Lawyers as Rats: Part Deux

By C. Evan Stewart

This author was somewhat surprised to learn that there are approximately 30 rats in animated cartoon history. Undoubtedly, the nicest and most charming (and thus, I suppose, the most popular) is Remy from the movie *Ratatouille*.[1] In a prior article for this distinguished journal, less charming rats were explored: lawyers who rat out their clients and seek to profit thereby.[2] This article will explore lawyers as rats in a different context: ratting out other lawyers.

There's a Rat Rule!

Forty-seven states (and the District of Columbia) have adopted ABA Model Rule 8.3 ("Maintaining the Integrity of the Profession"). Subsection (a) sets forth: "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"[3] (emphasis added). Two states—Georgia and Washington—have replaced that mandatory obligation with a discretionary one ("should"). And one state—California—has expressly rejected adopting *any* ethical provision like Rule 8.3.[4]

While this reporting obligation looks simple on its face, its application in real life tells a different story. Most importantly, what constitutes "knowing"? According to one ethics guru, there are least seven definitions that can fill the bill.[5] One frequently cited standard can be found in *Riehlman*.[6] There, the court opined that a lawyer must report another lawyer's misconduct "when the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred." That standard, of course, is an objective one.[7]

New York State takes a different approach. In Opinion 854,[8] the New York State Bar Association Committee on Professional Ethics opined that "knowing" meant the reporting lawyer has actual knowledge or clearly believes another lawyer has engaged in misconduct.[9] The committee also addressed the sticky wicket of whether the ratting lawyer can report the other lawyer's misconduct to that lawyer's client(s). Good faith disclosure to the clients is permitted (but not required) *if* the lawyer has actual knowledge of the misconduct *and* does not reveal any client confidences.[10] This latter condition is consistent with Rule 8.3 (c) and other jurisdictions' views that the obligation of confidentiality takes precedence over the duty to report.[11] The committee went on to urge caution before rushing off to make a discretionary report of misconduct to another lawyer's client(s), citing a host of countervailing considerations (especially damage to that lawyer's attorney-client relationship(s)).

Not *every* violation of the ethics rules is reportable;[12] the test is whether the violation "raises a *substantial* question as to the lawyer's honesty, trustworthiness or fitness" (emphasis added). The most obvious examples of reportable conduct are lying and stealing.[13] Other situations requiring reporting include: inaccurate advertising;[14] unreasonable fees;[15] an improper settlement offer;[16] violation of the duty of confidentiality;[17] failure to correct a defective court order;[18] and the unauthorized practice of law.[19]

Most jurisdictions do not require self-reporting, given that Rule 8.3(a) talks of "another lawyer."[20] But a few jurisdictions do not construe the reporting obligation that way (e.g., Ohio, Alabama, and Kansas), and they *do* require self-reporting.[21]

In one area there is general uniformity: lawyers may *never* use the threat of reporting to attempt to gain an advantage in litigation.[22]

A Seminal Decision

One case seems to stand out—above all others—in the circumstance of a lawyer ratting out another lawyer: *Himmel*.[23] In 1983, Illinois licensed attorney Himmel was hired to help an 18-year-old motorcycle accident victim recover $23,000 in settlement monies that her first attorney pocketed. Himmel was told by his client *not* to report the first lawyer's misconduct to the Illinois Attorney Registration and Disciplinary Commission (IARDC); unbeknownst to Himmel, the client reported the first attorney to the IARDC. Himmel proceeded to get a very favorable settlement of $75,000 with the first lawyer in exchange for an agreement not to prosecute him. When the first lawyer welched on that agreement, Himmel went into court and secured a $100,000 judgment. Ultimately, the client received $10,000 and Himmel received nothing monetarily for his troubles.

In 1986, the IARDC brought charges against Himmel for violating Rule 8.3.[24] And in 1988, the Illinois Supreme Court affirmed the one-year suspension sanction imposed

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by the IARDC. The court ruled that it is the lawyer's *unwaivable* duty to report misconduct; thus, it was simply irrelevant that the client had instructed Himmel not to report on the first lawyer. As a secondary ruling, the court found that Rule 8.3(c)'s bar against using confidential/privilege information to report did not save Himmel from being sanctioned because the privileged information was conveyed to Himmel in the presence of third parties and related to the first lawyer's conversion of client funds (i.e., illegal conduct).[25]

Perhaps it is because of the *Himmel* decision that Illinois leads the nation in misconduct complaints being filed by lawyers against other lawyers.[26] And while actual prosecutions are a far fewer number from initial complaints, many prominent Illinois law firms have felt the sting of Rule 8.3(a).[27]

The Associate's Dilemma

Over the years, a number of commentators have raised concerns regarding the pressures on associates at law firms not to report partner misconduct.[28] In fact, there is a body of law that has developed in this area that is instructive.[29]

The starting point is *Weider v. Skala*.[30] In *Weider*, a former associate at a small New York City law firm brought a breach of contract and wrongful discharge action against his former firm. The ex-associate alleged that he was a star performer ("in charge of handling the most important litigation in the [f]irm"), but when he reported the improper conduct of a fellow associate to two senior partners (both of whom—allegedly—confirmed that the fellow associate was a "pathological liar") and persisted in having the fellow associate be reported to the bar authorities, the ratting lawyer was fired. His complaint was dismissed at the trial court level,[31] and that ruling was affirmed by the intermediate appeals court.[32]

The New York Court of Appeals, however, reversed in part, allowing the ratting lawyer a breach of contract claim, but not a wrongful discharge claim. Theretofore, New York State had been a strict at-will employment state.[33] But because the ethical reporting requirement "is nothing less than essential to the survival of the profession,"[34] and given the "unique characteristics of the legal profession" (especially the dynamics facing associates in law firms), the state's highest court created an exception to the at-will doctrine and ruled the ratting lawyer could proceed with a breach of contract claim (if he could prove the existence of one).[35] As far as giving the ratting lawyer a wrongful discharge claim (where the potential for a real monetary recovery lay), however, that was a bridge too far for the Court of Appeals: "any additional protection must come from the Legislature."[36]

Other jurisdictions that follow the *Weider* precedent include Connecticut, South Carolina, and Illinois.[37] The latest *Weider* case is *Joffe v. King & Spaulding LLP*.[38] In 2017, a former associate of King & Spaulding sued his old firm, claiming that his demotion from senior associate to associate, pay freeze, denial of year-end bonus, and subsequent firing were the result of his attempt to report "ethical concerns about the conduct of two King & Spaulding partners, which arose during their representation" of a Chinese telecommunications company.

The trial court rejected the law firm's motion to throw out the case; King & Spaulding argued that the law firm's ex-associate had not adequately demonstrated "actual knowledge" or "clear belief" of ethical misconduct. The court found the firm's argument "extremely narrow" because it would have required a "mini-trial" as to whether there were in fact actual ethical violations. Instead, the court found sufficient, but "not overwhelming," evidence to support the former associate's position, and allowed the dispute to be resolved by a jury.[39] In December of 2021, after a week-long trial, a jury rejected the ratting lawyer's claim.[40]

Conclusion

In California, it would appear that no one likes a "snitch," and the organized bar firmly believes that "[a]ttorneys will not become their brother's keepers."[41] One ethics professor believes that the reporting rule in all the other states often "goes unenforced, and part of it is kind of a cultural norm against being, you know, the squealer, the snitch, right?"[42] But as the foregoing case law and ethics opinions make clear, the ethical obligation to report another lawyer's misconduct is a real one. A rat may not be what we signed up for in law school, but rules are rules.

Endnotes

1. Disney (2007).
2. C. Stewart, *Lawyers as Rats: An Evolving Paradigm*, NY Business Law Journal (Winter 2018).
3. There is a corresponding duty to report on a judge's misconduct (Rule 8.3 (b)). Ratting does not require disclosure of information otherwise protected by Rule 1.6 ("Confidentiality of Information") (*see supra* 8.3(c).
4. It is somewhat ironic that recent transgressions by two high-profile California attorneys (Thomas Girardi and Michael Avenetti) have brought renewed interest in Rule 8.3—but not in California. *See B. Lowrey Girardi Saga Shows Why Calif. Attys Don't 'Snitch'*, Law360 (Sept. 8, 2021).
5. *Conference Panelists Call for Clarification of Obligation to Report Peer Misconduct*, ABN/BNA Lawyers' Manual on Professional Conduct, 297 (6/13/07). (Patricia Saller, ethics counsel for the Arizona State Bar).
6. 891 So. 2d 1239 (La. 2005).
7. *See also* Louisiana Ethics Op. 06-RPCC-010 (2006) ("reasonable lawyer"); Texas Ethics Op. 520 (1997) (knowledge based on objective facts). For very different standards see Connecticut Informal Ethics Op. 2004-13 (2004) (a "visceral reaction to conduct that produces a 'feeling'...is a reasonable starting point"); *In re Brigandi*,

843 So. 2d 1083 (La. 2003) (knowledge based upon activities which "permeated [the] office").

8. Opinion 854 (3/11/11).

9. *See also* Philadelphia Ethics Op. 2005-7 (2005) (belief is not tantamount to knowledge of misconduct); Vermont Ethics Op. 2004-0 ("good faith or substantial belief").

10. Somewhat seemingly at odds with its actual knowledge standard, the committee went on to opine that if a lawyer "merely suspects" misconduct, she *may* report to authorities. In such a circumstance, the ratting lawyer may *not* notify the attorney's clients and may *not* reveal confidential information.

11. *See, e.g.*, Connecticut Informal Ethics Op. 2011-06 (2011); Massachusetts Ethics Op. 12-01 (2012); Michigan Informal Ethics Op. RI-314 (1999); North Dakota Ethics Op. 02-05; Oregon Ethics Op. 2005-95 (2005); Pennsylvania Ethics Op. 2014-025 (2014).

12. *See, e.g.*, Rhode Island Ethics Op. 2006-04 (2006) (dilatoriness in filing judgments is "far less contemptible" than "deliberate acts of dishonesty"); Texas Ethics Op. 632 (2013) (use of impermissible trade name did not raise a "substantial" question)' Maryland Ethics Op. 2015-03 (a violation of Rule 1.6 on a listserv will not create a duty to report); Connecticut Informal Ethics Op. 2013-05 (2103) (purported violations involving litigation among heirs of a "highly dysfunctional family" did not raise a "substantial question").

13. *See, e.g.*, *Robison v. Othotic & Prosthetic Lab, Inc.*, 27 N.E. 3d 182 (Ill. App. Ct. 2015); Connecticut Informal Ethics Op. 05-11 (2005); Maryland Ethics Op. 2004-11 (2003); North Dakota Ethics Op. 01-05 (2001); Virginia Ethics Op. 1840 (2007).

14. *See* Missouri Informal Ethics Op. 2006-0074.

15. *See* New Mexico Ethics Op. 2005-2 (2005).

16. *See* North Dakota Ethics Op. 98-02 (1998).

17. *See* South Carolina Ethics Op. 02-15 (2002).

18. *See* Texas Ethics Op. 534.

19. *See* Mich. Bar Ethics Op. No. R1-382 (Dec. 8, 2021) (must report); *but see* Pennsylvania Ethics Op. 2002-11 (2002) ("might be" required to report). In any case, this particular issue has become even more difficult in light of the pandemic's effect on law practice and possible changes in Rule 5.5. *See* Bloomberg Law (*Lawyers Without Borders? The Future of Rule 5.5*) (2002-02).

20. *See, e.g.*, *State v. Ankerman*, 840 A. 2d 1182 (Conn. App. Ct. 2004). That said, in some jurisdictions there is a duty to report on your own or your co-counsel's malpractice. See NY Ethics Op. 1092 (2016).

21. *See* Ohio Supreme Court Ethics Op. 2016-2 (April 8, 2016).

22. *See e.g.*, Wisconsin Formal Ethics Op. E-01-01 (2001); *Pearson v. Linden Lumber Co.*, 2006 BL 135851 (S.D. Ala. April 13, 2006); Iowa Ethics Op. 14-02 (2014). In *Pigs Get Fat, Hogs Get Slaughtered: Keeping Lawyers Out of the Slaughterhouse*, NY Business Law Journal (Summer 2015), the author surveyed the law concerning a related subject: whether lawyers may threaten criminal prosecution to gain a tactical advantage in civil litigation.

23. 533 N.E. 2d 790 (Ill. 1988).

24. Rule 8.3(a)'s equivalent in Illinois at the time was 107 Ill. 2d R. 1-103(a).

25. Thus, one of the 5 Cs (confidentiality) was missing. *See* C. Stewart, *The Attorney-Client Privilege: Misunderestimated or Misunderstood?* New York Law Journal (Oct. 20, 2014). While this might be the correct analysis of confidentiality vis-à-vis the privilege, the *Himmel* court once again confused the privilege (an evidentiary privilege owned by the client) with the ethical obligations attorneys have of protecting client confidentiality. *See supra Stewart*, note 2.

26. *See* D. Van Duch, *Best Snitches: Illinois Lawyers*, National Law Journal A1 (Jan. 28, 1997).

27. *E.g.*, Winston & Strawn; Chapman & Cutler; Mayer Brown; Lord, Bissel & Brook.

28. *See, e.g.*, *supra* note 5 (Hofstra Law Professor Roy Simon).

29. There are other instances, however, where situations have been mislabeled as the "Associate's Dilemma." *See* C. Stewart, *The Associate's Dilemma: Joe Fortenberry, Mahlon Perkins, and the Kodak Antitrust Trial*, Federal Bar Council Quarterly (August 2021); C. Stewart, *The Associate's Dilemma: Regulation U*, Federal Bar Council Quarterly (December 2021).

30. 80 N.Y. 2d 628, 593 N.Y.S. 2d 752 (Ct. Appls. 1992).

31. By moving to dismiss the complaint, the law firm made a critical mistake: all of Weider's allegations had to be accepted as true. King & Spaulding appear not to have repeated this mistake in *Joffe*. *See infra* notes 38–40 and accompanying text.

32. 544 N.Y.S 2d 971 (Sup. Ct. N.Y.Cty) & 582 N.Y.S. 2d 980 (1st Dep't).

33. *Murphy v. American Home Products Corp.*, 58 N.Y. 2d 293, 461 N.Y.S. 2d 282 (Ct. Appls. 1983).

34. Rule 8.3(a)'s predecessor in New York State was DR 1-108 (A).

35. 593 N.Y.S. 2d at 756. The dilemma that the ratting lawyer had to face (reporting vs. losing his job) did not move the highest court of Illinois in *Balls v. Gambro*, 584 N.E 2d 104 (Ill. 1991). *See supra* note 2.

36. 593 N.Y.S. 2d at 757. Why one fundamental alteration of the state's public policy can be within the Court of Appeals' purview, but another is not, continues to baffle this author.

37. *Matzkin v. Delany, Zemetis, Donahue, Durham & Noonan P.C.*, No. CV-04-4000288-S (Conn. Super. Ct. July 29, 2005) (unpublished); South Carolina Ethics Op. 05-21 (2005); *Skolnick v. Altheimer & Gray*, 730 N.E. 2d 4 (Ill. 2000) [*Skolnick* appears to be at odds with *Balls* – *see supra* note 35; *see also supra* note 2].

38. 2018 BL 204273, No. 17-CV-3392 (VEC) (S.D. N.Y. June 8, 2018).

39. *King & Spaulding Case Spotlights Response to Ethics Report*, ABA/BNA Lawyers' Manual on Professional Conduct (June 13, 2018).

40. *King & Spaulding Off Hook for Defamation Claim in Ethics Case*, Bloomberg Law News (2021-12-07).

41. *See supra* note 4.

42. *Id.* (Professor Dmitry Bam, University of Maine School of Law).