

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 98-12

Approved December 4, 1998

Question: When a lawyer becomes aware that another lawyer has illegally used or possessed controlled substances, under what circumstances must the first lawyer report such conduct to the Utah State Bar?

Opinion: A lawyer is required to report to the Utah State Bar any unlawful possession or use of controlled substances by another lawyer if two conditions are satisfied: (1) the lawyer has actual knowledge of the illegal use or possession, and (2) the lawyer has a reasonable, good-faith belief that the illegal use or possession raises a substantial question as to the offending lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. A lawyer is excused from this reporting requirement only if (i) the lawyer learns of such use or possession through a bona fide attorney-client relationship with the offending lawyer, or (ii) the lawyer becomes aware of the unlawful use or possession through providing services to the offending lawyer under the auspices of the Lawyers Helping Lawyers program of the Bar.

Analysis: The unlawful use or possession of controlled substances is criminal conduct and may constitute the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," which is professional misconduct under Utah Rules of Professional Conduct 8.4(b). If another lawyer has actual knowledge that a lawyer has unlawfully possessed or used controlled substances, such that it raises a substantial question as to the offending lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, the lawyer is bound by the provisions of Rule 8.3(a) to make a report to the Office of Professional Conduct of the Utah State Bar, (fn1) unless this disclosure obligation is excused by Rules 8.3(c) or 8.3(d). Rule 8.3(a) provides:

A lawyer having knowledge 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

However, Rule 8.3(a) imposes an obligation to report only if the lawyer has "knowledge" that the other lawyer has committed a violation of the Rules. "Knowledge" as used in Rule 8.3(a) requires actual knowledge of the violation of the Rules by the other lawyer. (fn2) In addition, whether the unlawful use or possession of a controlled substance reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects is dependent upon the facts and circumstances.

Rule 8.3(a) imposes a reporting requirement only when the known misconduct raises a "substantial question" regarding a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. The Comment to Rule 8.3 recognizes that the rule does not require disclosure of every violation of the Rules of Professional Conduct. Rule 8.3(a) limits the violations that must be reported to "those offenses that a self-regulating profession must vigorously endeavor to prevent." The Comment further states: "A measure of judgment is, therefore, required in complying with the provisions of this Rule." Whether a "substantial question" arises is therefore measured by the subjective, reasonable, good-faith belief of the lawyer with knowledge of the violation. But the Comment to Rule 8.3 also states that the use of the "term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

In the matter at issue, whether the lawyer has actual knowledge of a violation of Rule 8.4(a) by the offending lawyer and whether the lawyer has a duty to report the violation under Rule 8.3(a) is governed by the same inquiry: the subjective good-faith belief of the lawyer as to whether the misconduct raises a substantial question regarding the offending lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. The reporting lawyer's obligation under Rule 8.3(a) arises only on the subjective, reasonable, good-faith belief, considering all the facts and circumstances, that the illegal possession or use of a controlled substance by the offending lawyer raises a substantial question regarding the offending lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

There are, however, two exceptions to the reporting requirement of Rule 8.3(a). Rule 8.3(c) provides that the reporting provision "does not require disclosure of information otherwise protected by Rule 1.6." Rule 1.6 protects information obtained by a lawyer in an attorney-client representation. (fn3) Therefore, if knowledge of illegal possession or use of a controlled substance is learned in the course of an attorney-client

representation of the offending lawyer, disclosure is not required under Rule 8.3(a).

Rule 8.3(d) provides that the lawyer is not required to report the use or possession to the Bar if the lawyer becomes aware of information regarding the offending lawyer in the course of service on the Lawyers Helping Lawyers Committee, a Utah State Bar program that assists lawyers with substance abuse and psychological and emotional problems. (fn4)

The somewhat inartful wording of Rule 8.3(d) raises the question of whether a lawyer fulfills the Rule 8.3(a) requirement by simply reporting an offending lawyer's illegal actions to the Lawyers Helping Lawyers Committee. We conclude that the focus of the Rule 8.3(d) exception only extends to those lawyers who receive or discover information in connection with their active participation on the Lawyers Helping Lawyers Committee. This committee is a volunteer operation sponsored by the Utah State Bar, but it possesses no authority over lawyers who may need assistance. Indeed, lawyers who may need substance-abuse help, for example, are under no obligation to participate in the program, even when contacted by that organization. Merely reporting information to Lawyers Helping Lawyers does not satisfy the reporting lawyer's Rule 8.3(a) obligation.

Additional support for this conclusion is found in the Comment to Rule 8.3, which states: "A report should be made to the Bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances." This appears to contemplate reporting misconduct to an "agency" that has some measure of authority or official advisory role in the Bar's lawyer-discipline function. Accordingly, we conclude that, if there is an obligation to report a lawyer's criminal drug use or possession under Rule 8.3(a), it can not be satisfied by a report to the Lawyers Helping Lawyers Committee.

Footnotes

1. Formerly, the Office of Attorney Discipline.
2. The Terminology section of the Preamble to the Rules of Professional Conduct provides that: "'Knowingly,' 'known' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances."
3. Rule 1.6(b) permits, but does not require, disclosure by the lawyer of information obtained in an attorney-client representation under limited circumstances. Rule 1.6(b)(4) permits disclosure of such information by the lawyer to comply with the Rules of Professional Conduct. Rule 8.3(c) makes clear that a lawyer may not exercise the exception to

confidentiality contained in Rule 1.6(b)(4) to disclose violations of the rules by another lawyer under Rule 8.3(a).

4. This rule does not require disclosure of information provided to or discovered by members of the Utah State Bar during the course of their work on the Lawyers Helping Lawyers Committee, a committee which has as its purpose the counseling of other Bar members about substance abuse or psychological or emotional problems.

Utah Rules of Professional Conduct 8.3(d).

Rule Cited:

8.3