



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I have a question about the duty to report professional misconduct. I have learned that a lawyer (Bill) in our firm accidentally copied a lawyer from another firm with an email intended for a client, discussing the client's matter and including confidential and privileged information. It happened when the autofill function of the email program filled in an email address from Bill's contacts instead of the client's email address which begins with similar letters. Bill did not catch the error before he hit send. Fortunately, the lawyer who received it was not adverse to this particular client and readily agreed to delete the email.

On the face of it, however, the communication violated Rule 1.6 ("a lawyer shall not reveal information relating to the representation of a client" without client consent), but it was a simple and understandable mistake that could happen to any of us. And what if the client does not want to report it because it doesn't want the contents of the email to be shared with the authorities? Do I have a duty to report this to the disciplinary authorities in our state?

A: Let's unpack the issues here. Model Rule 8.3(a) defines when professional misconduct must be reported: "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." Rule 8.3(c) qualifies this duty, stating that the rule does not require disclosure of information otherwise protected by Rule 1.6 (Comment 2 suggests that a lawyer should request the client to consent to disclosure if appropriate) or gained by way of involvement in a lawyer assistance program.

In the matter you are dealing with, Rule 8.3 presents two issues. First, the conduct—disclosure of information protected by Rule 1.6 without client consent—is clearly a violation of the rules, but is it one that raises a substantial question about Bill's honesty, trustworthiness or fitness as a lawyer? Your answer suggests that it does not. Second, you indicate that the client does not want to disclose the matter to the disciplinary authorities because they do not want their Rule 1.6 information to be disclosed in that context. That falls within the limiting language of Rule 8.3(c). Either or both of these factors relieve you of a duty to report.

A caveat—as noted in Comment 3 to Rule 8.3—the "substantial question" language referenced above was added to the rule to provide a measure of judgment not requiring the reporting of every violation, no matter how minor,

and not triggering violations relating to the failure to report others for insubstantial issues. It notes that “Such a requirement [a duty to report every violation] existed in many jurisdictions but proved to be unenforceable.” Notwithstanding this language, there are still versions of Rule 8.3 not containing the “substantial question” qualifier, that appear to require reporting of even the most minor violation, providing that other conditions are met. *E.g.*, Kansas Rule 8.3 (“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”)(emphasis added). Please check the version of Rule 8.3 currently in effect in your relevant jurisdiction.

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About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 134 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.