



**LAWYER TO LAWYER MENTORING PROGRAM  
WORKSHEET R  
INTRODUCTION TO REPORTING LAWYER MISCONDUCT**

Worksheet R is intended to facilitate a discussion about a lawyer's obligation to report lawyer misconduct, including the appropriate way to handle situations where the new lawyer believes another lawyer has committed an ethical violation and where the new lawyer has been asked by a senior member of the firm to do something that is unethical or unprofessional.

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- Discuss a lawyer's obligation to report lawyer/judge misconduct, including the reasons why lawyers should report other lawyers' misconduct and to whom such misconduct should be reported. See Prof. Cond. Rules 8.3 and 8.4.
- Discuss the types of factors which should be considered in determining whether misconduct should be reported to a tribunal, disciplinary agency, prosecutor's office, or other authority.
- Discuss the following situations and suggest the most appropriate authority (if any) to whom the conduct should be reported and the reasons therefore:
  - Continuous discovery abuse by opposing counsel
  - Opposing counsel filing frivolous lawsuits or lawsuits merely to harass your client
  - Egregiously unprofessional conduct during litigation
  - Suspected theft by an attorney of a former client's funds
  - Suspected financial misconduct by a lawyer who is guardian for an incompetent person
  - An attorney's failure to pay expert fees or other costs of litigation
  - Theft of IOLTA monies by a lawyer in your firm
  - Abusive and disrespectful behavior toward counsel and/or witnesses by a judge
  - Client neglect because of suspected substance abuse or mental health issues by another attorney
  - Erratic and unfair behavior by a judge because of suspected substance abuse or mental health issues
  - Opposing counsel representing a party with whom there is a conflict of interest
  - Unauthorized practice of law by an attorney licensed in a jurisdiction other than Ohio
- Discuss a lawyer's obligation to assist in and provide information about a lawyer or judge's conduct in an inquiry by a tribunal or other authority investigating that lawyer or judge. See Prof. Cond. Rule 8.3 and Gov. Bar R. V(4)(G).



- Discuss the firm's procedure (if in an in-house mentoring relationship) or the appropriate action for a new lawyer who suspects that a partner in the firm has committed misconduct. Discuss the procedure when an associate in the firm is suspected of misconduct.
- Discuss what the new lawyer should do if he or she does not know whether a partner or associate's conduct is inappropriate, but he or she suspects that it might be.
- Discuss what the new lawyer should do if a superior in the new lawyer's firm instructs the new lawyer to do something that the new lawyer believes to be unethical. See Prof. Cond. Rules 5.1 and 5.2.
- Discuss the new lawyer's ethical responsibility to properly oversee non-lawyer assistants' efforts to ensure that their conduct is compatible with the professional obligations of the lawyer. See Prof. Cond. Rule 5.3.
- Read and discuss the attached excerpt regarding dealing with ethical issues in your law firm. KIMM ALAYNE WALTON, *WHAT LAW SCHOOL DOESN'T TEACH YOU...BUT YOU REALLY NEED TO KNOW* (2000).
- Suggest resources that the new lawyer can consult for making important ethical decisions, including the following:
  - Identify the procedure for obtaining in-house ethics advice (if you are in an in-house mentoring relationship).
  - Provide suggestions for finding outside ethics counsel and when such action is recommended.
  - Identify other helpful ethics materials, where they can be found, and the importance of supplementing general ethics resources with independent research on Ohio disciplinary case law when the ethics resources reviewed are not based on the Ohio Rules of Professional Conduct.
  - Identify ethics inquiry services of bar associations.
  - Discuss procedures for requesting or researching ethics advisory opinions of bar associations or the Ohio Supreme Court Board of Commissioners on Grievances and Discipline.



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**RESOURCES**

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**OHIO RULES OF PROFESSIONAL CONDUCT**

**V. LAW FIRMS AND ASSOCIATIONS**

**RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS**

(a) [RESERVED]

(b) [RESERVED]

(c) A lawyer shall be responsible for another lawyer's violation of the Ohio Rules of Professional Conduct if either of the following applies:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved;

(2) the lawyer is a partner or has comparable managerial authority in the law firm or government agency in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

View comments at

[http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule5\\_1](http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule5_1)

**RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER**

(a) A lawyer is bound by the Ohio Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Ohio Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of a question of professional duty.

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[http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule5\\_2](http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule5_2)



## **RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

With respect to a nonlawyer employed by, retained by, or associated with a lawyer, all of the following apply:

(a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm or government agency shall make reasonable efforts to ensure that the firm or government agency has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer if either of the following applies:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;

(2) the lawyer has managerial authority in the law firm or government agency in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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[http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule5\\_3](http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule5_3)

## **VII. MAINTAINING THE INTEGRITY OF THE PROFESSION**

### **RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT**

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the



information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.

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[http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule8\\_3](http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule8_3)

## **RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to do any of the following:

- (a) violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

View comments at

[http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule8\\_4](http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule8_4)



**Ohio Rules of Court**

**Rules for the Government of the Bar of Ohio**

**RULE V. DISCIPLINARY PROCEDURE**

**Section 4. Investigation and Filing of Complaints.**

**(G) Duty to Cooperate.** The Board, the Disciplinary Counsel, and president, secretary, or chair of a Certified Grievance Committee may call upon any justice, judge, or attorney to assist in an investigation or testify in a hearing before the Board or a panel for which provision is made in this rule, including mediation and ADR procedures, as to any matter that he or she would not be bound to claim privilege as an attorney at law. No justice, judge, or attorney shall neglect or refuse to assist or testify in an investigation or hearing.

Ohio Supreme Court Board of Commissioners on Grievances and Discipline Ethics Advisory Opinions [http://www.sconet.state.oh.us/BOC/Advisory\\_Opinions/](http://www.sconet.state.oh.us/BOC/Advisory_Opinions/)

American Legal Ethics Library <http://www.law.cornell.edu/ethics/>

LegalEthics.com [www.legalethics.com](http://www.legalethics.com)

sunEthics <http://www.sunethics.com/>

or a lack of initiative. Drum up the work yourself. If there is someone in charge of your assignments, go to them and volunteer your time. If nobody is in charge of the work you get, go around and ask other lawyers if there's something you can work on for them. If there's a particular practice area that interests you, be sure to get to know the attorneys who work in that area and ask if you can help them. You may shake loose not just a memo or two but some work that really excites you! If you are unable at first to find any more work, hide that as best you can by boning up on your legal reading. Don't let yourself be seen twiddling your thumbs!

#### D. ETHICAL ISSUES: HOW TO AVOID BEING LED AWAY IN HANDCUFFS AND AT THE SAME TIME AVOID TORQUING OFF YOUR BOSS

I don't have to tell you that if you do something unethical, you risk losing your license to practice law. But in practical terms, things are often not quite so cut and dried. If they *were*, nobody would ever do anything unethical. You can be under *lots* of pressure as a lawyer, and that's what causes ethical problems. Your boss may press you to do something that makes you uncomfortable, and you worry that if you speak up you may lose your job. A major client wants you to bend the rules a little, implying that if you don't, you'll lose their business. You're at a prosecutor's office, and your boss pressures you to "get a conviction," and you interpret that to mean, "Do *whatever* it takes, ethical or not." You're still in school, and the employer you'll be working for when you graduate asks you to use your Lexis or Westlaw student ID to do research for them. You worry that if you don't, you'll jeopardize your job before you even *start*.

In this section, we'll talk about how to handle ethical dilemmas, and how to resolve ethical issues without destroying yourself politically at the office. We'll also discuss what to do if you determine that the behavior being pressed on you is truly unethical. (As we'll see, it's pretty straightforward. Refuse to do it. If they insist—leave.)

#### 1. Protect yourself up front from ethical problems.

Ideally you never want to be in the situation where your boss comes to you and says "Hey—bury this gun for me, will you?" There are a couple of prophylactic measures you can take to protect yourself from ever having that happen. One is to "establish yourself from the start as a rule-following, I-dotting, T-crossing person," says DePanfilis & Vallerie's Carrie Colangelo. Don't brag about how you've gotten away with things in the past, and don't make approving noises when other people tell you about what *they've* done. "The kid at the checkout missed the case of soda under my cart," "I wrote off more miles on my car than I *drove* last year"—don't respond, "Wow!" When you turn in your time sheets, make them precise, and let your supervisors *know* that. Don't pad expense reports. Don't suggest in any way that you've got lax standards. That may well encourage an unscrupulous supervisor to ask you to do something unethical at work.

Secondly, make sure that you keep accurate records. I talk all about that in the "Getting Off On the Right Foot" Chapter in the section called "Getting Organized." If you keep accurate records of what you do, communications with clients, and you have memos to file and backup e-mails, you'll help protect yourself if you're ever charged with an ethical breach.

#### 2. When you're faced with an ethical issue, don't jump to the conclusion that what you're being asked to do is unethical. There are a lot more 'gray areas' than you think.

Some things are obvious. Destroying evidence. Paying bar dues out of trust accounts. Padding bills. But many lawyers told me that new lawyers tend to think that a lot of behavior is unethical when it really isn't. It's important to figure out if something is really an ethics problem—or you've got something on your mind making you *think* it is. It could be that you don't approve of the client or what they want to do. Perhaps you're *sure* that the client is lying but you have nothing to prove it. Or maybe you think you heard someplace that something's unethical, but when you look it up you find that the rule you thought you heard wasn't accurate.

Incidentally, "If you turn in your billables and your supervisor cuts your hours, it's not an ethical issue," says Nova Southeastern's Pat Larson. "That's looking out for the client. It's perfectly ethical."

So—how do you figure out if something is ethical or not? That's what we'll tackle next.

### 3. Finding out whether something is truly unethical *without* upsetting the apple cart.

It depends on the source of the questionable behavior and the nature of your employer. If it's the client, buy time so that you can find out whether the behavior is ethical or not. If you're a junior person, say, "I hear what you want, let me talk to X [your superior] about it and get back to you." If it's your client, say, "I hear what you're saying. Let me think about this strategy. I'll call you back at X time."

The situation is different if it's your superior who's requesting what you believe might be unethical behavior. The problem is this: especially if you're new, you don't know how your boss will react to having his/her ethics questioned. Some lawyers will take it in stride. Some won't, and they'll be hacked that you'd even question their ethics. You're better off *not* asking them directly unless you're *sure* of how they'll react. If you're *not* sure, what you should do depends on the nature of your employer. If the person who's asking you to do something unethical is not at the most senior level in the office—for instance, it's a senior associate—go to someone *more* senior to ask for advice. If you're at a large firm or in a large office of any kind, go to someone else you trust—be it a mentor, a risk manager, partner, or anyone else at work whom you trust—and say, "I'm not really sure about this one—what do you think?" and lay out the problem. Or you could say, "I'm new, but last semester in school we studied this, and it seems to me it's against the code of professional ethics." Pitch the question as though you want to be educated, not as though you're pointing an accusatory finger. They'll do one of two things: They'll assure you that what you've been asked to do is ethical (and that's what'll happen the vast majority of the time). Or they'll tell you that it's *not* ethical, and if that's the case, you need to ask them how best to handle it. Maybe they'll talk to your supervisor directly. Or they'll

brainstorm with you about alternative strategies. Either way, you've taken a great burden from your shoulders by going to someone who knows your supervisor better than *you* do.

If you work in a smaller office—or you work in a large organization and don't feel comfortable going to someone in-house—there's a whole raft of possibilities for you in determining whether or not something is unethical. If you have other close friends in the legal community, you can bounce the situation—in very general terms—off them. You can say, "Am I nuts, or is this a problem?" You can call your ethics professor from law school and use them as a sounding board. Or you can call your state bar association's hotline. Florida, for instance has an ethics hotline that gets 20,000 calls a year and they give opinions over the phone. You could also contact the ABA's ethics hotline. It's called ETHICSearch, and you can reach them by phone at 312-988-5323, or fax at 312-988-5491, or e-mail at [ethicsearch@staff.abanet.org](mailto:ethicsearch@staff.abanet.org) (needless to say, if you call, call from your cell phone or a public phone; if you e-mail, e-mail from home; and if you fax, fax from Kinko's. You don't need to have your employer see a record of your contact on the phone bill!) ETHICSearch lawyers can often give you an authority on point immediately and/or e-mail or fax you the authorities you need to understand the issue and resolve the problem (like relevant ethics opinions and rules). The initial consultation is free, and if you want additional research, it costs \$45/hour for ABA members and \$60/hour for non-members. You could even contact a legal ethics lawyer—there are lawyers who devote some or all of their practice to handling ethical questions for other lawyers—and ask *them*. If you're sufficiently concerned or flummoxed, that's a possibility. And that has the benefit of proving, should the issue ever arise, that you took steps to ensure that you were doing the right thing. The bottom line is, there are a bunch of resources available to you for resolving ethical issues. Take advantage of them!

Now, it *may* be that after asking around a bit, you don't have a definitive answer on whether or not the behavior is unethical. There's a *lot* of gray area in ethics! In that case, the rule is that if you're acting under the direction of another lawyer, you can rely on their interpretation of an ethics rule as long as it's *reasonable*. There's a bit of judgment there—

you couldn't, for instance, follow the advice of a superior saying, "Go ahead and hide the body. It's ethical. Trust me." But for an issue that's truly questionable, the rules suggest that you're protected.

4. Handling the situation once you know something is unethical.

Again, it depends on the source: whether it's a client or a superior who requested the unethical behavior.

If it's a client, it depends: whether you're their attorney or if it's your supervisor who's the point person. If your boss is the one with the principal responsibility for the client, then your boss will handle the matter. If instead you are the front person with the client, you can always point out other alternatives that *are* ethical. "Why don't we think of other alternatives . . ." You can also point out that what they're trying to do ultimately won't work. Pass the ball! For instance, you can say, "A jury will not believe this."

If they back you into a corner, you've basically got to say, "What you're asking me to do will put my license to practice at risk. I wouldn't do it for anybody *against* you, and I can't do it *for* you. And neither can any other lawyer." I know that's easy to say when I'm sitting here writing a book instead of staring down a big client. But apart from any other ramifications of unethical behavior, think about this: Once a client convinces you to do something unethical, they've got you by the short hairs. They can blackmail you professionally. You can't ever again say "I won't do that" because they know you already *did* something unethical. It's just not worth it!

clearly outside the scope of my duties as a lawyer. He wanted me to use a document where he had whited out some of the words; I'd seen it before, so I knew something was different. I told my supervisor, and the supervisor immediately responded, "Get rid of the client. It takes years to develop a professional reputation. You can lose it in an instant. Don't let a client put you in that position."

If it's your boss, again, break it gently. Look past their specific request to the goal they are trying to reach, and see if there isn't an ethical way to accomplish that goal. Perhaps there's a client who's insisting on a particular answer, and your supervisor is feeling that pressure. Instead of saying, "This is wrong!" or "This is unethical!" say, "Can we take a look from this perspective?" or "This troubles me. I hear what you're asking me. But can we talk about other strategies?" Maybe they interpret the rules differently than you did, and if they can support their argument, as I mentioned just a minute ago, the ethics rules say you're covered (mind you that's only true for areas that are *truly* gray, *not* for things that are more straightforward). As Dickinson's Elaine Bourne suggests, "Do a memo to file, cc: somebody else if that's feasible"—cover yourself!

If your boss doesn't take the bait and insists that you do something that you're fairly sure is unethical, you just can't do it. As Venable, Baetjer's Stefan Tucker advises, "Once you ascertain for sure that it's unethical, say to them, 'I'm sorry. I can't do it.'" If it costs you your job, you're well rid of it. As Loyola's Pam Occhipinti says, "My father always told me, 'You can always make all the money in the world, but you can't make your name back.' Don't compromise your reputation!" Flaherty, Sensabaugh's Scott Kaminski agrees: "In the practice of law, your reputation is everything. Never do anything that would compromise your reputation, no matter the reason." *No* job is worth committing an ethical breach, no matter how it looks when you're sitting in the hot seat. If your boss is a sleazeball, other lawyers know it, and you don't want to be tarred with that same brush. As Pam Occhipinti says, "One associate I know worked for three partners in a plaintiff's personal injury firm. One day all three partners were arrested for stealing from clients. Realize that



SMART HUMAN TRICK . . .

Mid-level associate, New England firm: "We represented a chain of stores who leased space from larger stores. The deal was that they were supposed to pay rent based on how much they sold, and it was pretty clear that they were hiding some of their sales. In order to get out of paying the larger stores, they were contemplating filing bankruptcy. Finally one day the CEO asked me to do something that was

if your boss is disbarred, you'll be investigated, too." As soon as you know the real story—get out.



## SMART HUMAN TRICK . . .

Junior associate, Midwest firm: "Our firm had a 'partner from hell,' who always waited until the last minute to do tremendously important work. Then he'd make a frantic pass through the hallways, grabbing whatever hapless associate(s) he could find. When the last minute work was done, he'd inevitably blame the associate for whatever went wrong, missed issues, bad cites. Fortunately, nobody at the office was ever fooled.

Once he strode into my office at 4:30 in the afternoon, half an hour before the courthouse closed, and plopped a one-inch thick complaint on my desk. He told me to sign it and get it filed. A firm in another state had sent it over by federal express and he had promised them he'd have it filed that day. The partner left my office and I sat there staring at this behemoth of a complaint, just stunned. After about five minutes, I collected my wits. I knew that under FRCP Rule 11, there was no way I could sign and file the complaint by five o'clock, and comply with the rule. There was no way I could verify the items in the complaint in any way, shape or form in less than half an hour!

I walked to the partner's office, looked him in the eye, and said, "Under Rule 11, I cannot, and will not, sign this complaint today." He looked at me, absolutely flabbergasted that I had the nerve to stand up to him. Then he said in distress, "But I can't do it, either!" essentially admitting that he tried to bamboozle me into doing something he knew was unethical!

Fortunately for him, the Statute of Limitations was not an issue, so he called the out-of-state firm and asked if they minded whether he took another day to review the complaint and comply with Rule 11. No problem. I read and checked out the complaint and the next day had it filed.

After that incident, that partner never asked me to do his dirty work for him again."

Incidentally, if it comes to that—and you have to look for another job—be careful how you bring up the topic with future employers. If there are other reasons you wanted to leave the employer—like you wanted to change practice areas or settings or move to another city—focus on those. When it comes to the ethics problems, as Hofstra's Caroline Levy says, "Couch it in diplomatic terms, like 'I had some reservations about the practice' or 'I was uncomfortable' or 'Our styles weren't compatible.' The fact is, if somebody is sleazy, everybody in the legal community already knows it!" If you're pressed on the issue, Elaine Bourne says, "Then tell them. Dance around it until you're cornered, and then say, 'They asked me to do some things that I researched and found to be outside the rules of ethics. Frankly, if you asked me to do those things for you, I wouldn't do them for you, either.'" Face it. If a prospective employer wanted you to do something unethical for them, you don't want *that* job, either!

### 5. What to do if you find out that the behavior is ethical—but you're still not happy with it

If you ascertain that what you're being asked to do is ethical, and you're disappointed with that—there's something else going on. It's entirely possible that something could be ethical but still make your hair stand on end. Maybe you just can't bring yourself to represent people you consider sleazoids. Or maybe you've got moral problems with the kinds of businesses your firm represents. Or maybe you think your bosses are sleazy, even though what they're doing is technically on the right side of the ethics code. You know what? It's not the right job for you. As Nova Southeastern's Pat Jason says, "If you're uncomfortable, it's not a good fit for you. It's a sign." John Marshall's Bill Chamberlain adds, "They may be paying your salary, but it's still *your* life." To figure out what to do, look at the chapter called "Being Your Own Career Coach," where we talk all about those kinds of issues. That's not an ethical problem—that's a career issue!