

ETHICS ADVISORY OPINION

13-01

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.

Factual Background:

Lawyers A and B represented the same Client simultaneously for years, with each Lawyer providing distinct services to client. Upon Client's death, the children of Client brought an action against Lawyer B. In Lawyer B's defense of himself, he presented an email which claimed that Lawyer A was supposed to be providing a certain service to Client. Lawyer A's file had a copy of an email bearing the same date and which was identical to that presented by Lawyer B, except that Lawyer B's version included two words not present in Lawyer A's file copy of the email. Lawyer A filed an affidavit attesting to the veracity of his file copy of the email and denying any alteration of the email on his part. On the date of the hearing on this issue, the matter settled.

Questions Presented:

1. Is Lawyer A under any ethical obligation to report the matter to the Office of Disciplinary Counsel, or anyone else in authority?
2. Would other Lawyers involved in the action be under a duty to report the matter?

Summary:

Lawyer A is required by Rule 8.3(b) to report the conduct of Lawyer B to the Commission on Lawyer Conduct, Office of Disciplinary Counsel of the South Carolina Supreme Court under the facts presented. This Committee cannot opine on the duties of the other lawyers involved in the litigation, as each lawyer must analyze the facts for himself or herself to determine whether he or she has knowledge of the violation that rises to an obligation to report the conduct.

Opinion:

Rule 8.3(b) of the South Carolina Rules of Professional Conduct states “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.” S.C. R.P.C. Rule 8.3(b) (emphasis added). Further, Comment 3 to the rule provides in part “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.” S.C. R.P.C. Rule 8.3, Comment 3.

Rule 3.4(a) provides that a Lawyer shall not “unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.” S.C. R.P.C. Rule 3.4(a). In addition, Rule 3.3(a) provides “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 . . . (3) offer evidence that the lawyer knows to be false . . .” S.C. R.P.C. Rule 3.3(a)(1), 3.3(a)(3).

Lawyer A contends that Lawyer B has violated Rule 3.4(a) in that Lawyer B altered evidence and then subsequently offered that altered evidence to a tribunal in violation of Rule 3.3(a)(1) and (3). Lawyer A knows this because under the circumstances, either Lawyer A (or someone in his office) has changed his file copy of the email or Lawyer B (or someone in his office) has changed his copy of the email, and Lawyer A has made a sworn statement as to his recollection of the original document, and that to his knowledge, his file copy represents the original email as received. Therefore, Lawyer A “knows that another lawyer has committed a violation of the Rules of Professional Conduct.” S.C. R.P.C. Rule 3.4(a), S.C. R.P.C. Rule 1.0(h)(defining “knows” as denoting actual knowledge of the fact in question which can be inferred from the circumstance).

Thus Lawyer A now must consider whether this violation of the Rules of Professional Conduct “raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.” S.C. R.P.C. Rule 3.4(a). The Rules of Professional Conduct define “substantial” as follows: “when used in reference to degree or extent denotes a material matter of clear and weighty importance.” So Lawyer A must go through a fact-based analysis as to whether the action on the part of Lawyer B was of “clear and weighty importance” in reflecting on that attorney’s honesty and trustworthiness. In the opinion of this committee, the altering of evidence and presentment of that evidence to a tribunal does “raise a substantial question as to that lawyer’s honest, trustworthiness or fitness as a lawyer in other respects,” such that Lawyer A has a duty to report this violation to the Commission on Lawyer Conduct, in the Office of Disciplinary Counsel appointed by the South Carolina Supreme Court.

As to question 2, this Committee cannot advise as to the conduct of other attorneys involved in the underlying litigation. The question of knowledge of a violation presented by S.C. R.P.C. Rule 8.3(b) is one that each lawyer must answer for himself or herself, using the analysis stated above. While one lawyer involved in the matter may have “knowledge” of the violation, under the facts, another lawyer may not have “knowledge” of the infraction in question.