

OCDC SPOTLIGHT

Your Duty to Report Misconduct

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A common topic of inquiry we hear from lawyers is: “What triggers an absolute duty to report misconduct?” A short answer might be conduct involving dishonesty or trustworthiness. But, as in any legal issue, there really are no short answers! Missouri lawyers seem concerned about fulfilling their obligation, yet don’t want to be perceived as abusing the discipline system with unnecessary reports. We appreciate this quandary and offer this article as guidance on mandatory and discretionary reporting.

Missouri Supreme Court Rule 4-8.3 requires lawyers to report to disciplinary authorities the conduct of another lawyer that raises a “substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer.” Some lawyers think of it as a “snitch” rule and are reticent to “tattle” on their fellow lawyers. When does your duty to report another lawyer come into play and why is it important?

The rule is specific as to the reporting of violations of the basic duties of honesty and trustworthiness. However, the phrase “fitness as a lawyer” causes some confusion for lawyers trying to figure out what they must report. While the duty to report is mandatory, it calls for some judgment assessment by the lawyer. It states a lawyer “having knowledge”¹ that another has committed a violation that raises a “substantial question” into their fitness *shall* report the matter.

What, then, is a “substantial question” and what raises a question of “fitness?” According to the Comment to Rule 4-8.3, the rule limits the obligation to those offenses that a

self-regulating profession must *vigorously endeavor to prevent*.

There have been some published summaries of informal, non-binding ethics opinions in Missouri addressing the question of what must be reported under the rule. The obvious cases involve some form of alleged dishonesty or misrepresentation:

Inf Op. 97-0029 Duty to report knowledge of another attorney improperly attaching pre-signed notarized signatures of clients to documents that are later prepared.

Inf Op. 95-0075 Duty to report Attorney’s unauthorized use of another attorney’s name and license to appear in another state.

A Missouri ethics opinion that addressed the prong “fitness as a lawyer” advised the inquiring lawyer to report his knowledge of criminal acts committed by another lawyer. *Inf. Op. 2003-89*. Further guidance may come from the comment to Missouri Supreme Court Rule 4-8.4, which suggests “fitness to practice” is raised by illegal conduct such as “willful failure to file an income tax return.” An attorney’s fitness to practice may also be implicated when there is a substance abuse or mental health problem. In less obvious cases, ethics opinions often include the advice that if the inquirer believes the other attorney has violated a rule, it should be reported for evaluation by the discipline office. *Inf. Op. 2000-132*. The Comment to the rule explains that what appears to be an isolated instance of questionable conduct may, in fact, be part of a pattern of misconduct that only a disciplinary investigation would uncover.

Another difficult question that arises for lawyers when evaluating whether the

information they have is something they should report is: “What is the threshold level of *proof* of a violation before I should report?” In the case of mental health or substance abuse, they fear they may have misinterpreted a person’s eccentricities or physical demeanor in an unusual situation. “Who am I to judge?” is a phrase that may cross their mind. It is not required that the reporting attorney conduct an independent investigation into the situation, and usually they are not in a position to do so. The rule requires reporting to the disciplinary authority (in Missouri, the OCDC) because it is in a better position to gather relevant information as it deems appropriate. The possible difficulty in gathering sufficient proof of a violation or of fitness to practice is not something that should concern the reporter.

Attorneys should be aware that not every matter that is reported to the discipline office results in an investigation. Sometimes the report is simply a piece of information that may assist in identifying a lawyer who has a deeper problem that should be addressed. An impaired lawyer may miss court dates and filing deadlines or fail to raise relevant issues, request repeated continuances, or create other delays. While any one of these incidents may not be a violation in itself, a series of complaints or reports of this nature may be an indication that the lawyer is headed for a problem due to some impairment.

The disciplinary system in Missouri, as in many other states, has several options available to address substance abuse, remedial education issues, law office management problems, and mental and physical health issues. Some of those options are disciplinary in nature,

such as a probation, while others are outside of the disciplinary process – a diversion program, referral to MOLAP (the lawyers’ assistance program), or the Complaint Resolution Program.

There is an independent responsibility under Rule 4-5.1 for lawyers with supervisory authority over others to assure their subordinates are in compliance with their ethical obligations. In the case of an impaired lawyer, this requires that a supervisor who is aware of the condition must exercise closer scrutiny because of the added risks that may be present. When ethical obligations have been violated, the firm’s responsibility under the reporting rule (8.3) comes into play. In addition, their duties to clients under 1.4 (adequate communication) and 1.7 (conflict of interest) may require reporting to the affected clients. See ABA Formal Op. 03-429. The firm’s *paramount* obligation, according to the ABA opinion, is to take steps to protect the interests of its clients.

ARE LAWYERS PROSECUTED FOR FAILURE TO REPORT?

There has been an increase in the number of reported cases of discipline for violations of 8.3 in recent years.² Not only must the report be made – *if it raises a substantial question of fitness or honesty* – but it must be made in a timely fashion. While there may be some leeway in timing of the report, clearly if there is a need to protect a client or the public against some future wrongdoing, the report should be made promptly. Waiting several years to report was still found to be a violation in a recent Louisiana case. *In re Riehlmann*, 891 So.2d 1239 (La. S. Ct. 2005).

The Supreme Court of Louisiana in a 2005 case determined the lawyer’s alleged misconduct was such that a “reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred.” In this case, the misconduct related to the prosecution and conviction in a capital offense. Although the Respondent attorney did report the prosecutor’s

conduct five years later, claiming that the information he had was equivocal, a violation was still found for the delayed report.

Respondent Riehlmann’s best friend and law school classmate, a former prosecutor, told Riehlmann about his suppression of exculpatory evidence in a criminal case. This information was shared with Riehlmann on the same day that the friend informed him that he was dying from cancer. Riehlmann did nothing about the situation other than to encourage his friend to take action to correct it. The friend died in 1994 and never took any corrective action. Five years later, when one of the defendants whom the deceased lawyer had prosecuted in 1985 was on death row, Riehlmann learned of newly discovered exculpatory evidence by the defense attorneys. He then contacted the defense lawyers and provided them with an affidavit as to his friend’s statements about suppression of evidence in an unnamed case. Shortly thereafter, he also reported the misconduct to the disciplinary authority. Riehlmann received a public reprimand from the Louisiana Supreme Court in 2005 for violations of rules 8.3 and 8.4. The formal disciplinary hearing committee that first heard the matter did not find an 8.3 (duty to report) violation, but it did find an 8.4 violation (prejudice to the administration of justice). The committee’s reasoning in not finding a reporting violation focused on the ambiguity of the information Riehlmann heard from the deceased lawyer, which did not clearly identify the criminal defendant, and his uncertainty that the evidence would, in fact, exculpate the defendant. On review, the Supreme Court said the Louisiana rule required a lawyer to report “all unprivileged knowledge of any ethical violation by a lawyer, whether the violation was, in the reporting lawyer’s view, flagrant and substantial or minor and technical.”³ The court affirmed that it is clear that absolute certainty of ethical misconduct is not required before the report must be made. The court also reaffirmed that it is not sufficient to report the conduct to others (in this case the defense counsel); rather, the report

must be made to the discipline office.

WHEN TO REPORT

If a legal matter is pending when the misconduct occurs and the lawyer has a concern that a report may negatively impact his client at that point, it may be appropriate to delay. In any case, consultation with the client and consent to the report if it involves confidential information may be necessary. The lawyer may need to balance the harm to the client and the harm to the system in delaying the report. In any case, it is important not to use the timing of a report as a threat or leverage.

A plaintiff lawyer’s failure to report what he believed⁴ was misconduct by opposing counsel in an ongoing personal injury case was found to be a violation of rule 8.3 by a Kansas attorney in 2004. *In the Matter of E. Thomas Pyle III*, 278 Kan. 230, 91 P.3d 1222 (S. Ct. 2004). In this matter the attorney wrote to opposing counsel accusing him of presenting a frivolous position and ignoring admissions made by his client, the insured defendant. He suggested the misconduct also included violations of the rules on candor to the court, expediting litigation, and fairness to the opposing party. Yet he did not report the conduct to the disciplinary authorities, merely listing the possibility in a letter to opposing counsel as one of several actions that he would take if the case were settled within 20 days.

In Re Himmel from 1988 raised the issue of the client’s control of the report. *In Re Himmel*, 125 Ill.2d 531, 533 N.E.2d 790 (S. Ct 1988). In this Illinois case, an attorney took the client’s \$23,000 portion of settlement proceeds. She then hired Himmel to help her recover from the first lawyer. Himmel prepared an agreement for his client and the first lawyer to settle her claim against him for \$75,000. As part of the agreement she was not to initiate any action (including disciplinary) against the lawyer. Himmel did not report the misappropriation to the disciplinary office, asserting that his client did not want him to do so and that the information was privileged. Himmel ultimately received a year’s suspension

from the Illinois Supreme Court. The court stated a lawyer may not choose to circumvent the rules “by simply asserting that his client asked him to do so.” The court also found that there was no privileged information or that it had been waived.⁵

However, the prevailing view seems to be that client consent is required before a report, at least where it may be a discretionary reporting issue. A summary of an informal non-binding ethics opinion from 2001 in Missouri advised an attorney to obtain client consent before reporting another lawyer where he had the client sign a limitation of liability agreement when he was agreeing to a limited representation. The agreement between lawyer and client related to advising the client, who was acting pro se in a lawsuit. The opinion goes on to state that the writer is not opining on whether the other lawyer’s conduct was violative of the rules. It would appear that there was insufficient information to determine that the conduct of the lawyer fell squarely within the mandatory reporting requirements of dishonest conduct or fitness to practice. Inf. Op 2001-39.

WHY DO WE HAVE THE DUTY TO REPORT AND IS THE RULE EFFECTIVE?

Illinois authorities reported a significant increase in the number of reports of professional misconduct from lawyers after the *Himmel* case was published. There is also some sentiment that a rule requiring reports of misconduct allows the reporting attorney a sense of authority to do so, as opposed to a voluntary rule. A mandatory rule allows the attorney to rely on the duty to report, rather than making a subjective personal decision. OCDC estimates that in 2004, 30 attorneys reported misconduct to the office under their duty to report. An additional significant number of attorneys sent in complaints of misconduct and were listed in our records as the official complainant. Statistics are not available on the results

of those reports.⁶ However, it does appear that attorneys are taking their obligation to report seriously and that it is effective to some degree.

The need for the rule arises from the fact that we are a self-regulating profession. It is important for lawyers to bring to the attention of disciplinary authorities the types of violations that would be difficult for others to discover and which could pose continuing harm to clients or the public. The Preamble to our Rules of Professional Conduct states: “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” The Preamble further expounds on our duty to improve the law, administration of justice, and quality of service rendered by the profession and to “help the bar regulate itself in the public interest.”

Self regulation helps to maintain the profession’s independence from government domination. The supreme court of each state governs the lawyers’ conduct and thereby aligns us with the judiciary branch of government separate and apart from the executive branch, which oversees most other licensed professionals. The Preamble notes that “abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.” The credibility of our system of self-regulation is suspect when lawyers do not take this duty seriously.

SOURCES FOR INFORMATION

ABA Formal Op. 03-431 - Lawyer’s Duty to Report Rule Violations By Another Lawyer Who May Suffer From Disability Or Impairment (August 2003).

ABA Formal Op.03-429 – Obligations With Respect to Mentally Impaired Lawyer in the Firm (June 11, 2003). www.Mobar.org/opinions/index - for Missouri informal ethics opinions.

Greenbaum, “The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform,” Volume 16, no. 2 *Geo. J. of Leg Ethics*, 259.

Footnotes

¹ The new proposal under “Ethics 2000” revisions to the ABA Model Rules suggests the phrase “having knowledge” be changed to “who knows.”

² In research for this article, more than a dozen cases were found from various jurisdictions since 2000, including an 8.3 violation.

³ The Louisiana Rule 8.3(a) in effect in 2001 was more stringent than the model rule. It stated: “A lawyer possessing unprivileged knowledge of a violation of this code shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.” Apparently, the rule did not include the “substantial question” language and did not limit the violations to those of honesty, trustworthiness or fitness to practice.

⁴ Kansas Rule 8.3 states: “A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.” Interestingly, although the opposing counsel’s actions were investigated by the discipline office, no violations of rules were found.

⁵ The Illinois rule at the time required reporting of “unprivileged knowledge” of a violation. Some commentators believe that Illinois’ broad interpretation requiring a report of information regardless of whether the client consents is a minority view. Rotunda & Dzienkowski, *Legal Ethics-Lawyer’s Deskbook on Professional Responsibility* (2005-2006), page 1072.

⁶ A report published in 1997 on Arizona lawyers reported that 19% of the investigations initiated were the result of lawyer reports. Illinois reported from 1992-95, 8.9% of the complaints received by the agency were from lawyers and 18.2% of the formal disciplinary charges were initiated by lawyers. Greenbaum, “The Attorney’s Duty to Report Professional Misconduct,” 16-2 *Geo J Leg Ethics* 259, FN.63.