The "Snitch Rule" and Beyond: Mandatory and Permissive Reports of Lawyer Misconduct

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Most of us don't like being the bearer of bad news. And many of us were taught as children not to be a tattletale. When it comes to lawyer misconduct though, there are times when one lawyer is ethically obligated to report another lawyer to bar counsel. When a lawyer knows a fellow member of the bar has engaged in seemingly or even obviously unethical conduct, it's not unusual for the lawyer to question whether he or she is really required to report the matter to bar counsel. Frequently, a lawyer faced with a decision to report the matter is concerned about the personal consequences of initiating a bar complaint against another lawyer. As a result of such uncertainties, serious misconduct may go unreported, to the detriment of the public and the profession.

Rule 8.3(a) of the Massachusetts Rules of Professional Conduct requires 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" to report the matter to the Office of Bar Counsel. The comments to the rule make clear that a lawyer is not required to report all misconduct, although anyone, including a lawyer, may choose to report any act of suspected misconduct. Comment 3 indicates that the only conduct a lawyer must report is conduct that raises a substantial question of another lawyer's fitness to practice law. See also bar counsel's policy statement as to Rule 8.3 on the website of the Board of Bar Overseers and Office of Bar Counsel.

Whether a lawyer is mandated by the rules to report the matter is controlled by the seriousness of the sanction typically imposed for the misconduct. Conduct that must be reported is conduct for which, absent mitigation, a suspension from the practice of law would be warranted. In other words, while there may be other factors that mitigate the offense, if the type of misconduct standing alone would warrant a suspension, a lawyer having knowledge of the conduct is required to report it.

Common examples of conduct that raises a substantial question of a lawyer's honesty, trustworthiness or fitness to practice, and cited in Comment 3 to the rule, are crimes of dishonesty, crimes that constitute a felony, misuse of client funds, and acts of dishonesty such as misrepresentation to a tribunal. Another common situation, but not mentioned in the comments, is neglect of multiple client matters that has resulted in harm to the clients. This is by no means

an exhaustive list and lawyers are encouraged to consult prior disciplinary cases in order to get a sense of the sanctions typically imposed for the type of misconduct the lawyer is considering reporting. Disciplinary cases since 1974 can be found in the Mass. Attorney Discipline Reports, where they are indexed according to rule violation. Cases since 1999 are on the BBO website and can be researched by using the "Search this Site" function to find references to specific rules or other relevant terms. Lawyers may also wish to call bar counsel's helpline, 617-728-8750, for assistance with the issue of whether a problem is required to be reported.

There are times that a lawyer has knowledge of less serious misconduct that would likely result in a public reprimand or private discipline. When a lawyer has knowledge of less serious misconduct, such as multiple but seemingly minor instances of neglect, the lawyer should consider reporting the matter but is not required to do so. One reason to consider making a report is that, while the misconduct known to the lawyer may be minor, the misconduct may be part of a pattern or be just the tip of the iceberg. For instance, a lawyer who is neglecting multiple client matters potentially poses a serious risk to the public.

It is always tempting to think that serious misconduct will be brought to the attention of bar counsel by someone else, particularly if the conduct occurred in court. Some mistakenly believe that raising an allegation of misconduct and getting a court's ruling on sanctions ends the matter. Whatever occurs in court, Mass. R. Prof. C. 8.3 directs that lawyers report serious misconduct to bar counsel.

Another common misconception is that the attorney must witness the misconduct in order to be obligated to report it. The rule places an ethical obligation on every lawyer with *knowledge* of another's serious misconduct to report it. Comment 3 to the rule explains that knowledge need not be conclusive evidence of the facts; but the information should be supported by evidence sufficient for a reasonable lawyer to conclude that the misconduct has more likely occurred than not. While litigants and lawyers are encouraged to raise all claims related to a matter with the court or tribunal, a court's decision, even one that finds violations of the Rules of Professional Conduct is not a disciplinary action under S.J.C. Rule 4:01, which governs bar discipline. Unless a lawyer is certain that the matter has already been reported, he or she must report serious misconduct to bar counsel, even if others are aware of the misconduct also.

Bar counsel does not impose discipline, but rather is required to investigate allegations of misconduct. Bar counsel may be aware of and investigating other acts that, when viewed together with the reported matter, suggest a serious problem. Whether the alleged misconduct is serious or minor, only a disciplinary investigation is designed to determine whether there is sufficient evidence that a lawyer has violated the rules of professional conduct and whether bar counsel should recommend initiating disciplinary action.

Often, a lawyer learns of the misconduct of another lawyer while representing a client. In this circumstance, a lawyer should consider whether the information as to another lawyer's misconduct is confidential under Mass. R. Prof. C. 1.6, which protects a broad category of information of which privileged attorney-client communications are only a part. See Mass. R. Prof. C. 1.6, Comment 3A. When the basis of a lawyer's knowledge of misconduct is

confidential client information, the lawyer must have his client's informed consent before disclosing the matter to bar counsel, even if the report is required under Rule 8.3.

This raises another issue that arises in reporting misconduct, which is the reporting lawyer's motive when the misconduct has arisen in context of an ongoing dispute. Mass. R. Prof. C. Rule 3.4(h) prohibits a lawyer from making or threatening to bring a criminal or disciplinary complaint solely to gain an advantage in a civil matter. Some reporting lawyers express concern about facing an allegation that they have violated this rule if they report an opposing counsel's misconduct to bar counsel while the matter is still pending. Other times, a lawyer who has been confronted with an allegation of misconduct in an ongoing dispute raises the issue of the reporting attorney's motive.

If the misconduct in question requires a mandatory report under Rule 8.3, there is no issue of a violation of Rule 3.4(h). Comment 6 to Rule 3.4 states that Rule 3.4(h) "is never violated by a report under Rule 8.3 made in good faith because the report would not be made 'solely' to gain an advantage in a civil matter." In any event, Comment 3A to Mass. R. Prof. C. 8.3 indicates that a lawyer may choose to wait until the conclusion of a matter to report it, which in turn resolves the concern as to attempting to gain an advantage in civil matter. Beyond that, and even when the misconduct does not mandate a report under Rule 8.3, while the dispute is ongoing the question under Rule 3.4(h) is whether there is a basis for alleging misconduct, i.e. was the report made *solely* to gain an advantage in a civil matter or do the allegations raise valid concern. Rule 3.4(h) is not violated by a lawyer who has a good faith basis for believing that misconduct has occurred and reports it to bar counsel.

It is never easy to report misconduct. Few lawyers would ever wish to take such a potentially career-damaging action against another lawyer if they could avoid it. However, safeguarding the integrity of the bar and protecting the public is the responsibility of every lawyer, and when a lawyer knows that a fellow member of the bar has engaged in serious misconduct, "see no evil" is not an option.