

Yes!!! Gotcha! Our corporate client has been sued for employment discrimination. We have just received word that the sleazy plaintiff's counsel has engaged in unethical conduct regarding a witness that affects the litigation. Can we report this to the disciplinary authorities? Are we required to do so? If not, can we perhaps just threaten a little to report this conduct (and thereby gain more leverage in the litigation)? Please?

## Mandatory and Discretionary Snitching on Opposing Counsel's Misconduct

BY JOHN K. VILLA

As with most interesting questions, the answer to the above question depends. In this case, the determining factors are the gravity of the misconduct and the certainty of your knowledge. Even if the circumstances do not mandate a report, they may be sufficient to permit a referral of the matter to the disciplinary board. As to merely threatening opposing counsel with a possible referral to obtain a litigation advantage—be wary, or you may be facing your own ethical problems.

Let's start by reviewing the rules.

A lawyer's ethical responsibility with respect to another lawyer's misconduct is addressed in Rule 8.3 of the *Model Rules of Professional Conduct*:

- (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[.] . . .
- (c) This Rule does not require disclosure of information otherwise

protected by Rule 1.6 [governing confidentiality of information]. . . .<sup>1</sup>

Since the legal profession is self-regulating, the reporting rule is essential to protecting, preserving, and maintaining the independence, integrity, and reputation of the profession.<sup>2</sup> Failure to report when required to do so is itself misconduct warranting disciplinary action.<sup>3</sup>

### Must You Snitch?

Rule 8.3, predictably, has been read narrowly to avoid imposing sanctions on lawyers for inaction or nonreporting. A mandatory duty to report professional misconduct is triggered only under the following circumstances: (1) when the lawyer *knows* that another lawyer has committed an ethical violation; (2) when the violation raises substantial questions concerning that lawyer's *honesty, trustworthiness, or fitness to practice law*; and (3) when the report will not disclose information protected by the confidentiality provisions of Rule 1.6.<sup>4</sup> Each element is a relatively high hurdle.

**Knowledge of ethical violation.** As defined in the Terminology section of the Model Rules, the term "knows"

means "actual knowledge" which "may be inferred from [the] circumstances."<sup>5</sup> While various formulations exist as to what constitutes the requisite knowledge,<sup>6</sup> it is generally agreed that mere suspicion that a violation has occurred is insufficient to trigger a duty to report.<sup>7</sup> Subjective awareness *does not* satisfy this rule and there is a recognition in the Restatement that knowledge "[must be] assessed on an objective standard."<sup>8</sup> In short, you must have a high level of certainty.

**Substantiality of violation.** Not every violation of the ethical rules constitutes a reportable violation—far from it.

According to the commentary to Rule 8.3, the reporting obligation is limited to serious offenses—specifically, "to those offenses that a self-regulating profession must vigorously endeavor to prevent."<sup>9</sup> For example, the embezzlement of a client's funds<sup>10</sup> or the intentional misrepresentation of a fact in a negotiation letter<sup>11</sup> might raise substantial questions as to the lawyer's honesty, trustworthiness or fitness to practice law.

Conversely, the mere failure to comply with the statute of limitations,<sup>12</sup> the referral of a client to a nonlawyer known to be engaged in the unauthorized practice of law,<sup>13</sup> or the failure to segregate funds claimed by a third party, at least in the absence of a showing of an intent to permanently deprive,<sup>14</sup> might not raise such substantial questions. You can conclude that isolated, negligent, or unwitting ethics violations are ordinarily *not* required to be reported unless the lawyer is impaired or chronically ignores ethical rules.

**Preserving client confidences under Rule 1.6.** There is no duty to report another lawyer's professional misconduct under Rule 8.3 if the report reveals information protected by Rule 1.6.<sup>15</sup> Rule 1.6, parenthetically, protects

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a broad range of information from disclosure—not only information communicated in confidence by the client (i.e., classic attorney-client privilege), but any information relating to the representation, whatever its source.<sup>16</sup> Unless the client gives informed consent to disclosing this information or disclosure is either impliedly authorized or otherwise permitted by exceptions in Rule 1.6,<sup>17</sup> there is no obligation to report a lawyer's misconduct. Indeed, to report in these circumstances would presumably violate Rule 1.6 and thus subject the reporting lawyer to criticism.

**Indirect disclosure of client confidences.** One important question is whether a disclosure is required under Rule 8.3 if reporting misconduct will not itself reveal protected information but the disciplinary investigation would do so. This is addressed by Comment 4 on Rule 1.6: “. . . The prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.”

As thus interpreted, the confidentiality proviso to Rule 8.3 becomes a major limitation on the mandatory duty to report unethical lawyers—although you can, of course, secure the client's consent to making such a report. Thus, the question of whether you *must* snitch depends on some other questions: the nature and seriousness of the misconduct, the reliability or credibility of the information, the extent to which the information relates to the lawyer's representation of her client, and if so, whether the client consents to disclosing that information.

### Can You Snitch?

Even if there is no mandatory duty to report under Rule 8.3 because, for example, the misconduct is not serious or the evidence is equivocal, a lawyer is not precluded from reporting professional misconduct to the appropriate disciplinary authorities unless doing so

would violate another ethical rule. As explained in one state ethics opinion, Rule 8.3 “neither limits the circumstances in which a lawyer is permitted to make a report (except where Rule 1.6 precludes disclosure), nor defines those situations in which reporting might be appropriate if not mandatory.”<sup>18</sup> Instead, subject to a lawyer's confidentiality obligations, “[a] lawyer is always free to report evidence of what *might constitute* improper conduct by another attorney,” even without actual proof of misconduct.<sup>19</sup> All that is required is a good faith belief or suspicion that misconduct has occurred.<sup>20</sup>

### Can You Just Threaten a Little?


Can you legitimately threaten a lawyer with the filing of a disciplinary complaint, rather than making a formal report? Some jurisdictions characterize a threat to file disciplinary charges as misconduct in violation of the ethical rules, at least where the only purpose is to gain an advantage in a civil proceeding.<sup>21</sup> The Model Rules do *not* expressly prohibit this type of conduct; an ABA opinion does, at least in some circumstances.<sup>22</sup> In Formal Opinion 94-383, the ABA has opined that such conduct constitutes a violation of Rule 8.4(a), which identifies as ethical misconduct the lawyer's failure to report ethical violations of another lawyer pursuant to Rule 8.3 when required to do so.<sup>23</sup>

Such conduct may violate other provisions of the Model Rules as well. For example, a threat to file disciplinary charges to coerce settlement or to gain advantage in a civil proceeding may, in an extreme case, constitute extortion, in violation of Rule 8.4(b).<sup>24</sup> Accordingly, the ABA cautions that before threatening another lawyer with disciplinary charges, you must consider the requirements of the criminal law as well as those of the Rules intended to protect the integrity of the judicial and disciplinary processes.<sup>25</sup>

Remember also that the Model Rules

apply only to lawyers and those working with or for them. Thus, clients are neither required nor prohibited by these rules from making ethical complaints, although under Model Rule 8.4(a) a lawyer could not “knowingly assist or induce” a nonlawyer to do what the lawyer is prohibited from doing.

### Should You Snitch?

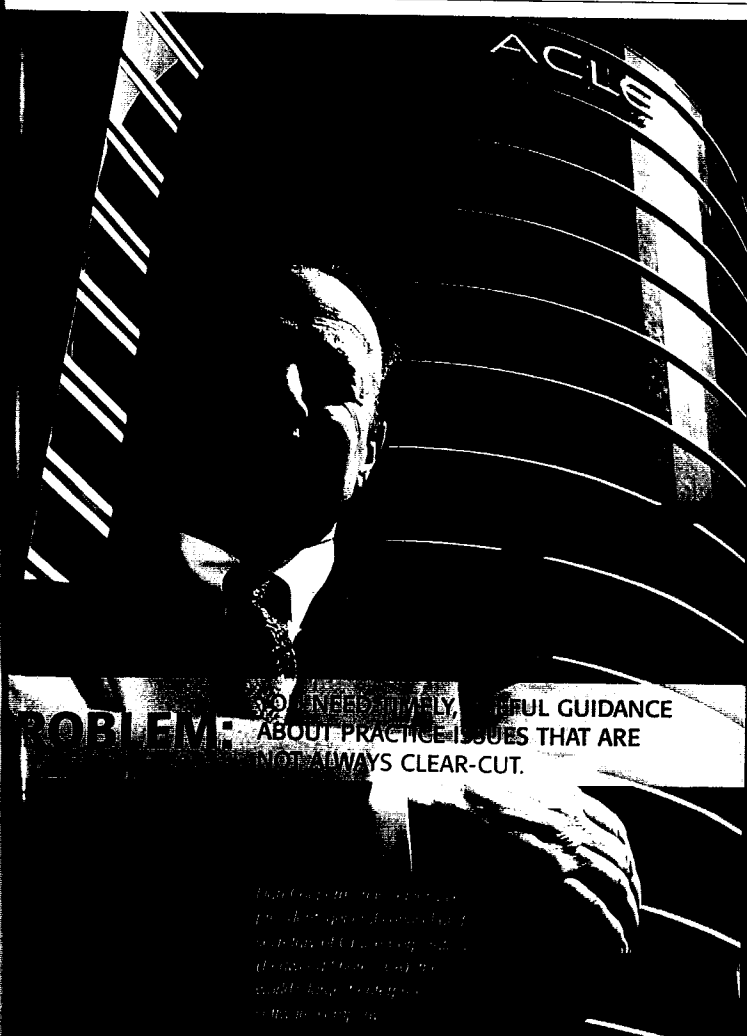
So what is our lawyer to do? Assess, first, the gravity of the ethical breach. Is it knowing or unintentional? Does it reflect adversely on fitness, character, or honesty? Weigh the level of certainty—is it known or merely suspected? And finally, will it disclose or lead to the disclosure of client confidence? If so, does the client consent? 

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### NOTES

1. *ABA Model Rules of Professional Conduct*, Rule 8.3(a), (c) (2004) (emphasis supplied). The Restatement provides to the same effect. *See Restatement (Third) of the Law Governing Lawyers* § 5(c) (2000).
2. *See* Model Rule 8.3, cmt. [1]; *see also* S.C. Adv. Op. 05-03, 2005 WL 483383, at \*2 (S.C. Bar Eth. Adv. Comm.); *see generally* Arthur F. Greenbaum, “The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform,” 16 *Geo. J. Legal Ethics* 259, 263-264 (Winter 2004) (reviewing justifications for the reporting duty).
3. *See ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 94-383 (July 5, 1994) at ¶ 8 (stating that such a failure would violate Rule 8.4(a), which provides that a lawyer is guilty of professional misconduct for violating or attempting to violate the Rules of Professional Conduct).
4. *See* Larry Schafer, “Attorney and Client: Duty to Report Lawyer Misconduct,” 67 *N.D. L. Rev.* 359, 364-366 (1991) (contrasting the broad reporting obligation under DR 1-103(A) of the Model Code with the more restrictive reporting obligation under Model Rule 8.3).
5. Model Rule 1.0(f).

6. See, e.g., *D.C. Bar Op.* 246 (Revised Oct. 18, 1994) (lawyer must have a "clear belief that misconduct has occurred, and [must] possess actual knowledge of the pertinent facts"); *New York City Ethics Op.* 1990-3 (1990) ("[T]he reporting attorney must be in possession of facts that clearly establish a violation of the disciplinary rules"); see also *Attorney U v. The Mississippi Bar*, 678 So. 2d 963, 970-972 (Miss. 1996) (reviewing the treatment of the rule's knowledge requirement by various state ethics commissions).
7. *Restatement (Third) of the Law Governing Lawyers*, *supra*, § 5, cmt. i.
8. *Id.*; see *Attorney U*, 678 So. 2d at 972 ("[The] standard must be an objective one . . . not tied to the subjective beliefs of the lawyer in question").
9. Model Rule 8.3, cmt. [3]; see Model Rule 8.4 (delineating what constitutes professional misconduct).
10. See *In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d 317, 321 (R.I. 1993).
11. See *S.C. Adv. Op.* 05-03, 2005 WL, at \*1 *Supra*, n. 2..
12. See *D.C. Bar Op.* 246, *supra*, n. 6.
13. See *Ct. Eth. Op.* 99-8, 1999 WL 957841 (March 25, 1999) (involving the duty to report in connection with an alleged violation of Rule 5.5(b)).
14. See *Il. Jud. Eth. Op.* 01-04 (Jan. 2002).
15. Model Rule 8.3, cmt. [2].
16. Model Rule 1.6, cmt. [3]. Not all jurisdictions follow the Model Rules, nor the version of Rule 1.6 adopted in 2002 by the ABA's House of Delegates; see J. Villa, *Corporate Counsel Guidelines* § 3:11 (Thomson/West 2005). Compare *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) (limiting exemption from reporting obligation to matters protected by the attorney-client privilege), with *In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d at 322 (Rhode Island's version of Rule 1.6 prevents disclosure of information to disciplinary authorities related to client representation even though the information may not be protected by the attorney-client privilege).
17. Model Rule 1.6(a).
18. *D.C. Bar Op.* 246, *supra*, n. 6.
19. *Id.* (quoting *New York State Bar Association's Committee on Professional Ethics*, *Op. No.* 635 (1992), at 4).
20. *Id.*; see also *S.C. Adv. Op.* 05-04, 2005 WL 483384, at \*1 (January 14, 2005) (absent firm knowledge of an ethical violation, a lawyer may, but is not required to, report the violation).
21. See, e.g., *D.C. Rules of Professional Conduct*, Rule 8.4(g).
22. *ABA Comm. on Ethics and Professional Responsibility*, *Formal Op.* 94-383, *supra*, at n. 3, ¶ 3.
23. *Id.* at ¶ 8.
24. *Id.* at ¶¶ 10-11. Other rules implicated by such conduct include Rule 3.1, prohibiting frivolous claims; Rule 4.1, requiring truthfulness when dealing with others on a client's behalf; Rule 4.4, prohibiting the use of means having no substantial purpose other than to embarrass, delay, or burden another; and Rule 8.4(d), prohibiting conduct prejudicial to the administration of justice. *Id.* at ¶¶ 12-14.
25. *Id.* at ¶ 15.



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