

**Louisiana State Bar Association
Rules of Professional Conduct Committee**

PUBLIC Opinion 06-RPCC-010¹

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Lawyer's Duty to Report Professional Misconduct of Another Lawyer

A lawyer is obligated to report promptly to the Office of Disciplinary Counsel knowledge of misconduct by another lawyer where the conduct raises a question as to that other lawyer's honesty, trustworthiness or fitness as a lawyer and where 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.

In *Re: Michael G. Riehlmann*², the Supreme Court of Louisiana was presented with an opportunity to outline a lawyer's duty to report professional misconduct of a fellow lawyer. The version of Rule 8.3(a) of the Louisiana Rules of Professional Conduct which was in effect in 2001 at the time formal charges were filed in *Riehlmann* provided as follows:

A lawyer possessing unprivileged knowledge of a violation of this Code shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

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² *In Re: Michael G. Riehlmann*, 04-0680 (La. 1/19/05), 891 So. 2d 1239.

The *Riehlmann* Court clarified the requirements of the Rule and ultimately held that Rule 8.3(a) required knowledge, rather than a mere suspicion of ethical misconduct; that the knowledge must be reported promptly; and that the report must be made to the Office of Disciplinary Counsel. These same requirements are stated in the current version of Rule 8.3(a). As noted by the *Riehlmann* Court, changes to Rule 8.3(a) were made effective March 1, 2004.

The Rule currently provides:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel.

Although the revision changed the wording of the Rule, it does not appear to have altered the conclusions set forth in the *Riehlmann* decision. The following is a discussion of each of the requirements of Rule 8.3(a).

A. Knowledge

An absolute certainty of ethical misconduct is not necessary to trigger the reporting requirement; yet, a lawyer must base his report on more than a mere suspicion of improper behavior.³ The *Riehlmann* Court held that “...a lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where 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...”⁴ The standard of determining “knowledge” is measured objectively and not according to the subjective beliefs of the lawyer reporting the misconduct.⁵

³ *Id.*, *Riehlmann* at p. 1247.

⁴ *Id.*, *Riehlmann* at p. 1247.

⁵ *Id.*, *Riehlmann* at p. 1247.

In some cases, a lawyer will not have clear and convincing evidence of a colleague's wrongdoing. The Rule relaxes the standard of certainty to one in which a reasonable lawyer could infer that improper behavior more than likely occurred.⁶ It is important to keep in mind, however, that a report of misconduct should not be based on a mere suspicion. A lawyer should have a legitimate degree of knowledge of another's misconduct in order to file a report with the Office of Disciplinary Counsel.

B. When Should a Lawyer Report the Misconduct?

Louisiana Rule 8.3(a) does not state a specific time period within which a report of misconduct must be made. But, as noted by the Court in *Riehlmann*, reporting should be made promptly⁷ because the public and the profession must be protected against future misconduct by the offending lawyer.⁸ “...*This purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented...*”⁹

C. Report to Whom?

In *Riehlmann*, the applicable version of Rule 8.3(a) failed to define the term “tribunal or other authority” to which the report of misconduct should be made. The Court looked to the comments to ABA Model Rule 8.3(a) for assistance and held that reports of misconduct should

⁶ *Id.*, *Riehlmann*, at p. 1247: “...*The lawyer is not required to conduct an investigation and make a definitive decision that a violation has occurred before reporting; that responsibility belongs to the disciplinary system and this court...*”

⁷ *Id.*, *Riehlmann*, at p. 1247: “...*Once the lawyer decides that a reportable offense has likely occurred, reporting should be made promptly...*”

⁸ *Id.*, *Riehlmann*, at p. 1247.

⁹ *Id.*, *Riehlmann*, at p. 1247.

generally be made to the bar disciplinary authority.¹⁰ The current Rule eliminates all confusion as to whom the misconduct should be reported by clearly stating that such violations shall be made known to the Office of Disciplinary Counsel.

D. What to Report?

What type of conduct must be reported is subject to some interpretation. The ABA Model Rule 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 that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. [emphasis added]*

It is noteworthy that the current Louisiana version of Rule 8.3(a) left out the word “substantial” that is utilized in the ABA Model Rule. The *Riehlmann* Court, discussing the differences between Louisiana’s Rule 8.3(a) and the ABA Model Rule, noted that Louisiana’s previous version of Rule 8.3(a)

...imposed a substantially more expansive reporting requirement [than the ABA Model Rule], in that our Rule required a lawyer to report all unprivileged knowledge of any ethical violation by a lawyer, whether the violation was, in the reporting lawyer’s view, flagrant and substantial or minor and technical...¹¹

The 2004 version provides that a lawyer is now only required to report misconduct that raises a question as to a lawyer’s honesty, trustworthiness or fitness to practice law, and therefore seemingly lightens the burden on a lawyer to report misconduct to those particular instances.

¹⁰ *Id.*, *Riehlmann*, at p.1247: “...Therefore, a report of misconduct by a lawyer admitted to practice in Louisiana must be made to the Office of Disciplinary Counsel...”

¹¹ *Id.*, *Riehlmann*, at p.1246.

Yet, under the rationale of *Riehlmann* and because the revision specifically left out the word “substantial” with regard to the question of misconduct, a lawyer is still required to report any ethical violation that raises a question as to a lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, whether “...*flagrant and substantial or minor and technical*...”. Although the revised Rule appears to narrow the scope only of reporting ethical violations to those involving certain qualities, it does not necessarily prevent reports of minor and technical violations. Louisiana’s Rule 8.3(a) requires misconduct to be reported if it raises a question—as opposed to the ABA Model Rule, which requires the conduct to raise a substantial question—as to the lawyer’s fitness to practice law. This distinction leads to greater potential for reporting of misconduct under the Louisiana Rule when compared to the ABA Model Rule because all acts of unethical behavior pertaining to the designated qualities must be reported, not just those unethical acts deemed “substantial”. By excluding the word “substantial,” the Louisiana Rule continues to “impose a more expansive reporting requirement” than the ABA Model Rule, in that all misconduct pertaining to a lawyer’s “honesty, trustworthiness or fitness as a lawyer” must be reported, rather than only those acts having a “substantial” impact on the legal profession.¹²

Conclusion

The rationale for Rule 8.3(a) is self-evident. Self-regulation of the legal profession assists in ensuring the integrity of the profession. At many times, a lawyer is in the best position to discover unethical behavior and is obligated to report this knowledge, despite the reluctance for policing one another. Until the Court further clarifies the substantiality issue, practitioners should note that a failure to report knowledge of unethical conduct that bears on honesty, trustworthiness or fitness by a fellow lawyer may be a violation of the Rules of Professional

¹² *Id.*, *Riehlmann*, at p.1246.

Conduct.