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Rule 8.3: Reporting other lawyers

By Chuck Lundberg, Esq., *Lundberg Legal Ethics* *

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Sometimes known as "the rat rule," ABA Model Rule 8.3 requires every lawyer to report certain professional misconduct by other lawyers to the appropriate disciplinary authority.

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 in the 1970s and 1980s, 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 otherwise protected by Rule 1.6.[2]

On their face, these requirements seem pretty straightforward. There are only three 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 appropriate professional authority, 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?

Before addressing that issue, there is one very important caveat: Several states have adopted markedly differing language for Rule 8.3; you must be sure you are aware of any differences in your own state's rule.[3]

As a threshold matter, note that you must report only "another lawyer." In most states, 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).[4]

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.

Here's an interesting hypothetical to illustrate the boundaries of Rule 8.3 (based on a true story):[5]

> 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, "But how can you represent someone you *know* 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."

Some commentators have suggested that the test may be something like "misconduct for which the court has in the past imposed public discipline." The Breathalyzer score almost four times the legal limit does seem serious, implicating substantial fitness issues. But what if the score was 0.09 blood alcohol content? Or even 0.07 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)."[6]

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 almost always be the case), there is no duty to report at all, absent the client's affirmative informed consent.

But there are other situations where no client's interest would be implicated: Imagine you are the managing partner of a law firm and you've just settled a very serious sexual harassment claim against one of your partners with a non-disclosure agreement. Reporting the misconduct 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 the disciplinary authority 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, in some states, if you "inform" the disciplinary authority of misconduct under 8.3, and am investigation 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 the disciplinary authority already knows? If you know that the attorney has already self-reported, for example, or the matter has been reported by someone else (or is on the front page of the newspaper), do you still have to report? I think the answer should be "no," but there is dictum in a handful of scattered ethics opinions that suggest that it is irrelevant that the misconduct is already "known" by others.[7]

In the end, it must be acknowledged that a failure to report under Rule 8.3 standing alone is rarely a basis for discipline. The law and commentary supporting that conclusion is beyond the scope of this column; a thorough analysis of the issue as of 2012 can be found in "Watergate: More Ethics Lessons for Lawyers."[8] 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 was found to have violated the "rat rule," the failure to report is usually one of several instances of misconduct. 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 found on facts where the current version of 8.3 unquestionably would not require reporting at all.

NOTES

[1] By statute in every state, mandated reporters include all professionals in such fields as education, health care, social services, childcare, mental health, law enforcement, correctional services, and clergy. 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). *See* generally https://bit.ly/2cyA3Cq.

[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] Just by way of example of differing language among the states — and this is not exhaustive: some states (e.g., Alabama, Ohio and Kansas) DO require self-reporting of the lawyer's own misconduct; other states (e.g., Iowa, Kansas) require reporting of any misconduct, however slight; some states have substantially differing language from the Model Rule on "knows" (e.g., "has information"); North Dakota requires the reporting lawyer to file a formal complaint ("initiate proceedings"). And in Washington and Georgia, reporting is not mandatory at all (their version of the rule says "should" report, not "shall"; the Georgia rule expressly provides that there are no disciplinary penalties for a violation of Rule 8.3).

[4] https://bit.ly/2TM9Y8D. See also ABA Formal Opinion 481, *A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error* (Apr. 17, 2018), https://bit.ly/2oSb8SB.

[5] *See* Sean Humiston, *Your duty to report,* Bench & Bar of Minn. (Mar. 6, 2017), https://bit.ly/2RGYZji.

[6] *See also* the detailed discussion id. at 344-46, concluding: "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). "

[7] That position would obviously lead to absurd results: If this morning's newspaper headline reports "Lawyer X admits stealing client funds," must every lawyer in that jurisdiction now report Lawyer X? Apparently only Alaska has anticipated the problem; its rule states that reporting is not required if the lawyer "reasonably believes that the misconduct has been or will otherwise be reported".

[8] Frank R. DeSantis & Karen E. Rubin, Watergate: More Ethics Lessons for Lawyers, at 12-16, https://bit.ly/2VKHopN.

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ABOUT THE AUTHOR

Chuck Lundberg is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with the Minneapolis trial firm of **Bassford Remele**. He now teaches at the University of Minnesota Law School and consults with and advises attorneys and law firms on the law of lawyering through **Lundberg Legal Ethics.** A version of this expert analysis was first published by Minnesota Lawyer on July 3, 2018. Republished with permission.