

17-02

Opinion No. 17-02

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

April 24, 2017

1. Issue: Is a lawyer required to report to the Bar a fellow lawyer who orally articulates an anticipated violation of the Rules of Professional Conduct?

2. Opinion: Under the circumstances of the requested opinion, there is no duty to report.

3. Background: Lawyer A overhears Lawyer B telling third persons that he was contemplating forming a business relationship with his non-attorney employee. Lawyer A requests an opinion as to her duty to report the conversation to the appropriate disciplinary authority.

4. Discussion. There is no duty to report unless there is a violation of the rules. Rule 8.3(a) provides that "A lawyer who knows that another lawyer *has committed a violation of the Rules of Professional Conduct* that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer." The Committee accepts the proposition that forming a legal business with a non-lawyer is presently a serious violation of the rules. This does not mean that an expression of intent to violate the rule constitutes misconduct. "As Comment 1 to Restatement 5 correctly notes, however, under most codes of professional ethics, the duty to report is limited to wrongdoing known (rather than suspected) to have occurred, is limited to relatively serious offenses and is qualified …" Hazard, Hodes & Jarvis "The Law of Lawyering" § 64.2 (2009 Supplement).

5. For examples of when a lawyer actually "knows" of a violation, see *Attorney U v. Mississippi State Bar*, 678 S.2d 963 (Miss. 1996) where the lawyer actually saw a contract setting up a business relationship between a lawyer and a non-lawyer testing firm. Even in that case, the Mississippi Supreme Court majority was not willing to impute knowledge to the attorney involved. (But see the dissent where four justices indicated that they would interpret "willful ignorance" as knowledge.) See also *In re Riehlmann*, 891 S.2d 1239 (2005), where an attorney had knowledge that the prosecutor had falsified the DNA testing of the defendant in a death penalty case. In both cases, the disciplinary authority was not willing to infer actual knowledge of events which might have occurred. This

opinion does not concern the quantum of proof needed to trigger a duty to report actual knowledge of an attempted or completed violation of the rules. It merely states that an oral expression of intent is not such a violation.

6. Rule 8.3(a) is limited to actions. The offending lawyer may well read the Rule and come to the conclusion that his proposed course of action is precluded. His fellow attorney in an act of professional courtesy might also give him that knowledge in order to assist a fellow lawyer from doing that which he ought not. The offending lawyer may simply lose interest and may never violate the Rules.

7. This opinion is supported by the reporting requirement of Rule 8.3(a) which requires only the reporting of "substantial questions of honesty, trustworthiness or fitness." As Hazard, Hodes & Jarvis note "Rule 8.3(a) accepts the reality that an all-encompassing mandatory reporting rule would be subject to massive civil disobedience that would in turn make it difficult to prosecute even clear and egregious cases of refusal to report. The compromise limits the Rule to cases of known violations that directly impact the integrity of the legal profession." Hazard, Hodes & Jarvis § 64.3 (2009 Supplement).

8. Comment 3 to Rule 8.3 notes that the former rule of unlimited responsibility to report any misconduct proved unenforceable in other jurisdictions. "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." [citation needed]

9. Rule 8.4(a) makes an attempt to violate the Rules of Professional Conduct itself misconduct. It has been suggested that speech may evidence intent to violate the rules. However, even under 8.4(a) the lawyer must still take action rather than muse out loud about violating the rules. Hazard, Hodes & Jarvis make plain that action is required. "As in the substantive criminal law, an *unsuccessful* attempt to violate the Rules may nonetheless still be sufficient to subject the lawyer to professional discipline under Rule 8.4(a). Hazard, Hodes & Jarvis § 65.3 (2009 Supplement) (emphasis in the original). It is clear that there must be an "attempt" to violate the rules and in the scenario before the committee, there is no such attempt.