

KBA Legal Ethics Opinion No. 14-01

July 1, 2014

TOPIC: Duty to report attorney memory lapses.

DIGEST: A lawyer is not required to report another lawyer to the Disciplinary Administrator unless the lawyer has knowledge of an action, inaction or conduct of the other lawyer which constitutes misconduct under the Kansas Rules of Professional Conduct. Rather, in the event there are memory lapses, cognitive deteriorations, or other potentially disabling conditions, the subject lawyer should be referred to the Kansas Lawyers Assistance Program or other suitable service.

Date of Request: June 11, 2014.

REFERENCES: Rules 8.3 (Duty to Report) and 1.1 (Competence), Kansas Rules of Professional Conduct (“KRPC”); and Supreme Court Rules 206 (KALAP), and 207 (Duties of Bar and Judiciary).

FACTS:

Law firm had a partner with “possible cognitive degeneration,” evidenced by memory lapses. These lapses include an inability to dial in to a conference call, a client reporting that the lawyer required a re-orientation to the facts of the representation, and multiple staff members reporting the lawyer’s failure to recall prior discussions. No violations of the KRPC are reported, but the law firm believes that the subject lawyer’s perceived memory lapses “could impact clients.”

The subject lawyer has now left the law firm, but continues to practice. The law firm questions whether – now that the lawyer has left the firm -- it has a duty to report the subject lawyer to the Kansas Disciplinary Administrator under Rule 8.3.

This Opinion assumes the following:

- (a) The subject lawyer has, or is perceived to have possible cognitive deterioration as evidenced by memory lapses;
- (b) To date, these memory lapses have not resulted in losses to clients or in any actual violation of the KRPC.

QUESTION:

Does a lawyer have an ethical obligation to report another lawyer’s perceived cognitive deterioration or memory lapses, in the absence of an actual violation of the KRPC?

ANALYSIS:

Rule 8.3(a), KRPC, provides as follows:

(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.[¹]

This Rule contrasts strikingly with the Model Rule adopted in most of the other states. The Model version of 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 in other respects, shall inform the appropriate professional authority.[²]

The Model Rule applies only to conduct by “another lawyer,” (i.e. not to the reporting lawyer himself). Moreover, the duty to report under the Model Rule does not apply to *all* Rule violations, but only to those violations which raise “a substantial question” as to that other lawyer’s “honesty, trustworthiness or fitness as a lawyer.” Those limitations were all removed from the Kansas version of the Rule in 1999. In Kansas, lawyers have a duty to report themselves,³ and they have a duty to report even KRPC violations that do not implicate the lawyer’s honesty, trustworthiness or fitness. The Comment to Rule 8.3 explains the justification of the duty to report on the basis of the bar as a self-policing profession.

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.[⁴]

But, the duty to report only extends to a situation in which the reporting lawyer has “knowledge” of acts or omissions which constitute a violation of the KRPC.⁵ In the present situation, the inquiring law firm does not identify any violations of the KRPC by the subject lawyer. Thus, no duty to report would arise.⁶

Rule 1.1, KRPC, provides as follows:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill,

thoroughness and preparation reasonably necessary for the representation.

Of course, it is the duty of each lawyer to ensure that s/he is and remains competent to practice in the lawyer's chosen area(s) of practice. Notably, the inquiring law firm has not expressed an opinion that the subject lawyer has violated this Rule.

However, should there be candid concerns in this regard, even coupled with an actual KRPC violation, consideration is commended to the resources and facilities provided by the Kansas Lawyers Assistance Program ("KALAP").

(a) KALAP Purpose. The Kansas Lawyers Assistance Program (KALAP) is established to provide immediate and continuing assistance to any lawyer needing help with issues, including physical or mental disabilities that result from disease, addiction, disorder, trauma, *or age* and who may be experiencing difficulties performing the lawyer's professional duties. KALAP will have the following purposes:

(1) to protect citizens from potential harm that may be caused by lawyers in need of assistance;

(2) to provide assistance to lawyers in need; and

(3) to educate the bench and bar about the causes of and services available for lawyers needing assistance.^[7]

The KALAP process provides a confidential means of seeking and obtaining assistance for a wide variety of issues,⁸ including those brought on by advancing age, through both the state and local committees.⁹ It is a very valuable service to the Bar and to the public, and its service is greatly appreciated.

CONCLUSION:

On this basis then, the Committee concludes:

(a) A lawyer has no duty to report another lawyer for perceived memory lapses which have not resulted in acts or omissions which, in the lawyer's opinion, represent violations of the KRPC.

(b) Consideration should be given to a referral of the subject lawyer to KALAP for such evaluation and assistance as may be indicated.

J. Nick Badgerow, Chair

¹ See also, Kansas Supreme Court Rule 207(c): “It shall be the further duty of each member of the bar of this state to report to the Disciplinary Administrator any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules.”

² American Bar Association, Center for Professional Responsibility, Model Rules of Professional Conduct, Rule 8.3, available on-line at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct.html.

³ *In re Piekalkiewicz*, 288 Kan. 610, 613-14, 205 P.3d 734 (2009)(indefinite suspension). See also, *In re Holden*, 267 Kan. 788, 789, 982 P.2d 399 (1999)(indefinite suspension for failing to report to the Disciplinary Administrator his suspensions by the Oklahoma Supreme Court).

⁴ Rule 8.3, KRPC, Comment [1].

⁵ See *In re Jensen*, 286 Kan. 1160, 191 P.3d 1118 (2008)(No violation of Rule 8.3 for failing to self-report, where the lawyer did not know of a KRPC violation; published censure for other violations).

⁶ And of course, threats to file disciplinary complaints should never be made. *In re Kenny*, 289 Kan. 851, 217 P.3d 36 (2009).

⁷ Kansas Supreme Court Rule 206(a)(emphasis added).

⁸ See <http://www.kalap.com/support/support-group/>.

⁹ See Kansas Supreme Court Rule 206(m).