RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge who knows 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.

(b) A lawyer having knowledge 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 inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of participating in an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

Commentary

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] 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 existed in many jurisdictions but proved to be unenforceable. 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. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. 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. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for the confidentiality of such information an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges
to seek treatment through such a program. Conversely, without such confidentiality an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. The Rule therefore exempts the lawyer from the reporting requirements of paragraphs (a) and (b) with respect to information that would be privileged if the relationship between the impaired lawyer or judge and the recipient of the information were that of a client and a lawyer. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to his or her use. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.
Model Rule 8.3
Reporter's Explanation of Changes

TEXT:

1. Paragraphs (a) and (b): Change "having knowledge" to "who knows"

In importing DR 1-103 of the ABA Model Code of Professional Responsibility into the Model Rules, the "having knowledge" formulation was used even though that term is undefined in the Rules. "Knows" and "knowingly," on the other hand, are defined terms, and the Commission is substituting them in this Rule for consistency and to put the mandate into the active voice. No change in substance is intended.

2. Paragraph (c): Substitute Rule 1.6 for "privilege"

The proposed change makes Rule 1.6 the operative standard as it is throughout the rest of the Model Rules.

3. Paragraph (c): Change "serving as a member of" to "participating"

This change expands the reporting exception to any lawyer or judge who participates in an approved lawyers assistance program, even if such participation is limited to a single instance.

4. Paragraph (c): Modify reference to information gained in lawyers assistance program

The Commission determined that the attempt to qualify or specify the conditions on which information gained by a lawyer or judge while participating in an approved lawyers assistance program is unnecessary and confusing. This modification makes it clear that this Rule does not require the reporting of information obtained during such participation.

COMMENTARY:

[5] The changes in the fourth sentence are intended to make clear that Rule 1.6 is the operative standard, not the attorney-client privilege. The last sentence of current Comment [5] has been deleted because it is inaccurate. It is not a violation of the Model Rules for a lawyer, impaired or otherwise, to "intend" to do something wrong, so it would not be reportable "professional misconduct" under any construction of the Rules. As drafted by the Commission, Rule 1.6 permits but does not require disclosure in certain circumstances. The changes also clarify that paragraph (c) of this Rule does not generally address the confidentiality obligations of a lawyer or judge who participates in a lawyers assistance program, but merely creates an exception to the reporting obligation under paragraphs (a) and (b). Whether an obligation of confidentiality is incurred depends on the rules of the particular program as well as law external to these Rules.