

DIGEST OF ETHICS ADVISORY PANEL
OPINION 90-4, REQUEST #75
Issued January 18, 1990

An attorney seeks Panel advice as to the proper course of conduct in the situation he describes.

The attorney advises the Panel that six affidavits in support of an application for preliminary injunction relief were filed by opposing counsel in connection with pending litigation. The attorney states that upon deposing one of the purported affiants he learned that the affidavits had been signed by each affiant at one location and notarized after the fact at opposing counsel's law office. The attorney adds that initially opposing counsel told him that he was unsure whether the affidavits in question had been properly notarized or not, but that he subsequently confirmed in writing that the affidavits had not been properly notarized.

The inquiring attorney states that he brought these facts to the attention of the trial justice at a hearing on the application for a preliminary injunction. He states that opposing counsel confirmed to the trial justice that the affidavits had not in fact been properly notarized. The inquiring attorney adds that opposing counsel indicated that he had instructed his secretary to notarize the affidavits after the fact because of the pressures of litigation. Opposing counsel represented to the trial justice that the contents of the affidavits were entirely accurate and that he had no intent to falsify evidence.

The inquiring attorney states that the trial justice took corrective action by allowing opposing counsel to remove the improperly notarized documents and replace them with properly notarized ones. The trial justice then ruled on the application for preliminary injunctive relief without referencing the affidavits.

The inquiring attorney states that he feels opposing counsel's conduct with regard to the affidavits might constitute violations of Rule 3.3, "Candor towards the Tribunal," Rule 3.4, "Fairness to Opposing Party and Counsel," Rule 4.1, "Truthfulness in Statements," and Rule 5.3, "Responsibilities regarding Non-lawyer Associates." The attorney asks the Panel whether he has a duty under Rule 8.3 to report these possible violations.

Rule 8.3, entitled "Reporting Professional Misconduct" provides, 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.

The comment to this rule provides, in pertinent part:

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 . . . The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware . . .

In his analysis of the scope of Rule 8.3 Professor Hazard notes that although the duty to report violations is an important aspect of the bar's self governance, "[o]ur society, unlike some others, does not impose a general duty to report crime, even serious crime." Professor Hazard goes on to note that "an enforced 'snitch rule' could weaken the profession . . . by breeding mutual suspicion." I G. Hazard The Law of Lawyering, 555-556. Explaining the scope of Rule 8.3, Professor Hazard notes that

[m]erely technical violations . . . would not qualify [under the mandatory reporting provisions of Rule 8.3] whereas destruction of evidence under subpoena, suborning perjury or self-dealing with trust funds would. Id. at 556.

Rule 8.3 simply outlines the scope of mandatory reporting on one's fellow attorney. Attorneys may report lesser infractions to the appropriate authorities as they see fit.

The Illinois Supreme Court had occasion to review the application of this reporting requirement as it was formerly embodied in DR 1-103(a) in In re Himmel, 533 NE.2d 790, 125 Ill.2d 531, 127 Ill. Dec. 708 (1989). The court found that Attorney Himmel's failure to report unprivileged information concerning another attorney's fraudulent conversion of client funds warranted suspension of his license. In so holding the court stressed that Himmel's failure to report his brother attorney's misconduct had effectively frustrated any disciplinary authority investigation and was thus tantamount to interference with the administration of justice.

The Panel cannot, of course rule on propriety of conduct of an attorney who has not sought its advice. If the inquiring attorney reasonably believes the conduct of the opposing counsel rose to the level of seriousness outlined above, Rule 8.3 obligates the inquiring attorney to report it to the disciplinary authorities. If, however, the inquiring attorney does not reasonably believe that the conduct rose to the requisite level of seriousness, then the Panel takes the position that he is under no obligation to report it to the disciplinary authorities.

Ethics Advisory Panel advice is protective in nature. There is no requirement that an attorney abide by a Panel opinion, but if he or she does, he or she is fully protected from any charge of impropriety.