I. Introduction

These materials supplement and build on the extensive outline prepared in connection with the original 2011 series of seminars, *The Watergate CLE*. In 2012, the 40th anniversary year of the Watergate break-in, our seminar’s legal ethics focus includes evidentiary issues and other issues that arise when a lawyer is involved in wrongdoing.

II. Background

In July 1970, when 31-year-old John W. Dean became counsel to President Richard Nixon, the legal ethics landscape bore little resemblance to today’s. Federal government lawyers admitted to the District of Columbia bar were under the disciplinary jurisdiction of the District Court for the District of Columbia. It was not until 1972 that the District of Columbia Court of Appeals assumed disciplinary jurisdiction, and adopted a version of the American Bar Association’s Model Code of Professional Responsibility (“Model Code”). The Model Code consisted of aspirational Canons and Ethical Considerations and normative Disciplinary Rules – a system that had its roots in the ABA’s earliest lawyer conduct code, which dated from 1908.

The professional responsibility picture for a lawyer today is quite different. In 1974, the ABA began requiring law schools to teach legal ethics, in direct response to the ethical lapses of the many lawyers involved in the Watergate scandal. The states began to mandate continuing legal education for lawyers, including an ethics or professional responsibility component. (Today, some 40 states require such continuing ethics training.) In 1991, the District of Columbia adopted its version of the ABA’s Model Rules of Professional Conduct, a revamped set of mandates that aimed to modernize and clarify lawyer conduct rules. Lawyer disciplinary authorities in almost every jurisdiction in the United States have now adopted some version of the Model Rules (although every jurisdiction has to some extent imposed its own variations). In 2001, another scandal – Enron – sparked more debate about the ethical duties of lawyers, spurring further changes to the Model Rules themselves.

With full recognition of the anachronism (since the Model Rules of Professional Conduct were unknown in the Watergate era), these materials nonetheless primarily refer to today’s Model Rules of Professional Conduct (“Model Rules”) as a way to again bring the legal ethics issues presented by Watergate into a current setting.
III. Who is the Client?

A. John Dean felt a high degree of personal loyalty to the President – but in his capacity as White House counsel, who was John Dean’s client? This question, discussed in the previous Watergate CLE, remains critical in this examination of evidentiary and other ethics issues. There are several potential answers.

1. The President as the “client:” Considerations of personal loyalty, and the fact that John Dean served at the pleasure of the President, might have created the mistaken impression that the President himself was the “client.”


   b. See also John W. Dean, III, Watergate: What Was It?, 51 Hastings L. J. 609, 621 (Apr. 2000) (“Watergate: What Was It?”) (“There is no question that many lawyers committed illegal acts out of loyalty to Richard Nixon, and to a degree that can be said of all who did so.”).

2. The government agency as client: The District of Columbia’s version of the Model Rules provides that “The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.” D.C. Rule of Prof’l Cond. 1.6(k).

   a. See also Restatement (Third) of the Law Governing Lawyers § 97 cmt. (c): “No universal definition of the client of a governmental lawyer is possible. … For many purposes, the preferable approach on the question presented is to regard the respective agencies as the clients …”

3. The Office of the Presidency as the “client:” The most ethically-correct answer.

   a. “[I]t is clear that the relationship of White House Counsel to the Office of the President is not one of attorney for the President personally, but for the Office of the President as part of the U.S. government.” Paulsen, supra, at 99 n.36.
b. “It is, however, the entity – the United States government – and not
the individual making the communication, that is the client.”
Michael Stokes Paulsen, *Who ‘Owns’ the Government’s Attorney-

1.) This is the most ethically-correct answer, supported by
decisions rejecting Clinton Administration lawyers’ attempt
to invoke attorney-client privilege to shield
communications between government lawyers and the
President relevant to the investigation by the Office of
Independent Counsel of possible criminal activity. *See In
re Bruce R. Lindsey (Grand Jury Testimony)*, 148 F.3d
1100 (D.C. Cir. 1998)( Deputy White House Counsel
could not assert attorney-client privilege to avoid responding to
grand jury if he possessed information relating to possible
criminal violations in connection with Monica Lewinsky
scandal); *In re Grand Jury Subpoena Duces Tecum*, 112
F.3d 910 (8th Cir. 1997) (in connection with investigation
into Whitewater scandal, White House could not invoke
any form of governmental attorney-client privilege to
withhold potentially relevant information from grand jury).

c. *See also* Ronald D. Rotunda & John S. Dzienkowski, *The
Lawyer’s Deskbook on Professional Responsibility*, § 1.6-8(a) at
269 (2012-13 ed.) (“Lawyer’s Deskbook”) (“the government
lawyer represents the government, not any official in his or her
personal capacity.”).

Privilege and the Government Lawyer*, 20 Legal Times 21-22, 28
(June 30, 1997); Ronald D. Rotunda, *White House Counsel and the
Attorney-Client Privilege*, 1 Prof’l Resp., L. Ethics, & L. Ed. News
1 (Federalist Soc’y, No. 3, 1997).

IV. Incriminating Physical Evidence: What are the Attorney’s Duties?

A. The evidence in Howard Hunt’s White House safe

1. Former CIA operative E. Howard Hunt was one of the White House
“plumbers,” a secret group charged with plugging “leaks.” Along with G.
Gordon Liddy, Hunt helped engineer the burglary at the headquarters of
the Democratic National Committee at the Watergate.

2. After discovery of the break-in, and as the subsequent cover-up began, a
focus of concern was the fact that Hunt had office space in the White
House, including a safe. On orders from John Ehrlichman, Nixon’s top assistant, Hunt’s White House safe was drilled open and its contents brought to John Dean’s office, where Dean proceeded to go through it with Fred Fielding, associate White House counsel:

a. “We plowed on into what Fred said was material from the safe. ‘Wait a minute,’ said Fred suddenly … ‘John, this stuff is sensitive. It could be evidence. Don’t you think we ought to be careful?’ ‘Yeah, I guess you’re right.’ It hadn’t occurred to me. I had been caught up by curiosity.” John Dean, *Blind Ambition* at 114 (Simon & Schuster 1976).

b. After putting on latex gloves they got from the office of the White House physician, Dean and Fielding sorted the safe’s contents, which included: a revolver; classified State Department cables on the Vietnam War; bugging equipment; and a psychological profile of Daniel Ellsberg relevant to the break-in at the office of Ellsberg’s psychiatrist. *Blind Ambition*, 114-15.

c. Unseen by Dean until later, the contents also included several small notebooks with cardboard covers marked “Hermes.” The “Hermes notebooks” identified people Hunt had recruited for his covert White House operations, including the Ellsberg break-in. *Blind Ambition* at 182.

d. John Ehrlichman suggested to Dean that he “‘deep-six’ the sensitive materials from Hunt’s safe by throwing them into the Potomac River.” *Blind Ambition* at 121-22.

e. While not wanting to disappoint Ehrlichman, Dean also “did not want to take responsibility for destroying potential evidence.” *Blind Ambition* at 122. Finally, Dean and Ehrlichman gave the documents from the safe to L. Patrick Gray, the acting FBI director. “By this ruse, we could say we had turned all evidence over to ‘the FBI,’ and literally it would be true. At the same time, we felt we could count on Pat Gray to keep the Hunt material from becoming public, and he did not disappoint us.” *Blind Ambition* at 122.

f. Eventually, however, during Hunt’s criminal trial, he demanded that the government produce the Hermes notebooks from his safe, claiming that they were vital to his defense. *Blind Ambition* at 169-70. But Gray revealed to Dean that he had destroyed the documents from the safe. *Id.* at 171.
1.) Dean, however, subsequently found the Hermes notebooks in his own office safe. *Blind Ambition* at 182.

2.) The notebooks “were no longer relevant to the trial after Hunt’s guilty plea. But they were certainly dangerous to the cover-up. I would have to get rid of the goddam things, as others had gotten rid of evidence. I put them into my new shredder. The machine tore through the pages but choked on the cardboard covers, and I was afraid it might break down. I felt a wave of paranoia… Finally it ate the last of the documents with a loud growl.” *Blind Ambition* at 182.

B. Much of the commentary about the ethical dilemmas presented when an attorney comes into possession of potentially incriminating physical evidence focusses on the duties that a criminal defense attorney owes to the client. *See, e.g.*, Norman Lefstein, *Incriminating Physical Evidence, the Defense Attorney’s Dilemma, and the Need for Rules*, 64 N.C. L. Rev. 897, nn. 8, 56 (1986) (hereafter “*Incriminating Physical Evidence*”) (discussing the issue from the defense attorney’s point of view, and citing other commentary).

1. As Dean came to recognize, the Watergate burglary and its cover-up involved criminal wrongdoing. *See Blind Ambition* at 168 (“It is uncanny, I thought, how the law prohibits all those little acts that had set off my chemical instincts of guilt … Now that I had read [the federal obstruction-of-justice statute] in black and white it was clear enough. We were criminals.”). *See also* John Dean, *Watergate: What Was It?*, 51 Hastings L. J. 609, 618 (Apr. 2000) (“*Watergate: What Was It?*”) (“Quite honestly, it never occurred to me that we were obstructing justice, until I began reading the annotations to Title 18 long after the fact.”).

2. If John Dean had believed that Howard Hunt was a representative of the Office of the President – his “client” – what are some of the evidence issues presented by the contents of Hunt’s safe, and what are the related ethics issues? (This analysis does not address “executive privilege” or the “national security privilege,” which are unique to Presidents of the United States.)

C. The duty of confidentiality vs. the duty of fairness to opposing parties and counsel

Under the Model Rules of Professional Conduct, “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…” subject to several exceptions. (MRPC 1.6, emphasis added.) On the other hand, however, a lawyer may not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.” (MRPC 3.4, emphasis added.)

- 5 -
These principles have been deemed to be in some tension, and can present dilemmas for lawyers.

1. The duty of confidentiality under MRPC 1.6

a. The first five exceptions to the duty of confidentiality do not apply to incriminating physical evidence, under most circumstances; *i.e.*,
   
   1.) preventing reasonably certain death/bodily harm;
   
   2.) preventing future crime/fraud;
   
   3.) preventing/rectifying financial injury from client’s crime/fraud using lawyer’s services;
   
   4.) securing legal advice about lawyer’s own conduct; and
   
   5.) establishing lawyer’s claim/defense in controversy with client.

b. The sixth exception to the duty of confidentiality points to authority *outside* the ethics rules, and permits disclosure of information relating to the representation of a client in order “to comply with other law or a court order.” (MRPC 1.6(e).)

c. A court-issued subpoena for evidence is a common source of such “other law or a court order.” Many cases have considered whether attorneys must obey subpoenas seeking production of physical evidence received from clients.

   1.) A seminal case is *State v. Olwell*, 394 P.2d 681 (Wash. 1964), in which the defense attorney was served with a subpoena, as part of a coroner’s inquest, seeking production of “all knives in [the attorney’s] possession relating to Harry LeRoy Gray.”

   2.) Based on the attorney-client privilege, the attorney refused to comply with the subpoena. The court held that “as an officer of the court,” the attorney had to turn over the evidence. But the court also upheld the privilege, holding that in any subsequent prosecution the State would be barred from disclosing that the knife came from the defense attorney. The court essentially separated the client’s
conduct in giving the physical evidence to the attorney (a privileged “communication”) from the evidence itself (which was not a “communication” subject to the privilege).

d. Cases analyzing the Fifth Amendment privilege against self-incrimination are in accord with the approach in Olwell. For instance, in Fisher v. United States, 425 U.S. 391 (1976), the taxpayer had provided his accounting records to his attorneys in order to obtain legal advice; the IRS attempted to compel the attorneys to comply with a subpoena for the records. The Supreme Court held that the taxpayer’s Fifth Amendment privilege, if any, could apply to the documents in the attorneys’ hands. Under the particular circumstances of the case, the documents did not qualify for Fifth Amendment protection, and the attorneys were compelled to produce them. But the Court held that if compliance with a subpoena would (a) acknowledge the documents’ existence and their possession or control, and (b) indicate the taxpayer’s belief that the papers were described in the subpoena, then the attorney’s compliance with the subpoena would involve self-incriminating testimony or communication that would be within the scope of the Fifth Amendment.

1.) See also United States v. Doe, 465 U.S. 605 (1984) (sole proprietor’s production of financial documents in compliance with federal grand jury subpoena would constitute testimonial self-incrimination, and absent grant of use-immunity preventing government from using fact of production against owner, owner not required to produce documents).

e. Even apart from the authority of the Model Rules (and their state counterparts), the disclosure of information in order to “comply with other law” also encompasses compliance with the common law. The court in Olwell, for example, in dictum, discerned a duty to voluntarily disclose to the authorities physical evidence in the lawyer’s possession, even if incriminating to the client.

1.) “The attorney should not be a depository for criminal evidence … which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense of [the lawyer’s] client’s case. Such evidence given the attorney during legal consultation for information purposes … could clearly be withheld for a reasonable
period of time. *It follows that the attorney, after a reasonable period, should as an officer of the court, on his own motion turn the same over to the prosecution.* Olwell, 394 P.2d at 684-85 (emphasis added).

f. Other courts have elevated the *dictum* in Olwell, citing it as a “rule.” *See, e.g., Morrell v. State,* 575 P.2d 1200, 1210 (Alaska 1978) (attorney had received client’s written kidnapping plans from third person; from *Olwell* and other cited cases, “emerges the rule that a criminal defense attorney must turn over to the prosecution real evidence that the attorney obtains from the client.”); *State v. Carlin,* 640 P.2d 324, 328 (Kan. App. 1982) (attorney had received client’s incriminating tape recording; citing *Olwell* and other cases, “[s]ince the appellant’s attorney had a duty to turn over the evidence … there was no error in the court ordering him to do so.”).

1.) *See also Restatement Third of the Law Governing Lawyers,* § 119 (lawyer may take possession of physical evidence of client crime for time necessary to examine/test it, but after that must notify prosecuting authorities of the lawyer’s possession of the evidence and/or turn the evidence over to authorities).

2.) Commentators have noted that “a substantial majority of decisions assert that defense counsel has a mandatory obligation to turn incriminating physical evidence over to the authorities once any legitimate purpose for possession is extinguished.” David Layton, *Incriminating Physical Evidence, Ethical Codes and Source Return,* J. of the Prof. Law. 59, at text accompanying n. 27 (May/June 2002) (hereafter “Ethical Codes”).

g. Professional discipline has also resulted from a lawyer’s failure to voluntarily turn over incriminating evidence received from the client. For instance, in *In re Ryder,* 381 F.2d 713 (4th Cir. 1967), the Fourth Circuit Court of Appeals affirmed an 18-month suspension from federal practice for a lawyer who took a bag of money and a shot-gun from a client suspected of bank robbery and put them in a safe deposit box. The court held that “It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime. Ryder’s acts bear no reasonable relation to the privilege and duty to refuse to divulge a client’s confidential communication.
Ryder made himself an active participant in a criminal act, ostensibly wearing the mantle of the loyal advocate, but in reality serving as accessory after the fact.”

h. But commentators have noted that the Fifth Amendment analysis in Fisher and its progeny should trump the notion that an attorney must voluntarily produce the client’s physical evidence. See Incriminating Physical Evidence at 918-19 (“Surely there cannot be a duty to reveal voluntarily evidence that is constitutionally privileged or evidence that, if ordered produced, must be the subject of an immunity order.”).

2. The duty under MRPC 3.4(a) not to destroy or conceal incriminating evidence

a. Complicating the picture, MRPC 3.4(a) provides that a lawyer shall not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”

1.) See also Restatement Third of the Law Governing Lawyers § 118 (lawyer may not destroy or obstruct another party’s access to evidence when doing so would violate a court order or other legal requirements, or counsel or assist client to do so).

b. Commentators have noted that Rule 3.4(a)’s bar against “concealing” material of “potential evidentiary value” is “relatively uninformative” in terms of guidance to lawyers who have incriminating physical evidence in their possession. Ethical Codes at text accompanying n. 20.

1.) In particular, the text of the rule itself is silent about whether the duty not to “conceal” by itself signifies the existence of an affirmative ethical duty to turn the evidence over to authorities.

2.) MRPC 3.4(a) cmt. [2] likely constitutes an attempt to harmonize the prohibition against destruction/concealment with both the duty of confidentiality and the duty to voluntarily provide incriminating physical evidence to the authorities. The comment refers lawyers to external “applicable law,” which “may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination … In
such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.”

c. At least some authority suggests that Rule 3.4(a) applies even when attorneys are not acting in their professional capacity as advocates. See, e.g., In re Melvin, 807 A.2d 550 (Del. 2002) (one year suspension imposed for violating state’s version of MRPC 3.4(a) by concealing or destroying wife’s journal and papers, which might have had aided in lodging criminal complaint against him for violating protection order barring lawyer from contact with his wife); Atty. Griev. Comm. v. White, 731 A.2d 447 (Md. App. 1999) (imposing reciprocal discipline after federal district court disciplined attorney for destroying discoverable evidence in her capacity as plaintiff in a civil trial before the federal court).

V. Lawyers In Trouble: What are the Ethical Duties?

A. When John Dean shredded the Hermes notebooks, he called it “a moment of high symbolism:” “This … act shredded the last of my feeble rationalizations that I was an agent rather than a participant – a lawyer defending guilty clients, rather than a conspirator.” Blind Ambition at 182.

B. Several Model Rules are relevant when a lawyer crosses the line that Dean describes, and becomes an actual participant in wrongdoing.

1. Model Rule 8.4 provides, in pertinent part, that:

   It is professional misconduct for a lawyer to:

   (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

   (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;

   (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

   (d) engage in conduct that is prejudicial to the administration of justice….

   a. “Rule 8.4 defines what constitutes misconduct for a lawyer. In general it provides that a lawyer may be disciplined for violating a mandatory requirement of the Rules, or for engaging in conduct
forbidden by other laws if such conduct demonstrates that the
lawyer should not be entrusted with the confidence that clients
normally place in a lawyer.” Lawyer’s Deskbook, § 8.4-1 at 1293.

b. See also Restatement Third of the Law Governing Lawyers, § 1
(on admission to bar, lawyer becomes “subject to applicable law
governing such matters as professional discipline, procedure and
evidence, civil remedies, and criminal sanctions.”); id., at cmt. [b]
(“The lawyer codes and much general law remain complementary.
The lawyer codes draw much of their moral force and, in many
particulars, the detailed description of their rules from preexisting
legal requirements and concepts found in the law of torts,
contracts, agency, trusts, property, remedies, procedure, evidence,
and crimes. Thus, lawyer codes particularize some general legal
rules in the particular occupational situation of lawyers but are not
exhaustive of those rules.”).

1.) One of the federal criminal code provisions applicable to
documentary evidence is 18 U.S.C. § 1519 (adopted in
2002), which applies to one who “knowingly alters,
destroys, mutilates, conceals, covers up, falsifies, or makes
a false entry in any record, document, or tangible object
with the intent to impede, obstruct, or influence the
investigation or proper administration of any matter within
the jurisdiction of any department or agency of the United
States.”

2.) Other criminal statues can also apply to physical evidence,
including, inter alia, the general obstruction statute. See 18
U.S.C. § 1503 (corruptly influencing, obstructing, or
impeding or attempting to influence, obstruct, or impede,
the due administration of justice).

3.) Section 1519 is very broad, and (in contrast to § 1503) does
not require the existence of a pending proceeding, or a
nexus between the defendant’s actions and a pending
proceeding, such as a grand jury proceeding. Compare
United States v. Moyer, 674 F.3d 192 (3d Cir. 2012) with
connection between defendant’s conduct and proceeding).

c. The Watergate scandal resulted in 69 government officials being
charged with criminal wrongdoing, and 48 being found guilty. See
http://en.wikipedia.org/wiki/Watergate_scandal#Final_legal_actions_and_effect_on_the_law_profession (listing principal officials
who were convicted). Many of those indicted or convicted, of course, were lawyers. See also Blind Ambition at 249 (Dean commenting to his lawyer regarding his handwritten list of those Dean felt would be indicted by the grand jury investigating the Watergate break-in: “You know, what is incredible is the number of lawyers on the list”).

2. Model Rule 8.3, provides in pertinent part:

(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. …

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 ….

Comment [2] to MRPC 8.3 explains that “A report about misconduct is not required where it would involve violation of Rule 1.6.

However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.”

a. “In general, lawyers have an obligation to volunteer information of another lawyer’s serious disciplinable violations unless the information is privileged.” Lawyer’s Deskbook, § 8.3-1 at 1278.

1.) The former Model Code likewise required the reporting of lawyer professional misconduct, similarly limited to that based on “unprivileged knowledge.” See DR 1-103, cited in Lawyer’s Deskbook, § 8.3-2 at 1286 n. 1.

b. Under Model Rule 8.3, Dean and other lawyers involved in Watergate would have had an arguable duty to report each others’ misconduct to disciplinary authorities – subject to the exception for confidential client information protected by Rule 1.6.

1.) The analysis of the duty to report depends on the client-identity analysis discussed briefly above. “[W]hen a lawyer represents another lawyer in the matter that is the subject of the misconduct, the Rules permit … the attorney-client relationship to override the duty to disclose
misconduct to the proper authority.” *Lawyer's Deskbook* § 8.3-2 at 1287.

2.) If Dean, for example, is deemed to have represented Nixon himself, there might have been no duty to report under MRPC 8.3, as the incriminating information would have been subject to the confidentiality requirements of Rule 1.6. Comment [2] would have encouraged Dean to seek consent to report from his client – which would surely not have been given.

3.) If, on the other hand, Dean is deemed to have solely represented the “Office of the President” (discussed above as the analysis most-closely comporting with ethics standards under the Model Rules), then the analysis might be altered, with Model Rule 1.13’s “reporting up and out” provisions coming into play. (For a discussion of that analysis, see *Materials for The Watergate CLE*, included herein.)

c. The confidentiality exception to the duty to report has been criticized as an exception that so weakens MRPC 8.3 that the “duty” is actually “little more than an illusion.” Vincent R. Johnson, *Legal Malpractice and the Duty to Report Misconduct*, 1 St. Mary’s J. on Legal Mal. & Ethics 40, 76 (2011) (hereafter “*Duty to Report Misconduct*”) (also noting that even the comment on seeking client consent to bypass the confidentiality requirement in order to permit reporting is merely a “weak injunction that a lawyer ‘should’ (not ‘shall’) seek client consent…”).

d. Just as the reporting obligation does not override the duty of client confidentiality, the Constitutional privilege against self-incrimination under the Fifth Amendment must also apply when a lawyer represents another lawyer, although not expressly mentioned in the Rule.

1.) *See Lawyer's Deskbook* § 8.3-2 at 1288-89 (“Clearly the [reporting] rule cannot apply to knowledge protected by a constitutional privilege such as the privilege against self-incrimination; otherwise the rule would be unconstitutional.”).

2.) *See also* Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-regulation*, 12 Georgetown J. Legal Ethics 175, 201-02
(1999) (hereafter, “Practical Analysis”) (noting the applicability of the privilege against self-incrimination and that many serious ethics violations are also crimes; “There is no point in diluting the Rule 8.3(a) reporting mandate by adding an unrealistic or unreasonable requirement.”).

e. Significantly, professional discipline for failing to report the misconduct of other lawyers is rare – violating the “rat rule” is very seldom itself a basis for discipline.

1.) See, e.g., Duty to Report Misconduct at 47 (in Texas, for example, during 2006-2011, only one lawyer was sanctioned for violating duty to report unprivileged knowledge of another lawyer’s misconduct).

2.) See also Heather F. Newton & Nikki A. Ott, A Current Look at Model Rule 8.3: How is It Used and What are Courts Doing About It?, 16 Georgetown J. Legal Ethics 747, 747 (2003) (calling MRPC 8.3 “one of the most underenforced, and possibly unenforceable, mandates in legal ethics.”).

f. On the other hand, there are some reported disciplinary cases in which the sanctioned lawyer violated the “rat rule,” although the failure to report is usually one of several instances of misconduct.

1.) See, e.g., Atty. Grievance Comm’n v Kahn, 431 A.2d 1336 (Md. 1991) (associate disbarred for failing to report employer’s misconduct; also improperly solicited clients, diverted client funds and misused information from former employer’s files); In re Rivers, 331 S.E.2d 332 (S.C. 1984) (lawyer sanctioned for failing to report a partner’s misconduct and improperly communicating with juror). See also Practical Analysis at 179 n. 32 (citing additional cases).

g. In In re Himmel, 533 N.E.2d 790 (Ill. 1988), however, widely cited by commentators, the failure to report another lawyer’s misconduct was the sole basis for discipline. The lawyer there – Himmel -- represented an injury victim whose lawyer in the underlying case had converted the victim’s settlement check from the tort-feasor. Himmel’s client had specifically instructed him not to take any other action against her former attorney except to pursue payment of her settlement money. Acting under these instructions, Himmel failed to report the other lawyer to the disciplinary authorities. The
Illinois Supreme Court suspended Himmel for one year, holding that he had had “unprivileged knowledge” of lawyer wrongdoing, because his knowledge was outside the scope of the evidentiary attorney-client privilege.

h. And notwithstanding the rarity of disciplinary action based solely on violating Rule 8.3, it remains a topic of concern, and even “angst,” among lawyers, who struggle to apply the rule. See Patricia A. Sallen, Combating Himmel Angst, J. of the Prof. Law. 55, at text accompanying nn. 1-2 (2007) (Arizona State Bar ethics counsel noted that five percent of the 2,100 calls to state bar’s ethics hotline in 2006 concerned Rule 8.3 reporting requirement).

i. Duty of lawyer to self-report own professional misconduct

1.) Under the ABA Ethics Committee’s interpretation of the prior Model Code of Professional Responsibility, a lawyer was required to self-report the lawyer’s own misconduct, to the extent that it was based on “unprivileged knowledge or information.”

2.) See ABA Informal Op. 1279 (Aug. 29, 1973) (lawyer required to report own violation of ethics rules “where his unethical conduct is not privileged because, for example, he clearly cannot be exposed to criminal sanctions for having engaged in such unethical conduct.”)

3.) However, MRPC 8.3 expressly negates any self-reporting duty, providing that the duty extends only to “a lawyer who knows that another lawyer” has committed misconduct.

4.) See Practical Analysis at 201 (noting problems with any self-reporting requirement, including self-incrimination issues under the Fifth Amendment, and characterizing as “unreasonable” and “unrealistic” the expectation that lawyers would self-report).

5.) See also State v. Ankerman, 2000 Conn. Super. LEXIS 3281, *5-6 (Conn. Super. Ct. Nov. 28, 2000) (lawyer not required to self-report misconduct, but having done so, his self-incriminating statements were not “involuntary” under Fifth Amendment, and would not be suppressed from evidence in disciplinary proceeding; “[E]ven if the rules could be read to mandate self-reporting under certain
circumstances, there is no question that the defendant's fifth amendment privilege”.

6.) But state versions of the Model Rules may adopt a different viewpoint on self-reporting of lawyer misconduct.

7.) For example, Ohio has retained the self-reporting requirement of the former Model Code. See Ohio Rule of Professional Conduct 8.3 (lawyer who possesses unprivileged knowledge of ethical misconduct that “raises a question as to any lawyer’s honest, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority …”) (emphasis added).


   b.) See also Disciplinary Counsel v. Robinson, 933 N.E.2d 1095, 2010-Ohio-3829, ¶¶ 13, 36 (2010) (attorney self-reported his destruction of evidence, on the day of the hearing, relevant to his disciplinary proceeding; court acknowledged the fact of self-reporting, but accorded it no weight in mitigating the misconduct, which included multiple offenses in addition to the destruction of evidence; one year suspension imposed).