speaking of ethics

By Saul Jay Singer

To Report or Not to Report: That Is the Question

Mick Wiggins

On behalf of your client, the Washington Washouts, you are negotiating a contract with Swifty King, agent and counsel for the team's top draft choice, All-American David "D-Minus Average" Debacle. In past negotiations for various first-round draft choices, Swifty—broadly recognized as the league's most dangerous and most feared player's representative—had proven to be a tough and inflexible negotiator. Today, however, he seems somewhat distracted and unfocused and, when he quickly agrees to a compensation package for his client well beneath the going rate for a player of Debacle's status, you strongly suspect that something is amiss. When Swifty extends his hand to shake on the successful completion of the negotiations—on terms wildly favorable to the Washouts—you catch an overpowering smell of alcohol on his breath, and you watch him stumble into a table as he leaves the room.

Before undertaking to draft the contract, you report the results of the negotiation to the team owner, Poor Learner, who is absolutely delighted with the results. "With the money you just saved us on Debacle," he says, "we can go out into the free agent market and buy ourselves another quality starter. Because of your excellent work, I think we actually have a chance at the playoffs!" When you suggest that Swifty King may have been drunk when he agreed to terms, Learner responds, "That's why I hired you; you have a nose for the kill just like I did when I first started my shipbuilding business. Seek every opening, take every advantage, that's what I always say!" He adds, "But make certain that you never tell anybody about Swifty's drinking. And get that contract drafted and sent over to Swifty for his client's signature ASAP—and I mean *now*, if possible, even before he has a chance to sober up and think twice about the deal he struck."

Squarely presented, the ethical issue arising out of this hypothetical is whether you have the affirmative duty to report Swifty to the Office of Bar Counsel (OBC) for investigation and possible disciplinary action.[1]

Probably more than any other profession, the legal profession is self-regulating as it relies on lawyers themselves, rather than on government or organizations outside the Bar, to enforce professional responsibility. As such, the D.C. Rules of Professional Conduct stand in stark opposition to the very idea of a "conspiracy of silence" among lawyers,[2] and Rule 8.3 imposes a mandatory reporting obligation under certain circumstances on every lawyer with respect to other lawyers' violations of the professional rules. The failure of a lawyer to report misconduct by another lawyer is itself a violation of the rules that may result in professional discipline.[3]

In accordance with Rule 8.3(a):

> 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.

However, pursuant to Rule 8.3(c):

> This rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

Thus, mandatory reporting under Rule 8.3 is required if, and only if, three distinct elements are met:[4]

1. *The other lawyer has committed an ethical violation that "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."*

Not every ethics violation invokes the mandatory reporting requirement, and Rule 8.3 "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent."[5] Some commentators criticize the lack of clarity regarding which types of violations must be reported and which ones do not have to be reported, and while "a measure of judgment is . . . required in complying with the provisions of this rule,"[6] that exercise of discretion is not going to help a lawyer who, in her best judgment, determined that she need not report but now faces an OBC investigation and possible sanction from the D.C. Court of Appeals for her failure to report.

Some cases are easy: a lawyer must report another lawyer for acts of fraud, misrepresentation, perjury, stealing client funds, and the like. There is also no doubt that, for example, a lawyer need not report another lawyer for a parking ticket. There remains, however, a vast, ambiguous middle ground where little definitive guidance can be provided.

In this case, it would seem that Swifty has violated, at the very least, Rule 1.1 (Competence), Rule 1.3 (Diligence and Zeal), and possibly Rule 1.16(a)(2) (Declining or Terminating Representation).[7] The specific issue here is whether Swifty's violations raise a substantial question as to his "fitness as a lawyer in other respects" and, more generally, whether alcoholism is a reportable offense.[8]

Answer: it depends. Alcoholism is not *per se* a reportable offense, as some alcoholics are very high-functioning, particularly at the initial stages of their disease.[9] However, there is no black-letter rule that can be applied to help resolve the question of whether Swifty's conduct in this case is such that he must be reported, and little guidance exists to help lawyers determine when a failure to report constitutes an ethical violation.

2. *The reporting lawyer has* actual knowledge *of a violation of the rules by the other lawyer.*

The duty to report misconduct by another lawyer arises only when the reporting lawyer has "actual knowledge" of the misconduct, a very high standard. Thus, for example, a lawyer's strong suspicions of wrongdoing by another lawyer, or even the presence of some evidence of

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an ethical violation by the other lawyer, does not create a Rule 8.3 duty to report.

As such, do you have the requisite "actual knowledge" of Swifty's ethical breaches, or knowledge that his alcohol use interferes generally with his ability to serve his clients? Again, the best available answer is "maybe." On one hand, you have no evidence whatsoever, let alone the requisite actual knowledge, that Swifty has an alcohol problem. Moreover, just because you smelled alcohol on his breath does not mean that he was drunk; it is at least possible that he had only one drink at the end of lunch before entering into negotiations with you on D-Minus Debacle's contract. On the other hand, you can't imagine that Swifty wasn't impaired, given his negotiation record, the results of this particular negotiation, and his stumbling into a table.[10]

3. *Making the report will not violate Rule 1.6.*

There is no requirement that a lawyer make a report in violation of Rule 1.6. The duty to maintain client confidences and secrets, which is very broad in the District of Columbia, trumps any duty to report. Put another way, if filing a report against another lawyer would violate a client confidence or secret, the reporting lawyer *may not* report the ethical violation absent the client's informed consent.[11]

In this case, even if you have actual knowledge of an ethical violation by Swifty that raises a substantial question as to his fitness as a lawyer, you may not report it because such reporting would undoubtedly adversely impact your client's interests—and, lest there be any doubt, you are bound by Poor Learner's instruction to "make certain that you never tell anybody about Swifty's drinking."

In general, when we discuss the duty to report ethical violations, we usually mean a report to OBC about the conduct of a D.C. lawyer. However, the actual language of Rule 8.3 is far broader than that, requiring reporting to "the appropriate professional authority." Thus, if a lawyer knows that the "bad" lawyer is also a member of the Maryland Bar, she has a duty to report the misconduct to *both* OBC and the Maryland disciplinary authorities. In fact, the "appropriate professional authority" may include *nonlegal* authorities. Thus, for example, if a lawyer who is also a real estate agent converts funds entrusted to him by a home buyer, a lawyer with actual knowledge of the conversion could have the duty under Rule 8.3 to report the lawyer/agent to both OBC and the relevant professional realtors association.[12]

Finally, Rule 8.3 does not provide any specific time frame within which mandatory reports must be made. However, since "the rules are rules of reason" and "[t]hey should be interpreted with reference to the purposes of legal representation and of the law itself,"[13] it is reasonable to conclude that the intent of Rule 8.3 is to require that reporting be made expeditiously within a reasonable period of time after the lawyer establishes his or her duty to report.

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Notes

1 The issue of *voluntary* reporting is beyond the scope of this article. In brief, a D.C. lawyer may voluntarily report to OBC any ethical violation by any D.C. lawyer, subject only to the limitation imposed by Rule 8.4(g): "It is professional misconduct for a lawyer to . . . seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter." In Legal Ethics Opinion 220, the Legal Ethics Committee determined that if a complaint or report is filed in good faith, "it cannot be said to be filed solely for the purpose of gaining an advantage in a civil matter."

2 *See*, *e.g.*, comment [1] to Rule 8.3: "Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct."

3 Moreover, the duty to report lies with each individual lawyer; i.e., a lawyer who is required to report misconduct is generally not relieved of that duty even if any number of other lawyers already have reported the violation.

4 For a comprehensive discussion of these elements and the broader Rule 8.3 reporting issue, *see* Legal Ethics Opinion 246.

5 Rule 8.3, comment [3].

6 *Id*.

7 Withdrawal from a representation is *mandatory* if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." Rule 1.16(a)(2).

8 As the ABA Committee Report explaining 1991 Amendments noted, serious concerns about "lawyer impairment" led to the creation of special programs throughout the nation to assist lawyers and judges who face alcohol or drug addiction or other serious problems. *See* ABA Report.

One such award-winning program is the D.C. Bar Lawyer Assistance Program (LAP), a *free* and *highly confidential* program assisting lawyers, judges, and law students who experience problems that interfere with their personal lives or their ability to serve as counsel or officers of the court. The program provides confidential access to trained professional counselors, assessment, and referral to appropriate treatment programs. In fact, the D.C. Court of Appeals has afforded particular confidentiality protections to lawyers who make disclosures to LAP counselors; *see* Rule 1.6(i) and Rule 8.3, Comment [5]. For further information, D.C. lawyers are urged to call the LAP at 202-347-3131.

9 Thus, pursuant to Comment [3] to Rule 8.3, some "significant problem[s] of alcohol or other substance abuse" do not require a report to OBC.

10 Note that "'knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. *A person's knowledge may be inferred from circumstances*." Rule 1.0(f) (emphasis added).

11 Informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e).

The broad scope of a lawyer's Rule 1.6 duty to maintain client confidences extends not merely to attorney–client communications, but also to *any* "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would likely be detrimental, to the client." Rule 1.6(b). This includes information learned from any third party or other source, including even information gained from the headline of a national publication.

12 For an instructive discussion on this subject, *see* Legal Ethics Opinion 220.

13 *See* introductory Scope section of the rules, [1].

Disciplinary Actions Taken by the Board on Professional Responsibility

Hearing Committees on Negotiated Discipline

IN RE DENNIS P. CLARKE. Bar No. 54353. August 18, 2011. The Board on Professional Responsibility's Ad Hoc Hearing Committee recommends that the D.C. Court of Appeals accept Clarke's petition for negotiated discipline for violating Rule 8.4(c) and suspend Clarke for 90 days, with all but 30 days stayed, followed by two years of probation during which time Clarke must not be found to have violated any Rules of Professional Conduct.

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Original Matters

IN RE HOWARD D. DEINER. Bar No. 377347. August 4, 2011. The D.C. Court of Appeals disbarred Deiner by consent, effective immediately.

IN RE DAVID B. GOLDSTEIN. Bar No. 414557. August 25, 2011. The D.C. Court of Appeals disbarred Goldstein by consent, effective immediately.

IN RE MICHAEL M. HADEED. Bar No. 395388. August 25, 2011. The D.C. Court of Appeals disbarred Hadeed by consent, *nunc pro tunc* to March 11, 2010.

IN RE A. RYAN LAHUTI. Bar No. 442592. August 25, 2011. The D.C. Court of Appeals disbarred Lahuti by consent, effective immediately.

IN RE BRIAN C. MALADY. Bar No. 459527. August 25, 2011. The D.C. Court of Appeals disbarred Malady by consent, *nunc pro tunc* to May 28, 2010.

IN RE PATRICK J. REDD. Bar No. 986694. August 4, 2011. The D.C. Court of Appeals disbarred Redd by consent, effective immediately.

IN RE JENNIFER P. STREAKS. Bar No. 463618. August 25, 2011. The D.C. Court of Appeals disbarred Streaks by consent, effective immediately.

IN RE W. WARREN TALTAVULL. Bar No. 29041. August 4, 2011. The D.C. Court of Appeals disbarred Taltavull by consent, effective immediately.

IN RE TOAN Q. THAI. Bar No. 439343. August 17, 2011. The D.C. Court of Appeals ordered that the probation imposed on Thai in the court's December 24, 2009, decision be revoked. The court further ordered that Thai be suspended for 60 days, and that prior to reinstatement Thai demonstrate that he has paid restitution to his former client in the amount of $4,500 plus interest.

IN RE HARRY TUN. Bar No. 416262. August 11, 2011 (amended August 18, 2011). The D.C. Court of Appeals accepted Tun's petition for negotiated disposition and suspended him for 18 months, with six months of the suspension stayed, followed by one year of probation on the conditions agreed to by the parties. Should Tun's probation be revoked, the six-month stay shall be lifted and reinstatement conditioned on a showing of fitness to practice law. Between 1999 and 2003, Tun submitted vouchers to the D.C. Superior Court claiming payment for legal services rendered to indigent defendants. In each voucher, Tun wrote down the time he purported to have started and stopped working for a particular client for each day he claimed payment. A review of the vouchers revealed

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that Tun sought payment for the same time period for two or more clients on 162 occasions. These errors were the result of Tun's "abysmal" recordkeeping. Tun ultimately repaid to the Superior Court $16,034, which represented the time that Tun had double-billed, minus a reasonable estimate of the time that he could have but failed to bill for other court-appointed matters. Rules 1.5(a), 1.5(f), 3.3(a)(1), 8.4(c), and 8.4(d).

Reciprocal Matters

IN RE DAVID L. SHURTZ. Bar No. 454598. August 4, 2011. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical discipline and suspended Shurtz for 18 months for misconduct, including ignoring calls from a client, accepting a settlement without his client's authorization, signing his client's name on a settlement agreement without her consent, falsely notarizing a signature he knew was not his client's, presenting the falsely signed settlement agreement to the opposing party, and endorsing his client's name on a settlement check without consent.

Disciplinary Actions Taken by Other Jurisdictions

In accordance with D.C. Bar Rule XI, § 11(c), the D.C. Court of Appeals has ordered public notice of the following nonsuspensory and nonprobationary disciplinary sanctions imposed on D.C. attorneys by other jurisdictions. To obtain copies of these decisions, visit www.dcbar.org/discipline and search by individual names.

IN RE S. HOWARD WOODSON III. Bar No. 448016. On February 22, 2005, the Fourth District Section II Subcommittee of the Virginia State Bar privately reprimanded Woodson.

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.*

Continuing Commitment

On September 14 the D.C. Bar Continuing Legal Education (CLE) Program held its Annual Faculty Appreciation Reception to recognize the commitment of its faculty volunteers. Morton J. Posner, chair of the CLE Committee, cited the program's growth since it was developed 21 years ago and offered 86 courses. In the past year, about 10,000 attendees participated in 134 CLE courses, while 300 volunteers logged 3,000 hours teaching and preparing for class. During the reception, Kristin D. Alden of the Alden Law Group, PLLC; Posner; and Matthew S. Watson, retired administrative judge of the D.C. Contract Appeals Board, were honored for their commitment to the CLE Committee by serving a full six years, which is the maximum three terms. Pictured from left to right are current and former CLE Committee members Alden, Lalla Shishkevish, Posner, Ron Schechter, Julienne Bramesco, William Herbert, Ted Hirt, Theodore Whitehouse, Jim Langford, Virginia McArthur, and Luke Reynolds.—*T.L.*

Legal Beat

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to the District Court when it was founded in 1801. (Johnson, however, declined the post, but he is still considered to be the court's first judge.) The exhibit also has pictures of Bryant, Washington's first black chief federal judge, and Burnita Shelton Matthews, the first woman appointed to serve on a U.S. District Court.

To complete the project, Ferren enlisted the help of American University associate professor Kathleen Franz and her graduate students from the university's public history program. While many of the portraits can be viewed in the Ceremonial Courtroom at the District Court, others are in storage and were examined by students to assess their condition.

The exhibit will continue to be updated with transcripts from ceremonies held when a portrait was donated to the District Court, as well as any additional information about the portraitists. Of the 84 portraits, 23 were painted by artist Richard C. Henderson.

To view the portraits online, visit www.dcchs.org.—*T.L.*

D.C. Bar Pro Bono Program Gets Third 4-Star Rating

For the third consecutive year, the D.C. Bar Pro Bono Program received a four-star rating for sound fiscal management from Charity Navigator, the nation's largest independent charity evaluator.

In determining the rating, Charity Navigator evaluated the program's overall financial health as well as its accountability and transparency. The four-star designation means the Pro Bono Program outperformed "most charities in its cause" and adhered to "good governance and other best practices that minimize the chance of unethical activities and consistently executes its mission in a fiscally responsible way."

Of the more than 5,400 charities reviewed by Charity Navigator, only 10 percent received at least three consecutive four-star evaluations.

Charity Navigator examined the Pro Bono Program's efficiency, which includes administrative and fundraising expenses and fundraising efficiency. It also reviewed the program's organizational capacity by looking at its primary revenue growth, program expenses growth, and working capital ratio in years.

The evaluation was based on financial information the Pro Bono Program provides annually on its IRS Form 990. For more information, visit www.charitynavigator.org and search "D.C. Bar Pro Bono Program."—*T.L.*

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