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REPORTING PROFESSIONAL MISCONDUCT

by
Nancy Kaufman

Reporting the misconduct of other lawyers is essential to the bar's system of self-regulation. Lawyers are in the best position both to observe and evaluate professional misconduct and assist the profession in sanctioning it. Public confidence in the legal profession's ability to regulate its members is diminished when lawyers fail to report substantial violations of the rules, or, worse, cover it up.

Since March 1, 1998, Mass. R. Prof. C. 8.3 has required lawyers to report to the Office of Bar Counsel certain ethical violations by other lawyers. (Lawyers are also required by this rule to report certain judicial misconduct to the Commission on Judicial Conduct.) Focusing on the obligation to report other lawyer's misconduct, this article will discuss who must be reported, what must be reported, the level of certainty required to trigger reporting, when and how the report must take place, and what exceptions apply.

Mass. R. Prof. C. 8.3(a) provides:

A lawyer having knowledge 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 Bar Counsel's office of the Board of Bar Overseers.

According to this rule, then, a lawyer need not report himself or herself but must only report another lawyer who has committed a violation within the rule's definition. The lawyer's duty does extend, however, to reporting the misconduct of another lawyer in the reporting lawyer's firm.

The lawyer whose conduct is at issue need not be on active status or in good standing with the bar. See Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 *Geo. J. Legal Ethics* 259, 294-295 n. 198 (Winter 2003) (hereinafter cited as "Greenbaum"). According to Greenbaum, extending the rule to suspended lawyers or lawyers on inactive status "makes sense because the lawyer on suspended or inactive status remains under the jurisdiction of the disciplinary authority, and the conduct in question might warrant discipline." In addition, the rule probably includes disbarred lawyers, at least in jurisdictions that, like Massachusetts, permit reinstatement after disbarment, because the misconduct would be relevant in a reinstatement proceeding. *Id.*

What must be reported is any conduct that both (1) violates a rule of professional conduct and (2) raises a "substantial question" as to the other lawyer's honesty, trustworthiness or fitness to practice law. A lawyer considering whether to report another lawyer's conduct to bar counsel must therefore first determine whether the conduct constitutes a violation of a rule of professional conduct.

Although ethics opinions abound in interpreting 8.3's requirements, there is very little analysis of the requirement that a rule be violated. Mass. R. Prof. C. 8.4(h) prohibits any conduct that

“adversely reflects on [a lawyer’s] fitness to practice law”, which widely broadens the scope of the rule. Nevertheless, not every objectionable act that might suggest untrustworthiness constitutes a rule violation. For example, comment [1] to Mass. R. Prof. C. 8.4(b), which prohibits a lawyer from committing a criminal act that reflects adversely on fitness to practice, identifies “adultery” as a criminal act that does not have a “specific connection to fitness for the practice of law.”

It appears, however, that lawyers struggle more with whether or not the conduct raises “substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” The comments to Mass. R. Prof. C. 8.3(a) provide some guidance. “[M]isconduct that would constitute a ‘serious crime’ as defined by S. J. C. Rule 4:01, § 12(3), qualifies as misconduct that must be reported.” Comment [3]. Serious crimes include any felony and any crime, whether felony or misdemeanor, that includes as an element “‘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]”. Id.

Conversion of client funds and perjury are examples of other conduct raising substantial questions about a lawyer’s fitness to practice. Indeed, any conduct that, “if proven and without regard to mitigation, would likely result in an order of suspension or disbarment” must be reported. Id. An non-exhaustive list of such offenses includes, in addition to conversion of client funds and perjury, misrepresentations to a court, *Matter of Neitlich*, 413 Mass. 416 (1992), including misrepresentations in pleadings filed in discovery, *Matter of Griffith*, 440 Mass. 500 (2003); a conflict of interest resulting in harm to a client, *Matter of Pike*, 408 Mass. 740 (1990); misrepresentations on bar applications, *Matter of Moore*, S.J.C. No.-09089 (Aug. 9, 2004); and acts of violence, *Matter of Grella*, 438 Mass. 47 (2002). Comment [3] of the rule directs the lawyer to consult the Massachusetts Attorney Discipline Reports for guidance on sanctions applicable to specific conduct.

Comment [3] also explains that “[t]he term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” How much evidence, then, suffices for a lawyer to have “knowledge” that another lawyer has committed a violation that must be reported? Mass. R. Prof. C. 9.1(f) defines “knowledge” as “actual knowledge of the fact in question.” Comment [3], however, advises that it is sufficient that the lawyer “possess[] 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.” Absolute certainty is therefore not required to trigger the reporting requirement, but there is also no obligation to report if a lawyer merely suspects, without supporting evidence, that a reportable violation has occurred.

The amount of information that must be conveyed to bar counsel in making the report is not specified in the rule. When reporting involves disclosures affecting a client, the lawyer should restrict the report to the information necessary to carry out the obligations imposed by Rule 8.3. See comment [14] to Mass. R. Prof. C. 1.6. Once the report is made, Mass. R. Prof. C. 8.1(b) requires lawyers to respond to bar counsel’s “lawful demands for information” so long as disclosure does not violate the obligations imposed by Rule 1.6. Rule 1.6 requires lawyers to maintain the confidentiality of information gained in the representation of a client.

Once the lawyer establishes that a reportable offense has likely occurred, when must the report be made? According to comment [3A], a lawyer must make an immediate report if delay will likely result in injury to the client or another. Examples of such instances include conversion of funds where delay might impede recovery or permit the lawyer to misuse other funds to cover the defalcation. The Illinois Supreme Court suspended a lawyer for one year for his failure to report another lawyer’s defalcations in part because that failure interfered with the Illinois Commission’s investigation and perhaps resulted in additional misuse of funds. In *re Himmel*, 533 N.E. 2d 790, 796 (Ill. 1988). When immediate action is not necessary, the lawyer may wait to report until the “matter is concluded”, comment [3A], but then he must do so

promptly. See Greenbaum, *supra* at 298 n. 216. The report must be made in writing to bar counsel. Lawyers who wish to consult with bar counsel regarding the need to file a report may call ACAP, bar counsel's attorney and consumer assistance program, but they must follow up with a written report if it is decided that the conduct meets Rule 8.3's requirements.

Rule 8.3 does not require the lawyer to report even substantial violations if reporting requires "disclosure of information otherwise protected by Rule 1.6..." See also comment [4]. The client may waive confidentiality, however, and comment [2] to Rule 8.3 advises that a lawyer "should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests." Rule 8.3 also does not require a report if the "information [was] gained by a lawyer...while serving as a member of a lawyer assistance program, as defined in Rule 1.6(c), to the extent that such information would be confidential if it were communicated by a client." See also comment [5] to Rule 8.3. Lawyers faced with reporting the misconduct of an associate or partner in the firm must determine whether or not the lawyer gained the information in his or capacity as counsel to the offender or in the capacity as a member or associate of the firm. In the first instance, Rule 1.6 would apply, but in the second, it would not.

Rule 1.6 does not, however, protect all otherwise confidential communications from mandatory disclosure. Rule 1.6(b) provides that "[a] lawyer may reveal, and to the extent required by...Rule 8.3 must reveal" information

(1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another;

(2) to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of a 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; involving the client or to respond in any proceedings to allegations of misconduct in the representation of the client;

(3) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services were used, subject to Rule 3.3(e);

(4) when permitted under these rules or required by law or court order.

Lawyers may also report to bar counsel professional misconduct that does not fall within the requirements of Rule 8.3. A lawyer may not, however, threaten to report or report another lawyer's misconduct to bar counsel "solely to obtain an advantage in a private civil matter...." Mass. R. Prof. C. 3.4(h). According to Comment [6], Rule 3.4(h) "is never violated by a report under Rule 8.3 made in good faith because the report would not be made 'solely' to gain an advantage in a civil matter."

That Mass. R. Prof. C. 8.3 is sometimes called the "snitch" rule tells us all we need to know regarding the popularity of the requirement to report another lawyer's professional misconduct to bar counsel. A "code of silence," however, does nothing to enhance the profession, preserve the privilege of self-regulation, or protect the public. A good faith adherence to Rule 8.3 is essential to preserving the integrity of the bar and protecting the public.

Please direct all questions to webmaster@massbbo.org.

