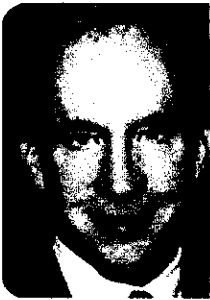


Reporting Professional Misconduct



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In February 9, 2007, the Supreme Court of Ohio's Board of Commissioners on Grievances and

Discipline (the Board) issued Opinion 2007-1 on what can be a sensitive topic: reporting a lawyer's—including one's own—misconduct.

Specifically, the Board addressed where to report misconduct and what to report.

Where to Report Misconduct

The precise question presented to the Board was whether the ethical duty to report another lawyer's misconduct in a matter pending before a tribunal is satisfied by reporting the alleged misconduct to the presiding judge. The Board stated the duty of a lawyer to report professional misconduct is governed by Rule 8.3 of the Rules of Professional Conduct. That rule in pertinent part provides that a lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness or fitness as a lawyer shall inform a disciplinary authority empowered to investigate or act upon such a violation.

That rule, the Board stated, specifies that misconduct should be reported to a disciplinary authority empowered to investigate or act upon a violation. The Board noted a judge has no such authority, unlike a certified grievance committee of a bar association and disciplinary counsel. Gov. Bar V(3)(B) and Gov. Bar V(3)(C). Even though a tribunal has authority to supervise, sanction and disqualify attorneys appearing in cases before it, the Board observed such authority is distinct from disciplinary authority.

The Board pointed out Rule 3.3, which imposes a duty of candor to a tribunal, may require disclosure of professional misconduct to a judge. That rule provides that a lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a previously false statement of material fact or law; (2) fail to disclose adverse legal authority in the controlling district known to the lawyer; or (3) offer evi-

dence the lawyer knows to be false. The rule also states that a lawyer who represents a client and knows that a person, including the client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal.

Accordingly, the Board counseled that there may be instances in which a lawyer's professional misconduct must be reported to disciplinary counsel or a certified grievance committee of a bar association as well as disclosed to a tribunal pursuant to the lawyer's duty of candor under Rule 3.3.

What to Report

In addressing what to report, the Board focused on Rule 8.4, which provides:

It is professional misconduct for a lawyer to do any of the following:

- Violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another
- Commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness
- Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation
- Engage in conduct that is prejudicial to the administration of justice
- State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law
- Knowingly assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law
- Engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age,

gender, sexual orientation, national origin, marital status or disability

- Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

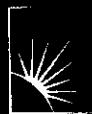
The Board identified two triggers to a reporting duty: first, unprivileged knowledge of a violation of the Rules; and second, a violation raising a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer. The Board acknowledged a lawyer must exercise professional judgment in determining if misconduct raises a question of honesty, trustworthiness or fitness as a lawyer. A lawyer who has doubts as to whether the misconduct raises such a question, however, should err on the side of reporting.

In considering what disclosure is mandated, the Board interpreted Rule 8.3 and its undefined term "unprivileged knowledge" in light of Rule 1.6 Confidentiality of Information. The Board concluded that there is a duty to report even confidential information within the meaning of Rule 1.6, but not privileged information.

The Board also opined that:

- A lawyer need not report another lawyer's professional misconduct revealed through a privileged communication by a client to a lawyer, but Rule 8.3 counsels that a lawyer should encourage a client to consent to reporting the misconduct if doing so would not substantially prejudice a client's interests;
- A lawyer retained to represent another lawyer whose professional conduct is in question does not have to report the lawyer's professional misconduct because that information is privileged;
- A lawyer serving on a bar association committee or sub-committee designed to assist lawyers with substance abuse or mental health programs has no duty to report because that information is privileged;
- A mere suspicion of misconduct need not be reported—there is a requirement of actual knowledge—although such knowledge may be inferred from circumstances; and
- A lawyer is required to self-report professional misconduct raising a question as to his or her own honesty, trustworthiness or fitness as a lawyer, just as the lawyer must report any such misconduct by another lawyer or a judge.

When an issue regarding potential misconduct by a lawyer arises, a practitioner should review Opinion 2007-1 for guidance. ☞



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