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PERSPECTIVE

Lawyers practicing in California have a duty to blow the whistle

By Arash Homampour

Lawyers, like everyone else, are capable of doing bad things. This is especially true when they are funding grotesque lifestyles made to look cool in our corrosive flex culture. Thomas Girardi and other well-known attorneys appear to have done some extremely ignoble things, including absconding with their clients' money. How is it, then, that they were able to continue practicing law and bringing on clients for a significant period of time after their misdeeds first came to light?.

Their cases certainly shined a light on high-profile lawyer misconduct, but don't expect them to necessarily stop other lawyers from engaging in similar conduct. California has the distinction of being the only state in the country that doesn't require — or even expect — lawyers to "snitch" on each other.

In researching this article, I was shocked to see how often this issue was framed as "snitching," when it is really about protecting clients and the public at large from unscrupulous attorneys. It is no different than bad actor corporations, financiers, doctors and other professionals who prey on unwitting victims. The overuse of the word "snitch" exemplifies how important framing is to an issue.

Clients and the public at large, as well as attorneys' public image, are the ones paying the price for this hands-off and jaundiced approach. It is not about snitching, but blowing the whistle before real harm is done. Imagine a professional football game where everyone sees that one player is cheating on a massive scale and no one does anything about it. It would not happen. Fairness is fundamental to professional sports. Likewise, it should be fundamental to the practice of law, and the profession of law is not a game.

The California State Bar made no secret of its distaste for lawyers reporting each other at its 2016 meeting: "Of the 68 proposed rules that the drafting commission sent to the bar in July, the only one that the board totally rejected was a narrow version of Model Rule 8.3, which requires lawyers to notify disciplinary authorities upon learning that another lawyer has committed a violation of professional conduct rules that casts serious doubt on the lawyer's honesty or fitness as a lawyer. The narrower California proposal would have required lawyers to inform disciplinary authorities when they know that another lawyer has committed "a felonious criminal act" that raises a substantial question about the lawyer's honesty or fitness as a lawyer…. In the end, the committee and the board jettisoned the proposal."

If we take the word 'snitch' off the table, we can see that, in fact, this has nothing to do with ratting people out. It is simply about supporting the values we as attorneys swore to uphold and maintaining the fundamental integrity of our profession.

ABA Model Rule 8.3, "Reporting Professional Misconduct Maintaining the Integrity of the Profession," has been adopted in some form by the bars of 49 other states. The rule as drafted establishes an unconditional obligation:

"(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.

"(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

"(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program."

Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by…."

Some states, like Washington and Georgia, softened the rule to make it a suggestion rather than an outright requirement. California flatly rejected the rule, refusing to put lawyers in the untenable position of choosing between ethical obligations and the duty to act in the best interest of clients.

The State Bar's decision to reject the ABA rule was no doubt heavily flavored by the Himmel case (In re Himmel, 533 N.E.2d 790 (Ill. 1988)), in which a lawyer was disciplined for failing to rat out his client's former attorney, even though the client had expressly forbidden him to do so as a condition of entrusting the malpractice claim to him. The bottom line was clear: "Attorneys will not become their brother's keeper."

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porting the values we as attorneys swore to uphold and maintaining the fundamental integrity of our profession. It should be a no-brainer to require that lawyers who know of malfeasance or criminal activity by another member of the profession report it to authorities. To remain silent jeopardizes the integrity of the profession and increases the likelihood that other clients will be harmed.

The equation is, however, more complicated than it at first appears. The state bar chose to forgo reporting rules because it anticipated that attorneys would be forced to choose the lesser of two evils: reporting bad actors or protecting their clients' interests. There is also the deep discomfort inherent in attacking the livelihood of a fellow professional. Lawyers understandably worry that lodging a report against a colleague could compromise their clients' arguably privileged information or be politically toxic.

The Girardi case is a perfect example of the latter concern. Lawyers who have since come forward to share what they knew of Girardi's bad acts have acknowledged that they refrained from reporting his activity because submitting a report against the well-connected Girardi would have been tantamount to professional suicide.

Let us retire the use of "good old boys club," "well connected," and "professional suicide" as excuses for allowing bad things to happen. We can do this by creating rules with teeth that cut through the nonsense, by creating a foundation by which those rules are actually enforced, that protect the person blowing the whistle and by promoting early intervention and help for the clients and for the wayward professional.

Yes, there are concerns that these rules can be improperly weaponized by opposing counsel or any other lawyer with a grudge. But those concerns can be addressed through other means and should not deter us from the overriding goal to protect clients and the general public.

As attorneys, we are always having to navigate at the intersection of competing laws. We must continually engage in a weighing and analysis, making uncomfortable but necessary judgment calls. Had these same attorneys — those who bit their tongues while Girardi stole his clients' money — been able to speak with knowledge that something would actually be done and without fear of reprisal, scores of Girardi clients would have been spared considerable loss and grief. The malfeasance went on for decades, and it should have been stopped as soon as someone learned of it.

Lawyers have to look at themselves in the mirror every day, and they should always use their own best judgment to do the right thing. But that is not happening. Why would a lawyer stick his or her neck out when it's not required and there are no consequences for keeping silent? It's time for the State Bar to finally adopt a version of the ABA Model Rule — not a "snitch" rule — that we can all live with. Our clients — and we — deserve nothing less. ■