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## Duty to Report Attorney Misconduct

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## DUTY TO REPORT ATTORNEY MISCONDUCT

BY LUKE SCHEUER<sup>1</sup>

### A. ABA Rule 8.3

"The American legal profession has long recognized the necessity of reporting lawyers' ethical misconduct."<sup>2</sup> The ABA Model Rules of Professional Conduct (hereafter "MRPC") contain a mandate to report certain ethical violations to the state bar ethics authorities. MRPC Rule 8.3(a) states "[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."<sup>3</sup> This mandate can apply to lawyers even if they observe misconduct while not themselves practicing law.<sup>4</sup> In addition, this mandate requires reporting of misconduct by non-practicing attorneys and attorneys who committed misconduct outside the practice of law if the misconduct raises substantial questions as to the lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects..."<sup>5</sup>

Reporting ethical violations by other attorneys has benefits for the profession as a whole but frequently imposes costs for the individuals involved. Benefits to the profession include promoting justice and professionalism, and improving the public image of lawyers.<sup>6</sup> But there are also costs to the individuals involved. The lawyer accused of the ethical violation can suffer stigma, malpractice lawsuits and various degrees of punishment including possible disbarment. The lawyer reporting the ethical violation can also suffer consequences including the potential loss of trust and friendship from fellow attorneys and if the reported attorney works within the same firm both the firm and the reporting attorney's role in the firm can be damaged.

Rule 8.3's mandate to report ethical violations, and the individual attorney's desire to not get involved, creates a tension that attorneys need to struggle with. Compliance with Rule 8.3 is made more difficult by some of the ambiguities within the rule itself. Most important of these ambiguities are the degree of knowledge required on the part of the reporting attorney, and the materiality of the violation required before reporting becomes mandatory.

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<sup>2</sup> *In re Michael G. Riehlmann*, 891 So. 2d 1239, 1246 (La. 2005).

<sup>3</sup> Connecticut, Maine, Massachusetts, New Hampshire and Rhode Island (the states represented at this conference) have all enacted local versions of MRPC Rule 8.3(a) that are substantively similar. Puerto Rico requires compliance with the ABA MRPC itself. *Southwire Co. v. Ramallo Bros. Printing, Inc.*, 2009 WL 4937726, \*7 (D.P.R. 2009).

<sup>4</sup> *Obligation of a Lawyer to Report Professional Misconduct by a Lawyer not Engaged in the Practice of Law*, ABA Formal Op. 04-433 (2004).

<sup>5</sup> *Id.*

<sup>6</sup> *But see* Arthur Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 Geo. J. Legal Ethics 259, 267-68 (1993) (arguing that mandatory reporting of ethical violations might not actually promote the public's image of the legal profession.)

## B. Requisite Degree of Knowledge

Rule 8.3 only requires attorneys to report ethical violations if they "know" of the violation. The degree of knowledge of the violation that the reporting attorney must have is not defined in Rule 8.3. Further many states use the term "knowledge" in their Rule 8.3, based upon an older version of MRPC Rule 8.3 which is an undefined term under the rules. The latest ABA version of MRPC Rule 8.3 has corrected this by using the term "know" in Rule 8.3. To "know" is defined in Rule 1.0 as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." It is necessary for attorneys to exercise judgment as to whether they "know" of the misconduct, however, "it is clear that absolute certainty of ethical misconduct is not required before the reporting requirement is triggered... On the other hand, knowledge requires more than a mere suspicion of ethical misconduct."<sup>7</sup> The Massachusetts Rule 8.3, comment 3 provides further guidance. "A lawyer has knowledge of a violation when he or she possesses supporting evidence such that a reasonable lawyer under the circumstances would form a firm opinion that the conduct in question had more likely occurred than not." One court has held that a client's accusation of an ethical violation against another attorney, an accusation denied by the other attorney, was not sufficient by itself to constitute "knowledge" and thus mandate reporting.<sup>8</sup> Most cases and ethics opinions have held that the "knowledge" standard is objective, however Rhode Island uses a subjective standard.<sup>9</sup> While the Rules of Professional Conduct do not require attorneys to report mere suspicions of ethical violations, there is also no bar against an attorney reporting a good faith suspicion of an ethical violation.

While Rule 8.3 does not impose a duty to investigate and gather evidence when there is not actual knowledge of a violation,<sup>10</sup> an attorney cannot deliberately "evade legally significant knowledge" so as not to have to report.<sup>11</sup> In addition, as discussed in section F, if the other attorney is within the same firm, there may be a duty to investigate under Rule 5.1.

## C. Materiality of Violation

Rule 8.3 does not mandate reporting all violations.<sup>12</sup> Instead only violations which raise "substantial questions" regarding the other attorney's "honesty, trustworthiness or fitness as a lawyer in other respects" must be reported. Determining which violations rise to the level of "substantial questions" requires judgment on the part of the reporting attorney. The comments to MRPC Rule 8.3 state that "[t]his Rule limits the reporting to those offenses that a self-regulating profession must vigorously endeavor to prevent." Some helpful factors in determining materiality suggested by Rule 8.3 comments and academics include the recency of the conduct, chance of future harm, extent to which the misconduct would otherwise go undetected, and the degree of culpability of the offending lawyer.<sup>13</sup> The rule emphasizes ethical violations which raise "substantial questions" regarding the "honesty" or

<sup>7</sup> *In re Michael G. Riehlmann*, 891 So. 2d at 1247.

<sup>8</sup> *Attorney U v. the Mississippi Bar*, 678 So.2d 963, 972 (Miss. 1996).

<sup>9</sup> ABA Formal Op. 04-433; Rhode Island Ethi. Advi. Panel Op. 95-41 (1995).

<sup>10</sup> *In re Michael G. Riehlmann*, 891 So. 2d at 1247.

<sup>11</sup> *Attorney U*, 678 So.2d at 971.

<sup>12</sup> Under the old Code rule, attorneys were required to report all rule violations without regard to their materiality. Code of Professional Responsibility, DR 1-103(A). This requirement was replaced by the new standard because it was seen as unrealistic and unenforceable. MRCP Rule 8.3 Comment 3.

<sup>13</sup> *Supra* note 6 at 290.

"trustworthiness" of the other attorney. This implies that crimes of dishonesty such as fraud are particularly important to report. The "fitness as a lawyer in other respects" is a catch all category for those violations which raise substantial questions despite not going to the honesty or trustworthiness of the other attorney.<sup>14</sup>

Some state rule comments give more specific direction on the materiality issue. Massachusetts Rule 8.3 comment 3 states:

a lawyer must report misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including misconduct that would constitute a 'serious crime' as defined in S.J.C. Rule 4:01, § 12(3). Precedent for determining whether an offense would warrant suspension or disbarment may be found in the Massachusetts Attorney Discipline Reports. Section 12(3) of Rule 4:01 provides that a serious crime is "any felony, and ... any lesser crime a necessary element of which ... includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit [such a crime]." In addition to a conviction of a felony, misappropriation of client funds or perjury before a tribunal are common examples of reportable conduct. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

Rule 8.3 does not require reporting of minor violations, nevertheless this does not mean that smaller ethical issues should be ignored. Single minor incidents might be insufficient for discipline. However, cumulatively they can be a cause for concern because they may indicate indifference to legal obligations, that in some cases may not be apparent to any one attorney. The comments to MRPC Rule 8.3 state "[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover." While a single missed deadline might not be cause for concern, and might not result in discipline if reported, if the disciplinary authorities learn that an attorney has missed numerous deadlines then this may cause concern as to the attorney's fitness as a lawyer. So while not required, attorneys should still consider reporting more minor violations. Another, not mutually exclusive, alternative is to privately discuss the violation with the other attorney and make sure they understand what they did wrong and the steps needed to prevent a repetition of such an incident.

If it is unclear whether the ethical violation rises to the level requiring mandatory reporting, attorneys should consider contacting the state bar ethics authority and explain the situation without using names and while complying with Rule 1.6<sup>15</sup> to receive guidance on whether reporting is required.

#### **D. Conflicting Duties to the Client: Confidentiality**

MRPC Rule 8.3(c)<sup>16</sup> does not require reporting of confidential information protected by MRPC Rule 1.6.<sup>17</sup> When there is conflict between Rules 1.6 and 8.3, attorneys should comply with Rule

<sup>14</sup> See *Attorney U*, 678 So.2d at 972-73 (collecting cases on issue of materiality).

<sup>15</sup> MRPC Rule 1.6(b)(4) contains an exception to confidentiality to obtain legal advice on complying with the MRPC.

1.6 unless the client consents to disclosure.<sup>18</sup> The comments to the MRPC and many local versions of Rule 8.3 direct lawyers to encourage their client to consent to disclosure where prosecution would not substantially prejudice the client's interests.<sup>19</sup> This discussion "must include the potential adverse impact that disclosure may have on the client, including the effect on the client's ultimate recovery in a malpractice action, for example."<sup>20</sup> "Good faith decisions by a client to withhold information from the disciplinary process must be respected, but it should be regarded as a violation of Rule 8.3 for a lawyer to manipulate a client into making that choice. If the violation that should be reported is serious enough, the lawyer has at least a moral duty - even putting aside the ethical duty - to urge the client to come forward (or to permit the lawyer to come forward) in the public interest."<sup>21</sup>

Most states require client consent prior to disclosure for all "information, whatever its source, relating to the representation."<sup>22</sup> However, in some states, if the knowledge of the misconduct is not protected by the attorney-client privilege (i.e. it was discussed in the presence of a third party) then the client's directive not to report the misconduct might not protect the attorney from discipline for violating Rule 8.3.<sup>23</sup>

Connecticut's Rule 8.3(a) curtails one of the client's possible motives for not consenting by stating "[a] lawyer may not condition settlement of a civil dispute involving allegations of

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<sup>16</sup> MRPC Rule 8.3(c) states: "This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program." A substantively similar version of Rule 8.3(c) has been adopted by Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Puerto Rico.

<sup>17</sup> MRPC 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

<sup>18</sup> ABA Formal Op. 04-433.

<sup>19</sup> See e.g. MRPC 8.3 Comment 2; Connecticut Rules of Professional Conduct Rule 8.3 Comment 2; Massachusetts Rule of Professional Conduct 8.3 Comment 2.

<sup>20</sup> ABA Formal Op. 04-433.

<sup>21</sup> *Id.* quoting Geoffrey C. Hazard Jr. & William Hodes, *The Law of Lawyering* § 64.8 at 64-18 (3rd Ed. 2002 & Supp. 2003).

<sup>22</sup> ABA Formal Op. 04-433; *In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d 317, 322 (R.I. 1993).

<sup>23</sup> See *In Re Himmel*, 533 N.E.2d 790, 794 (Ill. 1989).

improprieties on the part of a lawyer on an agreement that the subject misconduct not be reported..."

### E. Self Reporting

Most state Rules of Professional Conduct do not mandate that attorneys self-report ethical violations.<sup>24</sup> If the ethical violation rises to the level of criminal activity, mandatory self-reporting would implicate fifth amendment issues. Nevertheless, an attorney may wish to self-report for ethical or tactical reasons. In addition, if two attorneys jointly commit an ethical violation, they would according to Rule 8.3, be required to report each other. This would amount to self-reporting.

### F. Firm Reporting

As difficult as it can be to report another attorney's ethical misconduct it is even more difficult when the other attorney works within the same firm. In these situations the attorney reporting the misconduct might suffer serious financial harm through malpractice claims, loss of business or reputational harm to their shared firm. MRPC Rule 5.1(c) imposes responsibility on partners and supervisory attorneys if they order or know of and do not prevent a violation, or fail to make reasonable efforts to ensure the firm or subordinate attorney is complying with the rules.<sup>25</sup> As a consequence, there can be a duty to investigate mere suspicions of violations under Rule 5.1(b) which states "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." In addition, Rule 5.1(a) imposes responsibility on a firm to ensure compliance with the rules of professional conduct.<sup>26</sup> "The precise nature of the measures a firm must implement under Rule 5.1 necessarily will depend on the size of the firm, the experience of its members, and the nature and frequency of the ethical problems it encounters."<sup>27</sup> However a common measure is to designate an "ethics counsel", an attorney that members of the firm can direct their ethical concerns to.<sup>28</sup>

Reporting the misconduct of another attorney within the same firm can have negative effects on one's position within the firm. In Bohatch v. Butler & Binion, the Texas Supreme Court held that a firm could retaliate by expelling a partner who made a good faith, but ultimately incorrect, internal report of

<sup>24</sup> *But see Opinion 2007-1*, OH Adv. Op. 2007-1, \*8 (Ohio Bd.Com.Griev.Disp. February 9, 2007) (finding that an attorney does have a duty to self-report misconduct that raises a question as to honesty, trustworthiness, or fitness as a lawyer.)

<sup>25</sup> MRPC Rule 5.1 (c)

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or  
 (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.  
 (Connecticut, Maine, Massachusetts, New Hampshire, and Puerto Rico have adopted similar local versions of Rule 5.1.)

<sup>26</sup> Rule 5.1 (a) "A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." For a discussion of how to promote compliance with Rule 5.1 see Hon. Henry Saad, *Practical Ways to Improve the Ethical Behavior of Lawyers*, 78 Mich. B. J. 982 (1999).

<sup>27</sup> *In-House Consulting on Ethical Issues*, ABA Formal Op. 08-453 (2008).

<sup>28</sup> See *id.* for a discussion of the role of ethics counsel. Note that Rule 1.6 provides an exception from client confidentiality for the purpose of consulting with an ethics counsel.

overbilling about another partner within the firm.<sup>29</sup> The court refused to recognize a whistleblower exception to a partnerships' right to expel partners.<sup>30</sup> "The fact that the ethical duty to report may create an irreparable schism between partners neither excuses failure to report nor transforms expulsion as a means of resolving that schism into a tort."<sup>31</sup>

**G. Failure to Report**

There are few examples of attorneys facing discipline for violating Rule 8.3 by failing to report another attorney's ethical misconduct. The lead case in this area is *In re Himmel*.<sup>32</sup> The Illinois Supreme Court held that Himmel, an attorney with no prior record of complaints, should be suspended for one year for failing to report the misconduct of Casey, another attorney who previously represented one of Himmel's clients. While representing the client, Casey negotiated a \$35,000 settlement for her personal injury case, but did not distribute to the client her share of the proceeds. The client hired Himmel to collect the money from Casey. Himmel negotiated a \$75,000 settlement for the client in which the client agreed not to initiate any criminal, civil or attorney disciplinary action against Casey. The client specifically instructed Himmel not to take any action against Casey other than to collect the money owed to her. After Casey breached the settlement, Himmel filed suit and was awarded \$100,000. The court found that Himmel had violated his duty to report Casey's conduct under Rule 8.3. In addition, the court stated in dicta that even if the client had filed a complaint of attorney misconduct, this would not relieve the duty of attorneys who learn of it to also report it. Finally the court found that the client's direction not to report the misconduct does not trump the attorney's duty to report where, as here, the information was not privileged.<sup>33</sup> The court found that Himmel's financial interest in not reporting was an aggravating factor in determining whether Himmel had violated 8.3.

In addition, while Rule 8.3 does not set a deadline for mandatory reporting, courts have held that once an attorney has determined that reporting is required, the report should be made promptly.<sup>34</sup>

**FURTHER READING**

Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 Geo. J. Legal Ethics 269 (2003).

Alex B. Long, *Whistleblowing Attorneys and Ethical Infractions*, 68 Md. L. Rev. 786 (2009).

Hon. Henry Saad, *Practical Ways to Improve the Ethical Behavior of Lawyers*, 78 Mich. B. J. 982 (1999).

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<sup>29</sup> 977 S.W.2d 543 (Tex. 1998).

<sup>30</sup> *Id.* at 546.

<sup>31</sup> *Id.* at 547. See generally Alex B. Long, *Whistleblowing Attorneys and Ethical Infractions*, 68 Md. L. Rev. 786 (2009).

<sup>32</sup> 533 N.E.2d 790 (Ill. 1989).

<sup>33</sup> Most states have not followed Himmel because under their version of Rule 8.3 attorneys must have client consent before revealing any confidential information, not just information protected by the attorney client privilege.

<sup>34</sup> *In re Michael G. Riehlmann*, 891 So. 2d at 1247-48 (waiting five years to report another attorney's misconduct was a violation of Rule 8.3(a)).