

By Nathan M. Crystal

Professionalism is a frequently discussed topic these days: What does professionalism mean? Why has an emphasis on professionalism become necessary? What roles should law schools, the courts, and the bar play in promoting professionalism?

Fortunately, in South Carolina we have a number of institutions and individuals who do much more than talk about professionalism. Rob Wilcox, Associate Dean at the USC School of Law, assisted by Sharon Williams, directs the nationally recognized Nelson Mullins Center on Professionalism. The Center has hosted two national conferences on professionalism issues, sponsors a Web site, and is conducting empirical research with a focus on mentoring. For almost two decades Pam Robinson has been directing USC's award winning pro bono program, one of the largest voluntary programs in the country. The Charleston School of Law was founded on a commitment to professionalism and public service. Elizabeth McCullough directs the school's externship program, which provides students with a wide range of experiences, including many that involve public service.

Any reference to professionalism in this state would be incomplete without mentioning my colleague, John Freeman. John's service to the bar in this state is legendary: For more than 35 years he taught professional responsibility and related subjects at the USC School of Law, profoundly affecting the thinking of a large segment of the bar. John was the first chair of the Supreme Court's Commission on Continuing Lawyer Competency and has served on the state's Judicial Merit Selection Commission for many years. During the last 16 years he has written the *Ethics Watch* column for this magazine. John's articles have identified

significant recent developments and have provided the bar with his unerring good judgment and practical advice. For me personally, these articles are much more. Anyone who knows John and reads his articles understands that the articles are not just his work—they are John, written with passion, with wit, and with insight into human nature, both good and bad. John has a distinctive voice that is heard by many professionals and that affects their thinking and conduct. No writer could hope for more. All members of the bar owe John our profound thanks for his professionalism, and we look forward to the many other contributions that we know he will make in the future.

Professionalism has many aspects, but one of the central ideas is the duty to report misconduct by other lawyers and judges, found in S.C. Rules of Professional Conduct 8.3(a) and (b). While the general principle is clear, the precise scope of this duty is remarkably vague. On the one hand, the rule appears mandatory, stating that a lawyer "shall" inform the appropriate authority of misconduct by another lawyer or judge. On the other hand, the rule contains a number of qualifications and limitations: The rule only applies if the lawyer "knows" of misconduct by another lawyer or judge. The misconduct must raise a substantial question about the other lawyer's or judge's "honesty, trustworthiness, or fitness." The rule does not require disclosure of information protected by the duty of confidentiality under Rule 1.6. However, the duty of confidentiality is itself subject to a number of exceptions, producing doubt about the relationship between the principle of confidentiality and the duty to report. A recent case from New Jersey, *Estate of Spencer v. Gavin*, 2008 WL 1848101 (N.J. Sup. App.

Div. 2008), provides insight into the scope of the duty to report.

Plaintiffs in the case were three estates of a mother and her two daughters. Attorney Daniel Gavin, a sole practitioner, had prepared the will for the mother and had provided legal services to all of the estates. On the death of the second daughter, Gavin administered all three estates. At the same time Gavin was diagnosed with terminal lung cancer. During the last few years of his life Gavin began to wind down his practice. He referred a number of matters to Dean Averna, who practiced law in the building owned by Gavin. One of the matters involved the formation of a foundation that was to be created under the will of one of the decedents. After he formed the foundation, he drafted a construction contract between the foundation and a builder for repairs of a church.

During this period of time rumors began to circulate in Gavin's building that he was stealing from the three estates. Averna denied that he knew that Gavin was stealing money or otherwise acting improperly, but another attorney testified that Averna had said that Gavin was "raping and pillaging" the estates. The attorney also stated, however, that Averna did not provide any details about Gavin's conduct except that Gavin had stolen a pair of wedding rings from one of the estates.

After Gavin's death a substitute administrator discovered the extent of Gavin's theft, which investigation revealed to be between \$400,000 and \$500,000. The estates were able to recover \$322,500 of their losses from the state's client security fund. The estates brought suit against various defendants who may have had some involvement in the thefts by Gavin, one of whom was Averna.

The trial court granted Averna's

motion for summary judgment on several grounds: lack of causation, absence of attorney-client relationship, and failure to establish any duty owed by Averna to the estates. The appellate division reversed. The court first focused on whether an attorney-client relationship existed between Averna and at least one of the estates. Averna claimed that he had not been retained by any estate; instead, he had been employed by the foundation to be established under one of the wills. The court rejected this argument, finding that the existence of an attorney-client relationship was not as narrow as Averna claimed. First, the foundation that Averna formed was created pursuant to a specific bequest in the will of the second daughter to control a substantial portion of the residual assets in her estate. Second, Averna was paid for his services by the estate. Third, the estate benefited from Averna's work. Fourth, the executor of the estate, Gavin, was clearly engaged in breach of fiduciary duty and theft. Fifth, Averna did not have a formal engagement agreement confining his representation solely to the foundation or to the executor. Although the fees Averna received were minor, that did not negate the existence of an attorney-client relationship with the estate.

While the court found that there was sufficient evidence to establish an attorney-client relationship between at least one of the estates and Averna, the court went further, holding that there was sufficient evidence to establish a duty by Averna to report Gavin's theft even if there was no attorney-client relationship. The court concluded that the estates "implicitly relied" on Averna to be faithful to their interests. The court cited two factors to support this conclusion. First, Gavin and Averna had a close working relationship; Gavin had referred 10 to 15 cases to him. This relationship reinforced the fairness of finding a duty running from Averna to the estates. Second, the court cited Averna's failure to report Gavin's misconduct under Rule 8.3 as increasing the basis for finding civil liability.

Spencer is a significant case with

regard to the duty to report for a number of reasons. First, the case recognizes that in some situations lawyers have a duty to inform affected clients of misconduct by their lawyers in addition to reporting such misconduct to disciplinary authorities, and that breach of this duty may give rise to civil liability to the affected clients. Second, while the court's holding was limited to situations in which the attorney had actual knowledge of the wrongdoing, the court indicated that actual knowledge can be inferred from the circumstances, and the court left open the possibility that civil liability could be based on circumstances where the attorney had "reason to suspect" wrongdoing. Although disciplinary action under Rule 8.3 is limited to actual knowledge, civil liability does not necessarily have this restriction. Finally, while the ethical duty to report is subject to the ethical duty of confidentiality, civil liability is not so limited because informing a client, whether a current or a former client, of wrongdoing by that client's attorney does not breach any duty of confidentiality.

From a professionalism perspective, imposing civil liability for failing to inform a client of misconduct by that client's lawyer is a welcome development. By increasing the incentive for lawyers to report misconduct by other lawyers, it should reduce the amount and consequences of such misconduct. Of course, that means that lawyers may face some unpleasant decisions about reporting the conduct of other lawyers. The court recognized this:

We appreciate that reporting a fellow attorney is not easy or pleasant, and that filing such a report may involve professional and personal repercussions. But the integrity of the profession and the protection of clients cannot be sacrificed for expediency.

The court is expressing a key aspect of professionalism—acting to protect clients or the public interest even when it involves personal or professional difficulty or cost. ■

SAVE the DATE



**The South Carolina Chapter of
The Federal Bar Association
will honor**

**The Honorable David C. Norton
on**

**Thursday, September 11, 2008
at the**

Newly Restored,
Historic Federal Courtroom
(Home of the E.D.S.C. from 1845 until 1860)
23 Chalmers St.
Charleston, South Carolina

following a
Three-Hour Ethics CLE
(CLE credit application pending)

* * *

CLE registration will begin
at 1:30 p.m.

Reception to follow at 5:30 p.m.

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*CLE and Reception—
Complimentary for FBA Members
\$150 for Non-members
(includes FBA membership)*

Invitation to follow