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The Squeal Rule: Reporting Others' Misconduct

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Oregon lawyers have long had a duty to report other lawyers' professional misconduct. Former DR 1-103(A) first required such reporting in 1970. The reporting obligation continued with the transition to the RPCs in 2005. Oregon lawyers have also long enjoyed absolute immunity from civil liability for reporting their peers under ORS 9.537. The requirement is often described colloquially as the "squeal rule" and motives for reporting range from the absolute best to the absolute worst. Regardless, statistics published annually by the Oregon State Bar reflect no inhibition on the part of Oregon lawyers in reporting their colleagues—with opposing counsel and their clients (presumably upon consultation with their lawyers) typically supplying roughly 20 to 25 percent of the complaints handled by the Disciplinary Counsel's Office in recent years.

The current version of the reporting requirement, RPC 8.3(a), is functionally similar to both former DR 1-103(A) and its ABA Model Rule counterpart:

> "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 Oregon State Bar Client Assistance Office."

In this column, we'll survey the component parts of the reporting requirement. Further and more detailed guidance is available in OSB Formal

Ethics Opinion 2005-95 (available on the OSB's web site at www.osbar.org) and in Chapter 13 of the current edition of the OSB's *Ethical Oregon Lawyer* (available in most county law libraries) written by OSB General Counsel Sylvia Stevens.

***Knowledge*.** RPC 8.3(a) requires that a lawyer "know" that another lawyer has committed professional misconduct. RPC 1.0(h) defines "know" as "actual knowledge of the fact in question[.]" Although actual knowledge can be inferred from the circumstances under RPC 1.0(h), it is more than mere suspicion. Formal Ethics Opinion 2005-95 (at 2) puts it this way: "[A] Lawyer would be required to report a violation only if Lawyer knows, rather than merely suspects, that the violation occurred[.]"

Another Lawyer. By its terms, RPC 8.3(a) is framed in terms of another lawyer's conduct. Therefore, it does not require self-reporting.

***Source of the Information*.** In determining whether to report, the source of a lawyer's information must be considered because under RPC 8.3(c) our duty of client confidentiality (RPC 1.6 and ORS 9.460(3)) overrides the obligation to report. In other words, if the information falls within the confidentiality rule, a lawyer can only report with client consent (or one of RPC 1.6's other exceptions applies). Under RPC 1.0(f), confidential information "denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client

has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

The Kind of Misconduct. RPC 8.3(a) does not require reporting of every conceivable violation. Rather, it only requires reporting those that raise a "substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." In many circumstances, this definition is easier to state than to apply and is somewhat akin to former Justice Potter Stewart's famous definition of pornography as "I know it when I see it." Formal Ethics Opinion 2005-95 quotes (at 3) the comments to ABA Model Rule 8.3 in attempting to fashion practical boundaries to the reporting requirement:

> "'This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. *The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware*.'" (Emphasis added by 2005-95.)

To Report or Not? In many respects, RPC 8.3 presents some odd contrasts. Although it is focused on reporting others, it places the punishment for failing to do so on the observer. At the same time, nationally decisions for failing to report are very rare. Similarly, although the rule is cast in mandatory terms, it also accords the potential reporter significant discretion. The absolute immunity afforded by ORS 9.537 effectively means that there is no penalty on the reporter for erroneous reporting (whether well intentioned or not). Yet, the consequences

in time, money and reputation for an accused lawyer are substantial even if the lawyer is exonerated.

In many instances, the decision to report is clear because the conduct observed is both clear and clearly wrong. In many other instances, however, the answer is not as apparent. In those more nuanced situations, lawyers must undertake the balancing test that is a part of the rule itself and, where appropriate, consult with their clients.

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