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## The Duty to Report Violations of the Rules of Professional Conduct: Alternative Views

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# The Duty to Report Violations of the Rules of Professional Conduct: Alternative Views

Our colleague Thomas Horwitz wrote a thoughtful, provocative article in the November edition of this Journal criticizing Ohio Advisory Opinion 2007-1. That opinion offers the view of the Board of Commissioners on Grievances and Discipline on several features of Rule 8.3 of the Ohio Rules of Professional Conduct. Rule 8.3 requires lawyers to report certain violations of the Rules. Failure to report is itself a violation of the Rules. Tom not only criticized the advisory opinion, he also disapproved the procedures followed by the Board in formulating its advisory opinions. We respectfully disagree with Tom and offer our respective views:

## Lloyd Snyder

Ohio Rule 8.3(a) states: A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

Tom takes issue with Advisory Opinion 2007-1 based on his reading of the opinion as requiring a lawyer to report any instance of an attorney making a frivolous claim or defense or misrepresenting the law. Tom's criticism of the procedure for issuing advisory opinions is that the Board of Commissioners does not provide for public comment or participation in promulgating advisory opinions. He finds the process problematic in part because the Board also hears disciplinary matters and makes recommendations to the Ohio Supreme Court regarding the issues about which it has issued advisory opinions.

I believe it is wrong to assert that any frivolous claim or defense or misrepresentation of law in a litigated matter requires opposing counsel to report the conduct under Rule 8.3. The rule requires reporting when improper conduct raises a question about the lawyer's honesty, trustworthiness or fitness to practice. The rule does not require reporting of any violation.

In the emotional cauldron of litigation it is not unusual for lawyers to see conduct by opposing counsel as improper. Upon later reflection, when

the stress of litigation has diminished, it is not unusual for lawyers to recognize that opposing counsel's conduct was not as egregious as first assumed. In that light, whatever improper conduct may have been committed by opposing counsel is less likely to raise an issue of the lawyer's honesty, trustworthiness, or fitness to practice. The reporting rule does not mandate immediate reporting of any suspected violation. Allowing time for reflection when the heat of battle is over is appropriate.

There are other provisions that reduce the likelihood of a sudden flood of complaints about opposing counsel. The rule exempts reporting when doing so would disclose privileged information absent waiver by a client. The rule requires disclosure by a lawyer having knowledge of a violation. Suspicion of misconduct is not sufficient to trigger the mandate to report.

The old Ohio Code of Professional Responsibility also had a reporting requirement. Despite the rule, lawyers rarely reported misconduct by other lawyers. The current rule and advisory opinion appear to be attempts to induce lawyers to be more proactive in reporting misconduct. They may well foster a modest increase in reporting by members of the bar, but they are not likely to prompt a mad rush to bar association grievance committees.

Tom's article is critical of a process in which the same Board that hears cases and recommends findings to the Ohio Supreme Court drafts advisory opinions and does so without public comment. If we were starting from scratch inventing a disciplinary system we might well agree to make the body drafting advisory opinions independent of the body hearing disciplinary cases. But we are not starting from scratch. The Board of Commissioners has been publishing advisory opinions for well over twenty years with no indication that the preparation of advisory opinions has prejudiced the Board's hearing process.

Advisory opinions have served their purpose well, providing timely advice to lawyers from experts well positioned to know how the Ohio standards for lawyer conduct will be applied. We see no evidence

that the publication of advisory opinions has tainted the adjudicative process. The only likely result of a more public process would be to delay publication of the opinions. In the absence of any suggestion that the current system is 'broke,' I do not believe new procedures that would delay issuing opinions are necessary to 'fix' it.

### Harry Cornett

Every opinion issued by the Board of Commissioners contains, in bold letters, the statement that advisory opinions are "informal, non-binding opinions" in response to hypothetical questions. Tom criticizes the procedures for issuing these informal opinions because there is no ability for the public to challenge an advisory opinion after it is published. I believe the process works well. The Board itself monitors these opinions and updates or withdraws them as needed based on developing case law and changes to the rules. While the opinions provide useful guidance to lawyers and judges in the State of Ohio, disciplinary cases are not based on these opinions. Disciplinary cases are based upon alleged violations of the Rules of Professional Conduct as those rules are interpreted by the Supreme Court of Ohio. For example, Opinion 2007-1 does not "mandate" (as argued in Tom's article) any particular conduct by an attorney or judge in the State of Ohio. It merely does a good job of describing what the Rules of Professional Conduct and the decisions of the Supreme Court say about the conduct required of attorneys in Ohio.

Our colleague, John Travis, in the September 2007 issue of this journal, reviewed opinion 2007-1 and correctly pointed out that the term "unprivileged knowledge" was undefined in the Rules of Professional Conduct. This required the board to do an analysis of the interplay between Rule 1.6 on confidentiality and Rule 8.3 to determine the meaning of "unprivileged knowledge." The opinion concludes that there is a duty to report information relating to the representation but not attorney-client privileged information. This interpretation is really the only potentially controversial aspect of the Board's opinion. The Board points out that Comment 15 to Rule 1.6 infers that 8.3 requires disclosure only if Rule 1.6 permits it. Comment 15 ignores the inconsistent language of "unprivileged" versus "information relating to the representation." The Board correctly discusses an inconsistency that probably should be addressed the next time the Supreme Court considers amendments to the rules. But the rest of the Board's opinion is simply a clear review of the requirements under the rules. That is certainly a useful exercise for the enlightenment of the bench and bar in Ohio.

Tom tacitly recognizes the Board was simply interpreting rather than inventing the rules when he

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In order to further professionalism among judges and lawyers, the Cleveland Bar Association announces the Seventh Annual Professionalism Award. The award seeks to honor a lawyer or judge who has significantly contributed to the enhancement of professionalism in the Greater Cleveland legal community by exemplifying the goals of the Ohio Supreme Court's "A Lawyer's Creed" and "A Lawyer's Aspirational Ideals" and by furthering the ideals expressed in the Mission of the Cleveland Bar Association. Nominations are encouraged from Bar Association members and other interested persons. The nominees need not be members of the Cleveland Bar Association.

Nominations for the 2007-08 Award, and the basis therefore, should be submitted in writing to: The Ethics and Professionalism Committee, Cleveland Bar Association, 1301 East Ninth St., Second Level,

Cleveland, OH 44114-1253, ATTN: Harry D. Cornett Jr., chair. Please include your address and telephone number. Nominations must be submitted no later than Friday, April 4, 2008.

Nominations will be reviewed and evaluated by a selection committee of lawyers, judges and law professors. The award will be formally presented at the Association's annual meeting in June 2008.

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suggests in his final paragraph that the Supreme Court should consider modifying Rule 8.3 so that an attorney fulfills the reporting obligation by reporting professional conduct to the tribunal "in front of which the misconduct occurred." Such a change is not necessary. As has always been true, trial judges in Ohio and elsewhere have authority to supervise the conduct of the attorneys who appear before them in specific cases. What trial judges in Ohio do not have the authority to do is discipline attorneys in general. That power is reserved to the Supreme Court of Ohio under the Ohio Constitution. Opinion 2007-1, on page 4, cites a half a dozen Supreme Court of Ohio cases which I will not review in detail here. Suffice it to say that the Supreme Court has consistently held, in conformance with the Ohio Constitution, that it has exclusive jurisdiction to discipline attorneys. Pursuant to that authority, the Supreme Court established the Board of Commissioners in 1956 and promulgated the Rules for the Government of the Bar. The system is not perfect but it works well. Instead of having inconsistent discipline meted out by trial judges all over Ohio, the Supreme Court provides consistent and predictable discipline. There is no need to change the system and it is unlikely in the extreme that the Supreme Court would revert to a system that permitted trial judges to administer the disciplinary process. 



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