



## ETHICS ADVISORY OPINION

**16-04**

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

### **Factual Background:**

Lawyer A represents Client in the context of an ongoing mortgage foreclosure sales action. Lawyer A believes that the opposing attorney's (Lawyer B) conduct rises to the level of misconduct described in Rule 8.3, and that Lawyer B's conduct has damaged Lawyer A's client financially. However, due to the ongoing litigation, Lawyer A questions whether a report to the appropriate disciplinary authority must be made immediately or if such a report may be made at the conclusion of the litigation or appeal.

### **Question Presented:**

Is Lawyer A obligated to formally report Lawyer B's conduct to disciplinary counsel? If so, must misconduct be reported immediately, or may the report wait until the conclusion of the litigation or appeal?

### **Summary:**

Subject to the client's consent, and as required by Rule 8.3(d) and Rule 1.6, Lawyer A is under an obligation to report Lawyer B to the Commission on Lawyer Conduct, or other appropriate authority, if Lawyer A has knowledge that Lawyer B's conduct raises a "substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Lawyer A may wait until the conclusion of the case, or appeal, before making the report against Lawyer B if Lawyer A determines that a later report would be in the best interest of the client.

### **Opinion:**

The Rules of Professional Conduct require the report of a violation of the Rules which raises a

substantial question of a lawyer's honesty, trustworthiness or fitness to practice law. Since accusing another lawyer of misconduct is a serious matter that should not be undertaken lightly, Rule 8.3 requires actual knowledge, which implies more than a suspicion of misconduct. See Rule 8.3, Reporting Professional Misconduct. (See also, generally, South Carolina Ethics Advisory Opinion 02-13.)

A measure of judgment by the reporting lawyer is required in complying with the provisions of this Rule. Comment 3 gives guidance regarding "what is a substantial question of a lawyer's honesty, trustworthiness or fitness" by limiting the reporting obligation "to those offenses that a self-regulating profession must vigorously endeavor to prevent."

In this instance, Lawyer A believes Lawyer B violated Rule 3.3 of the Rules of Professional Conduct by failing to disclose material facts that would allow the Court to ascertain whether Lawyer B was a bona-fide purchaser, as defined under South Carolina law. Comment 4 to Rule 3.3(a), states "a lawyer shall not knowingly (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 or (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." Comment 4 to Rule 3.3 clarifies that "legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal." In this case, Lawyer B argued to the Court he was a bona fide purchaser under Spence, when in fact, he knew of the potential defect prior to paying the balance of the purchase price and acquiring title.

Furthermore, Rule 8.4 states it is misconduct for a lawyer to "engage in conduct involving dishonesty. . . or misrepresentation" and "engage in conduct that is prejudicial to the administration of justice". Rule 8.4(d) and 8.4(e).

The reason for the Rule 8.3 reporting obligation is summarized in the Preamble to the Rules of Professional Conduct:

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement... The legal profession's relative autonomy carries with it a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers.

Lawyers have been entrusted with the responsibilities to self-regulate because they are in the best position to observe misconduct by fellow lawyers, and to assist the legal profession in investigating and sanctioning misconduct. Therefore, so long as the report is not frivolous, or made simply to harass another lawyer, a lawyer should not hesitate to make any report that the lawyer reasonably believes is necessary for the protection of the public or the profession.

So when must the lawyer report the misconduct? The rule is silent in that regard. However, the prevailing view in opinions around the country is that reporting should be made 'promptly'. In the Riehlmann decision, the Louisiana Supreme Court stated "The need for prompt reporting flows from the need to safeguard the public and the profession against future wrongdoing by the offending lawyer. The purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented." *In re Riehlmann*, 2004-0680 (La. 1/19/05); 891 So2d 1239, 1247.

The Committee believes it is appropriate for a lawyer to consider any potential adverse impact to his or client in determining the timing of a report against another lawyer. It is the opinion of this Committee that if Lawyer A believes the conduct of Lawyer B raises a "substantial question as to [Lawyer B's] honesty, trustworthiness or fitness as a lawyer in other respects," then Lawyer A must report such misconduct to the disciplinary authority. Because the Rule is silent regarding the timing of such report, Lawyer A may wait until the conclusion of the matter if Lawyer A determines immediate reporting may hurt the client. However, the misconduct should be reported "promptly" at the conclusion of the litigation or appeal.