

**OPINION NO. 98-02**  
**(January 1998)**

**FACTS**<sup>1</sup>

Various lawyers have requested an opinion on an issue of mutual concern to criminal law practitioners. In particular, their concern involves situations in which a criminal defense lawyer executes an affidavit acknowledging ineffective assistance of counsel in some phase of his or her representation of a criminal defendant. Such affidavits are often filed in support of claims of ineffective assistance of counsel made in post-conviction relief proceedings and in federal habeas corpus actions. In general, the issue raises questions concerning a lawyer's duty to report professional misconduct under ER 8.3.

**Questions Presented**

1. When a criminal defense lawyer executes an affidavit acknowledging that he or she rendered ineffective assistance of counsel, in what circumstances do prosecutors, defense lawyers and judges have a duty to report that attorney to the State Bar?
2. Should the fact that a post-conviction relief proceeding is ongoing affect the duty to report the attorney to the State Bar?
3. If the duty to report does not arise based on the affidavit itself, but instead is activated only when and if there is a finding of ineffective assistance of counsel by the state court in post-conviction relief proceedings, does this interpretation of the ethical rules condition the investigation of professional misconduct upon a finding that the conduct resulted in prejudice to the individual defendant?
4. If the duty to report an attorney executing such an affidavit does not arise until after a finding of ineffective assistance of counsel, how does one reconcile the seemingly contrary view of the Arizona Supreme Court as stated in In re Wolfram, 174 Ariz. 49, 53, 847 P.2d 94, 98 (1993) (“[W]e decline to adopt a per se rule that successful post-conviction relief based on ineffective assistance of counsel automatically results in an ethical violation, or,

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<sup>1</sup> **Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 1998**

conversely, that a denial of post-conviction relief will always insulate an attorney from professional discipline”).

4. Has the Arizona Supreme Court’s opinion in Wolfram caused the State Bar to modify its advice contained in Opinion No. 90-13? If so, how?
5. What is the duty of prosecutors, defense lawyers and judges with respect to affidavits filed by criminal defense lawyers acknowledging ineffective assistant of counsel?

**Relevant Ethical Rules**

ER 1.1        Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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ER 1.6(a)    Confidentiality of Information

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a)(2).

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ER 8.3(a)    Reporting Professional Misconduct

A lawyer having knowledge 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, except as otherwise provided in these rules or by law.

**Opinion**

In responding to this inquiry, we first must remind the inquiring attorneys of our Statement of Jurisdictional Policies, which provides in pertinent part that:

4. The Committee will not render opinions involving the questioned ethical propriety of the conduct of an attorney other than the inquiring attorneys. Such opinions will be rendered only when requested by the Board of Governors, the Arizona Disciplinary Board, another Committee, or the Executive Director of the State Bar; a Local Administrative Committee; the

Committee on Examinations and Admissions; and Arizona county or other local bar association; or a member of the Arizona judiciary (state or federal) before whom the questioned conduct of the member has occurred.

As a result, this opinion does not address, and should not be construed to define, the ethical propriety of a criminal defense attorney's execution of an affidavit acknowledging ineffective assistance of counsel. This opinion only addresses the question of when the inquiring attorneys may have a duty to report such acknowledgment under ER 8.3.

While the present inquiry contains certain nuances not specifically raised in prior requests, the ethical issues presented here mirror the inquiries addressed in our previous Opinion Nos. 89-06 and 90-13. Essentially, the inquiring attorneys have asked this Committee to opine again on *when* a lawyer's duty to report a violation of the Arizona Rules of Professional Conduct arises. Consequently, the Committee's answer largely reflects the analysis set out in our prior opinions.

As we have stated previously, an attorney has a mandatory duty to report a violation of the Arizona Rules of Professional Conduct when he or she has "knowledge" of conduct that raises a "substantial" question regarding another lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects." See, Opinion No. 89-06 at 8; Opinion No. 90-13 at 8.<sup>2</sup> This mandatory duty to report is, however, limited by the broad confidentiality provisions of ER 1.6. Hence, a lawyer is relieved of his duty to report an ethical violation if breach of a client confidence would be involved.

### **Question One**

Applying ER 8.3 to the instant factual situation, the inquiring attorneys have a duty to report the averring attorney to the State Bar if the affidavit would provide the inquiring attorneys with "knowledge" of conduct that raises a "substantial" question regarding another lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects."

Given the admission contained in the affidavit, the knowledge element is plainly satisfied. Therefore, the reporting attorney need only apply his or her judgment to determine whether the ineffective assistance admitted is (a) substantial, and (b) involves another lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects." Not every instance in which ineffective assistance is alleged will necessarily amount to a disciplinary violation, and concomitantly, a duty to report will not necessarily arise every time such an affidavit is filed.<sup>3</sup>

In the first instance, such a duty will arise only where the violation is "substantial." As set out in the Comment to ER 8.3, "the term 'substantial' refers to the seriousness of the possible offense

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<sup>2</sup> The elements of the duty to report are thoroughly addressed in our opinion 90-13.

<sup>3</sup> The application of ER 8.3 is governed by a rule of reason, and is not intended to inundate the disciplinary system with minor infractions. See, Opinion No. 89-06 at 8. As the Comment to ER 8.3 states, "[t]his rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule."

and not the quantum of evidence of which the lawyer is aware.” In this context, “substantial” also “denotes a material matter of clear and weighty importance.” Opinion No. 90-13 at 9 (emphasis in original) (citation omitted). To be sure, an admission of one’s ineffective assistance of counsel in the criminal context is a presumptively serious matter. Whether it constitutes a “substantial” violation within the meaning of ER 8.3 in every instance is impossible to say, and a lawyer weighing his or her duty to report the matter to the Bar must resolve that issue on a case-by-case basis, not some artificial “bright line” triggered by the filing of an affidavit.

Second, the reporting attorney must examine the affidavit to determine whether the violation admitted affects the averring attorney’s fitness as a lawyer.

ER 8.3 covers only those violations that impact directly on the integrity of an attorney as a member of the legal profession ... For example, a single and apparently isolated instance of a conflict of interest under ER 1.9, or of negligently missing a filing date in possible violation of ER 1.1 and ER 1.3 might not be embraced within ER 8.3. But, as the Comment on ER 8.3 makes clear, even such an apparently isolated violation “may indicate a pattern of misconduct that only a disciplinary investigation may uncover.” Thus, if there are reasonable grounds to believe that the observed instance is indicative of a pattern of misconduct that reflects on the attorney’s fitness as a lawyer, the balance should weigh in favor of reporting, especially if otherwise there is a realistic potential for future harm, and “the victim is unlikely to discover the offense.”

Opinion 90-13 at 9 (citations omitted). If, in the inquiring attorney’s judgment, both of these criteria are satisfied, the duty to report is mandatory.

### **Question Two**

The fact that a post-conviction proceeding is ongoing does *not* affect a lawyer’s duty to report under 8.3. However, any suggestion or appearance of a threat to report used as leverage to gain an advantage must be avoided. See, Opinion No. 90-13 at 12 n.17.

### **Question Three**

As made clear by Chief Justice Feldman in In re Wolfram, 174 Ariz. 49, 847 P.2d 94 (1993), “successful post-conviction relief based on ineffective assistance of counsel [does not] automatically result in an ethical violation, [n]or, conversely, [does] a denial of post-conviction relief always insulate an attorney from professional discipline.” Id. at 53, 847 P.2d at 98. In other words, an attorney may have committed a disciplinary violation even if post-conviction relief is

denied. Moreover, an attorney might be found innocent of a disciplinary violation despite the fact that post-conviction relief is granted. See, Florida State Bar v. Sandstrom, 609 F. Supp.2d 583, 584 n.1 (Fla. 1992); In re Riccio, 131 A.D. 2d 973 (N.Y. 1987); Office of Disc. Counsel v. McKinney, 668 S.W. 2d 293, 296-97 (Tenn. 1984); In re Lewis, 445 N.E. 2d 987, 989 (Ind. 1983).

Because ineffective assistance of counsel and compliance with the ethical rules are not wholly coextensive, there is no need for the inquiring attorney to await resolution of the post-conviction proceeding before reporting a violation under ER 8.3. Similarly, a finding against ineffective assistance in the post-conviction proceeding does not necessarily relieve the inquiring attorney of one's duty to report the violation.

#### **Question Four**

The Arizona Supreme Court's opinion in re Wolfram has not caused the Committee to alter its Opinion No. 90-13. As set out above, In re Wolfram is fully consistent with the Committee's prior opinion. In In re Wolfram, the court merely clarified the distinction between ineffective assistance of counsel and an attorney's fitness as a lawyer under the rules of professional responsibility. The court in no way altered the analysis under ER 8.3, and Opinion No. 90-13 has therefore *not* been changed.

#### **Question Five**

As set out above, when the inquiring attorneys are presented with an affidavit acknowledging ineffective assistance of counsel, they must carefully evaluate it to determine whether it admits conduct that raises a "substantial" question regarding another lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects." If, in the inquiring attorney's judgment, these criteria are satisfied, the inquiring attorneys have a mandatory duty to report the conduct pursuant to ER 8.3.

#### **Conclusion**

The filing of an affidavit acknowledging ineffective assistance of counsel does not necessarily give rise to a duty to report under ER 8.3. The analysis set out in our Opinion Nos. 89-06 and 90-13 still operates to determine whether the affidavit acknowledges conduct that raises a "substantial" question regarding another lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects." In sum, the duty under ER 8.3 to report a violation to the State Bar requires the exercise of an attorney's sound professional judgment on a case-by-case basis.