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Tough Call:
Reporting Professional Misconduct under RPC 8.3

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> **Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession[.]**
> **~ABA Canon 29**

The duty to report professional misconduct is not new. Canon 29 was adopted in 1908. The reason is not new either. Comment 1 to Washington's current reporting rule—RPC 8.3—notes that the duty to report is a fundamental obligation of a self-regulating profession. At the same time, many situations giving rise to potential reporting are often more nuanced than a lawyer who stole money from a trust account or lied to a judge.

In this column, we'll look at two aspects of Washington's reporting rule. First, because Washington's rule varies in a central respect from its ABA Model Rule counterpart, we'll briefly survey the history of the Washington version for context. Second, we'll then examine the principal elements of the rule.

Before we do, three preliminary points are in order.

First, although we will focus on misconduct, reporting may also be triggered when another lawyer's "fitness . . . in other respects" leads to a serious violation of the RPCs. ABA Formal Opinion 03-431 (2003) discusses when reporting may be necessary due to another lawyer's rule violation—such as competence under RPC 1.1 or the failure to withdraw under RPC 1.16(a)(2)—

stemming from an illness or other impairment. ABA Formal Opinion 03-429 (2003) also touches on reporting from the perspective of an impaired lawyer within your own firm.

Second, we will focus on reporting misconduct by other lawyers.[1] RPC 8.3(b), however, also extends reporting to misconduct by judges.[2]

Third, we will discuss reporting another lawyer you encounter rather than a lawyer you are defending or advising on past professional misconduct. RPC 8.3(c) excludes from reporting misconduct learned through confidential information subject to RPC 1.6.[3] Therefore, Comment 4 to RPC 8.3 notes that reporting does not apply to counsel retained to represent a lawyer regarding past misconduct: "This Rule does not apply to a lawyer retained to represent a lawyer, LLLT, or judge whose professional conduct is in question."[4]

Historical Context

As noted at the outset, Canon 29 encouraged lawyers to report professional misconduct. When the Canons were replaced by the ABA Model Code of Professional Responsibility in 1969, encouragement was transformed into an obligation under ABA DR 1-103(A): "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 [misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such

violation."[5] Washington, however, rejected that change—with the WSBA review committee at the time writing in the *Bar News* that "the concept of a lawyer's duty to bring to the attention of proper officials violations of the canons by other lawyers was covered sufficiently in the form of an ethical consideration [using the word "should"] and that it was unnecessary and unrealistic to subject a lawyer to discipline for failure to comply[.]"[6] Instead, the review committee stressed a lawyer's duty under a companion provision to cooperate with disciplinary investigations.[7]

When the ABA replaced the Model Code with the Model Rules of Professional Conduct in 1983, the scope of ABA Model Rule 8.3(a) changed somewhat from its Model Code predecessor, but reporting remained mandatory.[8] Washington again followed a different trajectory. When Washington moved to RPCs patterned on the ABA Model Rules in 1985, reporting under Washington RPC 8.3(a) was framed as discretionary ("should") rather than mandatory ("shall").[9]

In the early 2000s, the WSBA comprehensively reviewed the RPCs in light of then-recent amendments to the ABA Model Rules. The WSBA committee appointed to review the ABA amendments—known as the "Ethics 2003" Committee—recommended in a close vote to retain discretionary reporting rather

than move to the ABA's mandatory formulation.[10] In forwarding the Ethics 2003 Committee's report to the Supreme Court, however, the Board of Governors recommended that reporting under RPC 8.3 be made mandatory.[11] Ultimately, the Supreme Court left reporting under RPC 8.3 as discretionary.[12] Other than amendments in 2015 to incorporate references to LLLTs, the rule has remained the same since it was last updated in 2006 in the Ethics 2003 process.

Washington RPC 8.3(a) now reads:

> A lawyer who knows that another lawyer or LLLT has committed a violation of the applicable Rules of Professional Conduct that raises a substantial question as to that lawyer's or LLLT's honesty, trustworthiness or fitness as a lawyer or LLLT in other respects, should inform the appropriate professional authority.

WSBA Advisory Opinion 1633 (1995) noted that "'should' is stronger than 'may'" in encouraging lawyers to report cases of serious misconduct. Recent annual reports from the Office of Disciplinary Counsel reflect that around five percent of all complaints received in a typical year are from other lawyers and judges.[13] This is not dramatically different than mandatory jurisdictions like Oregon that for the pre-pandemic years 2017 through 2019 received roughly 10 percent of all complaints from other lawyers and judges.[14, 15]

Elements of the Rule

Two of the most prominent features of the Washington rule are what is not included. First, as just discussed, reporting is discretionary rather than mandatory. Second, under the Washington rule (like its ABA Model Rule counterpart), self-reporting is not required[16]—with reporting framed in terms of the misconduct of "another lawyer."[17]

On a practical level, most reporting issues usually center around requisite knowledge, what constitutes a "substantial question" and where (and when) to report.

Knowledge. "Knows" is defined in the terminology section of the RPCs (at RPC 1.0(A)(f)) as "actual knowledge of the fact in question"—while noting that "knowledge may be inferred from circumstances." Learning from a document that another lawyer has lied to a court, for example, is actual knowledge. Having a hunch that opposing counsel "skirts the line" is not.[18] As noted earlier, RPC 8.3(c) specifically excludes confidential information protected by RPC 1.6 from reporting.[19] No duty to report would arise, for example, if the only source of a lawyer's knowledge was through a privileged attorney-client communication.

Substantial Question. In many respects, the most difficult practical assessment lawyers face with potential reporting is what constitutes a

"substantial question" about another lawyer's "honesty, trustworthiness or fitness as a lawyer[.]" Comment 3 to RPC 8.3 underscores this tension: "A measure of judgment is . . . required in deciding whether to report a violation. The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."[20] WSBA Advisory Opinion 1701 (1997), for example, notes that malpractice may—or may not—meet this standard depending on the circumstances. An isolated error in docketing a limitation period by an otherwise competent lawyer likely would not meet the "substantial" threshold. Comment 1 to RPC 8.3 counsels, however, that even "[a]n apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover" and adds that "[r]eporting a violation is especially important where the victim is unlikely to discover the offense." The ABA added the qualifier "substantial" to the reporting requirement when it moved to the Model Rules in 1983, noting both that the earlier Model Code formulation that required reporting any violation "proved unenforceable in practice" and that introducing the "substantial" trigger "was intended to incorporate a rule of reason."[21]

Where and when. In most instances, the "appropriate professional authority" for reporting is the Office of Disciplinary Counsel.[22] Instructions and

forms are available on the WSBA web site. Under ELC 1.4, there is no statute of limitation on the filing of a grievance or the commencement of a disciplinary proceeding in Washington. A lawyer considering reporting, therefore, potentially has some discretion on timing if, for example, a violation by opposing counsel, while serious, will not cause imminent harm to others and the lawyer is in the middle of delicate negotiations with the opposing counsel over settlement of a lawsuit and reporting immediately would prejudice the reporting lawyer's client if the negotiations would likely "blow up" due to the report.[23]

Summing Up

Reporting another lawyer for a violation of the RPCs can be a tough call. For every clear instance of serious misconduct, lawyers are likely to be confronted with more subtle situations that call for the discretion vested in the rule.

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[1] Reporting misconduct under RPC 8.3(a) includes both other lawyers and LLLTs. Similarly, LLLT RPC 8.3(a) also includes both lawyers and LLLTs.

[2] RPC 8.3(b) reads: "A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should inform the appropriate authority."

[3] RPC 8.3(c) reads: "This Rule does not permit a lawyer to report the professional misconduct of another lawyer, judge or LLLT to the appropriate authority if doing so would require the lawyer to disclose information otherwise protected by Rule 1.6."

[4] *See also* ABA Formal Op. 08-453 (2008) at 5 (discussing this point in the context of law firm in-house ethics counsel). Although consultation with the WSBA's Professional Responsibility Program does not create an attorney-client relationship, APR 19(e)(7) designates such consultations as confidential and exempts them from RPC 8.3. Similarly, information learned in the course of a lawyers' or judges' assistance program is confidential under APR 19(b). *See also* RPC 8.3, cmt. 5 (discussing the exemption for information learned while participating in such programs).

[5] *See generally* Thomas R. Andrews, Ch. 12 at 12-4 to 12-5, *The Law of Lawyering in Washington* (2012) (recounting history of Washington RPC 8.3(a)) (Andrews).

[6] Committee on the Code of Professional Responsibility, *Code of Professional Responsibility*, 24 Wash. St. B. News 34, 34-35 (1970) (Code Review Committee); *see also* WSBA Jan. 18, 1985 Letter to Supreme Court at 6 (WSBA Archive) (WSBA 1985 Letter) (commenting on Washington's version of DR 1-103).

[7] Code Review Committee, *supra*, at 35. *See also* Former Washington CPR DR 1-103 and EC 1-4 (WSBA Archive).

[8] *See* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 839-43 (2013) (ABA Legislative History) (discussing history of ABA Model Rule 8.3).

[9] Andrews, *supra*, at 12-4; *see also* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61

Wash. L. Rev. 823, 900 (1986) (discussing Washington RPC 8.3 as adopted in 1985); WSBA 1985 Letter at 6 (recommending "should" rather than "shall").

[10] *See* WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 213 (2004) (on file with author); *see also* Andrews, *supra*, at 12-5 (recounting the Ethics 2003 Committee's review on this point).

[11] *See* WSBA, Board of Governors' Revisions to Ethics 2003 Committee Recommendations at 20-21 (2004) (on file with author); Andrews, *supra*, at 12-5.

[12] Andrews, *supra*, at 12-5.

[13] Washington Disciplinary System Annual Reports 2020 (at 8), 2019 (at 7), 2018 (at 9), available at www.wsba.org.

[14] Oregon State Bar, Disciplinary Counsel's Office Annual Reports 2019 (at 12), 2018 (at 15), 2017 (at 14), available at www.osbar.org.

[15] In mandatory reporting jurisdictions, lawyers who fail to report are at disciplinary risk themselves. But, aside from a few well-publicized decisions (*see, e.g., In re Himmel*, 533 N.E.2d 790 (Ill. 1988)), cases involving reporting failures are relatively rare in mandatory jurisdictions. *See* ABA, *Annotated Model Rules of Professional Conduct* at 696-702 (9th ed. 2019) (compiling cases and ethics opinions nationally). The *Himmel* decision, however, did trigger a sharp increase in lawyer reporting in Illinois. *See* Laura Gatland, *The Himmel Effect: "Snitch Rule" Remains Controversial but Effective, Especially in Illinois*, 83, No. 4 A.B.A. J. 24, 24-25 (Apr. 1997). Closer to home, Oregon has not imposed sanctions for failure to report under its analogous mandatory rules since it began comprehensively compiling disciplinary decisions in the early 1980s. *See* Oregon State Bar, *Oregon Rules of Professional Conduct Annotated* at 1001-05 (rev. 2021). Nonetheless, Oregon's contemporary level of lawyer reporting is roughly the same as Illinois. *See* Note 14, *supra*; Illinois Attorney Registration & Disciplinary Commission 2020 Annual Report, Chart 26, available at www.iardc.org.

[16] Restatement (Third) of the Law Governing Lawyers, § 5(3) (2000) addresses reporting. Under the Restatement, reporting is mandatory but does not include self-reporting.

[17] Self-reporting, however, is required under three provisions of the Rules for the Enforcement of Lawyer Conduct: ELC 7.1(b) requires reporting felony convictions; ELC 9.2(a) requires reporting public discipline in another jurisdiction; and ELC 15.4(d) requires reporting receipt of a trust account overdraft notification. Violation of a duty imposed by the ELCs, in turn, is a basis for discipline under RPC 8.4(l).

[18] Noting the analogous ABA Model Rule definition of "knowledge," the Illinois Supreme Court in *Skolnick v. Altheimer & Gray*, 730 N.E.2d 4, 14 (2000), commented on this tension: "[T]he ABA has concluded that the 'knowledge' requirement of Model Rule 8.3 requires 'more than a mere suspicion' but need not amount to 'absolute certainty.'" (Citation omitted.)

[19] In assessing whether RPC 1.6 precludes reporting under RPC 8.3, the exceptions to the confidentiality rule under RPC 1.6(b) should also be weighed. *See Weiss v. Lonnquist*, 173 Wn. App. 344, 356, 293 P.3d 1264 (2013) (noting the availability of exceptions under RPC 1.6(b) in determining lawyer could have reported under RPC 8.3(a)).

[20] Under ELC 2.12, participants in the regulatory process—including lawyer-reporters under RPC 8.3—are afforded a privilege from civil suit for providing the information involved.

[21] ABA Legislative History, *supra*, at 840.

[22] *See generally In re Schafer*, 149 Wn.2d 148, 165, 66 P.3d 1036 (2003) (noting that reporting under RPC 8.3 is limited to an "appropriate professional authority").

[23] At the same time, a lawyer cannot use the threat of reporting to gain "leverage" against opposing counsel. *See generally* ABA Formal Op. 94-383 (1994) (discussing this topic).