Lawyers' Risk Management Newsletter

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A Lawyer's Ethical Duty: Reporting Opposing Counsel's Ethical Violations

In this newsletter we review when lawyers' ethical duties to report opposing counsel's violation of the Rules of Professional Conduct pursuant to Rule 8.3 is required, and whether it is ever permissible to threaten to make such a report.

Recent Wisconsin Ethics Opinion EF-21-01 (Jan. 1, 2021) reaffirmed that reporting opposing counsel's ethical violations is an obligation imposed by the Rules of Professional Conduct, but that lawyers may not use the threat of filing a disciplinary complaint or report against opposing counsel as an advantage in a civil case. This issue was addressed in ABA Formal Opinion 94-383, which concluded that threats to file disciplinary charges against an opponent may violate ABA Model Rules 3.1, 4.1, 4.4, 8.4(b) and 8.4(d) as well as amount to criminal extortion. In addition, offering to not file a complaint if a favorable settlement is made is the "logical corollary of a threat to file a complaint." Conversely, failure to file a report that is required under Rule 8.3 would violate Model Rule 8.4(a), which states it is professional misconduct for a lawyer to violate the Rules of Professional Conduct. ABA Op. 94-383 (1994).

Since then, other ethics committees have opined that an attorney may not threaten to file a disciplinary complaint when the obligation to report opposing counsel has already arisen (i.e., once he or she has knowledge of conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer). See e.g., NYC Op. 2015-5 (2015); CT Op. 01 (2015); IA Op. 14-02 (2014); PA Op. 2000-19 (2000); FL Op. 94-5 (1995). The same is true for negotiating to not report a potential disciplinary violation. See e.g., UT Op. 16-02 (2016).

> ABA Model Rule 8.3 provides as follows:
>
> (a) 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.
>
> (b) 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 fitness for office...shall inform the appropriate authority.
>
> (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge...while participating in an approved lawyers assistance program.

Comment [3] to Rule 8.3 adds, "If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

Also relevant, ABA Model Rule 1.0(l) defines "Substantial" as "of clear and weighty importance." In addition, ABA Model Rule 1.0(f) defines "knows" as "actual knowledge of the fact in question," which "may be inferred from circumstances."

In the context of Rule 8.3, a "substantial" question is defined by whether an attorney's violation of the rules reflects adversely on that attorney's fitness to practice law or involves dishonesty. See TX Op. 632 (2013) (clear violation of advertising rules by using trade name did not raise substantial question of honesty, trustworthiness, or fitness that triggers reporting requirement unless trade name "affirmatively false and misleading"); and see e.g., Robison v. Orthotic & Prosthetic Lab, Inc., 27 N.E.3d 182 (Ill. App. Ct. 2015) (defense should have reported opposing counsel's misrepresentations and failure to advise of plaintiff's death); NM Op. 2005-2 (2005) (insurance company lawyer who believes claimants' lawyer's million-dollar fee in uncontested, simple matter was unreasonable must report to disciplinary authorities).

A clear substantial question about an attorney's honesty arises where an attorney engages in the unauthorized practice of law. NY Op. 1091 (2015); PA Op. 2015-038 (2015); MD Op. 2005-2 (2005).

There is also a duty to report opposing counsel even when a violation of a rule reflecting on that attorney's fitness and honesty has arisen as a result of mental impairment.

NC Op. 2 (2003); see also ABA Formal Op. 03-429 (2003); ABA Formal Op. 03-431 (2003) ("[A] lawyer's failure to withdraw from representation while suffering from a condition materially impairing her ability to practice, as required by Rule 1.16(a)(2), ordinarily would raise a substantial question requiring reporting under Rule 8.3"); see e.g. DC Op. 377 (2019); VA Op. 1887 (2017); VA Op. 1886 (2016); KY Op. 14-01; NC Op. 8 (2013); NY Op. 822 (2008).

However, a mere suspicion of such a violation does not trigger a duty to report and there is no duty to investigate whether such a violation has occurred. NY Op. 854 (2011); KY Op. E-430 (2010); NYC Op. 1990-3 (1990). "That said, before making a report, an attorney is permitted to confront her adversary with evidence of misconduct to confirm that an ethical violation has occurred." NYC Op. 2015-5 (2015). Such conduct would not constitute threatening to file a complaint.

The duty to report may be qualified by a lawyer's duty to his or her clients. Even when an attorney has knowledge of a violation that raises a substantial question about opposing counsel's fitness and honesty, the lawyer has to determine both whether and when reporting will do the least damage to his or her client. In turn this may trigger the duty to confer with and obtain the consent of the client as to if and when to report. See SC Op. 16-04 (2016) (lawyer may wait until the conclusion of the matter if lawyer determines immediate reporting may harm the client); NC Op. 2 (2003) (opposing counsel's conduct may constitute confidential client information "relating to the representation of a client" under Rule 1.6(a)).

If the information necessary to make a complaint is confidential under Rule 1.6, then the requirement that the lawyer first obtain the client's consent is absolute. Comment [3] to ABA Model Rule 1.6 notes that a lawyer "may not disclose [confidential] information except as authorized or *required* by the Rules of Professional conduct or other law." (emphasis added). Because Model Rule 8.3 "does not require disclosure of confidential information," there is no exception to the duty to maintain the confidentiality of information that would otherwise trigger a duty to report under Rule 8.3 absent client consent. See NYC Op. 2017-2 (2017); see also ABA Model Rule 1.6, Comment [17]. A lawyer should, however, check the Rule in the relevant jurisdiction to see if the same principle applies[1].

Finally, the seriousness of the violation will be a substantial factor on whether or for how long an attorney should wait to report any violation. *See* Commonwealth of Massachusetts, Rule 8.3, Comment [3A] ("In most situations, a lawyer may defer making a report under this Rule until the matter has been concluded, but the report should be made as soon as practicable thereafter. An immediate report is ethically compelled, however, when a client or third person will likely be injured by a delay in reporting, such as where the lawyer has knowledge that another lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds."); Schuff v. A.T. Klemens & Son, 16 P.3d 1002 (Mont. 2000) (affirming defense counsel's motion to disqualify plaintiff's counsel but referring both counsel to disciplinary commission: "if [defense counsel] viewed [plaintiff's counsel's] conduct as being as serious as claimed, then, it is, likewise, appropriate that the Commission make inquiry into why such violations were not reported to the disciplinary authority with jurisdiction to address them").

[1]For a useful discussion of the dilemma a lawyer may face in these circumstances, see In re Himmel, 125 Ill. 2d 531 (1988)

Further information

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