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## Damned if You Do ...

### Reporting misconduct under RPC8.3

Marc Garfinkle, New Jersey Law Journal

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The frequency of calls to my office that begin, "Do I have to report ...?" suggests that a brief refresher course on Rule of Professional Conduct 8.3 is in order.

Most New Jersey lawyers are generally familiar with the RPCs and practice in a reasonably ethical manner the vast majority of the time. We are most aware of the "major" RPCs, such as the prohibition against commingling trust funds, the mandate to advise our client when his case has been dismissed, and the rule that says we can't sue a former client without her consent. These guidelines, though strict, are usually easy to follow. They are essential to restoring and maintaining public confidence in legal professionals.

Every time a lawyer breaks the rules, particularly at a client's expense, public confidence in the legal system is eroded. Our professionals fall further into disrepute. All lawyers are embarrassed when other ones make headlines for bilking the public, lying under oath or manipulating disadvantaged clients. We shake our heads in retrospect, but we don't point our fingers as it happens. No one wants to be a rat, but we resent our collective loss of prestige from guilt by association.

Being a lawyer is like belonging to an institution run on the honor system. Whether at summer camp, in college or law school, or in a job where you tally your own hour or expenses, honor systems reveal quirks in our psyche or morality. If they hadn't already been invented, no one today would even consider trying one out. No modern institution would be that naïve. Honor systems are too porous. Today, people seem to honor only security cameras.

Still, every one of us took a solemn vow to abide by the rules, including the honor code rule, the one that says we have to report wayward colleagues. The burden to "clean up" the profession falls on lawyers, not so much for the free policing, but because no one is better positioned than we. Attorneys are the ones who might see another lawyer notarize a document outside the signer's presence or send a certification page to the client for signature, affixing the body thereafter, explaining to a client that the firm has a very good relationship with the judge in a matter.

Lawyers alone may be aware that a case had been dismissed and reinstated without the client's knowledge or that a paralegal's services were deducted as an expense before distributing the proceeds of an injury case. Probably only lawyers, if anyone, will know when a colleague alters a mailing date, disparages a client for racial reasons or creates a phony excuse to request an adjournment.

It is difficult enough to point the Ethics Committee toward an obnoxious rule-flaunting adversary. It is almost impossible to report a friend, a long-time colleague, a new associate, a partner or a mentor. When we *do* report colleagues, it is rarely because of our deep respect for our oath of office; it is usually to protect ourselves in the event that we may be investigated for our own guilty knowledge. Worse, we cannot report anonymously. The reporting attorney may be Exhibit One when the committee investigator finally writes the report.

Few of us would enjoy reporting even our most unethical colleagues. Our culture instills a morality where it is wrong to get someone else in trouble, and worse to get found out. People should mind their own business and not get involved. We turn the other cheek and let nice guys finish last.

That's the culture. It's not the law. Here's the law: *"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, Reporting Professional Misconduct (emphasis added).

That "authority" is the Attorney Ethics Committee, or the OAE's designee, such as the Committee on Advertising.

Despite how it sounds, the rule does not impose a zero-tolerance or "report everything" standard. The Rules Committee comments note that, "If a lawyer were obligated to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable."

In New Jersey, the language of the rule has changed to reflect that reality and to avoid clogging our universe with picayune backbiting and paranoid bystanders. A subtle word change in the rule now makes a world of difference to lawyers who may be witness to unethical activity. Originally, the burden to report misconduct fell on "[a] lawyer who *has knowledge* that another lawyer has committed a violation ...." Now, the burden is on the lawyer who actually *knows* that another lawyer has done so. But what constitutes knowledge? You're a lawyer. You're expected to figure that out.

It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, or to commit a criminal act that reflects adversely on "honesty, trustworthiness or fitness as a lawyer in other respects." It is hard to imagine a criminal act that would reflect favorably, which helps explain why every criminal act by a lawyer is answerable in ethics as well as in criminal court. Even an attorney's willful failure to file an income tax return is reportable misconduct.

Moreover, any conduct involving dishonesty, fraud, deceit or misrepresentation, or conduct that is prejudicial to the administration of justice is misconduct. The concept of prejudice to the administration of justice is broadly viewed.

Even the "fitness as a lawyer in other respects" part is thought not too broad for lawyers to understand. The offenses must indicate "lack of those characteristics relevant to law practice." So, an attorney sneaking around cheating on the spouse who is working two jobs may have issues in family court, but the Ethics Committee will probably not be interested. The attorney who routinely signs a spouse's signature on personal checks probably should not be reported. The one who signs, even once, or asks a secretary to sign, a client's signature on a trust check should have some explaining to do.

Any violation must be *substantial* for the obligation to arise. "Substantial" refers to the seriousness of the possible offense and not to the quantum of evidence available. An insubstantial violation need not be reported. Beyond that, we have little guidance for drawing the line of demarcation except that a pattern of repeated offenses, even minor ones when considered separately, is reportable.

The comments to the rule give us further insight into specific situations that might arise. "Reporting a violation is especially important where the victim is unlikely to discover the offense." Thus, when a lawyer charges a minor fee for a service that was not rendered or for a cost that was not incurred, the first known event might not demand reporting. Perhaps a conversation with the offender will suffice and a system put in place to prevent recurrence. Likewise, where a lawyer fails to return a client's call who has phoned three times in a week, you need not feel compelled to report. However, when the practice is widespread or repetitive, even if, as a unique event it might have been *de minimus*, reporting may be required. The senior partner or managing member is not the "appropriate professional authority."

Within a firm, lawyers should be careful about reporting matters internally. Others in the firm may have skin in the game. A lawyer is responsible for another lawyer's violation of the RPCs if she, with knowledge of the specific conduct, orders or ratifies the conduct. Responsibility also attaches where the lawyer is a partner or has managerial authority in the firm, or directly supervises the offending lawyer and "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

It is not always an easy test to apply. Attorneys who have "guilty knowledge" have a clear mandate. Those that just suspect another attorney's misconduct are not required to report or to investigate it. They may even choose to not know more.

Every day, attorneys witness unethical practices by colleagues, and we stand mute. With rare exception, we turn the other cheek to avoid the uncomfortable consequence of reporting. Most of us would wish the bad apples in our firms, our specialties and our vicinages to just go away. We would like to return the profession to its once-prestigious perch, but we do little to ensure that result.

No one can make you report a colleague. It's the honor system. Only you can decide where the line is. Only you can sit down to make that phone call or dictate that letter. Attorneys have told me that it is among the most difficult decisions they have ever made. Of course, you can call me and ask, "Do I have to report ...?"

*Next Week...*

## Environmental Law

*Garfinkle practices in Morristown, focusing exclusively on legal ethics, attorney discipline, bar admission and judicial misconduct. He is also an adjunct professor at Seton Hall University School of Law.*

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