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PROFESSIONAL CONDUCT

Rules for Reporting Fellow Attorneys' Misconduct

BY ELLEN C. BROTMAN AND MICHAEL B. HAYES
Special to the Legal

One of the things we learned as children is that it's better to tell on yourself than to have a classmate tell on you. In our practice, this translates into advising clients to self-report misconduct before the letter from the Office of Disciplinary Counsel arrives. We also learned that nobody likes a tattletale. Yet both Pennsylvania and New Jersey's Rules of Professional Conduct impose a duty to report certain types of lawyer misconduct. Unfortunately, a large gray area of uncertainty in the law as to the scope of this duty makes it difficult to know when reporting on your colleague is required.

In Pennsylvania and New Jersey, Rule 8.3 states, "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." In both jurisdictions, the necessary exception to the rule is that you are not required to disclose information that you can't disclose because of the attorney-client privilege. Thus, in our representation of lawyers, we are not required to report their misconduct, or the misconduct of other lawyers that we learn about through that representation. To do so would violate the privilege.

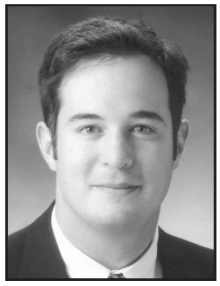
Both Pennsylvania and New Jersey also have another equally important and necessary exception to the duty to disclose: information learned of by "a lawyer or a judge while participating in an approved lawyers' assistance program" does not fall within the rule. New Jersey requires that the lawyer assistance program, not just be "approved," but be administered by the Bar Association. Additionally, in New Jersey, but not in Pennsylvania, "if the effect of discovered ethics infractions on the practice of an impaired attorney is irremediable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities."

Rule 8.3(a) does not mandate that an attorney report every violation of a rule of professional conduct. Only conduct that raises a substantial question as to the honesty, trustworthiness or fitness of a lawyer must be reported. Craig Simpson, a Pittsburgh attorney who specializes in ethics and representation of attorneys before the disciplinary board, sees the duty to disclose on a sliding scale. He advises clients that they should report other attorneys to the disciplinary board if "the misconduct standing alone, without aggravating factors, would result in public discipline. ... But, if [the conduct] would result in only private discipline, the attorney would not be required to report it, although they could if they wanted to."

The duty to report is based on knowledge and the commentary to the rule makes clear that a mere suspicion, speculation or conjecture would not be enough to trigger the rule. We interpret the knowledge requirement as akin to the competency of a witness. For example, you may strongly suspect that your partner is cheating on his income taxes, but unless you have personally observed and analyzed the relevant documents you don't know anything and you have no duty to report. However, if your partner is dipping into the escrow account to make ends meet at the end of the month, that's a different story. You have a duty to know about it, correct it and report it.

While prosecutions for violating Rule 8.3 for failing to report seem rare to the point of non-existence, the rule exists for a reason. We are a self-policing profession, and we must maintain our integrity. In our practice, we've seen lawyers whose problems started two or three employers ago. In failing to report misconduct, those employers have created a dangerous condition and put innocent parties in harm's way.

BROTMAN



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A recent New Jersey case uses this analysis to support a claim for civil liability based on a failure to report misconduct. In *Estate of Spencer v. Gavin,* Dean Averna, a New Jersey attorney, rented space from another attorney, Daniel Gavin, who was allegedly grooming Averna to take over his practice. At Gavin's request, Averna created the Spencer Foundation, on behalf of one of Gavin's clients, Kathryn Spencer. Averna allegedly knew that Gavin was "pillaging" Spencer's estate, and that Gavin had used wedding rings stolen from the estate for his own 1994 wedding.

The Middlesex County Superior Court held that no attorney-client relationship, or fiduciary duty to protect, had been established between Averna and the Spencer estate and granted Averna's motion for summary judgment. However, on April 28, 2008, the Superior Court of New Jersey reversed, holding that the failure to report was evidence of a violation of a civil duty. The court, "applying the precepts of R.P.C. 8.3(a)," was "satisfied that if Averna had actual knowledge that Gavin was repeatedly siphoning money and property from the plaintiff estates, such an awareness would amount to a serious professional breach that raises 'a substantial question as to [Gavin's] honesty, trustworthiness or fitness as a lawyer.' Accordingly, Averna would have had a professional obligation, owed not only to his clients but to the public at large, to bring Gavin's thefts to light."

The court went on to say, that "[i]n citing R.P.C. 8.3(a), we heed the Supreme Court's admonition ...that violations of the RPC's are not to be treated as per se grounds for an attorney's civil liability. ... Nonetheless, a failure by Averna to abide by his professional reporting duties under R.P.C. 8.3(a) only strengthens our conclusion that such inaction exposes him to civil liability to those who were harmed by his silence." The court concluded that material issues of fact existed, requiring a trial on the issue of Averna's liability.

The situation in Averna clearly invoked a duty to report. But beyond misrepresentations and harm to clients, the duty gets murkier. For instance, in Pennsylvania, an attorney "might be" required to report that his former partner is giving guidance to a litigant proceeding pro se in a jurisdiction in which the former partner is not licensed. (*Pennsylvania Ethics Op. 2002-11 (2002))* Bar ethics committees in other states have found that undisclosed conflicts of interest, unreasonable fees, and violations of confidentiality must also be reported. According to *Virginia Ethics Op*. 1785 (2003), when a county lawyer for two county entities has refused to withdraw from representing one of them, the opposing lawyer should report him if the refusal to withdraw raises a substantial question as to honesty, trustworthiness or fitness. In *New Mexico Ethics Op*. 2005-2, an insurance company's defense lawyer must report his belief that opposing counsel's $1 million fee in a simple uncontested matter was unreasonable. According to *South Carolina Ethics Op*. 02-15 (2002), a lawyer must report that his firm colleague has violated the obligation of confidentiality by advising opposing counsel, who is the colleague's close friend, how best to pursue a claim against a firm client.

Without a clear body of case law concerning the scope and application of the duty to report under Rule 8.3 to guide you, how do you know when disclosure is required? Our advice is, analyze the known facts and weigh the risks to innocent bystanders. Don't make the decision in a vacuum; consult the general counsel in your firm, an ethics expert, or call the Philadelphia Bar Association's Professional Guidance Committee at 215-238-6328.

Sometimes, attorneys whose conduct might be subject to report need other kinds of assistance. There are many ways to assist attorneys in trouble. Both the Pennsylvania and Philadelphia Bar Associations have active Lawyers' Assistance Committees. Although referring an attorney to an approved lawyer's assistance program "is not a substitute for reporting to a disciplinary authority with responsibility for assessing the fitness of lawyers licensed to practice in the jurisdiction," it is an option whether or not Rule 8.3 imposes a duty to report. (*ABA Ethics Op*. 03-431)

Along with our bar assistance committees, here in Pennsylvania, we also have Lawyers Concerned for Lawyers, a robust organization that provides support to lawyers grappling with all types of issues. LCL can be found on the Web at www.lclpa.org and is also reachable through their confidential helpline at 1-888-999-1941.

Among other resources, LCL will provide a free, confidential drug and alcohol evaluation. We have advised clients to turn to the bar assistance committees and LCL many times, with great success. Because that's another thing we learned as children: When a friend is in trouble, you offer a hand.

Firm litigation associate Karen M. Ibach and summer associate Sarah Payne Bryan contributed to the research and drafting of this article. •