MINNESOTA LAWYER

Quandaries and Quagmires: Rule 8.3: Reporting other lawyers' misconduct

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Sometimes known as "the rat rule," Rule 8.3 requires every Minnesota lawyer to report certain professional misconduct by other lawyers to the Office of Lawyers Professional Responsibility.

As a matter of professional responsibility, we attorneys are *mandated reporters* of other lawyers, and we were mandated reporters long before statutory mandated reporting became a Thing, first in the medical profession, and then in the social and human services generally.[1]

Reporting on another's misconduct is always a sensitive subject; one instinctively doesn't want to be a squealer; we all learned in kindergarten it's not nice to be a tattletale. But sometimes we must tell on someone, for the good of the profession.

So, when do you report another lawyer's ethical misconduct, and how do you do it?

The brief language of Rule 8.3 is deceptively simple:

(a) 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.
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(c) This rule does not require disclosure of information that Rule 1.6 requires or allows a lawyer to keep confidential . . . [2]

On their face, these requirements seem pretty straightforward. There are only three (3) elements:

If you (1) know (2) that another lawyer has violated a rule in a particularly serious way — i.e., the known misconduct "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer," then you must inform the OLPR, unless (3) your knowledge is protected by client confidentiality under Rule 1.6.

In practice, though, it's sometimes not simple or self-explanatory at all. What to do when you're not sure?

As a threshold matter, note that you must report only "another lawyer." There is never a duty to report your own misconduct — although it may sometimes be very prudent to do so. (If you're in that situation, you need counsel, stat, and you probably also need to talk to your malpractice carrier first.) See Lundberg, *Self-Reporting Malpractice or Ethics Problems*, Bench & Bar of Minnesota (Sept. 2003).[3]

National statistics show that an inquiry like, "Do I have a duty to report attorney X's misconduct on the following facts?" is one of the most frequent questions asked on attorney discipline hotlines across the country. The statistics in Minnesota are similar. In addition to fielding frequent questions like this on its free advisory opinion service, OLPR regularly tries to educate attorneys about the scope of this duty. Just last year, *Bench & Bar of Minnesota* published an article by Susan Humiston, director of the OLPR, that reviewed the critical basics of mandatory reporting by lawyers under Rule 8.3 (hereafter "the 2017 Article").[4]

For purposes of discussion, the 2017 Article posits the following scenario:

> *Counsel at a motion hearing is unusually discourteous, interrupting opposing counsel and talking over the court. The motion is argued, not particularly competently, and submitted. Following the hearing, counsel experiences what appears to be a serious medical emergency, and medical and bailiff personnel are called. Shortly thereafter, counsel and the court learn from court bailiffs that counsel registered almost four times the legal limit on a breathalyzer. What are the ethical issues presented by this scenario?*

Let's apply the numbered elements above to this scenario:

(1) "When do you really *know*?" Remember this question, from first year law school? Usually said in response to a nonlawyer's question, "How can you represent someone you <u>know</u> is guilty?" Lawyers have been known to agonize, Hamlet-like, about "but do I really know?" pondering weighty epistemological notions about the possibility of certainty, of how one can ever know that one knows.

But the rule assumes that, as to another lawyer's misconduct, *either you know, or you don't*. "Know" is defined as "actual knowledge," but "knowledge may be inferred from circumstances." Rule 1.0(g). Knowledge is most often inferred when the fact in question is obvious.

The scenario says counsel and the court learn from court bailiffs of a breathtakingly bad breathalyzer result. Query whether that information was duly entered into the record, findings made, etc., or whether counsel just overheard some courtroom hallway chatter by the bailiffs? In the latter situation, I would not say that the lawyers "know."

(2) A serious ethical violation: Not just any rule violation must be reported. It must meet a higher threshold; it must be a rule violation that "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer." What kind of misconduct is serious enough to trigger the 8.3 duty to report?

Comment 3 to the rule adds these helpful hints: "This rule limits the reporting obligation 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."

OLPR and others have suggested that the test may be something like "misconduct for which the Minnesota Supreme Court has in the past imposed public discipline." The breathalyzer score almost four times the legal limit does seem pretty serious, implicating substantial fitness issues. But what if the score was .09 BAC? Or even .07 BAC? Would *that* be serious enough to trigger mandatory reporting?

(3) Finally, the broad Rule 1.6 confidentiality exception in 8.3 (c) is an even bigger issue. See Wernz, *Minnesota Legal Ethics* (7th ed. 2017) at 1211, noting that, in some cases, "the exceptions to the reporting obligation in Rule 8.3(c) and Rule 1.6 nearly swallow the reporting obligation of Rule 8.3(a)." Id. See also the detailed discussion id. at 344 – 46: "Rule 8.3(c) therefore creates or acknowledges a client veto right. This right is recognized, as a general principle, by the Restatement, "Even in the absence of a reasonable prospect of risk of harm to a client, use or disclosure is also prohibited if the affected client instructs the lawyer not to use or disclose information. Such a direction is the client's definition of the client's interests, which controls." Restatement of the Law Governing Lawyers § 60 cmt. c(ii). "

Similarly, an ABA Opinion, interpreting the Model Rules, concludes, "As a practical matter, clients have the ultimate authority when it comes to protecting confidential information. Hence, however salutary and indeed important the reporting of misconduct of lawyers may be, under the Model Rules the hands of lawyers are often effectively tied in these situations by the wishes or even whims of their clients." ABA Comm. on Ethics & Prof 'l Responsibility, Formal Op. 04-433 (2004) (footnotes omitted), id. at 1211.

Thus, where reporting could implicate a client's interests and the facts on which the report is based came to the lawyer in connection with the representation (which would usually be the case), there is no duty to report at all, absent the client's affirmative informed consent.

But there are other situations where a client's matter would not even be implicated at all. Imagine you are the managing partner of a law firm and you've just settled a very serious sexual harassment case against one of your partners with a non-disclosure agreement. Reporting to OLPR may well be required, notwithstanding the terms of the settlement.

A few final issues about how to report:

First, you are *never* required to file an ethics complaint. The rule simply requires that OLPR be informed. Every so often one hears of lawyers filing ethics complaints and bemoaning the fact they were "required" to do so. That is simply not true.

Second, and relatedly, if you "inform" OLPR of misconduct under 8.3, and a file is opened, you *will* be listed as the complainant, unless you make it crystal clear you don't want to be.

Third, is a report required if OLPR already knows? If you know that the attorney has already self-reported, for example, or the matter has been reported by someone else, do you have to report, too? I think the answer should be "no," but there is no law on the issue to my knowledge.

In the end, it must be acknowledged that a failure to report under Rule 8.3 standing alone is seldom a basis for discipline. While the law and commentary supporting that conclusion is beyond the scope of a short column, a thorough analysis of the issue as of 2012 can be found online here.[5] That article suggests that violating the "rat rule" is very seldom itself a basis for discipline, citing authorities that say Rule 8.3 "one of the most underenforced, and possibly unenforceable, mandates in legal ethics." While there are

a handful of reported disciplinary cases in which the sanctioned lawyer violated the "rat rule," the failure to report is usually one of several instances of misconduct, and in the singular case where the failure to report another lawyer's misconduct was the sole basis for discipline, the notorious *In re Himmel*, 533 N.E.2d 790 (Ill. 1988), discipline was based on facts where the current version of 8.3 unquestionably would not require reporting at all.

Footnotes

1. See, e.g., Minn. Stat. 626.556. One online reference site summarizes current Minnesota law as follows: "Who Are Mandated Reporters: All professionals in the following fields: education, health care, social services, childcare, mental health, law enforcement, correctional services, and clergy. All mandated reporters are required to report immediately upon learning of maltreatment" (e.g., sexual or physical abuse or neglect of a minor or vulnerable adult).
2. Deleted from the quoted text is 8.3 (b), mandating reporting of *judges* — which an entirely different topic — and the last line of (c), containing a very broad exception for any information gained by a lawyer while participating in a lawyers assistance program.
3. http://lprb.mncourts.gov/articles/Articles/Self-Reporting%20Malpractice%20or%20Ethics%20Problems.pdf
4. See Humiston, *Your duty to report*, Bench & Bar of Minnesota (Mar. 2017) http://mnbenchbar.com/2017/03/your-duty-to-report/. There are several earlier OLPR columns as well. See e.g., *The Obligation to Report and Retaliatory Ethics Complaints*, Bench & Bar of Minnesota (April 1998) by then-OLPR Director (now Court of Appeals Chief Judge) Edward Cleary. http://lprb.mncourts.gov/articles/Articles/The%20Obligation%20to%20Report%20and%20Retaliatory%20Ethics%20Complaints.pdf
5. WATERGATE: MORE ETHICS LESSONS FOR LAWYERS, at pp. 12 – 16, http://www.watergatecle.com/wp-content/uploads/2012/06/Ethics_memo-watergateII.pdf