NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1091 (4/18/2016)

Topic: Misconduct – Duty to Report

Digest: A New York lawyer who knows that a person admitted to the bar in another state, but not admitted or authorized to practice law in New York, has represented clients in the courts of New York must report that knowledge to a tribunal or other authority empowered to act if the lawyer concludes that the other person's failure raises a substantial question as to the other person's honesty, trustworthiness or fitness as a lawyer. Rule 8.3 applies even though the other person is neither admitted nor authorized to practice law in New York and even if the conduct is no longer occurring. Failure of the other person to comply with applicable rules on authorization to practice – whether generally, temporarily, or *pro hac vice* – ordinarily will raise a substantial question as to the other lawyer's honesty, trustworthiness or fitness as a lawyer. A good faith belief is not enough to trigger the reporting obligation.

Rules: 3.4(c), 5.4, 5.5 (a) & (b), 7.3, 8.3

FACTS

1. A lawyer admitted in New York State "believes" that an individual admitted to the practice of law in another state has appeared before New York courts without being admitted or authorized to practice law in New York. The Inquirer also "believes" that the individual lawyer is no longer appearing in New York Courts.

QUESTION

2. (a) Does a New York lawyer have an obligation to report the belief that an individual admitted to practice outside New York but not admitted or authorized to practice (whether generally, temporarily or *pro hac vice*) in New York State has improperly appeared in the past in New York Courts?

(b) Does it matter that the conduct is no longer occurring?

OPINION

3. At the outset, we note that our jurisdiction extends only to interpreting the New York Rules of Professional Conduct (the "Rules"). We do not opine on any duties that a lawyer may have to the courts under the rules of individual courts or under new Part 523 of the Rules of the Court of Appeals ("Part 523") authorizing the temporary practice of law in New York by out-of-

state and foreign attorneys.[1]

4. Two Rules may be relevant in examining the question: Rule 8.3 and Rule 5.5.

5. Rule 8.3 sets forth the standards for reporting professional misconduct by another lawyer. It provides:

> 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 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

6. Rule 5.5 states:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.
>
> (b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

Meaning of "Lawyer" in "Another Lawyer has Committed a Violation"

7. The term "lawyer" is used throughout the Rules but is not defined. Does it mean "a person admitted or authorized to practice in New York," or is it broader than that? Certain rules and our prior opinions indicate that the term "lawyer" may mean different things in different rules.

8. For example, Rule 7.5(d) permits partnerships between "lawyers" licensed in different jurisdictions as long as the firm's letterhead notes their jurisdictional practice limitations. *See also* N.Y. State 806 (2007). Rule 7.3(i) specifically applies the solicitation provisions of Rule

[1]Effective December 30, 2015, the New York Court of Appeals adopted a new Part 523 of the Rules of the Court of Appeals, which authorized the temporary practice of law in New York by out-of-state and foreign attorneys. Part 523 is similar to the American Bar Association's Model Rule 5.5, which permits temporary practice of law by attorneys licensed in other U.S. jurisdictions under certain prescribed circumstances. (The ABA's Model Rule 5.5, or substantially equivalent language, has been adopted in more than 45 other jurisdictions but not as part of the Rules of Professional Conduct in New York.) Under Part 523.2, a non-New York lawyer in good standing where he or she is admitted may provide legal sevices in New York on a temporary basis where such services (i) are undertaken in association with a lawyer admitted to practice in New York who actively participates in and assumes joint responsibility for the matter, (ii) are in or reasonably related to a pending or potential proceeding before a tribunal in New York if the lawyer or a person the lawyer is assisting is authorized to appear in such proceeding or reasonably expects to be so authorized; or (iii) are not within the preceding paragraph and arises out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Because the inquiry before us is dated shortly after the Part 523 Rules became effective and refers to the other lawyer's past conduct, we assume that the other lawyer was not relying on the Part 523 Rules.

7.3 to "a lawyer . . . not admitted to practice in this State who shall solicit retention by residents of this State". In N.Y. State 864 (2011), we held that a lawyer admitted in another state is not a "nonlawyer" for purposes of Rule 5.4(a), which prohibits a lawyer from sharing legal fees with a nonlawyer. Rule 1.15(e) specifies that only a lawyer admitted to practice in New York State may be an authorized signatory of an attorney trust account.

9. In other Rules, it is less clear that the rule was intended to apply to a person not admitted in New York. For example, Rule 8.5 – the choice of law rule for disciplinary matters – addresses lawyers admitted elsewhere only if they are also admitted in New York.

10. Consequently, the answer to the first question posed here depends on whether the definition of "another lawyer" in Rule 8.3 – which requires 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" must report that knowledge to a tribunal or other authority authorized to investigate or act upon such violation – includes a person admitted to practice law in one or more other jurisdictions but not admitted or authorized to practice law in New York (a "non-New York lawyer").

11. Comment [1] to Rule 8.3 explains the rationale for the Rule: "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. . . . An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover." Since the courts control whether an out-of-state lawyer may be admitted *pro hac vice*, and since New York disciplinary authorities can always refer violations by a non-New York lawyer to the disciplinary authorities in the admitting jurisdiction or jurisdictions outside New York, we believe that violations of the Rules by a non-New York lawyer that raise a substantial question as to the lawyer's honesty, trustworthiness or fitness implicate the policy goals articulated in Comment [1] to Rule 8.3. Consequently, we believe the term "another lawyer" in Rule 8.3 should be read to include a lawyer not admitted in New York who engages in misconduct in New York.

12. This conclusion is supported by 22 NYCRR § 523.3, which expressly refers to "complaints" against non-New York lawyers. Section 523.3 provides as follows:

> A [non-New York] lawyer who practices law temporarily in this State pursuant to this Part [523] shall be subject to the New York Rules of Professional Conduct and to the disciplinary authority of this State in connection with such temporary practice to the same extent as if the lawyer were admitted or authorized to practice in New York. A grievance committee may report *complaints and evidence of a disciplinary violation* against a lawyer practicing temporarily pursuant to this Part to the appropriate disciplinary authority of any jurisdiction in which the attorney is admitted or authorized to practice law. [Emphasis added.]

13. Our conclusion is also supported by court rules governing disciplinary matters that pre-

dated Part 523, some of which applied misconduct rules not only to lawyers admitted in New York but also to lawyers who "commit acts," or "in any way participate in any action or proceeding," or "transact business" or "practice" in New York. *See, e.g.,* 22 N.Y.C.R.R. Part 603.1(a) (First Dep't), 22 N.Y.C.R.R. Part 691(a) (Second Dep't), 22 N.Y.C.R.R. Part 806.1 (Third Dep't), 22 N.Y.C.R.R. Part 1022.17 (Fourth Dep't).

Must the Inquirer Report on the Other Lawyer?

14. Although we have concluded that the term "another lawyer" in Rule 8.3 applies to a non-New York lawyer, there is still a question whether the inquiring lawyer has a reporting obligation under Rule 8.3 in the particular circumstances posed in this inquiry. That depends on two independent factors.

15. First, the inquirer must "know" that the other lawyer has committed a violation of the Rules – here a violation of Rule 5.5(a) – by practicing without being admitted generally in New York or without being authorized *pro hac vice* by a New York state or federal court. For this purpose, "know" means actual knowledge, although knowledge may be inferred from circumstances. Rule 1.0(k). A good faith belief falling short of knowledge is not enough to trigger the reporting obligation.

16. Assuming that the inquirer has the requisite knowledge under the reporting rule, the inquirer must conclude that the other lawyer's conduct raises a substantial question as to the other lawyer's "honesty, trustworthiness or fitness as a lawyer." Comment [3] to Rule 8.3 explains this phrase: "The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." We believe that, in most circumstances, representation of a client in New York by a non-New York lawyer without becoming authorized or associating with a New York lawyer will implicate the honesty, trustworthiness or fitness of the non-New York lawyer.[2] Although it is true that over 45 other jurisdictions have adopted some version of ABA Model Rule 5.5, neither that rule nor any state equivalent authorizes lawyers to appear in the courts in jurisdictions where they are not admitted or authorized to practice. Every lawyer knows or should know that appearing in court requires either general admission in that jurisdiction, *pro hac vice* admission, or authorization under the jurisdiction's temporary practice rules. A lawyer who appears in a New York court without any authorization either has failed to research the rules or has deliberately flouted those rules. Consequently, we believe that appearing in court in a jurisdiction without being authorized generally, temporarily, or *pro hac vice* evinces a lack of trustworthiness or fitness. *See* Rule 3.4(c) (a lawyer shall not disregard a standing rule of a tribunal).

17. If the inquirer has the requisite knowledge of a violation and concludes that the violation raises the required "substantial question," the inquirer's belief that the violation has ceased is

[2] We generally do not give opinions about the conduct of lawyers other than the inquirer, since applying the Rules usually depends on the facts and circumstances and we cannot make an informed determination without all the facts.

immaterial. *See* Rule 8.1, Cmt. [1] ("An apparently isolated violation may indicate a pattern of misconduct").

18. Because we have concluded that Rule 8.3 applies to misconduct in New York by a lawyer who is not admitted or authorized to practice in New York, we need not reach the issue of whether the inquirer is obligated to report the non-New York lawyer's unauthorized practice under Rule 5.5. In any event, whether particular conduct constitutes the unauthorized practice of law, which is a crime in New York (*see* New York Judiciary Law §§ 478, 484, and 485-a), is a legal question.

CONCLUSION

19. A New York lawyer who knows that a person admitted to the bar in another state, but not admitted or authorized to practice law in New York, has represented clients in the courts of New York must report that knowledge to a tribunal or other authority empowered to act if the lawyer concludes that the other person's failure raises a substantial question as to theother person's honesty, trustworthiness or fitness as a lawyer. Rule 8.3 applies even though the other person is neither admitted nor authorized to practice law in New York and even if the conduct is no longer occurring. Failure of the other person to comply with applicable rules on authorization to practice – whether generally, temporarily, or *pro hac vice* – ordinarily will raise a substantial question as to the other lawyer's honesty, trustworthiness or fitness as a lawyer. A good faith belief is not enough to trigger the reporting obligation.

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