

# The Supreme Court of Ohio

## BOARD OF PROFESSIONAL CONDUCT

65 SOUTH FRONT STREET, 5<sup>TH</sup> FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

www.supremecourt.ohio.gov

PAUL M. DE MARCO

CHAIR

WILLIAM J. NOVAK

VICE-CHAIR

RICHARD A. DOVE

DIRECTOR

D. ALLAN ASBURY

SENIOR COUNSEL

HEIDI WAGNER DORN

COUNSEL

### OPINION 2016-2

Issued April 8, 2016

*Withdraws Advisory Opinion 1990-1*

#### *Duty to Report Unprivileged Knowledge of Misconduct*

**SYLLABUS:** A lawyer is required under Prof.Cond.R. 8.3 to report any unprivileged knowledge of a violation of the Rules of Professional Conduct to the Office of Disciplinary Counsel or a bar association's certified grievance committee. A lawyer shall not reveal privileged information relating to the representation of a client, including information protected by the attorney-client privilege. Prof.Cond.R. 1.6(a). A lawyer may reveal information relating to the representation of a client if the client gives informed consent under Prof.Cond.R. 1.6.

**APPLICABLE RULES:** Prof.Cond.R. 1.6, 8.3

#### **QUESTIONS PRESENTED:**

- 1). Whether a lawyer who represented a client against the client's prior lawyer has an ethical obligation under Prof.Cond.R. 8.3 to report the lawyer to the appropriate disciplinary authority.
- 2). Whether the information acquired from the client regarding their prior lawyer's conduct is privileged, thereby eliminating any duty to report?

**OPINION:** The requester seeks an advisory opinion regarding a lawyer's duty to report another lawyer's misconduct under the following facts. The lawyer represents a client against the client's prior lawyer to recover certain monies the lawyer allegedly

misappropriated from the client. A settlement is reached, curing the delinquencies but without an admission of liability by the prior lawyer. The settlement contained a confidentiality provision.

Question 1:

The Rules of Professional Conduct do not contain a strict reporting requirement that a lawyer report all misconduct of which the lawyer has unprivileged knowledge. Rather, Prof.Cond.R. 8.3 requires a lawyer to report misconduct only when 1) the lawyer has unprivileged knowledge, and 2) it raises a question as to another lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects." Prof.Cond.R. 8.3 also requires lawyers to report their own misconduct. If a lawyer has reservations as to whether to report the misconduct, the Board recommends the lawyer err on the side of reporting.

Lawyers are required to report misconduct to a disciplinary authority empowered to investigate or act upon such violation. Prof.Cond.R. 8.3(a). In Ohio, the proper disciplinary authority is the Office of Disciplinary Counsel or a bar association's certified grievance committee. The reporting duty is not fulfilled by reporting a lawyer's misconduct to a tribunal, since a tribunal does not have the authority to investigate or act upon reports of lawyer misconduct. However, in certain circumstances a lawyer may be required under another Rule of Professional Conduct to report the misconduct to the tribunal. *See*, Prof.Cond.R. 3.3, Adv. Op. 2007-1.

Additionally, in order to invoke the reporting requirement, a lawyer must have actual knowledge that another lawyer has violated a Rule of Professional Conduct. This requires more than a "mere suspicion" that misconduct has occurred. The term "'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Prof.Cond.R. 1.0(g); Adv. Op. 2007-01. *See* DC Bar Op. 246, citing N.Y. State Bar Opinion No. 635. Furthermore, a lawyer's duty to report is not removed when the lawyer being reported does not admit liability or even denies any misconduct.

Therefore, a lawyer who represents a client against the client's prior lawyer has an ethical obligation under Prof.Cond.R. 8.3 to report the prior lawyer's misconduct to the appropriate disciplinary authority if the lawyer has unprivileged knowledge and the violation raises questions as to the other lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects."

Question 2:

A lawyer is not required to report misconduct where it would involve disclosure of privileged information. Prof.Cond.R. 8.3, cmt. [2]. Rather, the lawyer should use his or her professional judgment to determine whether the privileged information should be disclosed to report the misconduct. If the lawyer determines that the information should be disclosed, the lawyer should encourage the client to consent to such a disclosure, where it would not prejudice the client's interests. Prof.Cond.R. 8.3, cmt. [2].

Prof.Cond.R. 1.6 should be consulted when determining whether information is privileged or unprivileged. Under Prof.Cond.R. 1.6(a), a lawyer is prohibited from revealing any information related to the representation, including information protected by the attorney-client privilege, without client consent. However, Prof.Cond.R. 1.6(b) allows, but does not require, a lawyer to disclose confidential client information that may be protected by the attorney-client privilege to accomplish the limited purposes contained in Prof.Cond.R. 1.6(b)(1)-(b)(6). *See*, Prof.Cond.R. 1.6, cmt. [17].

Consequently, a lawyer's duty under Prof.Cond.R. 8.3(a) to report the misconduct of a client's prior lawyer is conditioned on the possession by the lawyer of unprivileged knowledge. This requires the use of professional judgment to determine whether the information is privileged or unprivileged. If the information is unprivileged, the duty to report misconduct under Prof.Cond.R. 8.3 is triggered. However, if the information is privileged, the lawyer is not required to report under Prof.Cond.R. 8.3, but may encourage the client to consent to the disclosure of the privileged information if it would not substantially prejudice the client's interests. If a lawyer determines that he or she has a duty to report unprivileged knowledge of another lawyer's misconduct, failure to report is itself a violation of Prof.Cond.R. 8.3.

**CONCLUSION:**

A lawyer has a duty to report unprivileged knowledge of another lawyer's misconduct under Prof.Cond.R. 8.3. A lawyer is required to keep information related to the representation of a client confidential, including information protected by the attorney-client privilege under applicable law. A lawyer is not required to report privileged information of another lawyer's misconduct. A lawyer may; however, reveal information related to the misconduct of a lawyer if the client gives his or her informed consent to the disclosure under Prof.Cond.R. 1.6.

**Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Lawyer's Oath of Office.**

