Do The Right Thing:

Policing the Profession and the Attorney's Duty to Report Misconduct

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Introduction

The Model Rules of Professional Conduct ("Model Rules") and the Model Code of Judicial Conduct ("Model Judicial Code") require attorneys and judges to report their colleagues who engage in certain improper conduct. Specifically, Model Rule 8.3 requires a lawyer "who knows" that another lawyer or judge has committed a violation of the Rules of Professional or Judicial Conduct that raises a substantial question as to that lawyer or judge's honesty, trustworthiness or fitness as a lawyer or judge shall inform the appropriate professional authority. *See* Model Rule 8.3(a)/(b). This obligation is irrespective of any fiduciary duties law firm partners owe to each other. *See* South Carolina Ethics Adv. Op. 05-21 (2005). However, Rule 8.3 does not require disclosure of information that is protected by Model Rule 1.6 (the rule governing confidentiality), information gained by a lawyer or judge while participating in an approved lawyers assistance program, nor does Rule 8.3 require an attorney to report him or herself. *See e.g.* Conn. Bar Assoc., Informal Op. 97-38; State v. Ankerman, 81 Conn. App. 503, 513, 840 A.2d 1182, 1190 (2004).[1]

Similarly, the Model Code of Judicial Conduct Rule 2.15 requires judges who have knowledge that another judge or a lawyer has committed a violation of the applicable Rules of Professional Conduct or Codes of Judicial Conduct that raises a substantial question as to the judge or lawyer's honesty, trustworthiness, or fitness as a judge or lawyer shall inform the appropriate authority. *See* Model Judicial Conduct Rule 2.15(A) /(B). The comments to the rule indicate that "[i]gnoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system." *See* Model Rule of Judicial Conduct Rule 2.15 cmt 1.

The Judicial Conduct Rules also require that judges who receive information indicating a substantial likelihood that another judge or lawyer has committed a violation of the Judicial Code shall take "appropriate action." *See* Model Judicial Conduct Rule 2.15(C) /(D) The comments

[1] However, self-reporting may mitigate the punishment for a violation of an ethical rule. See e.g., In re Fayssoux, 675 S.E. 2d 428 (S.C. 2009) (while the lawyer's misconduct normally warranted a suspension, because the lawyer self-reported his misconduct and fully cooperated with the disciplinary investigation, a public reprimand was sufficient).

define "appropriate action" to include communicating directly with the judge or attorney who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. *See* Model Judicial Conduct Rule 2.15, Cmt 2.

What is "knowledge" in the context of an attorney or judge's "duty to report"?

Under the Model Rules, "knowing" denotes actual knowledge of the fact in question; however, a person's knowledge may be inferred from the circumstances. *See* Model Rule of Prof'l Conduct Rule 1.0(f). Various jurisdictions take different approaches to what constitutes sufficient knowledge of wrongdoing.

- **Illinois**: "whenever an attorney is aware of a potential ethical obligation, misconduct, or other improper practice on the part of another attorney, and so long as the information available rises beyond a 'mere suspicion', there is no discretion vested in the attorney who has the knowledge to refrain from bringing it to the attention of the appropriate forum as well as [the disciplinary committee]." Skolnick v. Altheimer & Gray, 191 Ill.2d 214 (2000).

- **Louisiana:** "[A]bsolute certainty of ethical misconduct is not required before the reporting requirement is triggered. The lawyer is not required to conduct an investigation and make a definitive decision that a violation has occurred before reporting; that responsibility belongs to the disciplinary system and this court. On the other hand, knowledge requires more than a mere suspicion of ethical misconduct. We hold that a lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred. As such, knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question." In re Riehlmann, 891 So. 2d 1239, 1247 (2005).

- **Maine:** "The lawyer has no duty to report the other lawyer's misconduct to disciplinary authorities unless the lawyer himself has knowledge, based on a substantial degree of certainty, that the lawyer has committed an offense that raises a substantial question regarding his honesty, trustworthiness, or fitness to practice law." Maine Ethics, Op. 100 (1989).

- **Mississippi:** The supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred and that the conduct, if it did occur, raises a substantial question as to the purported offender's honesty, trustworthiness or fitness to practice law in other respects. Attorney U v. Mississippi Bar, 678 So. 2d 963, 970-72 (Miss. 1996)

- **Nebraska:** "[B]ecause knowledge in the reporting rule means more than a suspicion, a lawyer need not report mere suspicions of code violations." Nebraska Ethics, Op. 89-4, (undated).

- **New Mexico:** The duty to report misconduct is mandatory and arises when a lawyer has a substantial basis for believing a serious ethical violation has occurred, regardless of the source of that information. This "substantial basis" test for knowledge of misconduct is intended to be greater than a "mere suspicion" or "probable cause" test. While no duty to report arises without a substantial basis for knowledge of misconduct, a lawyer may choose to report information of misconduct to the appropriate professional authority. New Mexico Ethics, Op.1988-8 (undated).

- **New York:** "The degree of certainty required to constitute knowledge under the rule must be greater than a mere suspicion; the reporting lawyer must be in possession of facts that clearly establish a violation of the disciplinary rules." New York City Ethics, Op. 1990-3 (1990).

- **Pennsylvania:** "If the lawyer believes that opposing counsel's conduct raises a substantial question about his honesty, trustworthiness, or fitness to practice, then the lawyer should report the other lawyer's misconduct to the disciplinary counsel." Pennsylvania Ethics, Op. 89-247 (undated). It is unclear from the materials available, however, whether the word "believed" refers to the legal conclusion whether the conduct is a violation or to the factual conclusion whether the conduct occurred.

- **District of Columbia:** A lawyer is compelled to report "only if she has a clear belief that misconduct has occurred, and possesses actual knowledge of the pertinent facts." D.C. Bar, Op. 246 (*Revised* 1994).

What is Conduct that "raises a substantial question as to that lawyer or judge's honesty, trustworthiness or fitness"?

According to the comments to the Model Rules, the reporting requirement is limited 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. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

Model Rule 8.3 cmt 3. ABA Formal Opinion 03-431 offers attorneys more guidance:

> When considering his obligation under Rule 8.3(a), a lawyer should recognize that, in most cases, lack of fitness will evidence itself through a pattern of conduct that makes clear that the lawyer is not meeting her obligations under the Model Rules, for example, Rule 1.1 (Competence) or Rule 1.3 (Diligence). A lawyer suffering from an impairment may, among other things, repeatedly miss court deadlines, fail to make filings required to complete a transaction, fail to perform tasks agreed to be performed, or fail to raise issues that competent counsel would be expected to raise. On occasion, however, a single act by a lawyer may evidence her lack of fitness.

ABA Comm. Prof'l Responsibility Formal Op. 03-431 (2003)**.** We will examine case law to determine what conduct rises to the level of creating a "substantial" question as to the lawyer or judge's judgment and thus requires reporting:

- **A Judge Concludes that During the Course of the Proceeding an Attorney has Violated his Duty of Candor.** *See* Covington v. Smith, 213 W. Va. 309, 325, 582 S.E.2d 756, 772 (2003), Gum v. Dudley, 202 W. Va. 477, 491, 505 S.E.2d 391, 405 (1997), after concluding that the attorney violated his duty of candor to the tribunal the court complied with its reporting obligations under Rule 8.3 and referred the case to the disciplinary authorities. *See also* AIG Hawaii Ins. Co., Inc. v. Bateman, 454-55, 923 P.2d 395, 396-97 (1996), referring attorneys to the relevant disciplinary committees after concluding that the attorneys failed to notify the appeals court of a settlement agreement in their appellate briefs and thus brought and defendant an appeal on a moot question.

- **A Judge soliciting improper loans from attorneys**. *See* Lisi v. Several Attorneys, 596 A.2d 313 (R.I. 1991), finding that attorneys failure to report family court judge's request for loans from attorneys who have or may appear in front of him was a violation of Rule 8.3

- **A Judge seeking to influence a case pending before another judge.** *See* In re Lorona, 178 Ariz. 562 (1994), finding that had the magistrate judge not reported a fellow justice of the peace's calls and other attempts to influence cases pending before the magistrate concerning the justice's friend and step-grandson, he would have been liable for a violation of Rule 8.3.

- **Mental Impairments Impacting An Attorney's Ability to Practice Law.** ABA Comm Prof'l Responsibility Formal Ethics Op. 03-429 (2003), if a lawyer lack's the fitness to practice law (such as from a mental defect) and the lawyer continues to practice, then partners or supervising lawyers must report the violation under Rule 8.3 unless they can otherwise take steps to bring the matter under control. The firm cannot simply remove the lawyer, but may have a responsibility to discuss with the client the circumstances regarding the attorney's departure so the clients can make an informed decision surrounding their choice of counsel. *See also* ABA Formal Ethics Op 04-433 (2004).

- **The Unauthorized Practice of Law** *See* Md Ethics Op 2005-2 (2005), finding that Maryland lawyers must report New York lawyers' for engaging in the unauthorized practice of law; Rose ex rel. Rose v. St. Paul Fire & Marine Ins. Co., 215 W. Va. 250, 258, 599 S.E.2d 673, 681 (W Va. 2004) court exercising its duty to report pursuant to Rule 8.3 when it concluded that an attorney represented clients in West Virginia without being a member of the West Virginia bar and without being admitted *pro hac vice*. *See also* In re Galmore 530 S.E. 2d 378 (SC 2000), attorneys must report suspended attorney's *offer* to practice law. Attorney Grievance Comm. v. Brennan, 714 A.2d 157 (MD 1997) finding that attorney's failure to report his partner's engaging in legal practice during the course of his suspension including drafting briefs and conferring with clients constituted a violation of Rule 8.3;

- **Suppressing Exculpatory Evidence** In re Riehlmann, 2004-0680 (La. 1/19/05), 891 So. 2d 1239, 1241 (2005) finding attorney liable for a violation of rule 8.3 when he failed to report his friend, a prosecutor, who confessed to him that he suppressed important exculpatory evidence.

Threatening to Report: Effective Negotiation or Ethical Violation in and of Itself?

ABA Com. on Ethics and Prof'l Responsibility, Formal Op. 94-383 ("Use of Threatened Disciplinary Complaint Again Opposing Counsel") threats by counsel to file disciplinary charges against an opponent may, depending on the circumstances violate one or more of the Model Rules. This opinion explains, in part:

> A lawyer's use of the threat of filing a disciplinary complaint or report against opposing counsel, to obtain an advantage in a civil case, is constrained by the Model Rules, despite the absence of an express prohibition on the subject. Such a threat may not be used as a bargaining point when the subject misconduct raises a substantial question as to opposing counsel's honesty, trustworthiness, or fitness as a lawyer, because in these circumstances, the lawyer is ethically required to report such misconduct. Such a threat would also be improper if the professional misconduct is unrelated to the civil claim, if the disciplinary charges are not well founded in fact and in law, or if the threat has no substantial purpose or effect other than embarrassing, delaying or burdening the opposing counsel or his client, or prejudicing the administration of justice.

ABA Com. on Ethics and Prof'l Responsibility, Formal Op. 94-383. *See also* South Carolina Ethics Adv. Op. 02-13 ("accusing another lawyer of misconduct is a serious matter that should not be undertaken lightly").

Conclusion

Although no attorney would like to be in the situation where they are compelled to report a fellow attorney or judge, the rules of professional conduct dictate that under certain circumstances, this is required. It is important that after learning of ethical misconduct you must analyze your local ethics rules, the conduct at issue, and the scope of your knowledge of the improper conduct. Only after a careful analysis of these factors can you determine your rights and responsibilities under the local ethics rules.