant to a lawyer's duty of candor toward a tribunal under Rule 3.3.

#### Part 1: Conclusion

In conclusion, the Board advises as follows. A lawyer's ethical duty to report professional misconduct under Rule 8.3 is fulfilled by informing Disciplinary Counsel *or* a certified grievance committee of a bar association. A lawyer's ethical duty to report professional misconduct under Rule 8.3 is not fulfilled by informing a tribunal. However, a lawyer's duty of candor to a tribunal under Rule 3.3 requires a lawyer to disclose to the tribunal any information required by Rule 3.3, thus, there will be instances in which a lawyer's misconduct must be reported to Disciplinary Counsel or a certified grievance committee of a bar association pursuant to a lawyer's duty to report under Rule 8.3 *and* disclosed to a tribunal pursuant to a lawyer's duty of candor toward a tribunal under Rule 3.3.

#### Part 2: What to Report

Equally important to knowing where to report misconduct, is knowing what to report. Knowing what to report requires knowledge of the rules as well as the exercise of professional judgment.

Rule 8.4 identifies what is professional misconduct.

#### **RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to do any of the following:

- (a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;
- (b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;
- (c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;
- (f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Not all professional misconduct must be reported by a lawyer. Rule 8.3 requires a lawyer to report "unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

Thus, there are two triggers to a lawyer's reporting duty under Rule 8.3. The reporting duty arises (1) when a lawyer has unprivileged knowledge of a violation of the Rules and (2) the violation raises a question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer.

Misconduct that raises a question as honesty, trustworthiness, or fitness

A lawyer must use professional judgment in determining what misconduct raises a question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer. It is beyond the scope of this opinion to list all such misconduct. A review of disciplinary cases will provide ample guidance as to the types of misconduct that raise a question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer

to the level of reporting. If a lawyer has doubts as to whether misconduct raises questions as to honesty, trustworthiness, or fitness as a lawyer, he or she should err on the side of reporting.

### Reporting unprivileged knowledge

“Unprivileged knowledge” is not a defined term in the Ohio Rules of Professional Conduct. Its meaning must be construed. First, the Board looks to the Comments to Rule 8.3 which explain and illustrate the meaning of Rule 8.3. Second, the Board looks to Rule 1.6, the rule protecting confidentiality of information relating to the representation of a client and to its explanatory Comments.

Comment [2] to Rule 8.3 states: “[a] report about misconduct is not required where it would involve the disclosure of privileged information. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client’s interests.”

In comparison, Comment [2] to ABA Model Rule 8.3 is stated differently: “[a] report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client’s interests.”

The significant difference is that Ohio’s rule does not require reporting of professional misconduct when the disclosure involves “privileged information,” whereas, the model rule does not require reporting of misconduct when the disclosure would violate Rule 1.6.

To aid in understanding the significance of this difference, Rule 1.6 is set forth in its entirety.

### **RULE 1.6: CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the commission of a crime by the client or other person;

(3) to mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal* or *fraudulent* act, in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary to comply with [Rule 3.3](#) or [4.1](#).

In short, Rule 1.6(a) protects the disclosure of *any* information relating to the representation (including information protected by the attorney-client privilege) unless the client consents to disclosure, the disclosure is impliedly authorized, the disclosure is permitted by Rule 1.6(b), or the disclosure is required by Rule 1.6(c) in order to comply with the duty of candor to a tribunal under Rule 3.3 and with the duty of truthfulness in statements to others as required under Rule 4.1.

But, Ohio did not choose to shield from the reporting duty all of the information protected by Rule 1.6. Ohio chose to shield only privileged information from the Rule 8.3 reporting duty.

Thus, the Board interprets the terms "unprivileged knowledge" used in Rule 8.3 and "privileged information" used in Comment [2], Rule 8.3 as references to: 1) the information imparted in a representation of a client that would be protected by the attorney-client privilege, and 2) the information that Rule 8.3(c) identifies as

privileged under the reporting rule. Generally defined, the attorney-client privilege is “[t]he client’s right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.” Black’s Law Dictionary 1235 (8<sup>th</sup> ed. 2004).

[The Board acknowledges that this construction of “unprivileged knowledge” does not square with Comment [15] to Rule 1.6. Comment [15] states that some rules require disclosure of information only if permitted by Rule 1.6(b). Comment [15] provides Rule 4.1(b), 8.1 and 8.3 as examples of such rules. This language matches the language in Comment [15] to ABA Model Rule 1.6 and may have been included inadvertently in Ohio’s Comment [15]. The inference from Comment [15] is that Rule 8.3 *requires* disclosure of information relating to a representation *only if* such disclosure is permitted by Rule 1.6(b). The Board rejects this interpretation because it is inconsistent with Ohio’s Comment [2] to Rule 8.3 which departed from the ABA Comment [2] to Rule 8.3. As already stated, Ohio chose to shield only privileged information from the Rule 8.3 reporting duty. Ohio did not choose to shield from the reporting duty all of the information protected by Rule 1.6.]

#### Reporting duty when representing a client

A lawyer is not required to report to disciplinary authorities information regarding another lawyer’s professional misconduct revealed through a privileged communication by a client to a lawyer during a representation; but, as explained in Comment [2] to Rule 8.3, a lawyer should encourage a client to consent to reporting the misconduct if doing so would not substantially prejudice a client’s interests.

#### Reporting duty when retained to represent a lawyer in a professional conduct matter

A lawyer who is retained to represent a lawyer whose professional conduct is in question does not have a duty to report the lawyer’s professional misconduct because that information is privileged; in addition, the confidentiality of that information is protected under Rule 1.6. Comment [4] to Rule 8.3 states “[t]he duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship. See Rule 1.6.”

#### Reporting duty when serving on a lawyer assistance committee

A lawyer who receives information while serving as a member of a bar association committee or subcommittee, or as a member, employee, or agent of a bar association established non-profit corporation designed to assist lawyers with substance abuse or mental health programs does not have a duty to report

such information to disciplinary authorities because that information is privileged knowledge under Rule 8.3(c). Comment [5] to Rule 8.3 explains that there is an exception from the reporting duty for information about a lawyer's or judge's misconduct or fitness received in the course of a lawyer's participation in an approved assistance program.

### Suspicion of misconduct

A mere suspicion of misconduct need not be reported. Rule 1.0(g) of the Terminology section states that "knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Actual knowledge is the standard, not mere suspicion.

### Self-Reporting duty

A lawyer is required to self-report his or her professional misconduct, as well as report others' misconduct, that raises a question as to honesty, trustworthiness, or fitness as a lawyer. Comment [1] to Rule 8.3 explains that reporting is required "when the lawyer knows of a violation of the Ohio Rules of Professional Conduct involving that lawyer or another lawyer. A lawyer has a similar obligation with respect to judicial misconduct."

A lawyer, licensed in Ohio, also has a duty under Gov.Bar R. V(11)(F)(1), to provide written notification to the Disciplinary Counsel and to the Clerk of the Supreme Court of Ohio of the issuance of a disciplinary order in another jurisdiction. The notification is to be made within thirty days of the issuance of the disciplinary order.

### Part 2: Conclusion

In conclusion, the Board advises as follows.

The duty to report professional misconduct under Rule 8.3 arises when a lawyer has unprivileged knowledge of a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer.

Privileged knowledge refers to the information imparted in a representation of a client that would be protected by the attorney-client privilege and to the information that Rule 8.3(c) specifically identifies as privileged.

A lawyer must use professional judgment in determining what misconduct raises a question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer. If a lawyer has doubts as to whether misconduct raises questions as to honesty,

trustworthiness, or fitness as a lawyer, he or she should err on the side of reporting.

A mere suspicion of misconduct need not be reported. Actual knowledge is the standard, not mere suspicion.

A lawyer is not required to report to disciplinary authorities information regarding another lawyer's professional misconduct revealed through a privileged communication by a client to a lawyer during a representation; but, a lawyer should encourage a client to consent to reporting the misconduct if it would not substantially prejudice a client's interests to do so.

A lawyer who is retained to represent another lawyer whose professional conduct is in question does not have an ethical duty to report the lawyer's professional misconduct because that information is privileged; in addition, the confidentiality of that information is protected under Rule 1.6.

A lawyer who receives information while serving as a member of a bar association committee or subcommittee, or as a member, employee, or agent of a bar association established non-profit corporation designed to assist lawyers with substance abuse or mental health problems does not have a duty to report such information to disciplinary authorities because that is privileged knowledge under Rule 8.3(c).

A lawyer is required to self-report his or her professional misconduct, as well as report others' misconduct that raises a question as to honesty, trustworthiness, or fitness as a lawyer.

A lawyer, licensed in Ohio, also has a duty under Gov.Bar R. V(11)(F)(1), to provide written notification to the Disciplinary Counsel and to the Clerk of the Supreme Court of Ohio of the issuance of a disciplinary order in another jurisdiction. The notification is to be made within thirty days of the issuance of the disciplinary order.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Lawyer's Oath of Office.**