

THE OBLIGATION TO REPORT AND RETALIATORY ETHICS COMPLAINTS

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When should an attorney in Minnesota feel a *duty* to report another attorney to the Office of Lawyers Professional Responsibility? When is the *threat* of reporting an attorney to the office by another attorney an ethical violation? These questions have come up recently on several occasions and deserve a response.

An attorney's duty to report another attorney who has committed a violation of the Rules of Professional Conduct is governed by Rule 8.3,^{Ftn. 1} which states in part as follows:

(a) 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 Office of Lawyers Professional Responsibility.

Known to some as the "snitch" rule, Rule 8.3 balances the inherent unfairness in forcing lawyers to report each other for even minor infractions with the public exploitation that results when members of the profession turn a blind eye toward serious (and often unprivileged) wrongdoing on the part of other attorneys (think Watergate). Our office does not wish to become a tool in a struggle between opposing counsel nor do we wish to go beyond our mandate and investigate all instances of perceived wrongdoing. At the same time, we do not want members of the profession shirking their responsibility by allowing unfit attorneys to prey on the public if they have information that falls within the parameters of Rule 8.3.

This reporting provision had its beginnings in the United States back in 1908. At that time the American Bar Association offered an aspirational provision, Canon 29 of the Canons of Professional Ethics, which suggests that: "lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession" ^{Ftn. 2} Powerful words, though not easily enforced. Sixty years later, as law schools and universities revisited "honor codes" for students, the ABA took another look at its reporting provision and decided it was time to suggest a mandatory reporting obligation. Consequently, in 1969, with the adoption of the Code of Professional Responsibility and the accompanying disciplinary rules, the ABA's Clark Report made clear that from then on this reporting provision was "to be not merely self-edifying but binding," since it had become clear to leaders of the profession that "lawyers' and judges' reluctance to report attorney misconduct was a major problem with attorney discipline." ^{Ftn. 3} The mandatory provision, effective in 1970 as DR 1-103 stated, in part:

[A] lawyer possessing unprivileged knowledge of a violation . . . shall report such knowledge to a tribunal or other authority in power to investigate or act upon such violation.

No longer was reporting professional misfeasance an aspirational option for lawyers; "shall" replaced "should" in defining a lawyer's obligation when confronted with such conduct. Arguably, the legal profession was not prepared for such a change; it appeared that the rule was difficult to enforce and easy to ignore. As each of us has the right under the Fifth Amendment to resist self-incrimination, so many members of our profession appeared unwilling to incriminate their brethren in the legal world.

By 1985 with the passage of the Rules of Professional Conduct and the current Rule 8.3, further changes were made with the intention of making the requirement more understandable and more workable. Maintaining the mandatory reporting language, the rule clarified the requirement of a "substantial question" as to the lawyer's honesty, trustworthiness or fitness, limiting the lawyer's obligation to report, while suggesting to members of the profession that the failure to report egregious violations within the meaning of the rule would result in the possibility of discipline. Rule 8.3(a) applies when:

a lawyer has knowledge that another lawyer has committed a rule violation;

that violation raises a substantial question as to the lawyer's honesty, trustworthiness or fitness ("substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware); and

the matter is not allowed or required to be kept confidential under Rule 1.6.

A lawyer has an obligation to report only when the violation fits within these narrow parameters. He is forbidden to report misconduct without client approval when he learns of that misconduct through a privileged attorney-client communication. However, the lawyer may, in his or her discretion, disclose client secrets in order to report.^{Ftn 4} Further, even when a violation is learned through a privileged communication, when the misconduct is sufficiently serious, a lawyer should encourage a client to consent to disclosure where the prosecution of the matter would not substantially prejudice the client's interests.

As a practical matter, the percentage of complaints filed by attorneys with this office is relatively small and remains stable at approximately 7 to 9 percent of all complaints annually. Roughly half of all complaints are filed by clients and another quarter are filed by adverse parties.

In the final analysis, lawyers are understandably reluctant to "turn in" another, perhaps on a "there but for the grace of God go I" basis. Nevertheless, when the misconduct is egregious and unprivileged, many come forward because it is the right thing to do for the public and the profession, not because they are frightened of prosecution themselves for the failure to report, for the likelihood of such a prosecution for non-reporting is very remote.

"RETALIATORY COMPLAINTS"

If an attorney is unlikely to be disciplined for failure to report, does the same hold true for an attorney who, for tactical advantage, threatens another with the filing of an ethics complaint? Not necessarily. This area of professional discipline is somewhat related to the threat of a lawyer to pursue criminal charges to gain an advantage in a civil matter. In both instances, a lawyer is threatening opposing counsel (or the client of opposing counsel) with some sort of reporting (in one case to this office, and in another to prosecuting authorities) to force a desirable outcome in a case. Lawyers should be aware that although such threats are not expressly prohibited, such conduct may still run afoul of the professional disciplinary system. The result may well be that they find themselves respondents rather than complainants.

Prior to 1985, lawyers were specifically prohibited from instigating or threatening to instigate a criminal prosecution to gain advantage in a civil matter. Since then, lawyers have not been prohibited from using the possibility of bringing criminal charges against another in a civil matter to gain relief for a client but only where:

the criminal matter is related to the client's civil claim;

the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts; and

the lawyer does not attempt to exert or suggest improper influence over the criminal process.^{Ftn 5}

With regards to improper influence, government lawyers are in a particularly tenuous position when they threaten to use their power to somehow guide the criminal process. The most objectionable scenario is a government attorney suggesting to an unrepresented party that a civil action be dropped or influence would be brought to ensure that other government authorities would begin a prosecution. So although the strict prohibition has been removed in this area, attorneys should take care to ensure that they do not run afoul of the limits to this practice.

Likewise, a lawyer's use of a threat of filing a disciplinary complaint or report against opposing counsel to obtain advantage in a civil case may subject the lawyer to discipline, despite the absence of an express prohibition on the subject. Such a threat may not be used as a bargaining point when the misconduct at issue raises a substantial question as to opposing counsel's honesty, trustworthiness, or fitness as a lawyer because in these circumstances, barring other impediments, the lawyer is ethically required to report such misconduct. The threat would also be improper:

if the professional misconduct is unrelated to the claim;

if the disciplinary charges are not well-founded in fact and in law (Rule 3.1: meritorious claims and contentions);

if a threat has no substantial purpose or effect other than embarrassing, delaying, or burdening the opposing counsel or his client (Rule 4.4: respect for rights of third persons); or

if the misconduct prejudices the administration of justice (Rule 8.4(d): misconduct).^{Ftn 6}

Finally, an attorney should be aware that Rule 8.4(b) prohibits the committing of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Threats of disciplinary action may constitute extortion under the criminal law of a respective jurisdiction, and therefore should be avoided for that reason as well. In the final analysis, if there is a substantial question as to a lawyer's honesty, trustworthiness, or fitness the attorney misconduct should be reported to the extent required by Rule 8.3(a) and not used as a bargaining chip in a civil case.

CONCLUSION

Seldom will this Office ever seek discipline of an attorney for failing to report another. There is a "big brother" aspect to such a course that is offensive; nevertheless, the provision remains and it remains for a

reason. Self-regulation of a profession includes the willingness and ability of its members to acknowledge, when we must, that one in our midst seriously threatens the integrity of us all. In that case, within the parameters of Rule 8.3, a lawyer should consider the needs of the public and his profession, after he has addressed the needs of his client.

NOTES

¹ *Rule 8.3 Reporting Professional Misconduct*; reads in part: (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Board on Judicial Standards. (c) This Rule does not require disclosure of information that Rule 1.6 requires or allows a lawyer to keep confidential.

² Ronald D. Rotunda, *The Lawyer's Duty To Report Another Lawyer's Unethical Violations In The Wake of Himmel*, 1988 Univ. of Ill. L.R. 977, 979.

³ Rotunda, *Ibid.*, 979, 980.

⁴ See 1.6(b)(6), MRPC, which states in part:

(b) A lawyer may reveal:

* * *

(6) secrets necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's 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. See Rule 8.3.

⁵ See ABA Formal Opinion 94-383: "use of Threatened Disciplinary Complaint Against Opposing Counsel."

⁶ *Ibid.*