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## DUTY OF ATTORNEY TO REPORT AN ETHICAL VIOLATION

Adopted April 23, 1983.

Amended June 15, 1996.

### *Questions Presented*

The questions addressed by this Opinion are as follows: (1) what type of knowledge possessed by an attorney regarding an ethical violation triggers the duty to report that violation; and (2) to whom must that violation be reported. This Opinion is directed to violations of the Rules of Professional Conduct and not to other statutory violations, such as criminal conduct.

### *Introduction*

Rule 8.3(a) of the Colorado Rules of Professional Conduct provides:

A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.

### *The Duty to Report*

For the purposes of this Opinion, the Committee adopts the definition of “knowingly,” “known,” or “knows” in the terminology section of the Colorado Rules of Professional Conduct (“denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances”).<sup>1</sup> As an example, where an attorney in the course of a representation, or otherwise, has directly observed conduct which the attorney believes clearly to be in violation of the Rules of Professional Conduct, the attorney has “knowledge” and may be duty-bound to report it to the appropriate authority, regardless of the personal ramifications. *See In re Gopman*, 531 F.2d 262 (5th Cir. 1976) (decided under the Code of Professional Responsibility). However, Rule 8.3(c) provides that a lawyer is not required to disclose “information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of an approved lawyer's assistance program to the extent such information would be confidential if it were communicated subject to the attorney-client privilege. *See also In re: Ethics Advisory Panel*, Opinion No. 92-1, 627 A.2d 317 (R.I. 1993).

When an attorney is informed of an alleged ethical violation by a communication from a third party whether from a client,<sup>2</sup> a fellow attorney,<sup>3</sup> or otherwise but has no other information concerning the alleged violation, the attorney does not possess knowledge triggering the duty to report and does not have a duty to investigate these allegations.<sup>4</sup> When the attorney becomes aware of an alleged violation, but has no direct information concerning it, the attorney may either recommend that the informing party file a request for investigation with the appropriate professional authority or the attorney may file a request for investigation.

### *Substantial Question*

Rule 8.3(a) changed the broader standard of DR 1-103(A) significantly by limiting the duty to report to those instances when the alleged violation raises a substantial question as to that lawyer's (a) honesty, (b) trustworthiness, or (c) fitness as a lawyer in other respects. “Substantial” is defined in the terminology section of the Rules of Professional Conduct to require reporting only those violations which raise a clear and weighty question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

### ***Timing of Reporting***

One issue which is frequently encountered is the timing of making the required report. The Rules of Professional Conduct do not provide an express time within which a report must be made. The attorney should balance the potential prejudice or damage to the client against the attorney's duty to report, as provided by Rule 8.3(c), and should report the violation as soon as practical, bearing in mind the attorney's duties to his/her client and the judicial system. The attorney should be aware, however, of Rule 4.5 which provides that a lawyer may not present or participate in presenting disciplinary charges solely to obtain an advantage in a civil matter.

Filing a request for investigation with a disciplinary authority while an action is pending before a tribunal potentially adds a collateral issue which can adversely affect the fair or orderly conduct of the proceedings. For this reason, it is usually appropriate to wait to file the request for investigation until the conclusion of the proceeding, unless the nature of the underlying conduct calls for immediate attention by the disciplinary authorities under Rule 241 of the Colorado Rules of Civil Procedure.

### ***Reporting Violations***

Once the duty to report has arisen, the Rules of Professional Conduct mandates its reporting to "the appropriate professional authority." [Rule 8.3(a).] Complaints concerning violations of the Rules of Professional Conduct may be made to the Supreme Court Disciplinary Counsel, which has original jurisdiction in all matters involving disciplinary proceedings against attorneys. [Rule 241 C.R.C.P.]

## **NOTES**

1. *See also* "knowledge means no substantial doubt." Restatement of Restitution, § 10, Comment d (1937). Rule 8.3 of the Colorado Rules of Professional Conduct.
2. Where an alleged violation is reported to a lawyer by a client, the attorney-client privilege may prohibit reporting unless the privilege is waived by the client.
3. In appropriate circumstances, the attorney-client privilege may attach to communications from a fellow attorney.
4. Hearsay is not sufficient. *See* Illinois State Bar Association Opinion 90-28. However, the attorney may report the violation based on hearsay information if otherwise appropriate.