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COMMITTEE ON PROFESSIONAL ETHICS AND THE UNAUTHORIZED PRACTICE OF LAW

**THE COMMITTEE ON PROFESSIONAL ETHICS
AND THE UNAUTHORIZED PRACTICE OF LAW**

Informal Opinion 25-4

DUTY TO REPORT PROFESSIONAL MISCONDUCT

The requestors are lawyers who work at a state agency. They seek guidance from the Committee as to their professional obligations in light of certain conduct by the chair of a public regulatory authority, including whether they have a duty to report such conduct. The chair is not a licensed attorney in Connecticut but is a member of the bar of another state. The conduct at issue consists of several communications by the chair in the context of discussions of a draft legislative proposal among multiple state government bodies, communications that the requestors allege constituted improper ex parte communications concerning a matter pending before the public authority. For the reasons set forth below, the Committee concludes that no duty exists under the Rules of Professional Conduct to report the chair's conduct. Furthermore, because the requestors by their own account did not engage substantively with the chair's communications upon learning of the latter's connection to the pending proceeding, there is no need to analyze whether doing otherwise would have violated any Rules.

Rule 8.3(a) provides, in pertinent part: "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." Thus the analysis under this section proceeds in two parts: first, a lawyer must know that another lawyer has violated one or more rules; second, if so, it must be determined whether the violation is significant enough to "raise[] a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." *See Connecticut Bar Association, Standing Committee on Professional Ethics, Informal Opinion 2013-05, Duty to Report Suspected Misconduct.*

As a threshold matter, it is clear that the chair is "another lawyer" within the meaning of the Rule despite neither being licensed in Connecticut nor (apparently) actively engaged in the practice of law, at least in the context of the request. "Misconduct by a suspended, out-of-state, or nonpracticing lawyer is treated as misconduct by 'another lawyer' for reporting purposes." Ellen J. Bennett, Helen W. Gunnarsson and Nancy G. Kisicki, *Annotated Model Rules of Professional Conduct* (10th ed. 2023).

Rule 3.5, titled “Impartiality and Decorum,” addresses ex parte communications by lawyers in the context of proceedings before tribunals.¹ Section 1 provides that a lawyer shall not “[s]eek to influence a judge, juror, prospective juror or other official by means prohibited by law.” Section 2 provides that a lawyer shall not “communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.”

The communications at issue here fall well outside the ambit of this Rule. Rule 3.5 addresses a lawyer’s professional obligation as an advocate, not as a member of a tribunal – which was the chair’s role in the underlying declaratory ruling proceeding. The chair’s communications concerning draft legislation with representatives of government bodies, at least one of which was a party to that proceeding, were not – indeed, and by definition could not have been – communications with or attempts to influence the tribunal. Rather, they were communications *by a member of the tribunal itself*. To whatever extent the chair’s communications were intended to advance legislation that would have impacted the pending proceeding, as the requestors insinuate, is of no moment. Those communications if anything implicate the chair’s responsibilities as an adjudicator, not their obligations as a lawyer under the Rules of Professional Conduct.²

The requestors nevertheless cite Connecticut statutes and agency regulations that prohibit members of state agencies from communicating ex parte with persons or parties concerning pending contested cases unless all parties are provided notice and an opportunity to participate. The requestors concede that inasmuch as the matter pending here was not a contested case proceeding but rather a declaratory ruling proceeding, these provisions do not apply. Yet they point to the public authority’s notice of proceeding in the matter, which stated that “even though this is an uncontested matter, the Authority strictly observes... [the prohibition against] ex parte communication.”

Even assuming the chair’s communications at issue violate that assurance, they would not amount to a violation of the Rules of Professional Conduct. The only ostensibly applicable provision is Rule 8.4, “Misconduct.” Pursuant to that Rule, it constitutes professional misconduct for a lawyer to engage in “conduct involving dishonesty, fraud, deceit or misrepresentation” (Section 3) or “conduct that is prejudicial to the administration of justice” (Section 4). Notwithstanding the breadth of those provisions, the chair’s conduct as reported here does not rise to the level of violating Rule 8.4. There is no suggestion that the chair’s communications at issue were somehow deceitful or involved misrepresentations. Nor is the chair’s participation in efforts to craft a legislative proposal – even if it were intended to affect the outcome of a matter pending before the public authority – somehow prejudicial to the administration of justice. The potential legislation that was the subject of the chair’s comments would have had to be enacted through a

¹ Notably, the Model Rule on which Connecticut Rule 3.5 is based is titled “Impartiality and Decorum *of the Tribunal*” (emphasis added). But the language of the two rules is identical except for Section 4 of the Connecticut rule and the corresponding Section (d) of the Model Rule. The former prohibits lawyers from engaging in “conduct intended to disrupt a tribunal *or ancillary proceedings such as depositions and mediations*” (emphasis added), whereas the italicized language does not appear in the Model Rule. The omission of the words “of the Tribunal” from the title of the Connecticut rule appears to be an effort to accommodate that addition.

² The chair is not subject to the Code of Judicial Conduct, notwithstanding their adjudicatory role. See Code of Judicial Conduct, Application, § I.

public process, during which any affected party, including the parties to the declaratory ruling proceeding, would have had an opportunity to express their positions to the appropriate legislative committee. Moreover, even if the chair's conduct were deemed to violate Rule 8.4, such conduct was not sufficiently egregious to "raise[] a substantial question" as to the chair's "honesty, trustworthiness or fitness as a lawyer" so as to trigger the requestors' reporting obligation under Rule 8.3. See Rule 8.3, Commentary ("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.")

Finally, the request indicates that, upon learning of the connection between the chair's communications and the pending proceeding, the requestors did not, and in at least one instance declined expressly, to engage substantively with those communications. Whether doing otherwise would have violated Rule 3.5 is unclear. The Rule prohibits ex parte communications "during the proceeding." Although the communications at issue clearly occurred during the proceeding as a temporal matter, they occurred in the entirely separate context of discussions over a draft legislative proposal, discussions which involved the pending proceeding only indirectly. Whether responding substantively to the chair's communications concerning the proposed legislation would have amounted to prohibited ex parte communications with a member of the tribunal concerning the pending proceeding is an issue we need not and thus do not address.

Accordingly, the Committee concludes that Rule 8.3 imposes no obligation to report the conduct at issue, and that nothing in the request suggests that the requestors themselves violated any of the Rules of Professional Conduct. However, this opinion includes no consideration of whether the conduct at issue implicates any other code of conduct, statutory provision, or other potentially applicable ethical rules.

Stuart C. Johnson

BY Stuart Johnson, Chair