



*Professional Ethics Committee*

30 Bank Street  
PO Box 350  
New Britain  
CT 06050-0350  
06051 for 30 Bank Street  
P: (860) 223-4400  
F: (860) 223-4488

Approved May 15, 2013

**Informal Opinion 2013-05**  
**DUTY TO REPORT SUSPECTED PROFESSIONAL MISCONDUCT**

The Requestor has asked the Committee whether the Requestor has a duty to report "a possible or potential ethical violation by another attorney under Rule 8.3." The Committee opines that, under the facts as set forth, the Requestor does not have a duty to report under Rule 8.3(a).

The Requestor has provided the following facts. After the death of their mother, four siblings, Heirs A, B, C and D became entangled in a series of lawsuits arising from the alleged actions of Heir A obtaining the bulk of their elderly mother's estate using a mortgage on her house. After the mother passed away, several of the siblings discovered that, prior to her death, the mother and Heir A, her youngest child, together executed a mortgage note on the mother's property to extract funds so that Heir A could purchase an investment property. During the transaction, the property was first quitclaimed to the mother and Heir A as joint tenants; later, the mother transferred all of her interest in the property to Heir A.

In the first two Superior Court actions, which were consolidated before trial, Heir B, being represented by Attorney 1, and Heir C, represented by the Requestor, together sued Heir A for undue influence. After a jury trial, Heirs B and C prevailed on their claims of undue influence.

Additionally, the financial institution that held the mortgage note initiated two foreclosure proceedings the first of which was withdrawn, but the second of which is still pending. In both foreclosure proceedings Heir B has been and is still represented by Attorney 1. Heir B, through Attorney 1, has claimed that Heir A's undue influence may be a defense to the financial institution's attempts to foreclose on the mortgage and note. The Requestor also indicates that Heir A did not appear in the first foreclosure action and until recently, did not appear in the second foreclosure action. In the pending foreclosure action, the court ruled that Heirs B and C, who did not sign the mortgage and note, lacked standing to attack it.

Around the same time, the probate court convened hearings to administer the mother's intestate estate. Heir B, again represented by Attorney 1, claimed in probate court that both Heir A, who did not appear in that matter, and Heir D, also unrepresented there, had each transferred their interests in the mother's estate to Heir B.

Recently, the Requestor received an appearance from Attorney 1 in which Attorney 1 states that he represents not only Heir B, but also Heir A, Heir B's litigation opponent in the state court undue influence action. It appears that this appearance was filed in the pending foreclosure action.

The Requestor states that "there is reason to suspect that the new alliance between Heirs A and B is being done to present a misrepresentation to either the probate court [or] the Superior Court or both." The Requestor further posits that, because of the foreclosure court's order denying standing to Heir B to attack the note and mortgage, "now it appears as if...Heir A, who signed the Note and Mortgage, is being brought in at the last minute to attack the mortgage and note."

The Requestor adds that the family involved is "highly dysfunctional," that the three siblings who are not his client have a "history of suing and being sued" by each other and of forming alliances to "manipulate the facts and possibly the court," that the two youngest siblings have federal drug convictions and that Heir B is "presently in foreclosure and to the best of my current knowledge and belief" operates an unlicensed business.

The precise question posed by the Requestor is whether the Requestor has a duty to report "a possible conflict of interest resulting from" Attorney 1 accepting the representation of a party that "he and his client sued in a previous action." The Requestor also appears to wonder whether he may have a duty to report potential, future misrepresentations made in either the probate court or the foreclosure court by Heirs A and B through Attorney 1. The Committee will consider this concern as a second question. The Committee's answer to both questions, based on Rule 8.3(a) and the facts presented is "no."

Rule 8.3(a) provides, in pertinent part, 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. ...

Rule 8.3(a) "is a mandatory rule of discipline that addresses, in pertinent part, the circumstances under which a lawyer must report ethical violations by other lawyers." Informal Opinion 96-20.<sup>1</sup> However, Rule 8.3(a) incorporates two significant threshold requirements before an attorney is required to report another's conduct: (1) the attorney must know that the other lawyer has committed a violation of the Rules and (2) this violation must raise a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

As the Committee has noted previously, Rule 1.0, Terminology, defines "knows" as denoting "actual knowledge of the fact in question" and further states that "knowledge may be inferred from circumstances." See Informal Opinions 11-06, fn2, 05-11 and 04-13. Moreover, the first threshold requirement, by using the phrase "has committed," also contemplates that the ethical violation must already have taken place. Both the Requestor's

---

<sup>1</sup> All rules that employ the word "shall" are imperative rules, and define "proper conduct for purposes of professional discipline." Scope, Rules of Professional Conduct.

own perceptions, disclosed in the language he employs, and the facts he presents reveal that the first threshold requirement has not been met in regard to either question posed. The general question framed by the Requestor is whether he has a duty to report "a possible or potential ethical violation." Similarly, the Requestor terms the perceived conflict arising from the recent representation of Heir A by Attorney 1 as "a possible conflict of interest." In regard to misrepresentations to the court, the Requestor states that he has only "reason to suspect," and not knowledge, that an ethical violation *may* occur, not that one has occurred. The Requestor's use of the words "possible" and "potential" and the phrase "reason to suspect" do not satisfy the requirement of actual knowledge that an ethical violation has occurred.

Similarly, the facts submitted do not evidence an inference of actual knowledge that an ethical violation has occurred, either in regard to the conflict of interest arising from the dual representation of Heirs A and B or from potential misrepresentations to the court.

Although the recent alliance of Heir A and B might raise concerns about a conflict of interest for Attorney 1, the Committee notes the following. Heir A is a *former* litigation opponent of Heir B, not a present one. Heir B has already proven that Heir A exerted undue influence over the decedent. That case is over. Heir B is presently using Heir A's undue influence as a defense to the foreclosure action against the financial institution holding the mortgage and note, not against Heir A. In the probate action, Heir B represented that Heir A had transferred Heir A's interest in the decedent's estate to Heir B. As a result, Heirs A and B may presently be aligned against the financial institution in the foreclosure action and may not be adverse to each other in the probate matter. Therefore, these facts do not create an inference that Requestor knows that (1) a conflict under Rule 1.7(a)<sup>2</sup> exists or (2) that, if it did, it was not waived under Rule 1.7(b)<sup>3</sup>.

In like manner, the Requestor's observations concerning the "highly dysfunctional" nature of the family of Heirs A and B and his stated knowledge of their past unethical, illegal or immoral acts create only a subjective suspicion about the propensities of Heirs A and B; they do not constitute a reasonable inference as to knowledge that Attorney 1 committed an ethical violation.

In sum, both the facts submitted by the Requestor, as well as the manner in which he framed the issues presented to the Committee demonstrate that the first necessary prerequisite to Rule 8.3(a) reporting, namely, actual knowledge of an ethical violation, has not been met.

---

<sup>2</sup> 1.7(a) provides that "Except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or by a personal interest of the lawyer."

<sup>3</sup> 1.7(b) provides that "Notwithstanding the existence of a concurrent conflict of interest under subsection (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and (4) each affected client gives informed consent, confirmed in writing."

Even assuming, *arguendo*, that the Requestor had actual knowledge that Attorney 1 had committed an ethical violation, the second prerequisite to mandated reporting under Rule 8.3(a), has also not been satisfied. As mentioned above, to create a reporting mandate, the ethical violation at issue must raise “a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Rule 8.3(a). Past Committee opinions have provided guidance as to what this phrase means. Citing the Commentary to 8.3, the Committee opined that the “reporting obligation [is limited] to those offenses that a self-regulating profession must vigorously endeavor to prevent.” Informal Opinion 05-11. The Commentary further points out that “the term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” Informal Opinion 01-04. Professor Hazard has noted that “A ‘substantial’ violation of the rules alone is not enough; the violation must be of such a nature that the conduct raises a ‘substantial’ question about the fitness of the offending lawyer to carry out his professional role.” Hazard & Hodes, *The Law of Lawyering* Section 8.3:201, p. 945 (2d Edition, 1996), cited in Informal Opinion 01-04. Further, in considering both Rule 8.3 and several prior opinions in which the duty to report was considered, this Committee stated that, “[i]n each of these instances [where we have found a duty to report] the facts suggest an intentional, perhaps even premeditated, effort to abuse the position of attorney to the advantage of the offending attorney. There seems [in those previous opinions] to be a sufficient degree of *mens rea*, which offends our collective sensibilities and which we ‘...must vigorously endeavor to prevent.’ Comments to Rule 8.3.” *Id.*, citing Informal Opinion 94-33. Nothing in the record, whether it is a possible conflict of interest or the suspicion of future misrepresentation even remotely suggests a violation that would create a substantial question as to Attorney 1’s honesty, trustworthiness or fitness to practice law. <sup>4</sup>

In sum, based upon the facts presented, the Requestor does not have a present obligation under Rule 8.3(a) to report Attorney 1.

THE COMMITTEE ON PROFESSIONAL ETHICS

By  \_\_\_\_\_  
John R. Logan, Chair

---

<sup>4</sup> The Committee has issued this opinion based on the facts presented and under Rule 8.3. However, if, in the course of representing Heir C in one of the actions, the Requestor came to know that Attorney 1 intended to engage in, was engaging in, or had engaged in fraudulent conduct related to the proceeding, the Requestor would have a duty under Rule 3.3(b) to take reasonable remedial measures, including, if necessary, making a disclosure to the tribunal.