

You wish to know whether a Virginia attorney is obligated, pursuant to DR:1-103(A), to report criminal conduct, known or believed by him to have been engaged in by other Virginia counsel, when there is no demonstration that this criminal conduct, however morally culpable it may be, has affected the lawyer's ability to practice law.

Disciplinary Rule 1-103(A) states that "a lawyer having information indicating another lawyer has committed a violation of the Disciplinary Rules which raises a substantial question as to that lawyer's fitness to practice law in other respects, shall report such information to the appropriate professional authority, except as provided in DR:4-101." Disciplinary Rule 4-101 provides for the preservation of client confidences and secrets and is not applicable to this inquiry.

Disciplinary Rule 1-103(A) contains a two-prong test. First, a lawyer must have information indicating that another lawyer's conduct has violated one of the Disciplinary Rules of the Virginia Code of Professional Responsibility. Your question involves a lawyer who has committed a crime as defined in § IV, Organization and Government of the Virginia State Bar:

Paragraph 13. Procedure for Disciplining, Suspending and Disbarring Attorneys.

A. Definitions....(9) "Crime" means (a) any offense declared to be a felony by Federal or state law; (b) any offense, whether Federal or state involving theft, fraud, forgery, extortion, bribery, or perjury; or (c) an attempt, solicitation or conspiracy to commit any of the foregoing. Any criminal offense may be deemed to be misconduct as hereinafter defined.

Disciplinary Rule 1-102(A)(3) [DR:1-102] is violated if a lawyer commits a crime or other deliberately wrongful act that "reflects adversely on the lawyer's fitness to practice law." If the attorney has committed a crime which reflects adversely on his fitness to practice law the first prong of DR:1-103(A) would be satisfied. See also EC:1-5, which provides:

A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and ethically reprehensible conduct which reflects adversely on his fitness to practice law. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

The second prong of DR:1-103(A) is whether the violation of the disciplinary rule "raises a substantial question as to that lawyer's fitness to practice law in other respects."

Committee Opinion
December 9, 1987

Your inquiry suggested that the degree of moral culpability involved in the crime is a lesser concern to the issue of the attorney's "fitness" to practice law. The Committee disagrees and opines that the degree of moral culpability involved in the crime may or may not be one relevant factor in determining if the commission of the crime raises a substantial question as to the lawyer's fitness to practice law. Other relevant factors include, but are certainly not limited to, the recency of the crime, the seriousness of the offense, the likelihood that the crime will be repeated, the likelihood that it will affect the attorney's competence and any mitigating or aggravating circumstances. No single factor is controlling in every case and all factors need not be met in order that a substantial question be raised as to an attorney's fitness to practice law.

The determination of whether a violation must be reported is a substantive one for the most part. However, certain violations may be so severe that reasonable people could not differ as to whether the violation must be reported. In LE Op. 977, the Committee believed that the crime and the fact that it had recently been committed was sufficient to conclude that the use of cocaine raised a substantial question as to the fitness of that lawyer to practice law. It was not the Committee's opinion that reasonable people might not differ on this issue, depending upon the particular circumstances surrounding the offense and in particular any mitigating circumstances. Accordingly, the commission of the crime, as described in LE Op. 977, should be viewed in light of the particular circumstances involved to determine whether the conduct raises a "substantial question" in the mind of the inquirer, which in turn would control the question of whether reporting is or is not required.

In summary, based on your inquiry, knowledge of a violation of DR:1-101(A)(3) which does not raise a substantial question as to that lawyer's fitness to practice law in other respects, does not create a duty to report misconduct pursuant to DR:1-103(A).

Committee Opinion
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Legal Ethics Committee Notes. – If information about the ethics violation is a client confidence, a lawyer may report the other lawyer's misconduct only if the client consents under Rule 1.6(c)(3); the lawyer considering whether to report must consult with the client under that Rule.

Rule 1.11 allows a law firm to avoid disqualification in certain circumstances if it screens the former government lawyer.