Reporting Lawyer Misconduct to OCDC

Many lawyers are reluctant to report their peers to the Office of Chief Disciplinary Counsel ("OCDC") for violations of the Missouri Rules of Professional Conduct. Under certain circumstances, however, practitioners have a mandatory duty to report. Rule 4-8.3 provides: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority."[1]

Knowledge of misconduct. The mandatory reporting rule is triggered when a lawyer "knows" another lawyer has violated the rules. The knowledge necessary to mandate a report is "actual." Per the Rule 4-1.1(f), "'knows' denotes actual knowledge of the fact in question;" although, "[a] person's knowledge may be inferred from circumstances."

Serious Offenses. Lawyers are not required to report every violation of the Rules. The mandatory reporting obligation is limited "to those offenses that a self-regulating profession must vigorously endeavor to prevent."[2] Lawyers must report "a violation … that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects…." Mandatory reporting is limited to those serious rule violations. Reports of other rule violations are discretionary.

What constitutes "honesty" and "trustworthiness" is probably obvious. "Fitness as a lawyer in other respects," however, may be a little harder to define. In a 2003 Missouri

informal ethics opinion, the inquiring attorney stated he or she had "information that another attorney has committed criminal acts," but that the other attorney had not pleaded guilty or been convicted. Legal Ethics Counsel advised that the inquiring attorney had an obligation to report the information to OCDC.[3]

In a 2005, a Missouri attorney asked for an informal advisory opinion[4] as to whether he or she had to report opposing counsel's alleged conflict of interest. The inquiring attorney represented a health care provider in a malpractice action. Opposing counsel in the case had previously represented the health care provider in a disciplinary proceeding before a state licensing board and had gained confidential information in that action that potentially could have been used in the current malpractice case. The inquiring attorney had filed a motion to disqualify the attorney but wanted to know whether he or she also had to report the lawyer to OCDC. [5]

Legal Ethics Counsel answered that the proceedings with regard to the motion to disqualify would clarify the facts, but also key was whether the inquiring attorney believed that the opposing counsel had a good faith belief that there was no conflict. If the court found specifically that there was no conflict, if inquiring attorney believed opposing counsel had a good faith belief there was no conflict, or if the court disqualified opposing counsel but the inquiring believed opposing counsel had a good faith belief there was no conflict, the inquiring attorney did not have a duty to report opposing counsel's conduct to OCDC. If the court did disqualify opposing counsel and the inquiring attorney believed opposing counsel did not have a good faith belief that there

was no conflict, then inquiring counsel did have a duty to report opposing counsel to OCDC. Even that duty to report, however, applied only with the client's consent.[6]

Rule violations combined with substance abuse or mental health issues also may implicate a fitness to practice inquiry. When in doubt, lawyers should contact the Legal Ethics Counsel's office to request an informal advisory opinion.

Lawyers should report misconduct that constitutes a mandatory rule violation even if they are worried that it will be hard to prove. In the context of analyzing the duty, "[t]he term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."[7]

Confidential Information. Rule 4-8.3(c) specifically exempts from the required disclosure of "information otherwise protected by Rule 4-1.6."[8] If, therefore, the report would cause the reporting lawyer to violate Rule 4-1.6, the report is not required and the duty of client confidentiality prevails. Under the Rule 4-1.4 duty to communicate, lawyers should inform their clients that they have the option to file a complaint with OCDC.

Rule 4-1.6(b) provides exceptions to the duty of confidentiality, but the starting point is that "[a] lawyer shall not reveal information relating to the representation of a client…."[9] With such a broad starting point, it is generally best to obtain the client's consent if the report of misconduct would disclose information related in any way to the lawyer's representation of that client.

Lawyers should encourage their clients to consent to the disclosure "where prosecution would not substantially prejudice the client's interests."[10] The client's

consent to the disclosure of confidential information must be "informed," so the lawyer must have advised the client of the risks associated with the disclosure and of any reasonably available alternatives to that disclosure.[11] Lawyers should document their discussions with clients where client confidentiality trumps an otherwise mandatory reporting obligation.

Finally,[12] the Rule does not require disclosure of "information gained by a lawyer or judge while participating in an approved lawyers assistance program."[13] This exception encourages lawyers to seek treatment through available assistance programs.

Report to OCDC. Lawyers cannot discharge their duty by reporting the conduct to a local judge. OCDC has received reports in the past of attorneys reporting alleged misconduct to trial court judges and proclaiming: "Now, you have to deal with it." That report does not comply with the Rule. Reports must be made to the "appropriate professional authority," generally, the OCDC.[14]

Additionally, the Rule does not include an exception that allows lawyers to rely on someone else to make the report. Even if lawyers believe someone else reported the misconduct, it is better to confirm that report in writing.

When reporting alleged misconduct to OCDC, lawyers may choose to be a "complainant" or a "reporter." With a report, OCDC follows up on its own investigation and the complainant is identified as "OCDC." Reporters are not notified of the result of the investigation.

If the reporting lawyer submits the information as a "complainant," he or she is provided notice of the result of the investigation and is immediately identified to the

respondent attorney at the time the investigation is opened. In both situations, the information submitted may be provided to the respondent attorney during the investigation.

OCDC does accept and investigate complaints made anonymously if they provide sufficient information. If a lawyer has a duty to report misconduct, he or she should keep in mind that they may need to prove they made the required report. A weak report may not constitute a report at all. Any report must be sufficiently detailed so that an adequate investigation can be completed. A vague or otherwise inadequate report might not result in a meaningful investigation and, if the report was made anonymously, OCDC will not have a complainant or reporter with whom to follow up.

Time of Report. Rule 8.3(a) is silent as to the timing of a required report of misconduct by another attorney. Reports generally should be made promptly, taking into consideration client impact and whether immediate action is needed to prevent some future wrongdoing.[15]

Threat of Report. Threatening disciplinary complaints to obtain an advantage in a representation may violate any or all of the following rules: 4-3.1, 4-4.1, 4-4.4(a), and 4-8.4(d).[16] Rule 4-3.1 prohibits a lawyer from "bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous…." While a claim "is not frivolous merely because the facts have not first been fully substantiated," … lawyers must "inform themselves about the facts … and the applicable law and determine that they can make good faith arguments in support" of their claim.[17]

If a lawyer threatens to report another attorney, but has no intention of doing so, the Court may find that the threat contained a false statement. Rule 4-4.1(a) prohibits a lawyer, in the course of representing a client, from knowingly making "a false statement of fact or law to a third person."[18]

The threat also may violate Rule 4-4.4(a): "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such a person." If a threat has no legal or factual basis, a court may find that its only purpose was to "embarrass, delay, or burden a third person."[19]

Further, a threat made to gain an advantage may violate Rule 8.4(d) which prohibits "conduct that is prejudicial to the administration of justice." In *In re Eisenstein*[20], the Supreme Court of Missouri found that the respondent violated Rule 4-8.4(d) when he sent an email to another attorney implying that she would suffer professional retribution if she continued to pursue an argument that he had engaged in misconduct. "Threatening opposing counsel during the course of litigation or to avoid an ethics complaint constitutes conduct prejudicial to the administration of justice."[21]

The legal profession is self-regulating and, "[t]o the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."[22] Reporting serious misconduct serves to protect the public and the reputation of the legal profession.

[1] Rule 4-8.3(a).

[2] Rule 4-8.3, cmt. [3].

[3] Mo. Informal Advisory Op. 2003-89.

[4] Pursuant to Rule 5.30, The Legal Ethics Counsel issues opinions to attorneys for their own guidance involving an existing set of facts. The summaries provided by The Legal Ethics Counsel are to be used only for general guidance and are not binding.

[5] Mo. Informal Advisory Op. 2005-0051.

[6] *Id.*

[7] Rule 4-8.3, cmt. [3].

[8] Rule 4-8.3(c).

[9] Rule 4-1.6(a).

[10] Rule 4-8.3, cmt. [2].

[11] Rules 4-1.6(a) and 4-1.1(e).

[12] Although some states rules do include such an exception, Missouri's Rule 4-1.6 does not include an exception to the duty to maintain confidentiality for reports to OCDC.

[13] Rule 4-8.3(c).

[14] Rule 4-8.3, cmt. [3]; see also *Skolnick v. Altheimer and Gray*, 730 N.E.2d 4, 15 (Ill. 2000) (Attorney was required to report misconduct to disciplinary counsel. "Her duty to report cannot be discharged by reporting the suspected misconduct to the trial court.").

[15] See, e.g., S.C. Bar Ethics Advisory Comm., Op. 16-04, 07/18/2016 (A lawyer may wait until the conclusion of a legal matter if he or she "determines immediate reporting may hurt the client. However, the misconduct should be reported 'promptly' at the conclusion of the litigation or appeal."); and *In re Riehlmann*, 891 So.2d 1239, 1247 (La. 2005) ("The need for prompt reporting flows from the need to safeguard the public and the profession against future wrongdoing by the offending lawyer. The purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented.").

[16] See Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 Am. J. Trial Advoc. 27, 29-39 (2010).

[17] Rule 4-3.1, cmt. [2]; see also *In re Caranchini*, 956 S.W.2d 910, 916 (Mo. banc 1997) (the respondent violated Rule 4-3.1 for continuing to pursue a slander claim after it became apparent that the facts did not support it).

[18] Rule 4-4.1(a); see also *In re Krigel*, 480 S.W.3d 294, 299-300 (Mo. banc 2016).

[19] See *In re Krigel*, 480 S.W.3d at 300 (respondent's conduct "actively concealing factual information … so that his client's position would prevail" violated Rule 4-4.4(a)).

[20] *In re Eisenstein*, 485 S.W.3d 759, 763 (Mo. banc 2016).

[21] *Id*.

[22] Missouri Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities, ¶ [11].