

**KENTUCKY BAR ASSOCIATION**

**Ethics Opinion KBA E-430**

**Issued: January 16, 2010**

**Subject:** A lawyer’s duty to report professional misconduct of other lawyers and judges

**Question I:** Under what circumstances does SCR 3.130 (8.3) impose a duty to report professional misconduct of others?

**Answer:** See discussion in Section I.

**Question II:** When does a lawyer “know” that a violation has occurred?

**Answer:** See discussion in Section II.

**Question III:** What constitutes a “substantial question” under Rule 8.3?

**Answer:** See discussion in Section III.

**Question IV:** Does a lawyer have a duty to report conduct unrelated to the practice of law or to judicial duties?

**Answer:** See discussion in Section IV.

**Question V:** Does a lawyer have a duty to report information protected by SCR 3.130(1.6) or other law, or information received in the course of participation in the Kentucky Lawyer Assistance Program (KYLAP) or the Ethics Hotline?

**Answer:** See discussion in Section V.

**Question VI:** Does a lawyer have a duty to self-report his or her own misconduct or that of an associate?

**Answer:** See discussion in Section VI.

**Question VII:** Does a lawyer have a duty to report the misconduct of a suspended or disbarred lawyer?

**Answer:** See discussion in Section VII.

**Question VIII:** Does a prosecutor have additional responsibilities under Rule 8.3?

- Answer:** See discussion in Section VIII.
- Question IX:** Is the reporting lawyer immune from civil or criminal liability?
- Answer:** See discussion in Section IX.
- Question X:** What are the procedures for reporting a violation and when must the report be made?
- Answer:** See discussion in Section X.
- References:** SCR 3.130 (Preamble); SCR 3.130 (1.0) (Terminology); SCR 3.130 (1.5) SCR 3.130 (1.6); SCR 3.130 (3.3); SCR 3.130 (4.1); SCR 3.130 (5.3); SCR 3.130 (5.5); SCR 3.130 (8.3); SCR 3.130 (8.4); SCR 3.166; SCR 3.453; SCR 3.470; SCR 3.530; SCR 3.990; Clay v. Kentucky Bar Ass’n, 290 S.W.3d 652 (Ky. 2009); Kentucky Bar Ass’n v. Bierbauer, 282 S.W.3d 318 (Ky. 2009); Kentucky Bar Ass’n v. Marcum, 292 S.W.3d 317 (Ky. 2009); Kentucky Bar Ass’n v. Matthews, 291 S.W.3d 236 (Ky. 2009); Radolovich v. Kentucky Bar Ass’n, 282 S.W.3d 327 (Ky. 2009); Kentucky Bar Ass’n v. Hawkins, 260 S.W.3d 337 (Ky. 2008); Kentucky Bar Ass’n v. Hammond, 241 S.W.3d 310 (2007); Kentucky Bar Ass’n v. Rice, 229 S.W.3d 903 (Ky. 2007); Kentucky Bar Ass’n v. Vanmeter, 176 S.W.3d 692 (Ky. 2005); Kentucky Bar Ass’n v. Hall, 173 S.W.3d 621 (Ky. 2005); Kentucky Bar Ass’n v. Layton, 97 S.W.3d 452 (Ky. 2003); *In re Riehlmann*, 891 So.2d 1239 (La. 2005); *In the Matter of Galmore*, 530 S.E.2d 378 (S.C. 2000); *In re Rivers*, 331 S.E.2d 332 (S.C. 1984); ABA Formal Op. 04-433 (2004); ABA Formal Op. 03-431 (2003); Pa. Eth. Op. 2008-12(2008); Oh. Adv. Op. 2007-1 (2007); S.C. Adv. Op. 05-21 (2005); Or. Eth. Op. 2005-95(2005); S.C. Adv. Op. 02-15 (2002); S.C. Adv. Op. 02-14 (2002); N.C. Eth. Op. 5 (2001); Ct. Eth. Op. 00-01 (2000); Ct. Eth. Op. 01-04 (2001); Pa. Eth. Op. 99-53 (1999); Ct. Eth. Op. 97-30 (1997); Ct. Eth. Op. 96-20 (1996); KBA E-265 (1982).

### Introduction

Under the recent amendments to the Rules of Professional Conduct,<sup>1</sup> SCR 3.130 (8.3),<sup>2</sup> Kentucky lawyers now have an ethical obligation to report certain types of ethical misconduct of other lawyers and judges. The obligations imposed by the rule are designed to preserve the integrity of the profession and to assure public confidence in the judicial system. Because the legal profession has the privilege of self-regulation it has

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<sup>1</sup> Kentucky Supreme Court Order Amending Rules of the Supreme Court 2009-5, issued April 16, 2009, made substantial changes in the Kentucky Rules of Professional Conduct, SCR 3.130. The Rule changes became effective July 15, 2009.

<sup>2</sup> Hereinafter referred to as “Rule 8.3.”

the corresponding responsibility of assuring that the profession's high standards are respected. Rule 8.3 reflects that privilege and responsibility.<sup>3</sup>

In many circumstances, lawyers are in the best position to know of another lawyer's misconduct and to minimize its consequences to others. Not only do lawyers know the standards by which lawyers and judges are expected to conduct themselves, lawyers also work closely with them and may be the first ones actually to observe the acts of misconduct. In many cases, the victim of the misconduct may not even be aware of it. As officers of the legal system, lawyers must take the affirmative responsibility to assure that both the bench and bar maintain the highest standards, and to assure that those who do not conform to these standards are disciplined. It is only by taking an active role in the disciplinary process that the profession is deserving of the public's trust and confidence.

The reason for the reporting obligation is summarized in the Preamble to Kentucky's Rules of Professional Conduct:

XIII. The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.<sup>4</sup>

Many questions have been raised about the rule's application. For example, must lawyers report all violations of the rules? How much does a lawyer have to know before the duty to report is triggered? How does confidentiality affect the obligation? Do lawyers have to report themselves? Do lawyers have to report partners or associates? These are all questions that lawyers may encounter as they seek to understand the implications of the new rule. It should be emphasized that every situation is different; thus lawyers will need to carefully analyze each situation independently. This opinion is designed to provide a framework for that analysis. In questionable cases, lawyers should seek further advice from their District Member of the Ethics Hotline.

### **I. Under what circumstances does Rule 8.3 impose a duty to report professional misconduct of others?**

The duty to report misconduct of another lawyer or judge does not arise every time one thinks a violation of the Rules of Professional Conduct may have occurred. Rule 8.3 imposes the obligation to report only under certain limited circumstances. The full text of Rule 8.3 reads as follows:

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<sup>3</sup> ABA Formal Op. 04-433 (2004).

<sup>4</sup> SCR 3.130 (Preamble).

## Reporting professional misconduct

(a) 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 in other respects, shall inform the Association's Bar Counsel (emphasis added).

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such violation to the Judicial Conduct Commission (emphasis added).

(c) A lawyer is not required to report information that is protected by Rule 1.6 or by other law. Further, a lawyer or a judge does not have a duty to report or disclose information that is received in the course of participating in the Kentucky Lawyer Assistance Program or Ethics Hotline.

(d) A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).

(e) As provided in SCR 3.435, a lawyer who is disciplined as a result of a lawyer disciplinary action brought before any authority other than the Association shall report that fact to Bar Counsel (emphasis added).

(f) As provided in SCR 3.166(2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, should immediately notify the Director of such event.

Before a lawyer has an obligation to report the conduct of another lawyer or judge, the following specific conditions must be met:

- The reporting lawyer must “know” of the violation.
- In the case of a lawyer, the violation of the Rules of Professional Conduct must raise “a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”
- In the case of a judge, the violation of the Rules of Judicial Conduct must raise “a substantial question as to the judge’s fitness for office.”
- The information that serves as the basis of “knowledge” must not be “protected by Rule 1.6 or other law” nor have been “receive(d) in the course of participating in the Kentucky Lawyer Assistance Program or the Ethics Hotline.”

If the above conditions are met, and none of the exceptions discussed below apply, then the lawyer with “knowledge” must report. If the misconduct raises a substantial question as to a lawyer’s honesty, trustworthiness or fitness, the report must be made to KBA Bar Counsel. The same is true if the lawyer is self-reporting<sup>5</sup> or a prosecutor is reporting the conviction of another lawyer.<sup>6</sup> If the misconduct raises a substantial question as to a

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<sup>5</sup> See discussion in Section VI.

<sup>6</sup> See discussion in Section VII1.

judge's fitness for office, the report must be made to the Judicial Conduct Commission. The duty to report to Bar Counsel or the Judicial Conduct Commission is independent of any other reporting obligations, such as a lawyer's obligation to report perjury to a tribunal under SCR 3.130 (3.3(a)(3)). Lawyers cannot satisfy their obligations under Rule 8.3 by advising the tribunal of misconduct or by making a referral to KYLAP. The duty to report is an individual duty. It is not satisfied because a report has been made to another person or by another lawyer.

## **II. When does a lawyer "know" a violation has occurred?**

Before a lawyer's duty to report is triggered, the lawyer must "know" of the violation. The term "know" is defined by SCR 3.130 (1.0) (Terminology) as follows:

[5] "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

The standard is an objective one. As the Louisiana Supreme Court recently observed:

A lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred. As such, knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question.<sup>7</sup>

In order to trigger the reporting requirement, absolute certainty is not required; but mere suspicion is insufficient to trigger the reporting requirement.<sup>8</sup> While lawyers cannot turn a blind eye to obviously questionable conduct, as a general rule they do not have a duty to investigate. However, there may be circumstances where another rule or principle of law may impose an independent duty to investigate. For example, under SCR 3.130 (5.3) a supervising lawyer who suspects a subordinate lawyer is engaging in unethical conduct would have a duty to investigate further. Similarly, an independent duty to investigate misconduct might arise under SCR 3.130 (1.5), which permits the division of fees between unrelated lawyers, but requires the lawyers to assume joint ethical and financial responsibility for the representation, as if they were partners.

Lawyers needing assistance in determining contemplated conduct under Rule 8.3 may contact the Supreme Court District Committee Member (Hotline Member) for guidance.<sup>9</sup> If lawyers have doubt as to their duty to report, any reasonable doubt should be resolved in favor of reporting.<sup>10</sup> It is then up to the appropriate authority, as designated in Rule

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<sup>7</sup> *In re Riehlmann*, 891 So.2d 1239, 1247 (La. 2005).

<sup>8</sup> *Id.* See also, Oh. Adv. Op. 2007-1 (2007), S.C. Adv. Op. 05-21 (2005), Or. Eth. Op. 2005-95(2005) and Pa. Eth. Op. 99-53 (1999), all concluding that suspicion is insufficient to trigger reporting requirement.

<sup>9</sup> Rule 8.3, Comment [2].

<sup>10</sup> Oh. Adv. Op. 2007-1 (2007).

8.3, to follow-up and determine if an investigation should go forward or if the matter should be terminated.

### **III. What constitutes a “substantial question” within the meaning of Rule 8.3?**

Both Rule 8.3(a), applicable to lawyers, and Rule 8.3(b), applicable to judges, use the term “substantial question.” The reporting duty is triggered when a lawyer knows that another lawyer has violated the rules in a circumstance that “that raises substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects....” The duty is also triggered when a lawyer knows that a judge has violated the applicable judicial code in a circumstance that “raises a substantial question as to the judge’s fitness for office....”

The intent of these two provisions is to require reporting of serious violations. Comment [2] reads as follows:

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement exists in many jurisdictions but has proved unenforceable. The Rule limits the reporting obligation to those violations 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. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

Thus, not every violation must be reported. For example, an isolated failure to respond to a discovery request in a timely manner may be a violation of SCR 3.130 (4.1), which states that the lawyer shall not fail to comply with the rules of the tribunal. However, Rule 8.3 would not normally require the reporting of this violation because it does not involve a substantial violation of the rules reflecting on the lawyer’s trustworthiness, honesty or fitness.

It would be impossible to list all of the situations in which a lawyer would be obligated to report. Clearly any conduct that would result in disbarment or suspension must be reported. Typical examples of conduct which have led to disbarment or suspension in Kentucky include theft,<sup>11</sup> conversion,<sup>12</sup> abandonment of clients,<sup>13</sup> credit card fraud,<sup>14</sup> perjury,<sup>15</sup> tampering with evidence,<sup>16</sup> comingling of client funds,<sup>17</sup> fraud,<sup>18</sup> failure to act with reasonable diligence or keep client reasonably informed,<sup>19</sup> mishandling of trust

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<sup>11</sup> Kentucky Bar Ass’n v. Hawkins, 260 S.W.3d 337 (Ky. 2008).

<sup>12</sup> Kentucky Bar Ass’n v. Layton, 97 S.W.3d 452 (Ky. 2003).

<sup>13</sup> Kentucky Bar Ass’n v. Hall, 173 S.W.3d 621 (Ky. 2005).

<sup>14</sup> Kentucky Bar Ass’n v. Rice, 229 S.W.3d 903 (Ky. 2007).

<sup>15</sup> Radolovich v. Kentucky Bar Ass’n, 282 S.W.3d 327 (Ky. 2009).

<sup>16</sup> Kentucky Bar Ass’n v. Vanmeter, 176 S.W.3d 692 (Ky. 2005).

<sup>17</sup> Kentucky Bar Ass’n v. Matthews, 291 S.W.3d 236 (Ky. 2009).

<sup>18</sup> Clay v. Kentucky Bar Ass’n, 290 S.W.3d 652 (Ky. 2009).

<sup>19</sup> Kentucky Bar Ass’n v. Hammond, 241 S.W.3d 310 (2007).

accounts,<sup>20</sup> refusal to return unearned fees,<sup>21</sup> and failing to take appropriate action to protect the client upon withdrawal or termination.<sup>22</sup> This list is by no means exclusive.

It may also be useful to look at cases in other jurisdictions in which courts and ethics committees have stated that there is a duty to report under rules which are similar to Kentucky's. Typical examples include cases involving lawyers who have made materially false statements, including offering false evidence to a state grievance committee,<sup>23</sup> making false statements about the filing of pleadings and back-dating documents,<sup>24</sup> signing false acknowledgments or forging documents,<sup>25</sup> preparing false billing statements,<sup>26</sup> or improper suppression of evidence.<sup>27</sup>

Although most situations which require reporting involve dishonesty and untrustworthiness, Rule 8.3 also contains a catch-all provision, which requires reporting when conduct raises a substantial question as to the lawyer's "fitness in other respects...." Reported examples include breach of a confidentiality agreement,<sup>28</sup> egregious conflicts of interest,<sup>29</sup> improper contact with jurors,<sup>30</sup> and misconduct by a suspended lawyer.<sup>31</sup> The catch-all provision may also apply to chronic neglect. Examples include situations in which a lawyer has repeatedly, and without explanation, missed court dates, failed to comply with court orders or failed to honor deadlines imposed by the court or the rules. In addition, any conduct which results in a contempt order by the court would normally fall within the catch-all provision and trigger the duty to report.

Misconduct, particularly neglect of duty, often arises when a lawyer is suffering from some kind of impairment. Impairment may arise as a consequence of senility, dementia, alcoholism, drug addiction, substance abuse, chemical dependency or mental illness. While not all impairments must be reported, any impairment that materially affects the fitness of the lawyer or the judge must be reported,<sup>32</sup> unless one of the exceptions described below applies.

#### **IV. Does a lawyer have a duty to report conduct unrelated to the practice of law or to judicial duties?**

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<sup>20</sup> Kentucky Bar Ass'n v. Marcum, 292 S.W.3d 317 (Ky. 2009).

<sup>21</sup> Kentucky Bar Ass'n v. Bierbauer, 282 S.W.3d 318 (Ky. 2009).

<sup>22</sup> Kentucky Bar Ass'n v. Hammond, *supra* note 19.

<sup>23</sup> Ct. Eth. Op. 00-01 (2000).

<sup>24</sup> Ct. Eth. Op. 01-04 (2001).

<sup>25</sup> Ct. Eth. Op. 97-30 (1997).

<sup>26</sup> Ct. Eth. Op. 96-20 (1996).

<sup>27</sup> *In re Riehlmann*, 891 So.2d 1239 (La. 2005).

<sup>28</sup> S.C. Adv. Op. 02-15 (2002).

<sup>29</sup> S.C. Adv. Op. 02-14 (2002).

<sup>30</sup> *In re Rivers*, 331 S.E.2d 332 (S.C. 1984).

<sup>31</sup> *In the Matter of Galmore*, 530 S.E.2d 378 (S.C. 2000).

<sup>32</sup> ABA Formal Op. 03-431 (2003).

It should also be noted that lawyers have an obligation to report other lawyers and judges who engage in activities unrelated to their professional obligations, when the conduct raises a substantial question about the lawyer's honesty, trustworthiness or fitness as a lawyer, or the judge's fitness for office. Although most of the duties under the Rules of Professional Conduct relate to the representation of clients, some do not. SCR 3.130 (8.4),<sup>33</sup> especially subsections (b) and (c), may involve behavior unrelated to the practice of law.<sup>34</sup> Specifically, the Rule provides that it is professional misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer ..." or "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Comment [2] to Rule 8.4 provides some guidance in observing that "although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category."

Thus, for example, a lawyer could be disciplined for fraud in connection with the sale of a personal residence, falsification of documents for personal use, or embezzlement from a non-profit organization with which the lawyer does volunteer work. All of these examples raise a substantial question as to the lawyer's honesty and trustworthiness. Similarly, a lawyer would have a duty to report a judge who engaged in the activities described above, because they would raise a substantial question as to the judge's fitness for office. Whether a lawyer has a duty to report activities unrelated to the practice of law or judicial responsibilities will depend on the nature of the act and the circumstances under which it was committed.<sup>35</sup> Clearly, theft, fraud or other serious misrepresentation, even when unrelated to professional activities, must be reported.

**V. Does a lawyer have a duty to report information protected by SCR 3.130 (1.6)<sup>36</sup> or other law, or information received in the course of participation in the Kentucky Lawyer Assistance Program (KYLAP) or the Ethics Hotline?**

Rule 8.3 provides a number of exceptions to the duty to report. A lawyer may not, without the client's consent, report misconduct of another if the knowledge is based on information protected by Rule 1.6.<sup>37</sup> In the context of Rule 8.3, the lawyer's duty of confidentiality takes precedence over any obligation to report misconduct.

Having recognized the exception for knowledge protected by Rule 1.6, two points must be made. First, the rule specifically authorizes the client to consent to disclosure, thus permitting the lawyer to report. "Informed consent" is defined by the Rule 1.0(e) [Terminology] as follows: "'Informed consent' denotes the agreement by a person to a

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<sup>33</sup> Hereinafter referred to as "Rule 8.4."

<sup>34</sup> See *KBA v. Matthews*, 131 S.W.3d 744 (Ky. 2004), holding that bank fraud, unrelated to the representation of a client, is a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects under Rule 8.4.

<sup>35</sup> ABA Formal Op. 04-433 (2004).

<sup>36</sup> Hereinafter referred to as "Rule 1.6."

<sup>37</sup> For examples of opinions discussing confidentiality and informed consent, see ABA Formal Op.04-433 (2004); Pa. Eth. Op. 2008-12(2008); Pa. Eth. Op. 99-53 (1999).

proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Reporting is designed to protect the public and lawyers are encouraged to discuss possible waiver and reporting with their clients, especially where the public faces a serious risk of harm.

Secondly, although a lawyer cannot report information protected by Rule 1.6, the lawyer does have a duty to report information from an independent source unrelated to the representation, if it raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness.

In addition to the exception for information protected by Rule 1.6, Rule 8.3 (c) does not require disclosure of information obtained while participating in a lawyer assistance program.<sup>38</sup> The Kentucky Lawyer Assistance Program (KYLAP) was established to protect the public and to assist lawyers who suffer from actual or potential impairment. SCR 3.990 provides that “all communications to KYLAP and all information gathered, records maintained and actions taken by KYLAP shall be confidential, shall be kept in strict confidence by KYLAP’s staff and volunteers, shall not be disclosed by KYLAP to any person or entity, including any agency of the Court and any department of the Association, and shall be excluded as evidence in any proceeding before the Board of Governors or the Offices of Bar Admissions....” Rule 8.3 recognizes the confidentiality of information obtained while participating in the KYLAP program. KYLAP staff and volunteers need not report misconduct about which they first learned through KYLAP. This reporting exception does not relieve a lawyer who is not a KYLAP staff member or volunteer from reporting an impaired lawyer or judge whose conduct raises a substantial question as honesty, trustworthiness or fitness. The rule attempts to balance the goal of assisting impaired lawyers by providing a confidential support network, with the need to protect the public.

Rule 8.3(c) also provides that information conveyed in the course of Hotline inquiries is confidential under SCR 3.530(3). It provides that a member of the Hotline does not have a duty to report or disclose information obtained as a result of participation in the Ethics Hotline.

## **VI. Does a lawyer have a duty to self-report his or her own misconduct or that of an associate?**

Rule 8.3 requires a lawyer to report certain misconduct of “another lawyer” or “judge.” As a general rule, a lawyer does not have to self-report.<sup>39</sup> This is not to say that a lawyer should not self-report and in some circumstances it may be the best course of action.

However, self-reporting is required under SCR 3.453, which provides that lawyers must report discipline from other jurisdictions, including federal court. In addition, SCR 3.166

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<sup>38</sup> Information obtained while participating in lawyer assistance program support group is confidential and falls within expectation to reporting rule. N.C. Eth. Op. 5 (2001).

<sup>39</sup> Ct. Eth. Op. 89-23 (1989).

requires a lawyer who has pleaded “guilty to a felony, including a no contest plea or a plea in which the member allows conviction but does not admit the commission of a crime, or is convicted by a judge or jury of a felony, in this state or in any other jurisdiction” to self-report.

A lawyer’s obligation under Rule 8.3 may require a lawyer to report a partner or associate. This may have consequences for the reporting lawyer, but there is nothing in the rule to suggest that the duty to report does not extend to one with whom the reporting lawyer is or was associated.<sup>40</sup> For example, if a lawyer knows that another lawyer in the firm falsified material documents for trial, the lawyer is obligated to report that misconduct unless one of the exceptions applied.

### **VII. Does a lawyer have a duty to report a suspended or disbarred lawyer?**

A lawyer who has been suspended is still subject to application of certain Rules of Professional Conduct. If a suspended lawyer engages in unprofessional conduct, including the unauthorized practice of law, then a lawyer who knows of that misconduct has a duty to report.<sup>41</sup> It is particularly important to report suspended lawyers who have engaged in misconduct because they may ultimately apply for reinstatement. One of the primary considerations on the application for reinstatement will be whether the suspended lawyer complied with the terms of suspension, and the rules during the period of suspension.

A disbarred lawyer is no longer a lawyer, and not subject to the Rules of Professional Conduct. Thus, there would generally be nothing to report. The Kentucky Bar Association has no authority over a disbarred lawyer’s general conduct, but it does have the authority to investigate unauthorized practice and initiate proceedings.<sup>42</sup> If a lawyer is involved in a matter in which a disbarred lawyer is engaged in the unauthorized practice of law, the failure to report the unauthorized practice of law could result in the lawyer’s violation of SCR 3.470 and SCR 3.130 (5.5(a)), which prohibit a lawyer from assisting another in the unauthorized practice of law. Good practice requires that lawyers not only disassociate themselves from the disbarred lawyer, but also report the unauthorized practice to the Executive Director of the Kentucky Bar Association.<sup>43</sup> The interests of both the public and the profession are best served by reporting the disbarred lawyer who is engaged in the unauthorized practice of law.

### **VIII. Does a prosecutor have additional responsibilities under Rule 8.3?**

Rule 8.3 reinforces the responsibilities of prosecutors to report known violations. Rule 8.3 (f) provides: “As provided in SCR 3.166 (2), a lawyer prosecuting a case against any member of the Association to a plea of guilty, conviction by judge or jury or entry of judgment, should immediately notify the Director of such event.”

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<sup>40</sup> S.C. Adv. Op. 05-21; Ct. Eth. Op. 89-23 (1989).

<sup>41</sup> Mich. Eth. Op. RI-101 (1991).

<sup>42</sup> SCR 3.460.

<sup>43</sup> *Id.*

Although 8.3 (f) says a prosecutor “should” report, SCR 3.166 (2) makes it clear that the obligation to report is mandatory. It provides: “The attorney prosecuting the case to a plea of guilty, conviction by judge or jury or entry of judgment, whichever occurs first, shall immediately notify the Director of the Kentucky Bar Association and the Clerk of the Supreme Court that such plea, finding or entry of judgment has been made.”

### **IX. Is the reporting lawyer immune from civil or criminal liability?**

A lawyer who makes a report in good faith is immune from civil or criminal liability or disciplinary action by the bar, except for conduct prohibited by SCR 3.130 (3.4(f)). Rule 3.4 prohibits a lawyer from filing or threatening to file a disciplinary charge “solely” to gain an advantage in a civil or criminal matter.<sup>44</sup>

### **X. What are the procedures for reporting a violation and when must the report be made?**

Reports of lawyer misconduct must be made to the Association’s Bar Counsel, 514 West Main Street, Frankfort, Kentucky 40601. Reports of judicial misconduct must be made to the Judicial Conduct Commission, P. O. Box 21868, Lexington, Kentucky, 40522. The purpose of the rule is to permit Bar Counsel or the Judicial Conduct Commission to begin an inquiry into the alleged misconduct. Thus, the reporting lawyer should report the facts underlying the belief that there is a substantial question as to the reported lawyer’s honesty, trustworthiness or fitness as a lawyer or the reported judge’s fitness for office. Reporting the facts underlying the belief further demonstrates the reporting lawyer’s good faith basis for making the report.

The Rules of Professional Conduct do not address the form of the communication to Bar Counsel or the Judicial Conduct Commission. There is nothing to prohibit the reporting lawyer from contacting Bar Counsel or the Judicial Conduct Commission by telephone in order to discuss the matter initially. However, SCR 4.170 requires a complaint against a judge to be in writing<sup>45</sup> and good practice dictates that all reports be reduced to writing. A written report eliminates any question as to what the reporting lawyer said or that the reporting lawyer satisfied the obligation to report imposed by Rule 8.3. It is clear that an anonymous report does not comply with the rule and affords no protection to the reporting lawyer.

The rule does not address the question of when one must make the report. Because the purpose of the rule is to protect the public, under most circumstances the report should be made within a reasonable time after discovery. There may be cases in which a report might have a detrimental impact on the reporting lawyer’s client. This might be the case where there are on-going relationships between the client and the lawyer who has engaged in misconduct. Assuming that the information came to the reporting lawyer in

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<sup>44</sup> See KBA E-265 (1982) for a discussion of the prohibition under the former Code of Professional Responsibility.

<sup>45</sup> A reporting form is available at [www.court.ky.gov/jcc](http://www.court.ky.gov/jcc).

the course of the representation of the client, it would be protected by Rule 1.6; absent client consent, the lawyer could not report. To the extent that the client's interests are not protected by the Rule 1.6 exception, it is the view of the Committee that where an immediate report would have a detrimental impact on the client, the lawyer may delay reporting to protect the client's interests. The lawyer would be well served to document any discussions with the client and the reasons for delaying the reporting.

The amendments to Rule 8.3 became effective on July 15, 2009. If, before the effective date, a lawyer knew that another had committed a violation of the Rules of Professional Conduct which raised a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, the lawyer is not required to report the misconduct. However, if the lawyer knows that the conduct has continued after the effective date of the amended Rule, the lawyer must report it. The same would be true if the misconduct involved a judge. A lawyer may, of course, make a report even if not required to do so.

### **Conclusion**

Under amended Rule 8.3, a lawyer does not have a duty to report every known violation of the rules, but must report those that underlie the core values of the profession: honesty, trustworthiness and fitness. It would be impossible to list all the cases in which a reporting duty arises. However, when lawyers know that another lawyer or judge has violated the applicable rules, they must critically evaluate the conduct to determine if it is sufficiently serious to require reporting. Lawyers who are unable to decide whether they must report, may contact the Hotline Member in the appropriate judicial district for advice. It is not easy to file a report against a fellow lawyer or judge, particularly if the reporting lawyer has a personal relationship with the lawyer or judge or knows of some unfortunate circumstances involving either. Nevertheless, the Rules require lawyers to report lawyers and judges who have engaged in serious misconduct. A lawyer's obligation to the profession and to the public outweighs any personal reservations the lawyer may have about reporting another lawyer or judge. Again, it is not the lawyer's duty to determine another lawyer's or judge's guilt, but merely to make the report so that the appropriate disciplinary authorities can make that determination.

### ***Note to Reader***

*This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides: "Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act performed by that attorney in compliance with an informal opinion furnished by the Ethics Committee member pursuant to such attorney's written request, provided that the written request clearly, fairly, accurately and completely states such attorney's contemplated professional act."*