

L.E.I. 92-04  
DUTY TO REPORT MISCONDUCT OF AN IMPAIRED LAWYER

The Committee on Legal Ethics was given the following hypothetical:

Attorney #1 discovered that attorney #2, who is an active alcoholic, had "misappropriated client funds." Attorney #1 contacted the Lawyer Impairment Committee for attorney #2's alcoholism and contacted the Lawyer Assistance Committee with respect to the misappropriations. Members of the Lawyer Assistance Committee worked with attorney #2 to repay the money.

The enquiring attorney asked: Has attorney #1 discharged his obligation to report unethical conduct under Rule 8.3(a) of the Rules of Professional Conduct or is he also required to report the matter to the Committee on Legal Ethics.

Rule 8.3(a) states:

A lawyer having knowledge 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 in other respects, shall inform the appropriate professional authority.

The enquiring attorney suggested that attorney #1 had the discretion to determine that the Lawyer Assistance Committee was the "appropriate professional authority" within the meaning of the Rule.

The Committee on Legal Ethics does not agree with this interpretation and wishes to provide guidance to attorneys faced with similar situations. Attorney #1 had a duty to report the misappropriation of client funds to the Committee on Legal Ethics.

There is no question that misappropriation of client funds is the type of conduct which raises a question as to a lawyer's honesty. Reporting the misconduct to the Lawyer Assistance

Committee did not relieve attorney #1 of this obligation. The Committee on Legal Ethics is the "appropriate professional authority" to report unethical conduct, regardless of a lawyer's impairment. The only exception is if attorney #1 learned of the misappropriation of client funds while assisting the Lawyer Impairment Committee or the Lawyer Assistance Committee in an intervention.

The different functions of the committees involved necessitates the position of the Committee on Legal Ethics. The Lawyer Impairment Committee counsels lawyers with drug or alcohol problems. The Lawyer Assistance Committee has less well-defined functions. It assists attorneys with emotional or mental disorders, such as bi-polar conditions, health problems, such as senility, and office management problems, including fee overcharging or disorganization. Members of both committees are exempt from the reporting requirements of Rule 8.3(a) unless the attorney refuses to discontinue the violation and to seek a program of rehabilitation, pursuant to Rule 8.3(d).

While the purpose of these two committees is to provide support to lawyers, the Committee on Legal Ethics has a judicially imposed obligation to protect the public and reassure the public as to the reliability and integrity of attorneys. Committee on Legal Ethics v. Pence, 161 W. Va. 240, 253, 240 S.E.2d 668, 675 (1977).

Theft of client funds is one of the most serious acts of misconduct an attorney can commit. The Committee has conducted disciplinary hearings and recommended sanctions to the Supreme Court of Appeals for attorneys who have engaged in such conduct,

regardless of whether there was restitution or whether an impairment existed. Impairment is only a mitigating factor, not a justification. Likewise, restitution does not negate the misconduct; it only serves as possible mitigation .

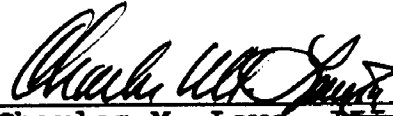
With attorney theft of client funds unfortunately on the rise, the Committee on Legal Ethics is concerned that the impaired attorney in the hypothetical might revert to his or her old behavior under stress. Large sums of money could be embezzled before the Committee discovers the problem. The attorney's clients, unaware of the prior misappropriation, might be placed in a risky position the Committee could have prevented.

The Committee on Legal Ethics always encourages impaired lawyers to seek help from the Lawyer Impairment Committee or Lawyer Assistance Committee, no matter how serious their misconduct. The Committee on Legal Ethics also encourages the lawyers' peers to contact those two committees. But if the peers learn of unethical misconduct within the meaning of Rule 8.3(a), they must also contact the Committee on Legal Ethics, with one exception.

When an attorney contacts the Lawyer Impairment or Assistance Committee about someone else, he or she sometime participates in an intervention or a meeting with members from those committees and the impaired lawyer. Should, for example, the impaired lawyer disclose during the intervention that he or she has misappropriated client funds, the participating lawyer can fairly be considered a representative of the Lawyer Impairment or Assistance Committee and thus exempt for the reporting requirements of Rule 8.3(a). Complete candor is essential to the intervention process, and

imposing a reporting requirement on a participating attorney could chill the process.

Dated:



Charles M. Love, III, Chairman  
Committee on Legal Ethics