



Duty to Report

When Does Another Lawyer's Unethical Conduct Become Your Problem?

By Russell R. Yurk

The legal profession is largely self-regulating. Similar to the United States' three-branch government, lawyers are expected to serve as checks and balances on the conduct of each other. Indeed, the legal profession and the judiciary, typically through a bar association or state supreme court, oversee lawyer conduct. Consequently, in certain situations, lawyers have a duty to report the unethical conduct of others. ABA Model Rule of Professional Conduct 8.3 codifies this duty:

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. Model Rules of Prof'l Conduct R. 8.3(a). This article discusses only the ABA Model Rule. The information in this article may not apply in jurisdictions that have not adopted or otherwise have rules differing from this rule.

Lawyers have an obligation to report because they are often in the best position to observe and to identify professional misconduct. See *In re Riehlmann*, 891 So. 2d 1239 (La. 2005). As the Louisiana Supreme Court noted, the legal profession has been entrusted to regulate itself, and "[i]f we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public." *Id.* at 1249.

But lawyers need not report every instance of potential misconduct for fear of violating their own ethical duties. An overbroad reading of Model Rule 8.3's duty to report would quickly lead to an overburdened disciplinary system spending the vast majority of its time attempting to separate the wheat from the chaff. For this

reason, Model Rule 8.3 sets a high standard for mandatory reporting.

Three elements create a duty to report. First, a lawyer must have *actual knowledge* of an ethical violation. Second, another lawyer must have committed the ethical violation. And third, the ethical violation must raise a *substantial question* about the lawyer's honesty, trustworthiness or fitness as a lawyer. If all three elements exist, then a lawyer has a duty to report another's violation to the appropriate disciplinary authority. If a lawyer violates the duty to report, he or she may be disciplined. See, e.g., *In re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (Ill. 1988).

The First Element: Knowledge. The terms "know" and "knowledge" require an attorney to have *actual knowledge*, which he or she may infer from circumstances. Model Rules of Prof'l Conduct R. 1.0(f). A reasonable belief, suspicion, or rumor does not trigger the duty to report. However, lawyers cannot avoid their duty to report by simply sticking their heads in the sand. The actual standard for "knowledge" varies by jurisdiction. See, e.g., *Riehlmann*, 891 So.2d at 1247 ("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."); Ariz. Ethics Op. 90-13 at 11 ("studious ignorance of readily accessible facts is... the functional equivalent of knowledge.") (citations omitted).

On the other hand, Model Rule 8.3's knowledge requirement does not limit the right to report potentially unethical conduct. Lawyers have a right to report any conduct that they feel that a disciplinary authority should investigate. When all three elements exist, lawyers *must* report the conduct; when the three elements do not all exist, lawyers *may* report the conduct.

The Second Element: Another Lawyer. Model Rule 8.3 does not require lawyers to self-report their own ethical violations, but only *other lawyers'* actions. This limitation eliminates Fifth Amendment or self-incrimination issues.

The Third Element: A Substantial Question. The rule standard does not oblige reporting all instances of



■ Russell R. Yurk practices at Jennings Haug & Cunningham LLP in Phoenix. He practices in professional negligence, product liability, and complex litigation. He is admitted to practice in all state and federal courts in Arizona, the Ninth and D.C. Circuit Courts of Appeal, and the United States Supreme Court. He previously served as the DRI Lawyers' Professionalism and Ethics Committee program chair and now serves as committee vice chair. In his spare time, he works as a replay official in the National Football League.

a known ethical violation. The rule standard obliges reporting misconduct only when the misconduct raises “a *substantial question* as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Model Rules of Prof’l Conduct R. 8.3(a) (emphasis added). The Model Rules define “substantial” as “a material matter of clear and weighty importance.” Model Rules of Prof’l Conduct R. 1.0(l). The comments to Model Rule 8.3 recognize that “the reporting obligation [is limited] to those offenses that a self-regulating profession must vigorously endeavor to prevent.” Model Rules of Prof’l Conduct 8.3 cmt. 3. The comment explains that “[t]he term ‘substantial’ refers to the seriousness of the possible offense and not to the quantum of evidence of which the lawyer is aware.” *Id.*

Obviously, what raises a “substantial question” under Model Rule 8.3 must be determined on a case-by-case basis. Some situations are easy calls, such as intentional misrepresentations, which directly implicate a lawyer’s honesty and trustworthiness. *See, e.g.,* Nassau Co. Bar Ass’n Comm. on Prof’l Ethics, Op. 90-9 (lying to a client about the pendency of an action is a reportable offense).

Conversely, determining whether conduct implicates a lawyer’s “fitness as a lawyer in other respects” is much more difficult. Moreover, even when one instance of misconduct may not raise a “substantial question,” repeated instances may indicate a pattern of neglect and oblige reporting.

The Superseding Obligation of Confidentiality. Finally, lawyers need to remain cognizant of their Model Rule 1.6 duty of confidentiality. Model Rule 8.3 contains an exception to the mandatory reporting requirement when reporting would require the disclosure of confidential client information. Model Rules of Prof’l Conduct R. 8.3(c). In most jurisdictions, Model Rule 1.6 is broadly interpreted and covers virtually all information learned in the course of representing a client, regardless of whether it would otherwise be considered privileged. Even information that is public knowledge or disclosed publicly is often considered confidential information under Model Rule 1.6. For purposes of Model Rule 8.3, if reporting would require the disclosure of confidential client information, then client consent of

the disclosure is required and should be encouraged. Model Rules of Prof’l Conduct R. 8.3 cmt. 2.

Although the mandatory duty to report arises only in the most serious of cases, lawyers need to understand when that duty arises to avoid violating their own ethical duties. Regardless of whether a mandatory duty arises, however, lawyers are always free to report suspected or potential ethical violations of other lawyers. 