

KENTUCKY BAR ASSOCIATION
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FRANKFORT, KENTUCKY 40601-1883

Ethics Hotline
Committee



(502) 564-3795
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September 30, 2010

Via Electronic Mail (fendleylaw@aol.com)
Mr. Daniel W. Fendley

RE: Ethics Opinion

Dear Mr. Fendley:

This is in response to your request for advice from the Kentucky Bar Association's Ethics "Hotline" Committee. This advice is provided to you based upon the following two representations; first, that you have not contacted nor conferred with another member of the Ethics "Hotline" Committee, and second, that your request pertains to a "professional act contemplated by you, within the meaning of SCR 3.530(1) and does not pertain to the propriety of another attorney's actions."

You have a rather long fact pattern and ask four concise questions. You are correct that R.P.C. 8.3 imposes new obligations upon lawyers to report fellow lawyers to the Bar Association when they engage in behavior that calls their honesty into question. This Amendment to the Rules was effective in July, 2009. This type of reporting is not optional, and it is also not retroactive. Therefore the answer to your question is somewhat convoluted. If Mr. Ulferts' behavior that would be reportable occurred before July 15, 2009, it is not compulsory for you to report the same. If, however, the behavior is continuing in nature due to his marriage to Ms. Quinn, etc. then R.P.C. 8.3 kicks in and you have a duty to report. This is rather new ground for the Rules of Professional Conduct and a unique fact pattern. Bar Counsel for the Kentucky Bar Association recommends that when in doubt report the matter and let Bar Counsel sort it out. R.P.C. 8.3 is something of an ongoing process as it regards thresholds and investigations. That is a long answer to a simple question but I recommend that you report the matter to Bar Counsel and let Bar Counsel figure out whether it constitutes a violation of R.P.C. 8.3 due to continuing conduct.

Your second question asks about your obligations to the defendant, Jason Parrish, to disclose newly discovered evidence. I believe that as a matter of procedure, notwithstanding ethics, that you have a duty to disclose newly discovered evidence to a criminal defendant. That is beyond the scope of my authority. I can neither require you to do so or give you license not to disclose. Ethically, several rules impact and suggest

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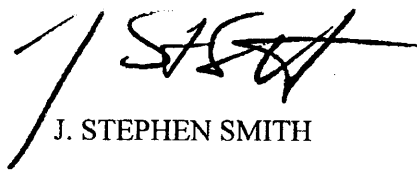
that you should disclose the information to Mr. Parrish, including duties of candor, fairness, and diligence. I suggest that you disclose the matter to Mr. Parrish.

Your third question asks whether or not in view of the fact pattern, it would be advisable or mandatory for you to contact the Public Defender's Office or the Court of Justice regarding this information and its prospective application in relation to CR 60.02. Your fact pattern states that Mr. Parrish was never represented by the Public Defender's Office. It appears that Mr. Parrish appeared pro se and entered a Plea Agreement. Therefore, I do not believe you are required to disclose the new evidence to the Public Defender's Office.

Your fourth question asks whether Jason Parrish, the defendant, is entitled to review and communicate this information to the Kentucky Division of Probation and Parole. I believe that since you have a duty to disclose the matter to Mr. Parrish as newly discovered evidence that it will be up to Mr. Parrish and his advisors, if he has any, about how to use the information before Probation and Parole. You do not have a duty to contact Probation and Parole on his behalf, however, he has the right to use the information to his benefit.

The advice contained in this letter is limited to the scope granted the writer as a representative of the 'Ethics Hot Line' established pursuant to Kentucky Supreme Court Rule 3.530(3) which indicates that this opinion is advisory only, but that 'no attorney shall be disciplined for any professional act on his part performed in compliance' with the request, provided it 'clearly, fairly, accurately and completely states his contemplated act.' This Hot Line Opinion is not an expression of law nor does it bind any court. I hope this has been of assistance to you.

Very truly yours,



J. STEPHEN SMITH

cc: Hon. John Meyer, KBA Executive Director
Hon. Linda Ewald, Ethics Committee Chair (via e-mail)