



**New York State Bar Association  
Committee on Professional Ethics**

Opinion 1120 (4/12/17)

**Topic:** Reporting Misconduct

**Digest:** If a lawyer for a government agency knows of a violation of the Rules by another agency lawyer, and the wrongdoer’s conduct raises a substantial question as to the wrongdoer’s honesty, trustworthiness or fitness to practice law, the government lawyer must report the information to a tribunal or other authority authorized to investigate and act on the conduct, unless the information constitutes confidential client information, and the agency does not consent to its disclosure. If a report to a tribunal or other authority is required, the lawyer must determine if the government agency’s ethics office is a “tribunal” or “other authority empowered to investigate or act upon such violation.” If the ethics office is not a tribunal or such other authority, the government lawyer may report initially to the ethics office of the government agency, but the lawyer may not defer to a decision by the ethics office not to report unless the reporting obligation involves an “arguable question of professional duty” and the decision of the ethics office not to report is a reasonable resolution.

**Rules:** 1.0(w), 1.6, 5.2, 8.3(a) & (b)

**FACTS**

1. The inquirer represents a government agency (the “Agency”) in federal administrative and court proceedings. The inquirer has come to know of a violation of the New York Rules of Professional Conduct (the “Rules”) by another lawyer at the Agency that the inquirer believes raises a substantial question as to the other lawyer’s honesty, trustworthiness or fitness as a lawyer.

2. The Agency has an internal process by which violations of the Rules must be reported first to an internal ethics office for review. The inquirer reported the facts to the internal ethics office but, although a reasonable period of time has elapsed, the internal ethics office has not responded to the inquirer’s inquiries as to the status of its review of the report.

**QUESTION**

3. If a lawyer for a government agency reports misconduct by another agency lawyer that meets the reporting requirements of Rule 8.3(a) to an internal ethics office of the lawyer’s employer, has the lawyer satisfied the requirements of Rule 8.3(a)?

## OPINION

4. Rule 8.3(a) provides:

(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 that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

However, under Rule 8.3(c), this reporting obligation does not require the disclosure of "confidential information" otherwise protected by Rule 1.6, *i.e.*, information gained from any source during or relating to the representation of a client (a) that is protected by the attorney-client privilege, (b) that is likely to be embarrassing or detrimental to the client if disclosed, or (c) that the client has requested to be kept confidential.

5. Thus, in determining whether the inquirer has a reporting obligation under Rule 8.3, the following elements must be satisfied:

- (i) There must be a violation of the Rules by the wrongdoer,
- (ii) The inquirer must know of the violation,<sup>1</sup>
- (iii) The wrongdoer's conduct must raise a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law, and
- (iv) Disclosure of the wrongdoer's conduct must not reveal client confidential information, unless the client consents to such disclosure.

6. Here, the inquirer advises that the first three elements have been satisfied. That leaves the fourth element, which raises two issues: (1) whether the facts known by the inquirer constitute confidential information of the client, and, if not (2) whether the inquirer's report to the government agency's internal ethics office satisfies the requirement of the Rule that the lawyer report knowledge of another lawyer's misconduct to a "tribunal or other authority empowered to investigate or act upon such violation."

### Client Confidential Information

7. Our opinions make clear that a lawyer's obligation to report misconduct is limited by the lawyer's obligation to protect client confidential information, unless the lawyer has obtained the informed consent of the client to disclosure of otherwise confidential information. *See, e.g.*, N.Y. State 649 (1993) (where one lawyer knows that another lawyer who is executor for an estate proposes to engage or has engaged in wrongdoing, whether the first lawyer must disclose the wrongdoing depends on whether the information is legally privileged or whether applicable law requires disclosure of an otherwise protected "secret"), N.Y. State 635 (1992) (before reporting misconduct, lawyer must consider whether any knowledge that would be included in

the report is a client confidence or secret). *See also* N.Y. City 2017-2 (reporting duty is limited by the lawyer’s duty not to reveal client confidences without the client’s informed consent after full disclosure, including disclosure that, once a report of misconduct is made to the disciplinary agency, the disciplinary agency may unilaterally decide to release the client’s information without the client’s knowledge or further consent).

8. Under Rule 1.6, information constitutes “confidential information” of the client if it was gained from any source (whether from the client or elsewhere) during or relating to the representation of the client and (a) the information is protected by the attorney-client privilege, (b) it is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested that it be kept confidential. Here, the client is the Agency. If disclosure of the wrongdoing would be embarrassing or detrimental to the Agency, or if the Agency has requested that the information not be disclosed, then there is an apparent tension between the goals of Rule 1.6 and 8.3: (1) the obligation of all lawyers to assist courts and disciplinary authorities in policing members of the bar, and (2) the obligation to maintain the confidentiality of client information. In addition, government lawyers (such as the inquirer here) also have a duty to seek justice. *See* Rule 3.8, Cmt. [6B]. However, since Rule 8.3 specifically exempts information protected as confidential, the Rules themselves resolve the tension in favor of confidentiality. *See* Rule 1.6, Cmt. [2] (“A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source. . . . The lawyer’s duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship.”).

9. The definition of “confidential information” allows the client to ask the lawyer to treat information as “confidential information” for any reason. However, it is not always clear in an organizational context who speaks for the client. Here, the inquirer must determine whether the ethics office has the authority to speak for the client in asking that the information be kept confidential. If the ethics office does have that authority, that determination will be binding on the inquirer. While the Agency is not required to provide the inquirer with reasons for a determination that its information should be treated as “confidential information,” there are many benign reasons why the Agency might do so, at least at this point. For example, the information may be protected by law as private information; or the Agency may have referred the matter to a prosecutor, whose investigation is confidential and protected by law.

#### Tribunal or Other Authority Empowered to Investigate or Act on Violations

10. Under Rule 8.3(a), if a report of misconduct is required, it must be made to a tribunal or to “other authority empowered to investigate or act upon such violation.”

11. The term “tribunal” is defined in Rule 1.0(w) as follows:

(w) “Tribunal” denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an *adjudicative capacity*. A legislative body, *administrative agency* or other body acts in an adjudicative capacity when a *neutral* official, after the presentation of evidence or legal argument by a party or

parties, will render a legal judgment directly affecting a party's interests in a particular matter. [Emphasis added.]

The Agency here may act in an adjudicative capacity when determining litigated matters before the Agency. That would probably be the case, for example, if an administrative law judge or similar "neutral" quasi-judicial officer in the Agency hears a matter. If so, then a report to the administrative law judge about a lawyer for a party would satisfy Rule 8.3's requirement to report to a "tribunal." However, the inquiry here does not state that the Agency's ethics office meets the definition of a tribunal, and it seems more likely that it does not constitute a tribunal within the meaning of Rule 1.0(w). However, this is a factual question that the inquirer must determine.

12. In N.Y. State 822 (2008), we discussed what might constitute "other authority" to which a report might be made, in the context of DR 1-103(A), the predecessor to Rule 8.3(a). We noted that the phrase "investigate or act" in that disciplinary rule suggested that the tribunal or authority must be a court of competent jurisdiction or a body having enforceable subpoena powers. This would include a grievance or disciplinary committee operating under the powers granted by the Appellate Division of the State Supreme Court under Section 90 of the New York Judiciary Law and related court rules. We therefore said the report could be filed with the grievance committee in the Appellate Department in which litigation is pending or with the grievance committee in the Department where the wrongdoer is admitted or where the prohibited conduct occurred. *See also* Nassau County 98-12 (if reporting is required, the lawyer may report to the court or to a grievance committee); N.Y. City 1995-5 (a lawyer should report misconduct to the appropriate disciplinary or grievance committee).

13. Here, as with the question whether the Agency's internal ethics office is a tribunal, the question whether the Agency's ethics office qualifies as "other authority empowered to investigate or act upon" a violation of the Rules is a factual question that the inquirer must determine.

#### Timing of Report

14. If a report under Rule 8.3 is required, the Rule does not specify the timing of the required report. In N.Y. State 822 (2008), we said: "The report need not be made immediately or without some reasonable effort at remediation, particularly where the consequences of reporting the violation may be more harmful to the lawyer's client than some alternative course of action." *See U.S. v. Cantor*, 897 F. Supp. 110 (S.D.N.Y. 1995) ("DR 1-103 must be read to require reporting ... within a reasonable time under the circumstances"); N.Y. City 1990-3 ("While it may be permissible in certain limited circumstances to postpone reporting for a brief period of time, we reiterate our caution that 'once a lawyer decides that he or she must disclose under DR 1-103(A), any substantial delay in reporting would be improper"). Evaluation of the timing of a required report will entail considering the facts and circumstances of the underlying misconduct, whether there is ongoing harm to any affected person, and whether the misconduct can be remedied or mitigated, among other factors.

14. Thus, we believe that the inquirer's initial reporting to the ethics office is consistent with

Rule 8.3. However, making a report to the internal ethics office does not automatically relieve the inquirer of the responsibility for making the report required by Rule 8.3 or ensuring that the Agency's ethics office makes such a report when the requirements of the Rules are met.

15. Rule 5.2(b) provides that a subordinate lawyer "does not violate these Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." The inquirer believes that a violation of the Rules that meets the requirements of Rule 8.3(a) has occurred, and the Agency apparently has not stated that the facts surrounding the wrongdoer's conduct constitute confidential information. Nevertheless, it is possible that the ethics office, after investigation, may conclude that the wrongdoer's conduct need not be reported to a tribunal or other authority, or may decide that the information necessary to make a report is "confidential information" within the meaning of Rule 1.6(a). In order for the inquirer to rely on the decision of the Agency's ethics office in matters of professional responsibility, the question of a duty to report must be "arguable" and the resolution by the ethics office not to report must be "reasonable."

## CONCLUSION

16. If a lawyer for a government agency knows of a violation of the Rules by another agency lawyer, and the wrongdoer's conduct raises a substantial question as to the wrongdoer's honesty, trustworthiness or fitness to practice law, the government lawyer must report the information to a tribunal or other authority authorized to investigate and act on the conduct, unless the information constitutes confidential client information, and the agency does not consent to its disclosure. If a report to a tribunal or other authority is required, the lawyer must determine if the government agency's ethics office is a "tribunal" or "other authority empowered to investigate or act upon such violation." If the ethics office is not a tribunal or such other authority, the government lawyer may report initially to the ethics office of the government agency, but the lawyer may not defer to a decision by the ethics office not to report unless the reporting obligation involves an "arguable question of professional duty" and the decision of the ethics office is a reasonable resolution.

(1-17)

<sup>1</sup> As we said in N.Y. State 635 (1992) and N.Y. State 480 (1978), the lawyer must possess a sufficient degree of knowledge of ostensibly wrongful conduct. A mere suspicion of misconduct is not sufficient.