Your duty to report

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Imagine the following scenario: 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?

What do the rules say?

Rule 8.3 provides that "[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."Ftn1 Let's take this rule in parts.

First, what do you know? The rules define "knows" as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."Ftn2 Here, several lawyers (the judge and counsel in attendance) have actual knowledge of breathalyzer results disclosed by law enforcement bailiffs and the unprofessional conduct during the hearing. Second, at least two rules are potentially implicated by appearing in court extremely intoxicated, namely, Rule 1.1 (competence) and Rule 8.4(d) (engaging in conduct that is prejudicial to the administration of justice). Third, is a substantial question of fitness presented? The rules define "substantial" as a "material matter of clear and weighty importance."Ftn3 I think few will disagree that choosing to appear at a contested hearing so intoxicated that you are several times over the legal limit to drive suggests the presence of a chronic illness and a substantial question of fitness.

Rule 8.3 then requires a report, but to whom? The rules says "appropriate professional authority." The rule itself does not explain to whom this refers but the comments indicate that "[a] report should be made to the bar disciplinary agency unless

some other agency, such as a peer review agency, is more appropriate in the circumstances."Ftn4 The judicial code provides a bit more guidance (and discretion) to judges in situations such as this:

> A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.Ftn5

Barriers to reporting

I recognize that few people want to report a peer or other lawyer to disciplinary counsel. Throughout life we are taught not to tattle. Reporting involves some exposure, even when confidential. The subject of the report is going to know who made the report because our Office does not accept anonymous reports, except in a few circumstances. You will most likely become a fact witness, and will be obligated to take time to answer questions and provide evidence, if needed. This is difficult, particularly in small communities where lawyers know each other. The above scenario is even more complex because what you really want to happen is for the attorney to get help, not call them out in a way that may lead to discipline. Often too, I think attorneys hope someone else will take care of it for them. I get it. The profession gets it, as evidenced by the rules preamble:

> Virtually all difficult ethical problems arise from the conflict between a lawyer's responsibilities to clients, the legal system and the lawyer's own interest in remaining an ethical person while earning a satisfactory living.Ftn6

This duty, however, is non-discretionary and belongs to all attorneys with the requisite knowledge. A self-regulated profession relies in part upon such reports in order for the disciplinary/regulatory authority to fulfill its obligation to investigate and address matters that may present a risk to the public or the profession. The rule is narrowly tailored and tied to the seriousness of the issue. Because the rule is non-discretionary, failure to report that which is required to be reported is itself an ethical violation by the non-reporting attorney and can lead to discipline. The classic case is *In re Himmel*, an Illinois case. In *Himmel*, the Illinois Supreme Court suspended for a year an attorney who failed to report his client's prior counsel's misappropriation of funds.Ftn7

Minnesota does not have any public discipline cases involving an attorney's failure to report under Rule 8.3. However, this fact should not lessen the seriousness with which you should approach your ethical obligation. I know many Minnesota attorneys take this obligation seriously, as evidenced by the numerous advisory opinion requests received by the Office involving whether a particular factual scenario requires reporting. Please take this duty seriously. Also note that, as the text of the rule makes plain, not all professional misconduct creates a mandatory obligation to report. You are not obligated to report rule violations that do not raise a substantial question as to another attorney's honesty, trustworthiness, or fitness. You are free to do so, of course, but just recognize that you are doing so because you have chosen to, not because you have an obligation to do so.

What about my own conduct?

There is a common misconception that the ethics rules require self-reporting. That is not the case. No rule requires a lawyer to report his own misconduct. However, your duty to report another's conduct may implicate your own misconduct, *e.g.,* failure to adequately supervise another.Ftn8 There also may be many good reasons why individuals may choose to self-report.

Confidentiality

One final note on confidentiality is appropriate. The rule does not require an attorney, when reporting, to disclose information that Rule 1.6 requires or allows a lawyer to keep confidential.Ftn9 The comment advises a lawyer in this position, however, to encourage a client to consent to the disclosure "where prosecution would not substantially prejudice the client's interest."Ftn10

Conclusion

Thank you to the attorneys and judges in Minnesota who take seriously your Rule 8.3 obligation. No one relishes reporting on another lawyer, and it can place the reporter in a very uncomfortable and even untenable position. Your ethical obligation requires it of you, as does, sometimes, your moral obligation, as presented in the above scenario. Even if the duty to report was not clear, I would hope that all attorneys would reach out to get a similarly situated lawyer assistance through a lawyer assistance program like Lawyers Concerned for Lawyers. Any questions regarding your duty to report under the professional ethics rules can be directed to the Office's Advisory Opinion line, 651-296-3952.

NOTES

1. Rule 8.3, Minnesota Rules of Professional Conduct (MRPC).
2. Rule 1.0(g), MRPC.
3. Rule 1.0(m), MRPC.
4. Comment [3], Rule 8.3, MRPC; *see also* Comment [1], Rule 8.3, MRPC, referencing "disciplinary investigation."
5. Rule 2.14, Minnesota Code of Judicial Conduct.
6. Preamble [9], MRPC.
7. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988).
8. Rule 5.3, MRPC.
9. Rule 8.3(c), MRPC.
10. Comment [2], Rule 8.3, MRPC.