

Reporting Misconduct

Key Concepts



- A lawyer who knows that another lawyer has violated the rules of professional conduct must report that lawyer if the violation raises a substantial question as to the lawyer's honesty, trustworthiness or fitness."
- A lawyer who knows that a judge has violated the rules of judicial conduct must report that judge if the violation "raises a substantial question" as to the judge's fitness.
- A lawyer need not report any incident if it would cause the lawyer to disclose confidential information under Rule 1.6.

Introduction



Reporting the misconduct of other lawyers is essential to the bar's system of self-regulation. Lawyers are in the best position both to observe and evaluate professional misconduct and assist the profession in sanctioning it. Public confidence in the legal profession's ability to regulate its members is diminished when lawyers fail to report substantial violations of the rules, or worse, cover them up.

Why are lawyers in the best position to know of unethical acts done by other lawyers? Clients may sometimes know of lawyer misdeeds but clients do not have the knowledge of the professional rules to determine when a lawyer or judge is behaving in a professionally inappropriate manner. Lawyers are in a position to see the conduct of other lawyers and judges, and they know when conduct is inappropriate. So lawyers have a duty to report the conduct of each other and of judges. In addition, a reporting rule makes sense in light of the profession's claim to the right to regulate itself. One state supreme court has stated:

Reporting another lawyer's misconduct to disciplinary authorities is an important duty of every lawyer... [T]he 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.¹

At a very basic level, reporting increases compliance with the rules because the chance of being caught is greater. Either a bad actor is deterred or a bad actor is more likely to be caught.

Rule 8.3(a) requires a lawyer who knows that another lawyer has violated the rules of professional conduct to report that lawyer if the violation "raises a substantial question" as to the lawyer's honesty, trustworthiness or fitness as a lawyer.² However, a lawyer need not report if doing so would require the lawyer to disclose confidential information protected by Rule 1.6.³ In addition, a lawyer need not report if the lawyer learned of the violation by way of a lawyer assistance program. A lawyer assistance program is designed to assist lawyers who have substance abuse problems or other such issues. No lawyer would attempt to get help from an assistance program if the information the lawyer conveyed in the program could be used against him.

However, there are limitations. First, a lawyer may not *know* that a lawyer has behaved improperly. What if the lawyer had a *reasonable belief* that another lawyer behaved improperly but does not *know* it with certainty? The duty to report arises *only* with *knowledge*. Second, the duty to report applies not to all violations of the rules but only to violations that raise "a substantial question" as to the lawyer's *honesty* or *fitness*. This limitation narrows the situations requiring reporting but, unfortunately, does not give much guidance as to when a violation of the rules of professional conduct might qualify for reporting. Any lawyer has, therefore, significant discretion as to whether to report another lawyer or not.

The Rule

Rule 8.3(a) opens with the basic concept that a lawyer is required to report another lawyer who knows that another lawyer has violated the rules of professional conduct.

THE RULE

Rule 8.3

The Duty to Report Misconduct

- (a) 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.

Rule 8.3(a) has two significant limitations on its application. First, in many situations, a lawyer may not know for sure that another lawyer has behaved improperly. The duty to report under Rule 8.3(a) arises only with *knowledge*.

Second, the duty to report applies not to *all* violations of the rules but only to violations that raise “a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” This qualification narrows the situations requiring reporting but, unfortunately, does not really tell lawyers when a violation of the rules might qualify as raising a “substantial question” concerning honesty, trustworthiness, or fitness. Therefore, it is really up to the lawyer to determine subjectively whether to report another lawyer.

Further, under the rule, a lawyer need not report *himself or herself* but must only report another lawyer who has committed a violation within the rule’s definition. The lawyer’s duty does extend, however, to reporting the misconduct of another lawyer in the reporting lawyer’s firm.

What must be reported is any conduct that *both* (1) violates a rule of professional conduct and (2) raises a “substantial question” as to the other lawyer’s honesty, trustworthiness, or fitness to practice law. A lawyer considering whether to report another lawyer’s conduct to bar counsel must therefore first determine whether the conduct constitutes a violation of a rule of professional conduct.

The harder question seems to be whether or not the lawyer’s conduct raises a “substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer.” For example, one state’s version of 8.3(a) states as follows: “[M]isconduct that would constitute a ‘serious crime’ as defined by S. J. C. Rule 4:01, § 12(3), qualifies as misconduct that must be reported [under 8.3(a)].”⁴ Serious crimes

include any felony and any crime, whether felony or misdemeanor, that includes as an element “ ‘interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit’ [such a crime]”.⁵

Conversion of client funds and perjury are examples of other conduct raising substantial questions about a lawyer’s fitness to practice. Indeed, any conduct that, “if proven and without regard to mitigation, would likely result in an order of suspension or disbarment” must be reported.⁶ A non-exhaustive list of such offenses also includes misrepresentations to the court,⁷ including misrepresentations in pleadings filed in discovery,⁸ a conflict of interest resulting in harm to a client,⁹ misrepresentations on bar applications,¹⁰; and acts of violence.¹¹ Consider the following example.

Example. Arnold Lawyer plays tennis with Righty Lawyer every Thursday. At the end of their last match, Arnold spoke about a recent meeting with a client in which Arnold told the client he did not have a valid claim to pursue. Arnold confides in Righty that the client actually had a rightful claim but Arnold had forgotten to file the complaint within the statute of limitations. Righty has known Arnold for over a decade and has always been under the impression that Arnold is a competent lawyer. However, Righty thinks he might be obligated to report this conduct. Is Righty obligated to report Arnold’s conduct? Why or why not?

Analysis. Yes, Righty Lawyer is obligated to report Arnold Lawyer’s conduct because Arnold’s failure to file a legitimate complaint within the statute of limitations raises a substantial question as to Arnold’s fitness as a lawyer.¹² Additionally, an apparently isolated violation of the rules may indicate a pattern of misconduct that only a disciplinary investigation could uncover.¹³ Therefore,

even though Righty may think Arnold is a generally competent attorney or that this misconduct might be a one-time event, Righty is still obligated to report this conduct because it may be an indicator of a greater pattern of misconduct in regards to Arnold's fitness as an attorney. Furthermore, reporting a violation is especially important where the victim is unlikely to discover the offense.¹⁴ Here, the facts indicate the client may never learn of Arnold error because Arnold told the client there was no claim to pursue. Righty is obligated under this rule to report Arnold's misconduct.

Further, the lawyer whose conduct is at issue need not be on active status or in good standing with the bar.¹⁵ Extending the rule to suspended lawyers or lawyers on inactive status "makes sense because the lawyer on suspended or inactive status remains under the jurisdiction of the disciplinary authority, and the conduct in question might warrant discipline."¹⁶

1. The Duty to Report Judges

Lawyers have a similar duty to report judges, according to Rule 8.3(b). The rule clearly requires a lawyer to inform the appropriate authorities of any non-confidential information showing that a judge (whether or not a lawyer) violated the judicial rules if the conduct raises a "substantial question as to the judge's fitness for office... ." The text of Rule 8.3(b) is as follows:

THE RULE

Rule 8.3

The Duty to Report Misconduct

- (a) ...
- (b) A lawyer who *knows* 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 appropriate authority.

If a lawyer knows that a judge has violated the rules of judicial conduct for office that “raises a substantial question as to the judge’s fitness for office,” the lawyer must report the judge to the judicial discipline authority. Similar limitations apply to the judge reporting requirement as apply to the lawyer reporting requirement.

However, the limitations that govern lawyers reporting other lawyers also applies to judges. For example, a lawyer has no duty to report if reporting would require the lawyer to disclose confidential information protected by Rule 1.6. Second, a lawyer has no duty to report a judge if the lawyer comes upon the information about the judge’s conduct through a lawyer assistance program. And third, a lawyer must know of the violation. Finally, a violation of judicial conduct alone does not trigger the duty to report. The violation must “raise a substantial question as to the judge’s fitness for office.”

2. Protecting the Duty of Confidentiality

Rule 8.3 requires a lawyer who knows that another lawyer has violated the rules to report that lawyer if the violation raises a substantial question as to that lawyer’s fitness as a lawyer. But, a lawyer need not report if so doing would require the lawyer to disclose confidential information protected by Rule 1.6. Rule 8.3(c) contains this limitation

THE RULE

Rule 8.3

The Duty to Report Misconduct

- (a)** ...
- (b)** ...
- (c)** This Rule does not require disclosure of information otherwise protected by Rule 1.6.¹⁷

Note the important last phrase in the rule that a lawyer need not report information that would be protected by Rule 1.6. One example of information learned that would fall within Rule 1.6 is when a lawyer contacts a lawyer's assistance program for help. What is a lawyers' assistance program? Lawyer assistance programs are designed to assist lawyers who have substance abuse problems or other such issues. No lawyer would attempt to get help from an assistance program if the information the lawyer conveyed in the program could be used against him or her. Consider the following example.

Example. Righty Lawyer is conducting a “professional misconduct” group workshop in an approved lawyer's assistance program in which Phil Lawyer is currently participating. Phil Lawyer reveals that he once misappropriated a client's funds in order to afford a week-long cruise vacation. Is Righty Lawyer obligated to report this misconduct?

Analysis. No, Righty Lawyer is not obligated to report this misconduct because the information about Phil Lawyer's misconduct or fitness was received by Righty Lawyer in the course of Righty Lawyer's participation in an approved lawyers or judges assistance program.¹⁸ This exception encourages lawyers and judges to seek treatment through such a program, and conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.¹⁹

For example, in Ohio, the Lawyers' Assistance Program's website has a specific disclaimer in order to ensure that lawyers know they can come to the program without the worry of discipline following any disclosures of information.

If you or someone you know is having problems with substance abuse, alcohol abuse, addiction or mental health, don't let fears about the disciplinary consequences prevent you from contacting us. No potential disciplinary situation will be made worse by contacting OLAP [Ohio Lawyer's Assistance Program].²⁰

The website goes on to state the actual rules that provide protection:

If you contact OLAP about yourself or about an attorney colleague, you can rest assured that your call and anything you discuss with OLAP will be protected by strong rules of confidentiality:

- **Prof. Cond. Rule 8.3** provides an exemption from the duty to report knowledge of ethical violations when that knowledge was obtained in the course of OLAP's work.
- **Code of Judicial Conduct Rule 2.14** provides that information obtained by a member or agent of a bar of [sic] judicial association shall be privileged.
- **R.C. § 2305.28** provides qualified immunity from civil liability for OLAP staff (B and C) and for anyone who provides information to OLAP (D).²¹

Further, the American Bar Association (A.B.A.) has a Commission on Lawyer Assistance Programs which has the following mission:

The Commission on Lawyer Assistance Programs (CoLAP) provides a unique service for the A.B.A. membership. During this time of career and financial uncertainty, lawyers are experiencing new stress and trauma as a result of the recession and national belt-tightening in the profession. Law firms are finding it necessary to reduce their lawyer and support staff numbers and are in some instances closing firms. The states that have staffed lawyer assistance programs (LAPs) can provide peer support for individuals and referrals to counseling— career, mental, and financial. The lawyers helping lawyers component of LAPs has existed from the beginning and continues to be of critical assistance in times of relapse, stress, and trauma. These volunteers can share a special bond and understanding, which has been found to be true in other professional peer support programs as well.²²

The reality is that lawyers are in a stressful business. Coupled with the recent economic recession, the stress of many lawyers' lives has increased dramatically. Researchers at Johns Hopkins University were able to correlate a statistical significance between economic factors, such as joblessness and social harms, with alcoholism and suicide.²³ "The legal profession has previously reached number one

in another Johns Hopkins study that ranks professionals in rate of depression and suicide.”²⁴ With these grave statistics, it is quite possible that depression, alcohol or substance abuse could be a reality for *any lawyer*. Accordingly, we all need to be very careful and seek help from outside sources before things become too complicated and our clients suffer as a result.

3. Reporting Your Fellow Lawyer

Is it difficult to report a fellow lawyer under Rule 8.3 when you are in the practice of law? *You bet it is!* Everyone learns in grade school that “telling on someone” is frowned upon. More importantly, the situations in which a lawyer must report are often very difficult to discern. Consider the following case.²⁵

A Louisiana lawyer met his friend at a bar. The two lawyers had served as prosecutors and then both had become defense lawyers. The lawyer’s friend disclosed that he was dying of cancer. After a couple of drinks, the friend told the lawyer that as a prosecutor he had suppressed exculpatory blood evidence in one case. The Louisiana professional conduct rule required a lawyer to report any unprivileged knowledge of a professional responsibility violation of any kind. The lawyer did not report his friend’s confession. After his friend died and five years had passed, the lawyer discovered that the lawyers of a man sentenced to death and scheduled to be executed in one month had discovered an exculpatory crime lab report that had never been shared with the defense team. The lawyer then knew this lab report was the evidence his dead friend had mentioned to him. The lawyer notified the defense team about his conversation with his now-dead friend and reported the matter to the discipline authority. Did the lawyer do the right thing? In the real case, the Louisiana Supreme Court publicly *reprimanded the lawyer* for failing to abide by the mandatory reporting rule. The lawyer *should have reported the information (and his fellow lawyer) as soon as he had learned about it*. Here is another example.

Example. Charlie Lawyer has been hired by NailColor Corporation, a national nail polish wholesaler, to defend NailColor against a products liability claim. Charlie has been interviewing dozens of the corporation’s officers and employees over a period of months in preparing the corporation’s case. At the end of Oona Employee’s interview, Charlie invited her out to dinner and the two ended up spending a passionate night together.

At dinner with Righty Lawyer a few nights later, Charlie reveals his tryst to his friend but adds the caveat that his work with the corporation is coming to a close and he does not need to have any additional professional communications with Oona. Must Righty Lawyer report Charlie Lawyer's conduct? Why or why not?

Analysis. Righty Lawyer is probably not obligated to report Charlie Lawyer's conduct. Although attorneys must report any misconduct that raises a substantial question as to another attorney's honesty, trustworthiness, or fitness as a lawyer, attorneys are not required to report every violation of the rules because such a requirement has proven unenforceable (i.e. the failure to report a violation would itself be a professional offense).²⁶ Therefore, attorneys must exercise discretion in complying with this rule.²⁷ In the example above, despite Charlie Lawyer's admission to Righty Lawyer, the offense of becoming romantically involved with the employee of a client is not necessarily substantially seriousness enough to require being reported; therefore, Righty Lawyer is probably not obligated to report Charlie Lawyer's conduct.

The court's opinion in the case discussed above was very instructive about the importance of reporting another lawyer's conduct.

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."²⁸ However, the court ended with the following important point: "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."²⁹

Quick Summary



Rule 8.3 requires lawyers to be a self-policing profession. A lawyer who knows that another lawyer has violated the rules of professional conduct must report that lawyer if the violation “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer.” The same applies to judges; a lawyer who knows a judge has violated the rules must report that judge. However, a lawyer need not report if to do so would require the lawyer to disclose confidential information or if the lawyer learned of the violation by way of a lawyer assistance program.

Test Your Knowledge



To assess your understanding of the material in this chapter, [click here](#) to take a quiz.

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- ¹ *In re Riehlmann*, 891 So. 2d 1239, 1249 (La. 2005).
- ² DLRPC Rule 8.3(a).
- ³ See Chapter 32, Duty of Confidentiality.
- ⁴ Mass. R. Prof. C. 8.3(a) comment 3.
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ See *Matter of Neitlich*, 413 Mass. 416 (1992).
- ⁸ See *Matter of Griffith*, 440 Mass. 500 (2003).
- ⁹ See *Matter of Pike*, 408 Mass. 740 (1990).
- ¹⁰ See *Matter of Moore*, S.J.C. No.-09089 (Aug. 9, 2004).
- ¹¹ See *Matter of Grella*, 438 Mass. 47 (2002).
- ¹² DLRPC Rule 8.3(a).
- ¹³ DLRPC Rule 8.3 comment 1.
- ¹⁴ *Id.*
- ¹⁵ See Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 294–295 n. 198 (Winter 2003).
- ¹⁶ *Id.*
- ¹⁷ DLRPC Rule 8.3(c) is slightly different than A.B.A. Model Rule 8.3(c). The A.B.A. Model Rule 8.3(c) adds the following phrase to the end of subsection (c): “or information gained by a lawyer or judge while participating in an approved lawyer’s assistance program.” The DLRPC simply added this content in a separate subsection (d): “Notwithstanding anything in this or other of the rules to the contrary, the relationship between members of either (i) the Lawyers Assistance Committee of the Delaware State Bar Association and counselors retained by the Bar Association, or (ii) the Professional Ethics Committee of the Delaware State Bar Association, or (iii) the Fee dispute Conciliation and Mediation Committee of the Delaware State Bar Association, or (iv) the Professional Guidance Committee of the Delaware State Bar Association, and a lawyer or a judge shall be the same as that of attorney and client.”
- ¹⁸ See DLRPC Rule 8.3(d).
- ¹⁹ *Id.*
- ²⁰ Ohio Lawyers Assistance Program, <http://www.ohiolap.org> (last visited on April 8, 2014).
- ²¹ *Id.*
- ²² About Us, American Bar Association, http://www.americanbar.org/groups/lawyer_assistance/about_us.html (last visited August 21, 2016).
- ²³ *Id.*
- ²⁴ *Id.*
- ²⁵ *In re Riehlmann*, 891 So. 2d 1239 (La. 2005).
- ²⁶ DLRPC Rule 8.3 comment 3.
- ²⁷ *Id.*
- ²⁸ *Riehlmann*, 891 So. 2d at 1249.
- ²⁹ *Id.*