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LEGAL ETHICS

A Rule That Is 'More Honored in the Breach'

While RPC 8.3 is admired, those who practice it are not

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Ah! You're from a *squeal* jurisdiction!" We had been talking ethics, and that's how Roy Ginsburg, a law office management expert from Minnesota, referred to New Jersey a few years ago at a national meeting of CLE providers: a "squeal" jurisdiction. Roy was talking about our Rule of Professional Conduct 8.3, a clone of the Model RPC now adopted by most states, requiring lawyers to report the unethical behavior of our colleagues. What rankled Roy was that the failure to report an unethical colleague is itself a violation of an RPC, exposing to discipline any attorney who has guilty knowledge of another lawyer's misconduct.

The rule is short, but not sweet. "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." That authority is the Office of Attorney Ethics or its local arm, the District Eth-

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ics Committee.

Not only must we report wayward colleagues under the rule, but we have little guidance as to when a matter raises a *substantial* question as to the attorney's honesty, fitness or trustworthiness. *We* must decide whether the transgression (or rather, what the transgression reveals about the lawyer) is *de minimis* or requires reporting.

Moreover, the RPCs bootstrap another set of offenses for us to report: violations of RPC 8.4 (Misconduct), which often raise substantial questions about an attorney's fitness. Classes of acts that constitute RPC 8.4 misconduct include:

- violating or attempting to violate the RPCs;
- committing or attempting to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness;
- engaging in dishonesty, fraud or deceit; or
- engaging in conduct prejudicial to the administration of justice.

To compound this responsibility, an attorney's RPC obligations remain operational even after work hours and away from the office. Accordingly, our responsibility to report includes unethical acts by lawyers anytime, anywhere.

Do we really need this around-the-clock policing? Apparently, we do. The undeniable debasing of our collective

reputation is proof that our profession needs better housekeeping. The "squeal" rule was born of necessity. Much like the Ten Commandments, whose words today are historical clues to the social and legal issues facing the Israelites at Mt. Sinai, our RPCs proscribe unwanted behavior in our professional community. One look at the rules gives a good idea of the types of misconduct our legal flesh is heir to.

We already have guards at the door. The OAE's Committee on Character works long, thankless hours screening for character issues the people who seek entry to the bar. They scrutinize and cross-examine would-be lawyers whose academic, juvenile, criminal, motor vehicle or personal histories suggest potential problems. They also seek candor in the candidates, and will bar entry to those who lack it. However, to police those who are already members of the bar, the task is far greater and exponentially more complex. Rule 8.3 is the engine.

Rule 8.3 is an honor code. And, as in our summer camps, boot camps, schools, colleges and even law schools that boast honor codes, we agree, as a condition of admission, to report our friends or classmates who cheated or stole or lied. In honor code theory, there is no dishonor in reporting a known offender; the dishonor is in failing to report one. The member who reports another is sanitizing the group and protecting its reputation by culling those who betray its values and who sully its name. Our

bar has similar goals.

Why does the job of policing fall to us? It would be hard to argue that any other body is better equipped for that job than we. After all, lawyers are the ones who know what the rules are and who see the most violations. We see the unconscionable fees that our adversaries, our client's last lawyer, or even our own firm charged in a matter. We see the attorneys whose glaring ignorance or ineptitude costs their clients dearly. We see the lawyers who have lied to the court to get an adjournment or misinformed their client about why the case was dismissed. We see the transactions where an attorney goes into a room where one client is believed to be waiting, and then returns with two notarized signatures. We see spurious motion practice engineered to churn cases for fees, and we see witnesses who have been coached by lawyers to lie. As lawyers, we see it all.

We hear a lot, too. It is lawyers who hear lawyers reveal information about their cases and their clients, out-of-school, as if there were some "we're all lawyers" exception to the confidentiality mandate. We hear colleagues defaming adversaries, judges and courts, even in the hallways of those courts, the public within earshot. We overhear prosecutors and judges discussing active cases with no defense attorney near.

Clearly, the bar's army of police is already on the ground. Why, then, are so few lawyers reporting?

It is human nature. People don't like to blow the whistle, point the finger or drop a dime. We recognize the need to

clean our house, but nobody wants to be seen holding the broom. No one wants to be a fink, a turncoat, a snitch, an informant, a Benedict Arnold, a stool pigeon or a rat. Beyond betraying our misplaced sense of honor, reporting a colleague can raise the stickiest of issues. What if it's your superior? What if it's a friend? What if it's house counsel for your best client? What if it's a judge? What if it's your governor? What if you're wrong?

Lawyers who find it distasteful to denounce a colleague should consider this: in New Jersey, we are fortunate that attorney discipline is the province of the Supreme Court. An attorney in trouble ultimately answers to that august and thoughtful body. The attorney/judicial disciplinary system is overseen and administered by bar committees, panels and courts consisting primarily of other lawyers and hand-selected "civilians." These people have the backgrounds and perspective needed to judge us fairly. In contrast, discipline for other professionals is a function of the Attorney General. If our present disciplinary system fails, the likely changes in the system could be bad for lawyers.

There is a price for this autonomy. In exchange for bar control of attorney discipline, we must accept the burden of policing ourselves. To be effective, self-policing requires that we embrace the honor code.

Even so, our obligations under Rule 8.3 are still not clear or palatable. The rule requires reporting by attorneys who "know" of another lawyer's violations. (Until very recently, the RPC required

that the attorney "have knowledge," rather than "know" of a violation.) Still, the question remains—what is guilty knowledge? If you suspect another attorney of serious unethical behavior, must you satisfy yourself that there is clear and convincing evidence before you make the call? Should you stop asking questions, thus avoiding guilty knowledge and defeating the purpose of self-policing? What if it seems like no big deal—the classic "no harm, no foul" situation? What if you learned of the violation in confidence?

Should you report the colleague who signs in for a live CLE course, and then slips out the side door before the course begins? Do you report the attorney whose description of a judge to a client contains expletives? What, if anything, do you do about the other lawyers who have the same knowledge as you, but who failed to report what they know? Must you report *them*? Can you get in trouble if you don't?

Few of us will ever report a colleague under 8.3. Of those who do, even fewer will do it for the right reasons. In practice, it seems that most of us will not report another lawyer unless that lawyer did something particularly offensive to us or our client, or if we think there is a chance that our own guilty knowledge may somehow come to light. We must reconsider our attitudes. We must do the right thing for the right reasons.

Ask yourself: what *should* you do the next time you see evidence of a colleague's unfitness to practice? Then ask: what *will* you do? It's a tough call to make. ■