

Rule 8.3: Reporting Professional Misconduct

1. Current Kentucky Rule with Official Comments:

There is no Kentucky Rule which requires that lawyers report acts of professional misconduct committed by other lawyers.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(8.3) Reporting professional misconduct

(a) A lawyer who knows that another lawyer has committed a criminal act or has engaged in conduct involving dishonesty, fraud, or deceit that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer shall report such act or conduct to the Association's Bar Counsel.

(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 report such violation to the Judicial Conduct Commission.

(c) A lawyer is not required to report information that is protected by Rule 1.6 or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received while participating in the Kentucky Lawyers Assistance Program.

(d) A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).

(e) As provided in SCR 3.435, a lawyer who is disciplined as a result of a lawyer disciplinary action brought before any authority other than the Association shall report that fact to Bar Counsel.

(f) As provided in SCR 3.166(2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, shall immediately notify the Director of such event.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate a disciplinary investigation when they know that another lawyer has violated certain minimum standards of behavior as described in the Rule. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] 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 exists in many jurisdictions but has proved unenforceable. The Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. Lawyers requiring assistance in determining the need to report an incident of misconduct may confer with their Supreme Court District Committee member. Pursuant to SCR 3.530(7) a lawyer's communications with a District Committee member are confidential.

[3] Paragraph (a) of the Rule requires that a lawyer who knows that another lawyer has committed specified inappropriate acts, as defined in this Rule, report the facts of such conduct to Bar Counsel. While a measure of judgment in complying with the Rule is appropriate, the Rule and Comments are designed to encourage compliance and to provide clarity as to the types of conduct that must be reported to Bar Counsel. The term "know" is a defined term of these Rules, and lawyers are expected to have sufficient knowledge and training to understand the import of the terms: "dishonesty, fraud, or deceit." Therefore, it is reasonable to expect that a lawyer will report the facts that constitute misconduct to Bar Counsel. Dishonest conduct encompasses a broad spectrum of improper actions. The following examples, while not all inclusive, are provided for the purpose of illustrating the types of acts of lawyer misconduct that must be reported: (i) conversion of funds; (ii) fabrication of documents, destruction of evidence or creation of false evidence; (iii) overreaching and undue influence; (iv) unauthorized endorsements on settlement checks; and (v) deception or fraud in connection with a business transaction.

[4] Rule 8.4(c) includes the term "misrepresentation" as constituting an act of

misconduct, however, an act of misrepresentation is not included within the required reporting requirement of the Rule because of the possibility of misunderstanding of what specific acts constitute an act of misrepresentation and the need to avoid confusion in the application of the Rule.

[5] A lawyer who knows that a judge has committed a violation of the Code of Judicial Conduct that raises a substantial question as to the judge's fitness shall, at a minimum, file a report with the Judicial Conduct Commission. The term "substantial" refers to the seriousness of the possible offense.

[6] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[7] The duty to report misconduct is an important aspect of self-regulation, and is intended to achieve societal goals. In order to protect a lawyer who makes a report in compliance with the Rule and to encourage a lawyer to make a voluntary report of other acts of misconduct, the Rule provides qualified immunity to the reporting lawyer thereby removing the fear of retaliation by the reported lawyer or judge. The Rule's immunity provision is founded upon a similar rule of immunity provided by Canon 3D.(3) of the Kentucky Code of Judicial Conduct.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) Background for the Committee's Recommendation: One of the more controversial aspects of this Committee's work was to consider whether Kentucky should adopt a rule that requires a lawyer to report acts of misconduct committed by another lawyer. Kentucky's current Rules of Professional Conduct do not contain a mandatory reporting requirement and the failure to have a reporting rule has been the subject of significant criticism. In a recent law review article, Greenbaum, *The Attorney's Duty to Report Professional Misconduct: a Roadmap for Reform*, 16 Geo. J. Legal Ethics 259 (Winter, 2003), the author Commented:

While the vast majority of United States jurisdictions do impose some

requirement that lawyers report the misconduct of other attorneys, the requirement is not universal. For example, Kentucky has no such requirement. Washington's and Georgia's are precatory only. California has substituted a regime requiring the automatic reporting of certain events to disciplinary authorities instead of relying on lawyers to police and evaluate the conduct of other attorneys.

The basic rationale underlying a reporting requirement is straightforward. As *Model Code* EC 1-4 states: "The integrity of the [legal] profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials." Such reporting works to remove bad lawyers from the practice, deter others from engaging in misconduct and foster public confidence in the profession. *Not only is reporting misconduct important, but much of that reporting must come from lawyers themselves. Lawyers, because of their training in the law, and their day-to-day interactions with other lawyers, are better situated than most to observe and evaluate the conduct of other attorneys.* (Emphasis supplied.) (At pages 262-265.)

(2) The Committee believes that it is appropriate for Kentucky lawyers to report certain types of misconduct because lawyers are better situated than most to observe and evaluate the conduct of other lawyers and because the reporting of misconduct will serve to protect the public interest and help to justify the lawyer system of self-policing.

(3) For the convenience of those reviewing this report MR 8.3 is 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.

b. Detailed discussion of reasons for variances from the ABA Model Rule (if any).

(1) When formulating a self-reporting rule for Kentucky, the Committee carefully considered MR 8.3 and found that the MR has been the subject of significant criticism. The Greenbaum law review article, quoted above, contains an excellent critique of the MR. The Committee agrees with the author's many criticisms. For example, the MR requires a lawyer to make a report when another lawyer commits "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." The Committee believes that a reporting requirement based on a violation of the Rules of Professional Conduct is simply too general and ambiguous and will prove to be unenforceable. The Committee considered various state rules that require a report of lawyer misconduct and found that the Illinois mandatory reporting rule has merit.

(2) When drafting a rule for Kentucky, the Committee preferred a rule that specified certain types of misconduct, i.e.; criminal acts, dishonesty, fraud, or deceit -- the types of misconduct that a lawyer should understand. Further, the Committee believes that lawyers have sufficient knowledge and training to understand the terms: "honesty, trustworthiness, or fitness" when such terms are used in connection with the practice of law and the covered types of misconduct. Comment [4] illustrates the meaning of the term "dishonesty" when used in connection with the legal profession as including the (i) conversion of funds; (ii) fabrication of documents, destruction of evidence or creation of false evidence; (iii) overreaching and undue influence; (iv) unauthorized endorsements on settlement checks; and (v) deception or fraud in connection with a business transaction.

(3) The Committee notes that proposed Kentucky Rule 8.4 Misconduct includes the term "misrepresentation" as constituting an act of misconduct. The Committee's version of Rule 8.3, however, does not include an act of misrepresentation that requires a lawyer to make a report because of the possibility of misunderstanding of what specific acts constitute an act of misrepresentation.

(4) MR 8.3 does not contain an immunity provision. The Committee believes that it is important that a mandatory reporting rule contain an immunity provision to encourage compliance, and to protect a lawyer making a report in compliance with the Rule. Hence, paragraph (d) adopts the substance of the Canons of Judicial Ethics that provide immunity for judges who are required to make a report of inappropriate lawyer conduct. The Committee notes that some states provide immunity by case law or by other regulation, hence, those states do not consider it necessary to incorporate such protection into their required reporting rule.

Dissent and Committee Response

Committee member Peter L. Ostermiller dissents from the Committee Rule 8.3 recommendation. His dissenting opinion is inserted here for consideration by the reviewing authorities. The results of the Committee's consideration of this dissent follow the opinion.

The majority of the Committee has recommended that this Court adopt the "Reporting Professional Misconduct" Rule, set out in American Bar Association Model Rule 8.3. Kentucky does not have any such Rule in the current Rules of Professional Conduct. The majority of the Committee has recommended that Kentucky include ABA Model Rule 8.3 which would change the numbering of our current Rule 8.3 entitled, "Misconduct," to SCR 3.130 (8.4).

As an aspirational guideline or ideal, a general statement that attorneys should report certain types of misconduct of other attorneys in certain types of situations, is an appropriate expression of general guidance to lawyers. However, the Rules of Professional Conduct are not aspirational goals, but a code of disciplinary law, the violation of which may subject a lawyer to disciplinary sanction by this Court.

Model Rule 8.3 is a "solution in search of a problem." The proposed Rule has been in place in a number of jurisdictions around the United States with no real practical impact. The current Rules do not limit the right of an attorney to report the misconduct of any attorney to the KBA. Therefore, for a lawyer who wants to report another attorney's misconduct, the proposed Rule is unnecessary. What the proposed Rule does is to subject the non-reporting lawyer to disciplinary sanction. The body of case law from around the country and studies which have been performed show that the proposed Rule is impractical and unnecessary.

An article in Georgetown Journal of Legal Ethics entitled, *a Current Look at Model Rule*

8.3: How Is it Used and What Our Courts Are Doing about It?” Georgetown Journal of Legal Ethics, (Summer 2003), stated that:

“For a myriad of reasons, current scholarship agrees that Model Rule 8.3 is underenforced and does not act as a deterrent to a attorney misconduct. (Emphasis added).

A majority of the jurisdictions around the United States have adopted some form of Model Rule 8.3. However, the Rule is little more than an expression of an ideal, and not the subject of legitimate disciplinary sanction. As the above-mentioned article noted, although most States have adopted such a Rule, in reality and in practice, only two States, Illinois and Arizona, have had attorneys who were sanctioned by the Supreme Court of those States for failing to report another lawyer’s misconduct.

ABA Model Rule 8.3 has been criticized for using broad aspirational language with no real specifics, thereby making application by lawyers and enforcement by a disciplinary authority a difficult, and essentially impossible, task.

Although the majority of the Committee has sought to limit the scope of the proposed Rule 8.3, the core problems identified regarding similar Rules adopted in other jurisdictions applies with equal force to the proposed Rule 8.3.

The proposed Rule imposes the reporting obligation on a lawyer who “knows” that another lawyer has committed certain misconduct. The term “knows” is defined in Rule 1.0. Although the definition begins by indicating that such knowledge requires “actual knowledge of the fact in question,” the definition continues by stating that a lawyer’s knowledge “may be inferred from circumstances.” Therefore, the KBA, in a subsequent disciplinary proceeding, could take the position that the knowledge of the criminal conduct could be “inferred from circumstances,” even though the attorney in fact had no knowledge of the misconduct.

The ABA Model Rule 8.3 imposed the reporting obligation on a lawyer if the conduct of another attorney raised “substantial questions about a lawyer’s honesty, trustworthiness, or fitness to practice.” The proposed Rule 8.3 removes the “substantial question” language and requires that the lawyer report another lawyer if it is known that the other lawyer has “committed a criminal act or had engaged in conduct involving dishonesty, fraud or deceit that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer.” The “substantial questions” phrase in the Model Rule has been criticized as providing no real guidance for lawyers in determining under what circumstances a reporting obligation

has been triggered. The exclusion of that phrase by the majority of the Committee does not remove that lack of clarity as to when the conduct of the other lawyer has reached a level requiring a reporting to the KBA.

The proposed Rule contains the same provision in the Model Rule regarding confidential information under Rule 1.6. In particular, a lawyer is relieved of any reported obligation if the information is protected by the confidentiality language of Rule 1.6. The language of Rule 1.6 is very broad, and covers all “information relating to representation of a client.”

The majority of the Committee, in paragraph (d) of the proposed Rule seeks to address the confidentiality issue. That paragraph states that if a lawyer acts in good faith in reporting another attorney to the KBA, that attorney will be “immune” from any civil or criminal action and from any disciplinary proceedings. A proposed Rule which tacitly acknowledges that an attorney’s compliance with proposed Rule 8.3 may involve a violation of Rule 1.6 regarding confidentiality, for which the attorney will be given immunity under paragraph (d) of Rule 8.3, is a corruption of the concept behind the Disciplinary Rules. In short, compliance with one Rule should not require violation of another Rule, for which immunity is given by the first Rule.

Additionally, although the majority of the Committee, in recommending the inclusion of paragraph (d), seeks to provide immunity, the major concern in imposing a reporting obligation on an attorney is not for being sued but for being fired from reporting what may be misconduct but what turns out not to be the case. The severance of an attorney’s employment, partnership relationship or associate status at a law firm is another practical consideration which, in application, causes attorneys to err on the side of caution in not reporting possible misconduct.

The purpose of this Dissent is not to criticize the reporting of misconduct by any attorney of any other attorney’s conduct in a particular case. Such voluntary reporting, without such reporting being used in an attempt to improperly leverage the outcome of a particular legal matter, is a right that any attorney enjoys. However, codification in other jurisdictions of a mandatory duty to report has turned out to be nothing more than a “feel good” ideal and not the proper subject of a disciplinary code.

The majority opinion of the Committee for the inclusion of ABA Model Rule 8.3 should be rejected by this Court.

Committee Consideration of the Dissent to its Recommendation: The Committee is not recommending adoption of MR 8.3 as indicated in the first sentence of the dissent.* In

recognition of the issues the dissent raises with MR 8.3 the Committee carefully crafted a narrow reporting rule distinct from MR 8.3 that it believes addresses the concerns expressed in the dissent and provides a workable Rule that can be followed and enforced in a fair and balanced manner. After consideration of the dissent's specific objections to the proposed Rule, the Committee respectfully does not find them persuasive or warrant a change in the Committee's recommendation. The Committee recognizes that this Rule is controversial, but as a matter of professional responsibility policy for Kentucky lawyers, its time has come.

**It is noted that the dissenter shows that he appreciates this in subsequent paragraphs, but it is essential to the evaluation of the Committee's recommendation that it be clear that the proposed KRPC 8.3 is a unique reporting misconduct rule for Kentucky lawyers.*

Adopted by the Court with slight modification of Comment 2 and deletion of Comments 3 and 4. Order 2009-05, eff 7-15-09.