

ETHICS WATCH

The Duty to Report Professional Misconduct

By Nathan M. Crystal

A lawyer represents a client against the client's former lawyer in a case alleging breach of fiduciary duty, including misappropriation. Does the lawyer have a duty to report the former lawyer's misconduct? In a medical malpractice action, the defendant doctor informs defense counsel that the plaintiff's lawyer previously represented him in a disciplinary proceeding before the state license board. Defense counsel files a motion to disqualify plaintiff's counsel. Does the lawyer also have an obligation to report the matter to the Office of Disciplinary Counsel (ODC)? A solo practitioner learns to his horror that his secretary deposited several checks that should have gone to the firm's trust account into the firm's operating account. Does the lawyer have a duty to self-report the matter to the ODC? These are only some of the questions that lawyers may face regarding the duty to report professional misconduct.

South Carolina Rule of Professional Conduct (SCRPC) 8.3 provides as follows:

- (a) A lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Commission on Lawyer Conduct in writing within 15 days of being arrested or being charged by way of indictment, information or complaint.
- (b) A lawyer who knows 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.

- (c) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's honesty, trustworthiness or fitness for office in other respects shall inform the appropriate authority.
- (d) This Rule does not require disclosure of information otherwise protected by Rule 1.6.
- (e) [except to reporting requirement for Lawyers Helping Lawyers Committee or similar bodies.]

Section (a) is a nonuniform provision not found in the ABA Model Rules.

Standard for reporting

Rule 8.3(b) requires reporting when a lawyer knows that another lawyer has committed a violation of the SCRPC that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Typical situations that fall within this standard are misappropriation, intentional misrepresentation to clients or tribunals, and serious criminal conduct. A duty to report also applies when a lawyer knows that a judge has engaged in such misconduct. Rule 8.3(c).

Not every violation of the SCRPC requires reporting. In *S.C. Bar Ethics Adv. Op. 02-15*, the committee ruled that a lawyer had a duty under Rule 8.3(b) to report breach of client confidentiality and violation of the provision of a confidential settlement agreement by other attorneys. Because the

lawyer obtained the information about misconduct in a client-attorney relationship, the lawyer was required by Rule 8.3(d) to obtain consent of the client under Rule 1.6 before disclosing the misconduct of the other attorneys to the disciplinary authorities. However, in *S.C. Bar Ethics Adv. Op. 92-01*, the committee indicated that violation of Rule 4.5 dealing with threatening criminal prosecution to obtain an advantage in a civil matter did not necessarily require reporting because such conduct might not raise a substantial question about the lawyer's "honesty, trustworthiness or fitness of a lawyer in other respects." See also *Maryland Ethics Op. 2015-03* (violation of duty of confidentiality to client by posting on list serve will not create a duty to report absent aggravating circumstances); *Texas Ethics Op. 632* (2013) (improper use of trade name alone does not raise a substantial question as to honesty, trustworthiness or fitness).

Exception to the duty to report for information subject to Rule 1.6

An important further limitation on the duty to report under Rule 8.3 is that a lawyer is not permitted to report information of misconduct that is protected as confidential under Rule 1.6 because the information relates to the representation of a client. Rule 8.3(d). In *Conn. Informal Eth. Op. 2011-06* the committee advised that if the lawyer for a wife in divorce action against her husband/attorney learns of trust account violations by the firm, her lawyer may not report the matter unless the wife gives informed consent after her lawyer explains how disclosure could adversely affect her interests. Comment 2 to SCRPC 8.3 suggests,

however, that the lawyer should encourage the client to permit disclosure to disciplinary authorities if the disclosure would not substantially prejudice the client. See *S.C. Bar Ethics Adv. Op.* 02-15 above. In addition, if an exception to the duty of confidentiality applies, see SCRPC 1.6(b), the exception to the duty of disclosure in Rule 8.3(d) would not apply.

The duty to report also does not apply if a lawyer is retained by an attorney to represent the attorney with regard to professional misconduct; in that situation the rules governing the client-attorney relationship, including the duty of confidentiality, apply. See *cmt.* 4 to Rule 8.3. In *Formal Opinion* 08-453, the ABA ethics committee, analyzing the duties of a law firm's inside ethics counsel, advised that in most instances information that ethics counsel receives will relate to the representation of the counsel's client, the law firm; therefore, the duty to report under Rule 8.3 will be subject to law firm consent. But see *S.C. Ethics Adv. Op.* 05-21 (2005) (fiduciary duty to partner or former partner does not limit lawyer's duty to report under Rule 8.3).

Reporting during pending litigation

Reporting issues with regard to the conduct of opposing counsel may arise during pending litigation. Rule 8.3 does not specify the time for reporting, although a lawyer who waits too long to report may himself be guilty of misconduct. See *In re Anderson*, 769 A.2d 1282 (Vt. 2000) (delay of nine months in reporting partner's mishandling of client funds was improper). However, the rule requires the lawyer to "know" that misconduct has occurred. When an issue of a lawyer's conduct is pending in court, for example in connection with a disqualification motion, it would be reasonable for the lawyer to defer reporting until the court rules on the matter. Until the court rules, the lawyer does not know that a violation has occurred, and even if the court rules that the lawyer should be disqualified,

reporting will not necessarily be required if the circumstances indicate the disqualified lawyer acted in good faith. Cf. Comment 3A to Mass. Rule of Prof. Cond. 8.3 (authorizing deferral until the conclusion of a matter unless the client or third person is likely to be injured by the delay, referring to embezzlement as an example).

In *Informal Op.* 2005-0051, Missouri Ethics Counsel advised that on the facts of the medical malpractice case posed above defense counsel did not have an obligation to report until the court ruled on the conflict of interest. If the court ruled that plaintiff's counsel was not disqualified, then defense counsel would not have a duty to report. Even if the court ruled in favor of disqualification, defense counsel must decide whether the conduct of plaintiff's counsel was in bad faith. However in *Robison v. Orthotic & Prosthetic Lab, Inc.*, 27 N.E.3d 182 (Ill. App. Ct. 2015), the court vacated a settlement reached after the plaintiff's death because plaintiff's counsel did not disclose that fact to defense counsel. The court sent a copy of the opinion to the disciplinary authority. The court stated: "We also believe that defense counsel possessed sufficient knowledge to trigger a duty to report [plaintiff's lawyer's] misconduct to the ARDC, and that the failure to report the misconduct constitutes a potential violation of Rule 8.3."

Self-reporting

Unlike the majority of jurisdictions, SCRPC 8.3(a) imposes a duty to self-report when the lawyer has been arrested or charged with a serious crime. There is no duty to self-report in other situations. See also SCRPC 8.3(b) providing that the duty to report applies when a lawyer knows of misconduct by "another lawyer." Lawyers who have committed any ethical violation, even one that is not subject to self-reporting under the rules, sometimes express the intention to immediately self-report. This intention may reflect a combination of



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guilt and hope that self-reporting will lead to more favorable treatment by the disciplinary authorities. Before taking that step a lawyer should obtain independent advice to make sure that the decision is fully informed and not compelled by emotional considerations. A lawyer who self-reports will not necessarily receive more favorable disciplinary treatment than one whose misconduct is reported by others. In *In re Beck*, 412 S.C. 585, 773 S.E.2d 576 (2015), the respondent, who had committed serious trust account violations for more than a decade, received a sanction of disbarment even though he had self-reported his misconduct, showed genuine remorse, and fully cooperated with disciplinary authorities. The court did order that his disbarment was retroactive to the date of his interim suspension four years earlier.

To whom should a report be made?

The rule requires reporting to the “appropriate professional

authority.” In Opinion 05-21, the South Carolina Ethics Committee advised that reporting to a solicitor is insufficient because a solicitor is not a professional authority under Rule 8.3. Similarly, reporting of misconduct to a court is insufficient. See *Stein v. Krislov*, 999 N.E. 2d 345 (Ill. App. Ct. 2013) (judge is not an “appropriate professional authority” for reporting purposes). However, if a judge has knowledge that a lawyer “has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.” See Canon 3(D)(1) of the S.C. Code of Judicial Conduct. A lawyer’s obligation to report is not satisfied because another person (even a judge) makes the report. See *S.C. Bar Ethics Adv. Op.* 89-04; *Ky. Ethics Op.* 430 (2010). A Texas opinion takes a broader view of the reporting obligation. In Opinion 522 the Texas Committee advised that

when a law firm learned that a new partner lied about being licensed in Texas, it must report the partner to “appropriate disciplinary authorities, including the Board of Law Examiners, Admissions Committee and the Unauthorized Practice of Law Committee of Texas and other jurisdictions” to which he may have applied for admission.

Threatening disciplinary action in civil matters

South Carolina Rule of Professional Conduct 4.5 provides that a lawyer may not threaten criminal prosecution solely to obtain an advantage in a civil matter. Because disciplinary proceedings are quasi-criminal, it is improper for a lawyer to threaten another lawyer with a report to disciplinary authorities to obtain an advantage in a civil matter. See *ABA Formal Ethics Op.* 94-383 (1994) (“an agreement not to file a complaint if a satisfactory settlement is made is the logical corollary of a threat to

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file a complaint in the absence of such a settlement” and is therefore unethical).

Obligations of subordinate lawyers

A subordinate lawyer is subject to the SCRPC even if the subordinate acts at the direction of a superior. SCRPC 5.2(a). However, a subordinate lawyer may rely on a senior lawyer’s “reasonable resolution of an arguable question of professional duty.” If misconduct by a senior is not arguable, the subordinate has a duty to report under Rule 8.3, subject of course to the duty of confidentiality to the client. See *D.C. Ethics Op. 270* (1997) (subordinate lawyer who learns that employer sent clients fake copies of correspondence must inform client and report to disciplinary authorities; subordinate’s obligations continue after resignation).

Relationship of reporting to attorney disability

Suppose a lawyer begins to suffer from substance abuse or men-

tal or physical disabilities that impair the lawyer’s ability to function. To encourage lawyers to seek the assistance of organizations designed to help lawyers with such conditions, the duty to report contains an exception for inquiries received by these bodies. See SCRPC 8.5(e). If the condition is serious enough, another lawyer who knows of the condition may have a duty to report under Rule 8.3. See *S.C. Ethics Op. 02-13* (2002) (lawyer who knows that colleague’s medical condition makes him unable to provide competent representation must report any violations of competence rule that raise questions as to his fitness as a lawyer). In less serious cases SCRPC 5.1(d) provides that law firm partners and others with comparable managerial authority have an obligation to take action when they reasonably believe that a lawyer is suffering a significant cognitive impairment. The rule requires partners to first seek to deal with the problem with the lawyer, and if

that is unsuccessful they may seek assistance from the Bar through SCACR 428.

Civil liability when a firm discharges a lawyer for reporting misconduct

In *Weider v. Skala*, 609 N.E.2d 105 (N.Y. 1992), the New York Court of Appeals recognized as a matter of public policy an exception to the employment at will doctrine when a lawyer is discharged for reporting to disciplinary authorities the misconduct of another attorney in the firm. However, in *Jacobson v. Knepper & Moga, P.C.*, 706 N.E.2d 491 (Ill. 1998), the court held that the public was adequately protected by an associate’s duty to report and it was unnecessary to recognize a cause of action for retaliatory discharge. See also *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (Tex. 1998) (allowing a law firm to expel a partner who reported his suspicion that another partner was over-billing clients). South Carolina has not addressed this issue. ❧

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