

# A POLICY STATEMENT OF THE OFFICE OF BAR COUNSEL

## REPORTING PROFESSIONAL MISCONDUCT

### AN ANALYSIS OF THE DUTIES OF A LAWYER

#### PURSUANT TO MASS. R. PROF. C. 8.3

The adoption of Mass. R. Prof. C., 8.3, requiring lawyers to report the professional misconduct of another lawyer of which they have knowledge, has raised significant questions of interpretation among members of the bar of the Commonwealth. This article will articulate a policy that will be followed by the Office of Bar Counsel in enforcing this rule.

The mandatory rule applies only to conduct occurring after its effective date, March 1, 1998. Thus, there is no requirement that lawyers report misconduct by other lawyers that took place before March 1 of this year.

The term "knowledge", which is defined in Mass. R. Prof. C., 9.1, denotes actual knowledge of the fact in question, but also may be inferred from circumstances. An American Bar Association Ethical Opinion (87-353, 1987) has interpreted knowledge to be something more than mere suspicion. In enforcing this rule in another jurisdiction, it was held that knowledge requires the "supporting evidence must be such that a reasonable lawyer under the circumstances would have framed a firm opinion that the conduct in question had more likely than not occurred." (Attorney U. v. Mississippi Bar, 678 So. 2d 963 (1996)).

Mass. R. Prof. C., 8.3 does not require a lawyer to report all violations of the Rules of Professional Conduct. Rule 8.3 limits required reporting to violations of the Rules that raise a "substantial question as to that lawyer's honesty, integrity, trustworthiness, or fitness as a lawyer." Comment [1] to the Rule defines "substantial" as "serious violations of ethical duty by lawyers.", even if the incident appears to be isolated. As the Comment points out, seemingly isolated incidents can be important because Bar Counsel may have information about a lawyer not available to the reporting lawyer. The Comments offer little further amplification of what specific misconduct falls within this reporting requirement except to note that the offenses include those that "the profession must vigorously endeavor to prevent."

In the view of Bar Counsel, a "substantial" or "serious" matter includes, at a minimum, any matter that would result in a suspension or disbarment, or which would warrant the transfer of the lawyer to disability inactive status pursuant to Supreme Judicial Court Rule 4:01, §13. Guidance as to what misconduct falls within this scope can be obtained from the disciplinary decisions of the S.J.C. and B.B.O., found in the Massachusetts Attorney Discipline Reports (1974-1996), as well as the current decisions printed in Lawyers' Weekly or on our web site at <http://www.state.ma.us/obcbbo/>.

There are some such matters that clearly fall within the scope of "substantial" misconduct: theft, conversion, or negligent misuse of client funds resulting in deprivation to the client (See, e.g., Matter of Schoepfer, 426 Mass. 183 (1997)); a felony conviction (See, e.g., Matter of Concemi, 422 Mass. 326 (1996)), or perjury or a misrepresentation to a tribunal or court (See, e.g., Matter of Neitlich, 413 Mass. 416 (1992)). As to an impaired or disabled lawyer, certainly when a mental or physical problem results in the abandonment of clients or law practices, the lawyer with knowledge of these types of problems is required to report the situation to Bar Counsel.

There are other matters that must be reported, such as when, as noted in Comment [1] to Rule 8.3, in a lawyer's judgment, there is likelihood of harm to a victim who is unlikely to discover the offense. For example, an attorney with knowledge of a lawyer's misrepresentation to a client and concomitant failure, or impending failure, to file a claim within the statute of limitations, which does not fall within the confidentiality exception, is required to report that lawyer if the client is unaware of the problem and would likely suffer substantial damage as a result of the lawyer's misconduct.

There also are some violations that clearly do not fall within the scope of Mass. R. Prof. C., 8.3. For example, the failure of a lawyer to return a file as promptly as might have been optimal would not require a report, nor would knowledge that a lawyer failed to act with reasonable diligence, if the matter caused little or no potential injury to the client or others.

Once the lawyer learns of the serious ethical violation, it is mandatory that the misconduct be reported to Bar Counsel unless it would require the lawyer to violate his or her duties pursuant to Mass. R. Prof. C., 1.6 on confidentiality. However, even when the information is confidential, the lawyer should encourage the client to consent to disclosure when doing so would not substantially prejudice the client's interests. Misappropriation of client funds, for example, is almost never an isolated occurrence, and a lawyer representing a client trying to obtain restitution from prior counsel should seek to persuade the client to permit reporting. In determining what is protected as confidential information, lawyers should be aware that the exceptions to the confidentiality requirements listed in Rule 1.6 (b) are mandatory to the extent required by Rule 8.3. Thus, a lawyer who knows that another lawyer is misappropriating client funds, and that this conduct will cause serious future financial injury to another, is required to report that fact, even if the information is otherwise confidential.

A lawyer with knowledge of a serious ethical violation of another lawyer may defer reporting the violation until the conclusion of a proceeding or transaction unless the client or a third person will likely be injured by a delay in reporting. Comment [3A] cites as an example the situation where a delay in reporting an embezzlement may impair the ability to recover the funds.

Finally, lawyers should keep in mind that the rule sets forth a minimum standard. This rule does not prohibit reporting misconduct that does not fall within the scope of the mandatory provisions and, in fact, we encourage lawyers to report the consequential misconduct of other lawyers. Nevertheless, lawyers should also be aware of Mass. R. Prof. C., 3.4(h), which prohibits presenting, participating in presenting, or threatening to present, criminal or disciplinary charges solely to obtain an advantage in a private civil matter.

Rules similar to Rule 8.3 are in effect in the vast majority of jurisdictions throughout the United States. Lawyers in other states have only rarely been charged with a violation of mandatory reporting requirements. The Massachusetts rule was adopted by the Supreme Judicial Court only after careful consideration of all the alternatives. Thus, it is hoped and expected that lawyers in Massachusetts will comply with their obligations under this rule.