Self Regulation and the Duty to Report Misconduct
Myth or Mainstay?

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--Model Rule 8.3(a) "*imposes a mandatory reporting obligation on every lawyer with respect to other lawyers' violations of the professional rules. Probably no other professional requirement is as widely ignored by lawyers subject to it.*"[1]

"Moreover, the lawyer's duty to report professional misconduct is the foundation for the claim that we can be trusted to regulate ourselves as a profession. If 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."[2]

Introduction

The notion that we are to report the 'infraction' of another receives mixed messages starting at an early age. As children, we are taught by harried moms that 'tattling' is wrong or at a minimum, unnecessary. Peer pressure of youth teaches the perils of being a 'snitch' under threats of ostracism or retaliation. Yet with age often comes the sense of responsibility that standing silent in the face of wrong amounts to acquiescence and participation in the act. Still, whistle-blower protections are often needed to assure against the notion (perhaps ineffectively) that reporting misdeeds will serve no other purpose than to ensure the isolation and condemnation of the messenger.

In the professions, we are taught that noble men and women will rise to a higher calling for justice, adherence to loftier aims, and engage in 'self regulation'. In practice, some of the professions have fallen a bit short, to be sure, as our colleagues in the accounting realm came to regret in the days following the demise of Enron and others. In the medical profession, the so called 'conspiracy of silence' has become almost accepted as a deeply ingrained part of the fraternity of doctors and health care providers. Can the legal profession lay claim to a better track record? Is the duty to report ethical misconduct an unreasonable expectation in a profession that encourages cooperation and accommodation as a means of delivering justice? Can lawyers *afford to fail* in this most difficult of obligations?

Just What Are We To Do?

Intertwined within the answers to the questions posed above is a threshold inquiry: Just what is expected of us? While Model Rule 8.3(a) purports to give guidance, it leaves many unanswered questions.

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[1] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, PRACTITIONER'S EDITION (1986) at section 12.10, p. 683.

[2] *In re* Riehlmann, 891 So.2d 1239 (La. 2005) at 1249.

The duty was embodied in DR 1-103(A) of the 1969 Model Code of Professional Responsibility and was carried forward to the 1983 Model Rules of Professional Conduct as Rule 8.3(a). In the 1983 version, the rule language read:

> "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 appropriate professional authority."[3]

The seemingly straightforward language of the rule raised questions almost from the start. What information was sufficient to constitute 'knowledge' for purposes of the reporting obligation? The terminology section of the Model Rules defined 'known' or 'knows' as "actual knowledge of the facts in question." But does that standard include a duty to investigate before the obligation is triggered? The almost universal reply was 'no', deferring to the proper investigative discipline authorities that unsavory task. But how much information constitutes 'knowledge'? The *Riehlmann* decision in Louisiana appears typical of court decisions seeking to answer that question and held on the point that the duty to report misconduct arises when "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."[4] The Court counseled that the standard is an objective one, not tied to the subjective beliefs of the lawyer.

Okay, so *when* must the lawyer report the misconduct? Again, the rule is silent in that regard. While the language found in opinions around the country vary somewhat, the prevailing view is that reporting should be made 'promptly'.[5] As the Louisiana Supreme Court noted in the *Riehlmann* decision, "The need for prompt reporting flows from the need to safeguard the public and the profession against future wrongdoing by the offending lawyer. The purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented."

Do we report *every little thing?* Well, no, but how clear is the language "a violation…that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects…"? While the effort was commendable, the clarity left much to be desired. The comments to the Model Rule appear to concede the difficulty:

> "If a lawyer were obliged to report every violation of the Rules, the failure to report would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. The Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule."[6]

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[3] MODEL RULES OF PROF'L CONDUCT R. 8.3 (1983).
[4] *In re* Riehlmann, 891 So.2d 1239 (La. 2005) at 1247.
[5] *See* Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap to Reform*, 16 GEO J. LEGAL ETHICS 259, 298 (Winter 2003).
[6] MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt [3] (2007).

The emphasis in both the rule and the comments appears to have been on the seriousness of the misconduct and purports to disclaim the relevance of quantity of evidence of wrongdoing. But without more, how does the practitioner decide what is 'serious' and what is not? While a failure to communicate and lack of diligence in a civil matter may be easily remedied, similar misconduct in a capital case could be disastrous (indeed fatal). Would most clients consider a glaring conflict of interest to be of little consequence? By limiting the standard to questions of *honesty* and *trustworthiness*, one might reasonably question whether or not we have carved the matter a bit too thin. And what of *fitness*? Most would assume that the term carries over from the bar admissions process where the applicant's fitness implies for example, "mental or emotional suitability of the applicant to practice law…". [7]

Requiring a 'measure of judgment' appears to dump the problem of what to report back into the lap of the busy lawyer who is left to grapple (if indeed the thought occurs) with the somewhat gauzy language of the rule. Are we back to a "You'll know it when you see it" standard? The dizzying array of vexing questions raises practical, legal and professional issues that can cause one to wonder if a duty to report misconduct isn't merely a trap for the unwary. Is the ethical duty to report misconduct a myth, or is it in fact a mainstay of our claim that we are a 'self-regulating' profession?

"If we fail in our duty, we forfeit that trust…"

At once let us dash the notion that the obligation to report misconduct is but a myth. Such cynicism is unworthy of our legal profession. But before we become too intoxicated by our own sense of high minded purpose, it is important to recall that the *ethical* duty to report **<u>and about which we explore</u>** is the one which carries with it the potential for sanction should we fail. There is a whole set of reporting that does in fact occur and that often falls *outside* the parameters of the Rule.

My disclaimer, albeit late, is that I approach this issue as a 29 year lawyer (nearly 18 of them as a private practitioner) as well as the Chief Disciplinary Counsel of our state for over 11 years. Experience and perspective are valuable assets—and I lay claim to nothing more than that which my years in those roles have provided.

While it is true that the most significant sources of complaint about lawyer misconduct are disgruntled clients, the trend clearly reflects higher rates of reporting by both lawyers and judges. With both groups, the matters reported would rarely fit within the confines of the arguably narrow confines of Rule 8.3(a). Rather, a growing sense of frustration with our profession (and perhaps a bit of nostalgia for 'the way things used to be') is often found as the motivation that spurred the lawyer or judge to report misconduct. The professionalism movement sweeping the country, often embodied in Inns of Court chapters and similar groups, stirs the sense of guardianship for the legal profession that serves such an integral role in our system of justice. The lawyers and judges who report misconduct under such circumstances tend to embrace the notion that it is important to 'do the right thing, even when no one is looking'. That is, they report misconduct even though failure to do so would not carry the threat of disciplinary action under the provisions of Rule 8.3(a).

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[7] Louisiana Supreme Court Rule 17, section 5(B).

While such trends are encouraging to see, that such a sense of honor and duty does not yet permeate the entire legal profession requires that, at a minimum, the duty to report serious misconduct carry with it the very real potential for disciplinary sanction. As the Court in *Riehlmann* noted, "Lawyers are in the best position to observe professional misconduct and to assist the profession in sanctioning it."[8] The harm that can and often does befall the unsuspecting client, unless stopped, threatens to spread like a cancer, metastasizing within a law practice, causing untold damage and injury to others. And the misfortune is not that of the victim clients alone. Each serious violation of the ethics rules by lawyers sworn to uphold the law further crumbles the already brittle respect that the legal profession enjoys in the public eye.

For perhaps more selfish reasons, as a group, lawyers should demand greater compliance with Rule 8.3(a). The lawyer-thief who converts client funds harms the client of course, but often triggers recompense from a Lawyers' Fund for Client Protection, common to most jurisdictions (and that is funded by lawyers typically). The incompetent, neglectful lawyer may well have rendered ineffective assistance in a criminal matter requiring a retrial; thus, further clogging an already overburdened justice system. For a whole host of reasons, lawyers have a huge interest in weeding out bad actors from the legal profession. A really sobering one is the threat of regulation by those outside the profession.

Few, if any, would extol the virtues of transferring responsibility for regulating the practice of law from the judiciary to either an executive or legislative branch of government. Yet public outcry for accountability can translate to voter accommodation by those of the political persuasion. Proper stewardship of our ethical obligations can serve as a powerful bulwark against the improper and truly frightening specter of political intervention in disciplinary regulation. A naïve notion? Not at all. The 'privilege' of self regulation could so easily drift towards the view that it is but an 'option', one that can be easily removed if not treated with the serious sense of purpose it deserves.

Self regulation is no myth. It is at the core of a viable legal profession. The duty to report ethical misconduct rests within the nucleus of that core, often hidden from view but as real as are the consequences should we fail; for if we do, "we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public."[9]

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[8] *In re* Riehlmann, 891 So.2d 1239 (La. 2005) at 1249.
[9] *Id*.