Ethical Obligations to Report an Attorney’s Misconduct

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Today’s Agenda

Talk you through how Model Rule 8.3 works with respect to a lawyer’s obligation to report the ethical misconduct of another lawyer

Discuss the categories of (mis)conduct that are among the hardest to deal with and how Model Rule 8.4(g) fits in

Offer some practical guidance for lawyers and law firms separate from what the ethics rules require
See Something Say Something Scenarios

To give context, we are going to go through a few scenarios to make us all uncomfortable for the next 70 minutes or so

These include situations that sadly could be met with a lot of #MeToo responses; some involving impaired lawyers, dishonest lawyers and bullies
Ethics Rules You Need to Know

Model Rule 8.3 – this one actually has been enacted (give or take) most everywhere you might practice

Model Rule 8.4(g) – this one actually hasn’t been enacted (yet) almost anywhere

Model Rules 2.1 & 4.4(a) – again, some version of these exist most everywhere
Model Rule 8.3

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 ...

Except ...

“This Rule does not require disclosure of information otherwise protected by Rule 1.6“
Sexual Harassment

What is it?

How to recognize and deal with it?

How not to be a part of the problem.
Scenario #1

Kim is a law firm associate, and a client’s GC she meets with on occasion attempts to engage in sexual conversation with her.

Kim reported this behavior to the supervising partner on the matter, but the partner told her not to “rock the boat” since the client is an important one, and the client has repeatedly stated he wants Kim on his matters.

You are a partner in the Firm. Kim comes to you with her concerns. What should you do?
The Appropriate Response

Bottom Line – Management must investigate and address the situation. Putting your head in the sand is not an option.

If conduct persists, might need to fire the client.
Scenario #2 ...

You attend a bar association event with another firm lawyer. During the cocktail hour, he refers to several female lawyers as “honey,” and touches one of the women in ways that appear to make her uncomfortable. He won’t keep his hands off her, even as she tries to move away.

What should you do? Is this a Rules violation that needs to be reported?
Your Response

Practical Advice for Handling the Situation

How adoption of ABA Model Rule 8.4(g) might change the reporting obligation.
Model Rule 8.4(g)

It is professional misconduct for a lawyer to:

g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law...
Model Rule 8.4(g)

“Discrimination” includes “harmful verbal or physical conduct that manifests bias or prejudice towards others” and that “harassment” encompasses “sexual harassment[,] ... derogatory or demeaning verbal or physical conduct.”

“Conduct related to the practice of law” includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.
Scenario #3

You learn in the course of representing a client that her prior lawyer had sexually assaulted her. She provides substantial, credible evidence to corroborate her claims.

The client has refused to authorize you to disclose that information to disciplinary authorities based on the advice of her therapist.

Can you report the lawyer to disciplinary authorities?
The Answer is No


Concluding that under Rule 8.3, duty to maintain client confidential information trumped duty to report, in a case where attorney learned that prior counsel raped and impregnated the client.
The problem of impaired lawyers

Aging, substance abuse, or even mental health and wellness issues are a big problem within the legal profession.

Guidance exists from the ABA . . . both as to lawyers in, and outside of, your firm.

Impairment issues can also surface as sexual harassment or other problematic conduct.
Scenario #4

You hear from an administrative assistant that a partner has started keeping odd hours, disappearing for long stretches of the work day, missing appointments and failing to return calls.

You have noticed a deterioration in your colleague’s appearance and had a couple of recent conversations where he seemed “off” and somewhat disoriented.

What should you do? If you suspect a substance abuse problem, are you obligated to report your suspicions to disciplinary authorities?
Impairments: ABA Formal Op 03-429

Firm must confront the lawyer, “forcefully” urge the impaired lawyer to accept assistance to prevent future violations or limit the ability of the impaired lawyer to handle legal matters or deal with clients.

No duty to report if the impairment that caused a rules violation has ended or the firm is supervising and monitoring the lawyer’s work so closely that the firm is “able to eliminate the risk of future violations”.
Scenario #5

After a series of missteps on client matters, you discover a litigation partner has a substance abuse problem.

You believe the impairment is serious enough that the lawyer is unable to effectively represent clients in pending cases, and tell the lawyer to get professional help. Instead the lawyer decides to leave the firm.

The firm is able to continue servicing the work, but the departing lawyer wants to pitch to keep her clients. Are you required to disclose the impairment to those clients or disciplinary authorities?
This is Tricky… (ABA Formal Op 03-429)

Distinguishes between clients who decided to transfer their files to the departing lawyer and those who have not made a decision.

If the firm says something, it needs “a reasonable factual foundation for any such statements”

There are also ADA and FMLA considerations, as well as risk of getting sued for defamation or tortious interference.
Other Noxious Behavior

Dishonest lawyers

Plain Old Bullying

Improper threats

On the ethics side, remember the client’s role and veto power over much of Rule 8.3
Dishonest Lawyer Scenario

You discover that your partner has misappropriated escrowed funds. You go to the client, and ask for permission to report the misconduct.

Client refuses, believing that doing so would prevent the lawyer from earning enough money to reimburse the client. Client continues working with the dishonest lawyer on other matters.

Can you report?
Again, the Answer is No

Supreme Court of Rhode Island Advisory Panel Opinion in *In re Ethics Advisory Panel Opinion No. 92-1.*

Duty to maintain confidentiality overrides duty to report even criminal misconduct.
Bullying and Other Obnoxious Behavior

Model Rules preamble: “A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.”

Rule 4.4 “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.”

Florida Bar v. Norkin, 132 So.3d 77 (Fla. 2014) -- two year suspension for repeated pattern of bullying, rude and obnoxious behavior.
Using the Grievance Process for “Leverage”

Short Answer: Don’t Do It (E.g. ABA Formal Opinion 94-383)

Relatedly, a lawyer may not condition a settlement on an agreement that an adversary either not pursue or withdraw an ethics complaint.
Practical guidance beyond ethics

Organizational policies

Vetting those you are bringing into the organization

Integration and education

The value of outside guidance