

OPINION 2004-01

SYNOPSIS:

If an attorney is aware of facts that raise a substantial question as to another attorney's honesty, trustworthiness or fitness as a lawyer, then that attorney must report the facts and conduct to the Vermont Professional Responsibility Program. Each attorney must make that determination based on the applicable Rule of Professional Conduct. The Professional Responsibility Committee declines to evaluate or comment on the conduct of a non-requesting attorney.

FACTS:

Requesting attorney inquires about conduct of separate counsel (Attorney A for purposes of this opinion) in a divorce matter and asks questions regarding the ethical propriety of certain actions and inactions by Attorney A in that matter. We decline to opine on the substance of Attorney A's conduct for the reasons stated below.

Requesting attorney describes two fact patterns applicable to Attorney A. Requesting counsel frames the request as a question of whether requesting attorney has a duty to report Attorney A, thereby seeking to convert the issue of Attorney A's conduct into a question of requesting attorney's duty to report.

When faced with this type of request in the past, we have declined to address the conduct of the separate attorney as being beyond the bounds of our mandate and outside the rules governing our committee. Opinion 95-18. See Committee Rule 4 which states in pertinent part that, "the Committee will issue an opinion to any member of the Bar who is a member of the Association on the propriety of the professional conduct in which the member proposes to engage ...". Rendering an opinion on the ethical propriety of Attorney A would intrude on the functions of disciplinary counsel. We, thus, decline to issue an opinion about Attorney A's conduct in this case, but we would like to take an opportunity to comment on the new standards applicable to reporting contained in the Vermont Rules of Professional Conduct.

STANDARD UNDER THE FORMER CODE:

Under the former Vermont Code of Professional Responsibility, an attorney had an absolute, non-delegable duty to report any violation of the Code, however large or small. Former DR 1-103(a) provided that an attorney who had unprivileged knowledge of a violation of the Code by another attorney must report that knowledge to a tribunal or other authority empowered to

investigate or act upon such violation.

Reporting Duty Under The Vermont Rules of Professional Conduct:

The adoption of the Vermont Rules of Professional Conduct raised the threshold for the mandatory reporting mandate. Rule 8.3 entitled "REPORTING PROFESSIONAL MISCONDUCT" states in subparagraph (a) as follows:

- (a) 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.

There is, thus, now a threshold requirement that the violation be of a nature and severity that it "raises a substantial question as to the [violating] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects ...". If an attorney believes that the misconduct meets that threshold level, then the duty to report is mandatory.

The Reporter's Notes to Rule 8.3 comment that "The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

As to the meaning of the term "knowledge", our committee has addressed that term in Opinion 87-08. The opinion was decided under the Code but we believe the standards discussed there remain the same under the Vermont Rules. We stated there that "knowledge" as used in the Code exists where the facts and circumstances of which an attorney is aware give rise to a "good faith or substantial belief on the part of the attorney ... that a violation has occurred."

Thus, here, if requesting attorney is aware of facts that raise a substantial question as to another attorney's honesty, trustworthiness or fitness as a lawyer, then requesting attorney must report the facts and conduct to the Vermont Professional Responsibility Program.