

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2008-12
(February 2009)

The inquirer advises that in the course of recent litigation in the Court of Common Pleas he witnessed conduct by opposing counsel that he believes violated several Rules of Professional Conduct. He brought that conduct to the attention of the trial judge both orally and in writing. The inquirer asks if he has any further reporting requirement under Pennsylvania Rule of Professional Conduct (the "Rules") 8.3.

Rule 1.0 **Terminology** provides that:

(e) "Informed consent" denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.6. **Confidentiality of Information** provides that:

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)...

Comment:

(1) This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client...[see] Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

Rule 1.9. Duties to Former Clients.

...

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known;

Rule 8.3. Reporting Professional Misconduct.

(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.

...

Comment

(2) A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

(3) If a lawyer were obligated to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. 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 duty to report involves only misconduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware** [emphasis added].

Because no specifics were provided by the inquirer as to the nature of the misconduct to which he brought the court's attention, the Committee's advice must be somewhat general in nature. First, it is clear that the duty to report misconduct as contained in Rule 8.3(a) refers to making a report to the Disciplinary Board of the Supreme Court of Pennsylvania. Although a report may have been made to court during a trial, reporting to the Court is distinct from the obligation to report to the Disciplinary Board.

The Committee notes however, that not all conduct need be reported. As outlined in Comment 3 to Rule 8.3, it is only conduct that meets the standard of conduct that "substantially reflects" on an attorney's fitness to practice law.

The Committee cautions the inquirer to be careful about the limitations on the duty to report imposed by the overriding duty of confidentiality (see Comment 2 to Rule 8.3). Even if a report to the court has already been made, a subsequent report to the Disciplinary Board still requires a waiver based on informed consent (as defined by Rule 1.0e), of any confidential information needed to make the report. Should the client refuse to waive confidentiality if that is needed, then the attorney should endeavor to convince the client otherwise provided it is not done to the prejudice of the client's interests.

Should the matter concern an individual who is now a former client, the inquirer is directed to the standard regarding the revealing of confidential information of former clients as contained in Rule 1.9(c)(1), which standard, depending on the specifics of the situation, might or might not require an informed consent waiver of confidentiality in order to make the report.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.