

Final

Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2006-04 Request No. 921
Issued October 12, 2006

FACTS:

The inquiring attorneys ask whether they have an obligation to report another attorney (the attorney) who failed to file final judgments in divorce cases immediately after the expiration of the ninety-day waiting period. The attorney maintained a small volume of family law matters relative to his/her total caseload. There were thirteen divorce cases that proceeded to final hearing. The attorney immediately filed final judgments after the expiration of the ninety-day waiting period in five of those cases. Of the remaining eight cases, four were finalized within four months of the final hearing. The four remaining cases had delays of 5.5 months, 7 months, 22 months, and 35 months. The inquiring attorneys state that the attorney does not appear to have an underlying personal or family crisis; they observed no signs of substance abuse or mental health problems.

ISSUE PRESENTED:

The inquiring attorneys ask whether they have an obligation under Rule 8.3(a) to report an attorney for possible violations of Rule 1.3 "Diligence" and Rule 1.4 "Communications" because the attorney failed to file final judgments after the ninety-day waiting period following decisions-pending-entry in divorce matters.

OPINION:

An attorney's failure to file final judgments in divorce matters after the ninety-day waiting period, in and of itself, does not create an ethical obligation to report for the inquiring attorneys having knowledge of it.

REASONING:

Rule 8.3 entitled "Reporting Professional Misconduct" states in pertinent part:

- (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.

- (b) This rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.4 entitled “Misconduct” provides in pertinent part:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit and misrepresentation;

The inquiring attorneys believe that the attorney has violated Rule 1.3 “Diligence” and Rule 1.4 “Communication.” The question is whether these violations rise to the level of seriousness that triggers mandatory reporting.

The question of just how serious an offense must be before lawyers are required to report it has not been well defined. Conn. Bar Assoc. Comm. on Prof. Ethics Informal Op. 94-33 (1994). This Panel has taken the position in the past that an evaluation about whether a violation of the Rules raises a substantial question about an attorney’s honesty, trustworthiness, or fitness as a lawyer is to be made by the attorney who witnesses such conduct, and not by the Panel. The Panel recognizes that those opinions, though correct, were not particularly instructive in guiding attorneys toward deciding whether a rule violation triggered mandatory reporting, and whether they would be at risk for being disciplined if they failed to report it.

The Comment to Rule 8.3 provides some guidance:

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.

Professors Hazard and Hodes explain that “[a] substantial violation of the rules alone is not enough; the violation must be of such a nature that the conduct raises a “substantial” question about the fitness of the offending lawyer to carry out his

professional role.” 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, §8.3:201 at 945 (2 ed. 1996 Supp.)

The Panel believes that two prior opinions can assist in judging the relative seriousness of the conduct in question in this inquiry. In Ethics Advisory Panel Op. 95-10, the Panel advised that the inquiring attorney had an obligation to report another attorney who had kept the proceeds from an estate sale. In Ethics Advisory Panel Opinion 92-1, the facts of which are more fully set forth in In re Ethics Advisory Panel Op. 92-1, 627 A.2d 317 (R.I. 1993), the Panel advised successor counsel that Rule 1.6 prohibited him/her from reporting predecessor counsel’s embezzlement of client funds where the client would not consent to the disclosure. The Supreme Court affirmed the Panel’s opinion, and also stated, “Thus, absent a confidentiality issue, it is clear that the inquiring attorney would be under an ethical obligation to report the embezzlement and indeed would be subject to discipline if the inquiring attorney failed to report the embezzlement.” Id. at 321.

In each of these instances, there was deliberate abuse of trust and abuse of the attorney’s position for the attorney’s own gain. There were deliberate acts of dishonesty, and elements of criminality. Such serious breaches of conduct by lawyers are offenses that “a self-regulating profession must endeavor to prevent.” Comment to Rule 8.3(a).

When compared to the facts in Op. 95-10 and in In re Ethics Advisory Panel Opinion, the facts as presented in the instant inquiry “do not seem to contain the requisite degree of odiousness.” Conn. Bar Assoc. Comm. On Prof. Ethics, Informal Op. 94-33 (1994) (no duty to report attorney’s ex parte communication with judge prohibited by Rule 3.5 which caused the judge to make changes to opinion.) In addition, there are no facts presented indicating signs of substance abuse, mental health problems, or underlying personal or family crises. The Panel therefore concludes that the attorney’s failure to file final judgments in divorce matters after the ninety-day waiting period, in and of itself, does not create an ethical obligation to report for the inquiring attorneys having knowledge of it.