REPORTING PEER MISCONDUCT: LIP SERVICE TO ETHICAL STANDARDS IS NOT ENOUGH

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There is a vague popular belief that lawyers are necessarily dishonest.... Let no young man choosing the law for a calling for a moment yield to the popular belief. Resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation rather than one in the choosing of which you do, in advance, consent to be a knave.[1]

INTRODUCTION

Human behavior is guided and judged by standards of law and ethics. Legal standards, though often difficult to interpret, are generally well-articulated and concrete. Standards of ethics, on the other hand, are more abstract and often vary substantially within any given culture and time. Legal standards impose a duty. Ethical standards present a moral obligation to which people should aspire, but do not impose sanctions for disobedience unless it results in misconduct which rises to the level of a violation of a legal duty. Unique problems occur when these two types of standards merge into a single legal-ethical duty—for example, when professional rules impose upon lawyers a duty to report the misconduct of their fellow attorneys. Another standard exists which creates a privilege of confidentiality for attorney-client communications. If a lawyer's knowledge of a peer's misconduct stems from a privileged conversation a conflict may arise between the best interests of the client and the best interests of the legal profession.

Moral and ethical standards are of great importance to the legal profession and their role in the self-regulation of attorney conduct has been the subject of considerable discussion.[2] Although some commentators argue that a lawyer's duty to report misconduct should be no more extensive than that of other members of society,[3] the majority believe that the duty to re-

1. THE COMPLETE WORKS OF ABRAHAM LINCOLN 143 (J. Nicolay & J. Hay eds. 1894).

2. *See, e.g.*, Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193; Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 (1981); Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509 (1978); Gentile, *Professional Responsibility*, N.Y.L.J., Oct. 23, 1984, at 1, col. 1.

3. *See, e.g.*, Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491. Lynch argues that regulation of the legal profession would be better served by increasing the resources available to disciplinary bodies, rather than by peer reporting. *Id.* at 538. He stresses the public's "pervasive distaste for informing." *Id.* at 521. He also points out that the legal profession is ill-suited to deal sensitively

port peer misconduct is an essential aspect of self-regulation.[4]

While the Bar entrance process contains safeguards to prevent the admission of unethical individuals into the legal profession, these barriers, alone, cannot ensure that legal-ethical standards will be maintained.[5] Fiscal and time restraints often make it difficult to weed people out. Moreover, applicants may lie during the admission process and fail to report past offenses of moral turpitude or drug and alcohol addictions. The most troubling problem is not, however, the admission of these men and women to the profession. The major failing of legal ethics is the failure to effectively remove or discipline these individuals.[6]

One of the privileges of the legal profession is self-regulation.[7] The complexity of the profession makes it desirable, perhaps even necessary, that the legal profession be regulated by lawyers themselves.[8] Self-regulation requires lawyers and judges to share the responsibility of maintaining the standards of ethics and competence within the profession.[9] This responsibility is not currently being met[10] and at least one observer believes that the failure may mean sacrificing the privilege of self-regulation.[11]

Standards exist by which a lawyer's conduct may be guided or judged.[12]

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with the moral issues involved in this area. *Id.* at 534. Although he recognizes that the interests of justice and social welfare may, at times, create a moral duty, his ultimate conclusion is that "[t]he ethical codes applicable to lawyers ought to reflect the same approach that has proven acceptable to society as a whole." *Id.* at 535.

4. Gentile, *supra* note 2, at 2, col. 2 ("The reporting requirement is nothing less than essential to the survival of the profession . . . ."). One reason behind the need for an effective reporting requirement is the freedom lawyers enjoy in the regulation of their profession. *See* Forshee, *Professional Responsibility in the Twenty-first Century*, 39 OHIO ST. L.J. 689, 689 (1978). *See also* Martyn, *supra* note 2, at 707 ("[I]n the United States . . . the separation of powers doctrine . . . vests almost exclusive control of the legal profession in the hands of a select group of its members: the courts.").

Another reason cited for the importance of the reporting requirement is that misconduct by legal professionals is most easily recognized by other lawyers. *See* Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 98.

5. Note, *supra* note 2, at 509. *See Id.* n.2, *citing* Manning, *If Lawyers were Angels*, 56 CHI. B. REC. 47, 56 (1975)("[L]awyers are not angels. However fine they are to fight with or drink with, they remain, as Harrison Tweed said, a 'variety of mankind.' ").

6. Note, *supra* note 2, at 509.

7. Marks & Cathcart, *supra* note 2, at 194 ("The principle of self-regulation continues to be asserted despite public uneasiness about the ethical conduct of lawyers . . . .").

8. ETHICS AND THE LEGAL PROFESSION 14 (M. Davis & F. Elliston eds. 1986) ("Professions enjoy a significant measure of autonomy, protected by mechanism[s] for self-regulation. Because professionals have an expertise that the average person lacks, the latter hesitates to pass judgment on the former."). Self-regulation is also a practical necessity, because lawyers are in the best position to observe and recognize the misconduct of other lawyers.

9. Marks & Cathcart, *supra* note 2, at 202 ("Lawyers and judges have a duty to report violations of the disciplinary rules . . . ."). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1983) ("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.").

10. *See* Marks & Cathcart, *supra* note 2, at 202 ("In fact, however, lawyers and judges do not regularly report known breaches of disciplinary rules."). *See also* Note, *supra* note 2, at 515 ("An official of the State Bar of Arizona has estimated that only fifteen percent of the complaints received are initiated by members of the bar.").

11. *See* Martyn, *supra* note 2, at 743 ("Failure to experiment with new methods of appeasing client concerns risks eventual judicial or legislative imposition of alternatives far less solicitous of lawyer involvement.").

12. *See infra* notes 20-49 and accompanying text.

Lawyers and judges have an ethical duty to report violations of standards of ethical conduct to appropriate authorities.[13] This duty is an integral part of a mature system of professional self-regulation.[14] The codification and enforcement of legal-ethical standards presents, however, a difficult task. This Note explores several of the problems associated with the implementation of reporting standards in the legal field and proposes some possible solutions to those problems.

The Note begins by describing the ethical standards governing the legal profession and their evolution over time.[15] It next focuses on the reporting requirements in conjunction with an examination of the conduct prohibited by other ethical standards.[16] The Note also analyzes some of the factors contributing to the ineffectiveness of the peer reporting requirement.[17] Finally, this Note examines several proposals designed to improve the level of ethical conduct in the profession.[18]

Remedying the failures of the reporting requirement is of paramount importance, as the inefficacy of the reporting requirement may ultimately result in the loss of the regulatory autonomy which lawyers now enjoy. The first step in improving the effectiveness of peer reporting, however, is to define the failures of the reporting requirement. The Note suggests that renewed attention[19] to the problem will compel the legal community to attend to its ethical and regulatory responsibilities.

THE EVOLUTION AND REFORMATION OF PROFESSIONAL STANDARDS

History

A general organization of the legal profession itself preceded the codification of legal-ethical standards in this country.[20] During the late 1800s various regional Bar Associations appeared,[21] eventually becoming affiliated with the American Bar Association (ABA).[22] Within twenty years of the ABA's founding in 1878, its president appointed a committee to consider a national code of ethics.[23] In 1906, the committee recommended the adoption of such a code,[24] and in 1908, the Canons of Professional Ethics were

13. Lawyers have a duty to report under each of the ethical codes previously discussed. Some observers contend that judges, who are bound by their own rules, are also bound, as lawyers, to the reporting requirements. *See infra* note 14.

14. Marks & Cathcart, *supra* note 2, at 202. *See also* Gentile, *Professional Responsibility*, N.Y.L.J., Oct. 23, 1984, at 2, col. 2 ("Should lawyers report each other to the Disciplinary Committee for ethical transgressions? The answer must be an unqualified yes . . . .").

15. *See infra* notes 20-35 and accompanying text.

16. *See infra* notes 36-51 and accompanying text.

17. *See infra* notes 51-109 and accompanying text.

18. *See infra* notes 110-60 and accompanying text.

19. For a discussion of past attention to ethical problems in the legal profession, *see infra* notes 23-27 and accompanying text.

20. *See infra* notes 21-25 and accompanying text.

21. D. PAPKE, THE LEGAL PROFESSION AND ITS ETHICAL RESPONSIBILITIES: A HISTORY, IN ETHICS AND THE LEGAL PROFESSION 29, 36 (M. Davis & F. Elliston eds. 1986).

22. *Id.*

23. George R. Peck, then president of the American Bar Association, appointed this committee in the 1890s. Its product was the Canons of Professional Ethics. *Id.* at 37.

24. *Id.*

formally adopted.[25]

The Canons served as the ethical standards of the profession until the 1960s. At that time, the profession experienced an upsurge in professional self-criticism,[26] which resulted in the Canons' ultimate demise and replacement. This came about largely because the Canons served the interests of elite practitioners in large firms, at the expense of the sole practitioners on the lower rungs of the profession's hierarchy.[27] In 1969, the American Bar Association replaced the Canons of Professional Ethics with the Code of Professional Responsibility ("Code").

Although the new Code temporarily quieted the profession's ethical controversy,[28] concern over the events surrounding President Nixon's Watergate scandal[29] brought new life to old questions.[30] What were the foundations of a workable code of legal ethics? What were the modern lawyer's ethical responsibilities?

In the years since Watergate, debate over the function and scope of professional ethics has continued in bar associations, law schools and courts.[31] In response to this problem, the American Bar Association formed the Commission on Evaluation of Professional Standards in 1977.[32] In 1980, the Commission proposed the Model Rules of Professional Conduct.[33] The ABA, after three years of discussion, adopted a revised version of the Model Rules in 1983.[34] The Model Rules were intended to replace the old Code.

Accordingly, the evolution of codified legal ethics produced three successive bodies of ethical rules: The Canons of Professional Ethics, The Code of Professional Responsibility, and The Model Rules of Professional Conduct. Each body of rules contains some type of peer reporting requirement;[35] the following sections will compare and contrast each of them.

The Early Canons of Professional Ethics

The Canons of Professional Ethics were the first ethical guidelines applicable to the entire legal profession. The Canons contain statements of axiomatic norms expressing, in general terms, the behaviors which the American Bar Association felt were appropriate to lawyers. For example, Canon 1 requires lawyers to assist in maintaining the integrity and compe-

25. *Id.*
26. *Id.* at 41.
27. *Id.* at 39. For example, the Canons restricted advertising. These restrictions did not affect those prestigious urban law firms which seldom used the mass media to acquire clients. Instead, they limited the power of the weaker sole practitioners who often must solicit clients or do without.
28. One factor involved in the 1960s ethics controversy was the lack of legal services available for the less affluent members of society. Unlike the Canons, the Code of Professional Responsibility articulated the profession's duty to make legal services available to all. *Id.* at 42.
29. Many of the wrongdoers involved in Watergate were lawyers. *Id.* at 43 ("For some commentators, the crimes of the Nixon Administration lawyers . . . seemed merely acute misconduct. But in some bar associations and lay circles, observers wondered if modern legal practice might invite a fundamental abandonment of morality.").
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 43-44.
35. For a comparison of the three reporting requirements, *see infra* notes 37, 42, 48.

tence of the legal profession.[36] All subsequent Canons contribute to this ultimate objective. Canon 29 provides the reporting requirement for this early set of ethical guidelines.[37]

Although these Canons might have offered guidance to professionals faced with a moral dilemma, and may have provided the foundation for a reporting requirement, they lacked the definitiveness necessary to actually regulate behavior.[38] The Canons set forth goals which their promulgators urged, but they did little to provide the means by which those goals could be achieved.

Revising The Canons—The Code of Professional Responsibility

In 1969, the Code of Professional Responsibility supplanted the Canons of Professional Ethics. This new Code articulated specific standards of conduct designed to direct the ethical behavior of those in the legal profession.[39]

The Code attempted to provide concrete standards through specific disciplinary rules. For example, Disciplinary Rule 1-102[40] set forth a list of prohibited conduct,[41] while the reporting requirement, set forth in DR 1-103(A),[42] mandated the reporting of unprivileged[43] Code violations.

Despite the reporting requirement, DR 1-103(A) was, in practice, a dead letter.[44] There are very few cases in which a court disciplined a lawyer for failure to report peer misconduct under the Disciplinary Rules of The Code of Professional Responsibility.[45] Thus, this second set of ethical guidelines effected no significant increase in the compliance with a peer reporting requirement.[46]

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36. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1969).

37. "Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession." MODEL CODE OF PROFESSIONAL CONDUCT Canon 29 (1969).

38. The Canons expressed ideals from which few would profess to stray, but the guidelines did not set concrete standards from which an attorney's specific actions could be judged.

39. The Code of Professional Responsibility set forth actual Disciplinary Rules. The Disciplinary Rules facilitated stricter regulation of lawyers' conduct. *See infra* note 40-43 and accompanying text.

40. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1969).

41. A lawyer should not:

1. Violate a Disciplinary Rule.
2. Circumvent a Disciplinary Rule through the actions of another.
3. Engage in illegal conduct involving moral turpitude.
4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
5. Engage in conduct which is prejudicial to the administration of justice.
6. Engage in any other conduct that adversely reflects on his fitness to practice law.

Id.

42. The MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1969), requires that "[a] lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to [an] . . . authority empowered to investigate or act upon such violation."

43. The reporting requirement did not mandate the violation of attorney-client privilege. *See* C. WOLFRAM, MODERN LEGAL ETHICS 685 (1986).

44. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 Legal Background (1983).

45. *Id. See also infra* notes 93-107 and accompanying text.

46. Although only one of the cases discussed in this Note involves the Canons and the others involves the Code of Professional Responsibility, this does not, however, indicate increased compliance with the redrafted reporting requirement. First, the cases do not involve compliance with the requirement, but violation. Second, the public record of cases appealed is not a particularly reliable measure of cases brought, as many cases may not be appealed.

Today's Model Rules of Professional Conduct

The third body of ethical guidelines the American Bar Association embraced was the Model Rules of Professional Conduct ("Model Rules"). The drafters designed the Model Rules to respond to contemporary ethical problems of the profession.[47] The Model Rules significantly changed the reporting requirement.

In an effort to improve the Code's reporting requirement, the ABA drafted Rule 8.3(a) of the 1983 Model Rules of Professional Conduct. Rule 8.3 requires that a lawyer report violations which raise a substantial question of a colleague's honesty, trustworthiness, or fitness as a lawyer.[48] The wording of this requirement corrected some of the problems encountered under the Code. Presumably, this reporting requirement can be more easily enforced because instances of trivial misconduct would no longer have to be reported, thus permitting the disciplinary boards to focus their attention on more egregious violations. As discussed below,[49] however, the new language created new problems by introducing a subjective threshold test to trigger the duty to report.

PROBLEMS CONTRIBUTING TO THE INEFFECTIVENESS OF THE PEER REPORTING REQUIREMENT

Enforcement of the legal ethical standards has been inadequate in the past,[50] and little progress seems to have been made toward an effective system to control peer misconduct.[51] The problems include the wording of the standards themselves, lawyers' ignorance of the standards, a distaste for reporting a peer's misconduct, conflicting obligations, and a general lack of judicial enforcement of the peer reporting requirements.[52]

The Wording of the Reporting Requirements

The Drafters of the Model Rules of Professional Responsibility sought to improve the wording of the reporting requirement in the Code and, to some extent, have succeeded.[53] Although most jurisdictions currently use the Model Rules, the wording of the Code is relevant, particularly in those jurisdictions which have not yet adopted the Model Rules.[54] Accordingly,

47. *See supra* notes 30-34 and accompanying text.

48. Rule 8.3 requires that:

> A lawyer having knowledge 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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983).

49. *See infra* notes 62-64 and accompanying text.

50. *See infra* notes 88-93 and accompanying text.

51. Many commentators would agree that regulation of the legal profession is in an abysmal state. *See* Steele & Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 919-20. *See also* Marks & Cathcart, *supra* note 2, at 193 ("[I]n a crucial element of true professional identity—the meaningful regulation of its own members—the organized bar is seriously deficient.").

52. *See infra* notes 56-93 and accompanying text.

53. *See infra* notes 57-61 and accompanying text.

54. The ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT lists those jurisdictions

the wording of both is discussed herein.

The wording of the Code's reporting requirement faces breadth and scope problems. Disciplinary Rule 1-103 of the Code requires that "[a] lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to [an] . . . authority empowered to investigate or act upon such violation." Disciplinary Rule 1-102 then lists specific instances of misconduct.[55] Some commentators observe that these two rules, applied in conjunction, trigger the reporting obligation, even if the violation is of a trivial nature.[56] The overinclusiveness of the rule, in turn, makes enforcement difficult. As evidence of the overbreadth of this reporting requirement, there has not been a single recorded instance of a lawyer being disciplined under the Code for failure to report a trivial violation.[57] The Model Rules limited the scope of this rule by adding language which indicates that the violation observed must be one that raises a substantial question as to that lawyer's fitness.[58] Thus, Model Rule 8.3 requires that "[a] lawyer having knowledge that another lawyer has committed a violation 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."[59] The new wording arguably eases administration of the reporting requirement, sacrificing the enforcement of trivial violations in order to more effectively address serious infractions. The unqualified scope of DR 1-103(A) could actually deter lawyers from subsequently testifying against a peer, because they might subject themselves to discipline for their initial failure to report.[60] In addition, if a lawyer were obliged to report every violation of the Rules, then failure to report *any* violation would in itself be a professional offense.[61] The new language of the Model Rules may, in theory, have corrected the scope problem. However, the new language fosters uncertainty of a new type because it creates a subjective threshold test that invokes the reporting requirement.[62] This test allows an individual observing proscribed conduct to evaluate the magnitude of the violation by some measure of his or her own choosing. Consequently, as the Rule is currently phrased, an attorney who is questioned for his failure to report a violation

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which have enacted new ethical standards since the time of the ABA's adoption of the Model Rules in 1983. *Id.* at § 01:3. This list shows that the majority of states have adopted the Model Rules. The remaining states use the Code or some combination of the Model Rules and the Code.

55. *See supra* note 41. The Code contains two types of rules. Some are merely aspirational, while others rise to the level of an enforceable duty, subjecting the violator to sanctions for the breach of that duty. Arguably, the reporting requirement does not apply to merely aspirational standards.

56. C. WOLFRAM, *supra* note 43, at 684.

57. *Id.*

58. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 requires reporting of a violation which "raises a *substantial* question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ." (emphasis added).

59. *Id.*

60. *See* Hood, *Renewed Emphasis on Professional Responsibility*, 35 LA. L. REV. 719, 741-42 (1975).

61. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1983).

62. In other words, the lawyer observing a peer's misconduct need not feel obligated to report such misconduct unless he or she determines that the lawyer's actions raise a "substantial" question of the peer's honesty, trustworthiness, or fitness as a lawyer. This evaluation must be made subjectively. No guidelines for such a determination appears in the Rules.

may assert that the violation was not, in his or her view, "substantial." [63] Few standards exist to guide one in a judgment of what "substantial" actually means.[64]

One explanation for the difficulty in structuring a reporting requirement is that ethical codes seek to protect multiple, and sometimes conflicting, interests. These interests include loyalty to the client, zealousness on the client's behalf, loyalty to the legal system, accessibility, and competence.[65] Because these concerns will frequently point an attorney with an ethical dilemma in multiple directions, they often cannot all be complied with simultaneously.[66] The hope is, of course, that the standards will nevertheless provide a useful map of the contours of legal professionalism.[67] As discussed below, however, the ethical codes are of little use if one is ignorant of their existence.

Ignorance of the Standards

A problem which is perhaps more serious than the wording of the standards themselves is the ignorance of lawyers to their very existence.[68] Surveys illustrate this ignorance.[69] For example, one survey revealed that about 90% of the sample agreed that they should heed the Canons of Ethics[70] regardless of their feelings about the issue involved.[71] Responses to subsequent questions, however, indicated that many of the lawyers who

63. Some forms of misconduct clearly raise substantial questions as to a lawyer's honesty, trustworthiness, or fitness. A lawyer asserting that a peer's theft from a client's trust fund did not raise a substantial question would, for example, get short shrift from a bar association. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15. There is, however, a large gray area in which the application of the substantial violation test becomes difficult. For instance, opinions might differ concerning the issue of a lawyer who is known to cheat on his or her taxes. *See* Lynch, *supra* note 3, at 513-14.

64. C. WOLFRAM, *supra* note 43, at 684 ("As a standard for imposing a mandatory obligation . . . [Rule 8.3] is unfortunately vague and indefinite. Both DR 1-103(A) and M[odel] R[ule] 8.3(a) require only that a lawyer 'possess' or 'have' knowledge of another lawyer's violation."). The comment following Rule 8.3 states only that "[t]he term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1983).

65. Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639, 659. One commentator described the Code as an "uneasy truce among a number of competing and even inconsistent values . . . ." *Id.*

66. *Id.* This situation of conflicting loyalties often gives rise to ethical dilemmas. For example, assume that a plaintiff's lawyer is aware of a substantial error on the part of the defense in failing to file a particular pleading. Zealousness on the client's behalf might encourage the lawyer to let the error pass unnoticed. Loyalty to the legal profession, on the other hand, would encourage him or her to raise the issue. Similar dilemmas are common.

67. *Id.*

68. Merrick cites ignorance of the obligation as one of the three reasons lawyers do not take a more active role in policing their ranks. The other two are a distaste for "snitching" and the assumption that someone else will do the job. Merrick, *Our Brother's (and Sister's) Keeper*, THE COMPLEAT LAWYER, Spr. '84-'85, 31, 55.

69. Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U.L. REV. 66 (1974).

70. Although Burbank and Duboff stated that, at the time of their survey, forty-nine states had implemented the Code of Professional Responsibility, they did not explain why they chose to use the Canons as the basis of their survey questions. *Id.* at 68. The fact that over 90% of their sample said that they should heed the Canons, almost five years after the adoption of the Code, may support the argument that lawyers are generally unaware of the ethical guidelines by which they are bound. *Id.* at 79.

71. *Id.* at 79.

agreed that they should follow the Canons were unfamiliar with them or did not follow them.[72] Although over 70% of the respondents indicated that they were acquainted with the Canons of Ethics, answers to subsequent questions suggested they were not as knowledgable as they claimed.[73] In addition, when asked to give their opinion of the Canons, more than 35% of the respondents failed to offer an opinion.[74] The researchers concluded that the foundation of this response, or lack of response, was a combination of unfamiliarity with the Canons and a lack of concern about ethical standards.[75] Because the reporting requirement is one of these standards it can be expected that this ignorance extends to this requirement. It is not surprising that lawyers are not fulfilling their reporting obligation when they are not familiar with their duty to do so. Educating those in the legal profession may be one solution to the peer reporting dilemma.[76]

Distaste for Reporting Peer Misconduct

A general distaste for reporting a peer's misconduct provides yet another major obstacle to an effective reporting requirement. An Arizona survey[77] revealed that the term "snitch" was one of the more frequent descriptions of the duty to report.[78] Lawyers not only find reporting a peer for misconduct distasteful, but characterize those who report as somehow traitorous to their profession. Even those who strongly support a reporting requirement admit that, at first blush, reporting a peer's misconduct seems to run counter to instinct and all basic social training.[79]

Clearly, standardized ethical conduct is a worthwhile goal. Distaste for reporting may, however, lead to a failure to observe and uphold ethical standards. Ignoring the peer reporting requirement encourages lip service to standards which are, in reality, neither followed nor enforced.[80] The distaste for peer reporting may also create hypocrisy on the part of those who advocate following ethical codes but do not report peer misconduct. The result of this hypocrisy may be the loss of the privilege of self-regulation.[81] It has even been suggested that if such standards are no more than "window-dressing" they should be removed from the Code and Model Rules because they are misleading statements about what can be expected from lawyers and judges.[82]

72. In a later question, 16% said that they rely on the Canons to decide legal-moral questions; only a fraction of those who had said they should abide by the Canons regardless of their own feelings. *Id.* at 93.

73. *Id.* at 92.

74. *Id.* at 95.

75. *Id.*

76. *See infra* notes 113-27 and accompanying text.

77. Note, *supra* note 2, at 509 n.36.

78. *Id.* at 515 n.36 ("Other characterizations were more colorful, but less printable."). Many answers employed the term "Gestapo tactics" or described the duty to disclose as "un-American."

79. Gentile, *supra* note 2, at 2, col. 1.

80. Marks & Cathcart, *supra* note 2, at 202 (lawyers and judges do not regularly report known breaches of disciplinary rules.).

81. At least one commentator recognizes the possibility that lawyers may have to give up the privilege of self-regulation. *See* Thode, *supra* note 4, at 101.

82. *See* Thode, *supra* note 4, at 100.

Conflicting Obligations

A lawyer may often have a disincentive to report a colleague's misconduct above and beyond a simple distaste for reporting. As mentioned above,[83] the ethics codes protect varied and sometimes conflicting interests. A lawyer is expected to be both a zealous advocate and an officer of the court, serving the interests of both the public and a private client.[84] Reporting the misconduct of another lawyer may be at odds with other interests, and the lawyer must make a choice. A hypothetical example illustrates this point. A defense attorney, after noticing a number of erratic practices on the part of a prosecutor, hears from a mutual acquaintance that the prosecutor has a serious cocaine habit. Assume that this amounts to "knowledge" under the Model Rules. The defense attorney may believe that her case will be more easily won and, consequently, her client's best interests may be better served, if the prosecutor's misconduct goes unreported. The best interests of the profession, however, clearly dictate reporting. Accordingly, the defense attorney is faced with a true conflict of interests. By serving her client's interest, the attorney fulfills her duty of loyalty to the client and acts as a zealous advocate by proceeding with the strategy which best protects the client. On the other hand, by failing to report the prosecutor, the attorney contributes to the very problem that may lead to the demise of self-regulation. Moreover, the attorney may jeopardize the fairness of the criminal justice system by failing to report somebody who should play a major role in its smooth and even-handed administration. Such difficult choices add to the ineffectiveness of the reporting requirement.

As the Preamble to the Model Rules of Professional Conduct points out, "virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living."[85]

One commentator suggests that reporting peer misconduct runs counter to basic American ideals.[86] He points out that an obligation of confidentiality lies at the center of a lawyer's code of conduct and that the heroes of the profession tend to be those that keep secrets faithfully.[87]

Choosing between these various conflicting interests is necessarily difficult. The message of the reporting requirement is that the integrity of the legal profession must be protected, even at the expense of zealous advocacy, and the lawyer's own interests. Such is the burden of self-regulation. The one clear way to communicate this message to the legal community is through rigorous enforcement. As the next section explains, however, such enforcement has been almost nonexistent.

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83. *See supra* notes 65-66 and accompanying text.

84. ETHICS, *supra* note 8, at 279.

85. MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983).

86. Lynch, *supra* note 3, at 491.

87. *Id.*

Lack of Enforcement of the Reporting Requirements

The ineffectiveness of reporting standards is demonstrated by the lack of relevant case law,[88] which in turn suggests that reports of lawyer misconduct are infrequent, or at least are infrequently appealed. Commentators have observed evidence of a "cover-up" propensity,[89] finding that only 6.3% of their sample would report to a disciplinary organization not connected with the firm when they learned of a colleague's flagrant violation of a Canon of Ethics.[90] It does not appear that the Code or Model Rules have so significantly altered the reporting requirement that such a tendency would disappear. Complaints brought by lawyers represent a small minority of total complaints lodged, and few of these result in published cases.[91] Thus, most attorneys are likely to limit their complaints to intra-office authority.

Most official complaints of lawyer misconduct come from clients.[92] Occasionally a state bar disciplinary committee will institute an investigation on its own initiative, targeting a specific type of behavior that might be creating public criticism.[93] However, very few cases involving ethical violations stem from attorney complaints.

The Case Law

A survey of the relevant case law supports the conclusion that enforcement of the reporting requirement is deficient. Research revealed only seven cases involving an alleged violation of the duty to report.[94] Of these seven, four were cases in which the respondent attorney was charged with other counts of misconduct, and the failure to report charge served to complete the list. In all but two of the cases, the courts apparently treated the failure to report as a minor violation, meting out light punishment or none at all.[95]

For example, *In Re Bonafield*[96] involved the illegal practice of law by one respondent while serving as a Judge of Compensation, and the aiding

88. *See* Ringler, *Lawyer's Obligation to Report Professional Misconduct*, N.Y.L.J., Sept. 20, 1984, at 3, col. 1.

89. Burbank & Duboff, *supra* note 69, at 100-01.

90. *Id.*

91. *See* Thode, *supra* note 4, at 99. Thode discovered that in Utah only eighteen of 142 complaints filed against members of the bar in 1974 were filed by lawyers; of the 135 complaints filed in 1975, sixteen were filed by lawyers.

The Arizona Daily Star reports that the overwhelming majority of complaints filed with the State Bar of Arizona are from clients. Arizona Daily Star, Dec. 11, 1977, § F, at 1, col. 4.

92. Marks & Cathcart, *supra* note 2, at 207.

93. *Id.* at 206.

94. *In Re* Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988) (In which attorney received one year suspension for failure to report misconduct of a peer); *In Re* Brown, 389 Ill. 516, 59 N.E.2d 855 (1945) (In which lawyer received six month's suspension for failure to report); Attorney Grievance Comm. of Maryland v. Kahn, 290 Md. 654, 431 A.2d 1336 (1981) (In which lawyer was disbarred for numerous ethical violations); *In Re* Bonafield, 75 N.J. 490, 383 A.2d 1143 (1978) (In which lawyer was reprimanded for several ethical violations); Williams v. Council of North Carolina State Bar, 46 N.C. App. 824, 266 S.E.2d 391 (1980) (In which the court questioned the concept of a civil action based on a violation of the Code of Professional Conduct); Disciplinary Counsel v. Tumini, 499 Pa. 284, 453 A.2d 310 (1982); Carter v. Folcarelli, 121 R.I. 667, 402 A.2d 1175 (1979).

95. *Kahn*, 290 Md. 654, 431 A.2d 1136; *Bonafield*, 75 N.J. 490, 383 A.2d 1143; *Williams*, 46 N.C. App. 824, 266 S.E.2d 391; *Tumini*, 499 Pa. 284, 453 A.2d 310; *Carter*, 121 R.I. 667, 402 A.2d 1175.

96. 75 N.J. 490, 383 A.2d 1143 (1978).

and abetting of that illegal activity by another respondent. The second respondent admitted to violations of DR 1-102 (Misconduct), DR 1-103 (Duty to Report), DR 2-107 (Division of Fees), and DR 3-101 (Aiding Unauthorized Practice of Law). The *Bonafield* Court simply reprimanded the aiding and abetting attorney.[97] If a reprimand is deemed sufficient discipline for the violation of these four ethical standards, one might better understand the lack of enforcement for the failure to report. When the court settled for a reprimand of an attorney who was guilty of violating four Disciplinary Rules, including the duty to report, it is difficult to imagine the *Bonafield* court construing the violation of the reporting requirement alone as a substantial offense.

Other courts have also failed to recognize the importance of the duty to report peer misconduct. In *Williams v. Council of North Carolina State Bar*[98] the plaintiff alleged that his counsel failed to file an appeal. Williams sought an injunction, requiring attorneys who move to dismiss on the ground that their opponent failed to perfect a timely appeal, report such failure to the state and district bars. A North Carolina appellate court dismissed the complaint against the defendant lawyer for lack of evidence. In its opinion, the court questioned the concept of a civil action based on a violation of the Code of Professional Conduct.[99] This decision delivers a message about the effectiveness of bringing a suit for failure to report peer misconduct, and confirms the negative stigma already attached to the reporting concept.

In contrast, the Illinois Supreme Court in *In Re Brown*[100] imposed discipline solely for failing to report misconduct. The *Brown* court found no evidence that the defendant attorney participated in any of the illegal acts in which his partner was involved. Nevertheless, the court suspended the attorney for six months because of his knowledge of his co-partner's false statements, made in the firm's name.[101]

At this writing, the Illinois Supreme Court is the only court to discipline an attorney solely for violating a peer reporting requirement. *Brown* provides positive incentive to lawyers to report the misconduct of peers, as the case demonstrates the consequences of failing to do so. The effectivenes of this instance of enforcement is limited by the fact that the case was decided in 1945, and was based on the Canons.[102] The same court, however, heard *In re Himmel*[103] in 1988, and its decision in that case may herald a

97. In declining to suspend or disbar the lawyer, Tedeschi, the court cited "Tedeschi's previously unblemished record as an attorney." *Bonafield*, 75 N.J. at 491, 383 A.2d at 1144.

98. 46 N.C. App. 824, 266 S.E.2d 391 (1980).

99. The court stated that "[a]ssuming *arguendo* that a failure to comply with the Code of Professional Responsibility can be the basis for a civil action . . . [t]he allegation that these defendants knew that plaintiff's attorney had failed to perfect an appeal does not, without more, support the inference that they had 'knowledge of a clear violation of DR 1-102.' " *Williams*, 46 N.C. App. at 824, 266 S.E.2d at 392.

100. 389 Ill. 516, 59 N.E.2d 855 (1945).

101. *Id.* at 858.

102. *See infra* note 103.

103. 125 Ill. 2d 531, 533 N.E.2d 790 (1988). Because this opinion has not been released for publication in the permanent law reports, until released, it is subject to revision or withdrawal.

change in the attitude of courts in regard to the enforcement of the reporting requirement.

In that case, the court held that respondent violated Rule 1-103 of Illinois' Code of Professional Responsibility, which was modeled after the ABA Code. The individuals in the case included respondent attorney, his client, and the client's former counsel. The client retained respondent in an attempt to recover settlement funds her former counsel converted.[104] The respondent decided not to report the misconduct of his client's former counsel, choosing instead to pursue a private agreement between the parties.

The court found respondent guilty of violating the reporting requirement because there was no legal support for his defense that he failed to report in response to his client's direction. The court pointed out that "[a] lawyer, as an officer of the court, is duty-bound to uphold the rules in the Code."[105] Accordingly, the court ruled that the information the respondent received was not protected by privilege, because it was communicated in the presence of others, and it was the client's intention that it be communicated to others.[106] The court also held that whether the client alerted the Attorney Registration and Disciplinary Commission (ARDC) to her former counsel's misconduct was irrelevant, because "[c]ommon sense would dictate that if a lawyer has a duty under the Code, the actions of a client would not relieve the attorney of his own duty."[107]

In imposing a one year suspension for respondent, the court stated that public discipline was necessary to carry out the purposes of attorney discipline. Such objectives include maintaining the integrity of the legal profession and safeguarding the administration of justice. The court considered mitigating factors in the case,[108] but concluded that these factors did not outweigh the respondent's failure.

In re Himmel illustrates the potential for enforcement of the reporting requirement. Such enforcement may be the most promising solution for the reporting requirement's ineffectiveness.[109] Lawyers are much more likely to report peer misconduct if the action of courts make it clear that they will be punished for the failure to do so. Additionally, if courts consider the problems involved with the duty to report, such as when the duty arises or when the best interests of the client must yield to the interests of the profession, lawyers will receive greater guidance in the ways in which their reporting obligation may be fulfilled.

PROPOSED SOLUTIONS

Commentators have advanced a variety of proposals to improve the ef-

104. The client's former counsel was disbarred on November 5, 1985.

105. *Himmel,* 125 Ill. 2d at 533, 533 N.E.2d at 792.

106. Respondent discussed the information with the insurance company involved, the insurance company's lawyer, and with his client's former counsel himself. For discussion of the privilege issue, *see* 125 Ill. 2d at 535, 533 N.E.2d at 794.

107. 125 Ill. 2d at 533, 533 N.E.2d at 792.

108. These mitigating circumstances included the fact that respondent helped his client recover $10,400 from her former counsel, that respondent has practiced law for eleven years with no record of complaints, and that he requested no fee for minimum collection of his client's funds.

109. *See infra* notes 110-12 and accompanying text.

fectiveness of the reporting requirement or to improve regulation of the field in other ways, thereby taking up where the reporting requirement leaves off. These proposed solutions include strict enforcement, education, malpractice suits, enforcement of regulations through disciplinary agencies or legislatures, and peer review systems. All of these suggestions have merit; not one alone, however, is a panacea.

Strict Enforcement

In re Himmel is a rare example of a court strictly enforcing a reporting requirement. The case is based on a reputable attorney's difficult choice between reporting a colleague and pursuing what he may have concluded were the best interests of his client.[110] The Illinois Supreme Court, however, felt that this choice was made at the expense of the integrity of the legal profession and the administration of justice.

The results of the *Himmel* court's decision are interesting and promising. Although at least three organizations, including the Illinois State Bar Association, have filed briefs for rehearing in the case,[111] *Himmel* has nevertheless had a vitalizing effect on the reporting requirement. According to an ARDC administrator, the commission received nearly 100 complaints by attorneys of possible misconduct by colleagues since the Illinois Supreme Court rendered its decision in September of 1988.[112]

The Illinois Judiciary has sent a clear signal to legal practitioners in that state. If courts in other jurisdictions take note of the positive changes brought about by such a decision, perhaps they will follow suit in increasing the enforcement of their reporting requirement. If so, other, more drastic solutions may not be necessary.

Education

If increased enforcement of reporting requirements does not occur in the near future, another solution to the failure of lawyers to uphold their ethical obligations must be found. One observer suggests that education would increase ethical sensitivity and may therefore have a corresponding effect on the reporting requirement.[113] The educational infrastructure, both before admission to the bar and after, is already in place. This proposed solution, therefore, is less costly than the ones discussed below, and will not cause great upheaval in the regulation of the legal profession. Unfortunately, despite observations to the contrary, it may also fail to change the status quo, and the reporting of misconduct may not significantly increase.[114]

If education were the chosen remedy, it would have to focus on two different populations. Both practicing professionals and students must have

110. *See* Middleton, *Illinois Bar Is Jarred by 'Snitch' Case*, NAT'L L.J., Dec. 19, 1988, 3, at 23, col.1. The Tau Epsilon Rho Law Society pegged this choice "Himmel's Dilemma" and filed a brief for rehearing in the case with the Illinois Supreme Court.

111. *Id.* at 23, col. 3.

112. *Id.* at 3, col. 1.

113. *See* Thode, *supra* note 4, at 101.

114. *See infra* notes 121-23 and accompanying text.

exposure to ethical questions and guidelines.[115] This dual focus would reach present and future members of the bar and, if successful, would guarantee improvement in the ethical conduct of legal professionals in the future.

Practicing lawyers should participate in continuing education programs[116] because in a profession which changes as rapidly as the law itself, such continuing education is indispensible. About two-thirds of the states have adopted voluntary continuing education programs.[117] In addition, nine states make some form of continuing education mandatory.[118]

One failure of continuing education is that it focuses on substantive information and often ignores ethics.[119] In other words, continuing education programs generally concentrate on improving a lawyer's practical skills, without addressing her ethical standards. The primary benefit of continuing education programs may be the skill enhancement of an already motivated individual, without substantially aiding those in greatest need.[120] Those lawyers who are ignorant of their ethical and regulatory responsibilities, it seems to follow, will also be likely to forego involvement in continuing education programs, if the programs are voluntary.

An attempt to increase student education may be ineffective as well. Although educational efforts may be furthered by requiring all law students to take courses in ethics in order to receive their degree, it appears that such exposure may not improve the likelihood that a student will later report misconduct as a lawyer.[121] In fact, ethics courses in law school appear to have little impact on whether an individual will report misconduct.[122]

In summary, the education solution requires perhaps the least restructuring of legal regulation, but also may offer the least improvement.[123] Commentators suggest that an individual's morality is determined before the entrance to law school or the legal profession.[124] Observers also point out that ethical training in school is not likely to have a sustained impact if older, more experienced lawyers and judges ignore ethical obligations, such

115. *See* Martyn, *supra* note 2, at 725-26 for a discussion of continuing education. *See also supra* note 113 and accompanying text.

116. *See* Martyn, *supra* note 2, at 725.

117. *Id.*

118. *Id.* at 726.

119. *See id.* at 726.

120. *See* ALI-ABA COMM. ON CONTINUING PROFESSIONAL EDUCATION, A MODEL PEER REVIEW SYSTEM, § 1 (Discussion Draft April 15, 1980) at 7, 8 (CLE program's greatest contribution may be to make good attorneys better; programs cannot ensure those in greatest need will properly apply themselves.).

121. *See* Note, *supra* note 2, at 520 n.74 (The reason for the lack of impact of legal ethics courses may be that the duty to report is not given much consideration.). *See also* S. TISHER, L. BERNABEI & M. GREEN, BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 81 (1977) ("[L]aw school education—and the fashionable, tax-deductible, post-admission programs frequently held in plush places—cannot teach . . . judgment or dedication or even morality.").

122. *See* Note, *supra* note 2, at 534 ("attendance in ethics courses has little overall impact on whether or not an individual will report misconduct . . . ."). *See also* D. PAPKE, *supra* note 21, at 45 ("An American Bar Foundation study reveals that regardless of the contemporary law school's new emphasis on professional responsibility, students often look upon courses in the area as relatively unimportant.").

123. D. PAPKE, *supra* note 21, at 45.

124. *See* Note, *supra* note 2, at 533.

as the duty to report peer misconduct.[125] Even those subscribing to this solution have serious doubts that the necessary cooperation of lawyers and judges would be forthcoming.[126] Furthermore, the goal of education would be to increase the incidence of lawyers reporting peer misconduct. If education is successful, the problem of lax enforcement would still exist.[127] Accordingly, other solutions warrant exploration.

Malpractice Suits

Commentators suggest that, because of ineffective self-regulation, market sanctions in the form of malpractice suits have become the primary method of enforcing standards of care.[128] Perhaps the effectiveness of peer reporting requirements would improve if lawyers believed that reporting would reduce the cost of malpractice insurance.[129] This "Free Market Alternative"[130] is one way to control lawyer incompetence[131] and would presumably have a similar effect in cases involving ethical violations, including violations of the reporting requirement. At least one commentator, in fact, suggests that the legal profession should be completely deregulated.[132] The underlying rationale of this argument assumes that the market would control attorney misconduct and the need for self-regulation would no longer exist.[133] Boycotts and malpractice suits against incompetent or immoral practitioners would lead to their reform or removal from the profession.

Malpractice suits do not, however, solve many of the problems connected with ethical violations.[134] Disciplinary agencies often do not equate ethical violations with incompetence or malpractice.[135] Therefore, it is often difficult to win a malpractice suit on the basis of ethical violations alone.[136]

Malpractice suits may also fall short of the perfect solution in other respects as well. It is clear that clients frequently fail to perceive many lawyer infractions.[137] Although several of the offender's peers may observe the

125. *Id.* at 534 ("A young lawyer is unlikely to take his or her duty to report seriously when older, more experienced lawyers, and even judges, ignore this obligation.").

126. *Id.*

127. For a discussion of lack of enforcement, *see supra* notes 93-100 and accompanying text.

128. *See* Martyn, *supra* note 2, at 732.

129. Intuitively, if lawyers were to report misconduct more often, the incidence of lawyer malpractice would drop. The reduced incidence of malpractice should reduce the rates of malpractice insurance. This concept is limited by the fact that not all ethical violations rise to the level of malpractice. *See supra* note 56.

130. *Id.*

131. *See* Martyn, *supra* note 2, at 732.

132. *Id.* at 733 n.205.

133. *Id.* at 733.

134. *See infra* notes 140-41 and accompanying text.

135. *See* MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983), which states: "Violation of a Rule should not give rise to a cause of action nor should it create a presumption that a legal duty has been breached." *See also Williams*, 46 N.C. App. at 824, 266 S.E.2d at 392, in which the court raised doubts as to the possibility of bringing civil action for an attorney's failure to comply with the Code of Professional Responsibility. The decision to let a cause of action arise from a violation of the Model Rules lies with individual jurisdictions. Enforcement of the ethical guidelines through malpractice suits would be greatly facilitated by declaring that a violation of rules which impose an affirmative duty constitute *negligence per se*. The wisdom of this is subject to debate.

136. *Id.*

137. *See* Gentile, *supra* note 2, at 2, cols. 2-3 ("lawyers . . . have the knowledge and training that clients lack, and they have unique opportunities to observe their colleagues in action.").

misconduct, it will not likely result in a malpractice suit if the client remains ignorant.[138] Moreover, not all ethical violations result in malpractice or harm to a client. This class of violations would therefore go unchecked. It is also uncertain whether the loss of a malpractice suit will compel an individual lawyer to improve his behavior in the future.[139] Finally, a malpractice suit may not unearth patterns of destructive behavior, such as alcoholism or drug abuse, which may be apparent to a lawyer's colleagues.[140] One likely effect of reporting the misconduct of a peer would be the discovery and possible treatment of an underlying disorder.[141]

Disciplinary Agencies

Another proposed solution to the lack of reporting may be the creation of disciplinary agencies outside of the profession.[142] The response to such a development may be dramatic. Although transferring control of legal regulation to legislators might raise questions of the separation of powers doctrine, it is a situation which the legal profession has seen before.[143] Some commentators predict that this type of intervention is on the horizon and suggest that it should be avoided if possible.[144] In addition to raising questions of separation of powers, regulation by legislators will send a message to the public confirming their suspicions that the legal profession is unable to police the conduct of its members. This will further erode the lawyer's professional and public image and will discourage individuals from turning to a lawyer when they are faced with legal problems they cannot effectively address by themselves. Obviously, this would be an unsatisfactory result. Consequently, only the effective regulation of the profession from within can dispel those reservations and restore public confidence in the field of law.

A more attractive alternative to legislative control is the development of disciplinary agencies within each state's bar. Some such agencies have emerged since the 1970s.[145] The difficulties with these organizations are two-fold. First, they are generally underfunded.[146] Second, they may tend

138. *See supra* note 92 and accompanying text. Because most complaints of lawyer misconduct come from clients, it is unlikely that a malpractice suit will arise from another source. Standing requirements, of course, underscore this conclusion.

139. *See* Steele and Nimmer, *supra* note 51, at 1000 ("[T]he entire field of deterrence remains empirically obscure and any discussion of it must proceed cautiously.").

140. These behaviors are misconduct, as defined by the Disciplinary Rules, and would warrant reporting. *See* Merrick, *supra* note 70, at 55 (All too often, misconduct is a symptom of something else which can and should be addressed: personal or emotional problems, alcoholism, or drug abuse. Ignoring the symptoms may only aggravate the situation until it becomes irremedial.).

141. *Id.* ("Disciplinary agencies are sensitive to these kinds of problems and, where possible, will attempt to aid, rather than punish, the troubled practitioner.").

142. *See* Thode, *supra* note 4, at 101.

143. *See* D. PAPKE, *supra* note 21, at 39 ("By the time President Wilson reluctantly led the United States into war, the profession had achieved virtually complete self-direction in ethical matters. In particular, primary control of the profession's ethics had passed from the legislatures and courts to bar associations and elite sections of the profession.").

144. The drafters of the MODEL PEER REVIEW SYSTEM viewed direct legislative or executive intervention as likely. *See supra* note 120, at 8. *See also* Martyn, *supra* note 2, at 734-35.

145. Thode, *supra* note 4, at 101 n.21.

146. Martyn, *supra* note 2, at 709 (stating "[t]he Clark Committee found that grievance procedures suffered from overly decentralized organization, insufficient funding and staffing, and inadequate procedures.").

to further propagate images within the profession of enforcers using hard-handed "gestapo-tactics"[147] to prey upon practicing lawyers.[148]

Disciplinary agencies may offer some hope of improving the ineffectiveness of the reporting standard and ethical misconduct in general. There are problems, however, with this solution. Impracticalities, such as those discussed above, exist with regard to establishing such agencies within the bar, and self-regulation would be sacrificed by placing disciplinary agencies outside the profession. This loss of the privilege to police the bar from within would create a dramatic upheaval in the workings of the law, creating a situation in which lawyers have to answer to others for their conduct. This result should, if possible, be avoided. The alternative is to somehow improve regulation from within. One method suggested to achieve this goal is through a program of peer review.

Peer Review

The American Law Institute-American Bar Association (ALI-ABA) Model Peer Review System[149] proposes the establishment of Lawyer Competence Review Boards that would formulate general competence criteria, operate remedial programs for individual lawyers, and provide evaluative and training materials for competence appraisal.[150] Following referral to the peer review board, an attorney's cooperation would be voluntary, in an attempt to educate rather than to punish. The board would, however, have the power to refer attorneys who refuse to cooperate to disciplinary boards for appropriate action.[151]

Peer Review is an accepted practice in both the Accounting and Medical professions.[152] Although Peer Review for the legal profession is a promising proposal, it, too, is not without flaws.[153] At least one observer believes that the legal profession is not as well-suited to Peer Review as the medical profession.[154] In addition, the system would likely be costly to implement.[155] Even if lawyers are compelled to donate their time to review boards, Peer Review would involve the administrative costs of creation of an institution entirely new to the profession. Another potential difficulty is the

147. *See* Brown, *ABA Code of Professional Responsibility, In Defense of Mediocrity*, 6 TRIAL 29, 30 (July-Aug. 1970).

148. Banding together to thwart a common enemy may encourage the cover-up propensity observed by Burbank & Duboff. *Supra* notes 88-89 and accompanying text.

149. *See supra* note 120. *See also* Smith, *Peer Review: Its Time Has Come*, 66 A.B.A.J. 451, 452 (Apr. 1980) ("The American Institute of Certified Public Accountants has employed the [Peer Review] idea for years.").

150. *See supra* note 120, at § 13.

151. *Id.* at § 13(4).

152. *See* Smith, *supra* note 149. *See also* Martyn, *supra* note 2, at 726 (stating that "peer review is far more developed in medicine than in law, in part because the particular institutional setting nurtures such review.").

153. For a discussion of the problems relating to issues of confidentiality, immunity, and admissibility of evidence, *see* Smith, *supra* note 149, at 454.

154. *Id.*

155. *Id.* at 452 ("[T]here is criticism [of Peer Review] . . . [in regard to] whether the costs of the proposed remedies are justified by prevailing conditions and by what they will accomplish.").

possibility that the review boards may develop a laissez-faire attitude.[156] One commentator believes that attorneys who participate in the grievance process identify and empathize with fellow lawyers who on occasion break the rules.[157] Some observers point out that this is a problem which plagues many state bars.[158] Other difficult questions involve whether the board should be liable for the validity of its determinations, and whether a court or disciplinary board should admit evidence which shows that a lawyer was the subject of peer review.[159] These issues will be of major importance in gaining the acceptance of lawyers necessary to the success of this proposal.

CONCLUSION

The legal profession is in crisis today. The public frequently perceives lawyers as mean spirited, morally suspect, and ethically bankrupt. Although guidelines do exist to help lawyers who face difficult ethical dilemmas, they require reporting peer misconduct. Reporting peer misconduct is, in turn, crucial to the privilege of self-regulation in the legal profession. Compliance with the reporting requirement, however, seldom occurs.

The problems of employing an effective peer reporting requirement in the legal profession are many. First, it is difficult to formulate the requirement in a way which facilitates fair and effective reporting of peer misconduct. Second, it is difficult to ensure that legal professionals are aware of their obligation to report the misconduct of their colleagues. Third, even if a lawyer is aware of an obligation to report, many have such a distaste for reporting that they will ignore it. Finally, the courts' failure to enforce these requirements allows them to remain unknown and accordingly not complied with by those individuals working in the legal profession. Coupled with a lack of education regarding ethical obligations, the legal profession has fallen far short of its promise and duty to self-regulate.

The Illinois Supreme Court has set the most promising trend for the future. That court has chosen to strictly enforce its reporting requirement. Such enforcement has provoked a significant increase in the number of complaints of peer misconduct brought by lawyers. This increase illustrates the effectiveness of the strict enforcement solution. Strict enforcement and the case law delineating this approach would clarify the scope of the reporting requirements. More published opinions may also increase lawyers' awareness of their ethical obligations. Finally, strict judicial enforcement would serve to dissuade lawyers from ignoring those obligations.

If other states follow Illinois' lead, peer reporting requirements may develop the influence they should have. If the Illinois Supreme Court continues to stand alone, another solution must be found, or the legal profession may lose its privilege of self-regulation. Other proposals to rectify the ineffectiveness of peer reporting include education, deregulation, disciplinary

156. Martyn, *supra* note 2, at 728. *See also id.* at 711 (Wherein Martyn cites the Clark Report's reference to the Bar's self-protective attitude.).

157. *Id.* at 712.

158. *Id.* at 712 n.49.

159. *See* Smith, *supra* note 149, at 454.

boards, and peer review systems. All of these proposals have merit and may draw attention to the problem. Not one of these solutions alone, however, offers a comprehensive solution.

Ultimately, there must be a general change of attitude within the legal profession itself. Such a change can best be brought about by judicial enforcement of the ABA's ethical standards. Unless all members of the legal profession accept responsibility for monitoring the performance of their colleagues, the privilege of self-regulation may disappear.