Reporting Misconduct when Lawyers aren't Lawyering.

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Recently, the American Bar Association (the "ABA") issued Formal Ethics Opinion 04-433, exploring a lawyer's duty to report professional misconduct committed by a licensed, but *non-practicing* lawyer.[1] It likely came as no surprise when the ABA confirmed that a lawyer is obligated under Model Rule 8.3 to report the professional misconduct of another lawyer, even of a non-practicing lawyer, if that conduct raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer.

Is this Formal Opinion all that new for Oregon? We submit that it is not. In Oregon, new Oregon RPC 8.3(a) and *former* DR 1-103(A) are virtually identical and, like the Model Rule, impose a duty to report professional misconduct; a duty explained in some detail in OSB Legal Ethics Op No 1991-95. And, even though the rules do not discuss the obligation to report non-practicing lawyers, the Oregon Supreme Court has consistently held non-practicing lawyers to the same ethical standards as practicing lawyers. See, e.g., the following examples:

- *In re Magar,* 337 Or 548, ___ P3d ___ (2004), where the Supreme Court recently upheld a one-year suspension of an attorney who had engaged in the unauthorized practice of law while an *inactive* member of the bar; and

- *In re Smith,* 318 Or 47, 861 P2d 1013 (1993), where the Supreme Court held that an *inactive* attorney remains subject to the disciplinary rules and may therefore not contact an adverse party represented by counsel regarding the attorney's own case.

It is easy to see that, if asked, the Oregon Supreme Court would come to the same conclusion as the ABA's Formal Opinion. But, what if we take the Opinion one step further and ask the related question whether a practicing lawyer can be disciplined for private activities; that is, may a *practicing* lawyer be disciplined for conduct outside the scope of his or her professional practice? In Oregon, the answer is "Yes, qualified."

The Oregon Supreme Court recently addressed this question in *In re Carpenter,* 337 Or 226, 95 P3d 203 (2004). In *Carpenter,* a lawyer accessed the "Classmates.com" website, created a user profile in the name of a teacher with whom the lawyer attended high school, and posted a false and defaming message in the teacher's name. *Carpenter,* 337 Or at 228-29.

The trial panel dismissed the complaint, stating that "[t]he reach of [the disciplinary rule dealing with dishonesty, fraud, deceit and misrepresentation] does not extend to the kind of non-professional, unregulated conduct found in this case." *Id.* at 229. The Supreme Court, however, disagreed and held that private activity can be the subject of professional discipline when a nexus

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[1] The ABA defined "non-practicing lawyer" as a lawyer who, at the time of the misconduct, was not actively engaged in the practice of law, i.e., "did not accept engagements by clients to provide legal services and did not hold himself out as a lawyer prepared to accept such engagements."

is established "between the lawyer's conduct and the lawyer's fitness to practice law." *Id.* at 233.

In the movie *Fight Club,* Brad Pitt explained to Edward Norton that the first rule of Fight Club, was not to talk about Fight Club. Unlike those in the Fight Club, we in the Lawyers Club are obligated to talk about it. Once a lawyer joins the Club, that lawyer will be held to the same ethical standards in his or her personal *and* professional life, whether actively practicing or not. And, if lawyers fail to live up to those standards, other lawyers may be obligated to report them.