Notes

THE LAWYER'S DUTY TO REPORT PROFESSIONAL MISCONDUCT

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One way in which the legal profession purports to distinguish itself from a trade association is its claim that lawyers are willing and able to exclude from the practice of law those who fail to meet minimum standards of ethics and competency.[1] The presence of unethical individuals in the legal profession is not surprising, since lawyers are only human.[2] Investigation by bar examining committees, no matter how stringent, cannot be one hundred percent effective in preventing the admission of less than ethical law school graduates.[3] The presence of such individuals in the profession, however, is not the most troubling problem of legal ethics; the problem is whether the profession is willing to act decisively in ferreting out unethical or incompetent lawyers and in disciplining or removing them.[4]

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1. *See* Thode, *The Duty of Lawyers and Judges to Report Other Attorney's Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95, 100.

2. Manning, *If Lawyers Were Angels*, 56 CHICAGO B. REC. 47, 56 (1975); (Special Centennial Issue 1974). "[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.'" *Id.*

3. Greenfield, *Making Ethics the Rule of Conduct of Every Lawyer*, 51 A.B.A.J. 150, 150 (1965).

4. Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A.J. 639, 642 (1977). It would seem more logical to prevent the admission of unethical lawyers in the first place by including ethics questions as a part of the bar exam, assuming that the ability to recognize an ethics issue reflects an internalization of ethical norms. However, critics of bar examinations question the success of such tests in "weeding out" unsuitable applicants. *See* Philadelphia Bar Association Special Committee on Pennsylvania Bar Admission Procedures, *Report on Racial Discrimination in Administration of the Pennsylvania Bar Examination*, 44 TEMPLE L.Q. 141, 191 (1971).

The necessity for the organized bar to conduct self-policing operations has been recognized for almost a century.[5] While the profession's disciplinary process is structured to respond primarily to complaints from aggrieved clients,[6] lawyers have traditionally recognized a duty on their part to take an active, self-policing role.[7] Canon 29 of the ABA Canons of Professional Ethics stated that "lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession."[8] The ABA Code of Professional Responsibility, which replaced the Canons,[9] contained the substance of Canon 29 in Disciplinary Rule [DR] 1-103(A),[10] which states: "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."[11] Unlike Canon 29, DR 1-103(A) is theoretically enforceable by disciplinary action.[12]

On its face, DR 1-103(A) seems clear in its requirement that a lawyer report to legal authority any unprivileged knowledge of another attorney's violation of DR 1-102.[13] The range of conduct proscribed by

5. Grover Cleveland, in addressing a meeting of the New York State Bar Association in 1884 stated it this way: "Those who steal our livery to aid them in the commission of crime should be detected and exposed; and this association, or branches of it, should have watchmen on the walls to protect the honor and fair fame of the bar of the state." Seymour, *Not Honesty Alone*, 47 N.Y. ST. B.J. 255, 303 (1975).

6. Garbus & Seligman, *Sanctions and Disbarment: They Sit in Judgment*, in VERDICTS ON LAWYERS 47, 51 (R. Nadar & M. Green eds. 1976).

7. *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 2 (1924); Wade, *Public Responsibilities of the Learned Professions*, 21 LA. L. REV. 130, 134 (1960).

8. ABA CANONS OF PROFESSIONAL ETHICS No. 29 (1967).

9. The Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 2, 1969, to become effective for American Bar Association members on January 1, 1970. *Preface* to ABA CODE OF PROFESSIONAL RESPONSIBILITY at ii (1976). By 1974 the Code had been adopted, in some form, by 49 states. Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U. L. REV. 66, 68 (1974). California was the only state to not adopt the Code, relying instead on 32 "Rules of Professional Conduct" which are generally similar in substance to the ABA Code. *See* CAL. BUS. & PROF. CODE § 6076 (West Supp. 1978).

10. Hood, *Renewed Emphasis on Professional Responsibility*, 35 LA. L. REV. 719, 740 (1975).

11. DR 1-102 states:

(A) A lawyer shall not:
- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through 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 that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102 (1976). The effect of a disciplinary rule is pointed out in the Code: "The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement 1C (1976).

12. Hood, *supra* note 10, at 740.

13. Despite the superficial simplicity, several of the terms used in the rule are not as specific as might be desired. The term "knowledge" for example has several different interpretations. *Compare* RESTATEMENT OF RESTITUTION § 10, Comment d (1937) (knowledge means no substantial doubt), *with* 2 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 244, 300 (3d ed. 1940) (knowledge is the receiving of a mental

DR 1-102 is broad and includes the failure to report misconduct.[14] In addition to requiring the reporting of actual misconduct, DR 1-103(A) requires an attorney to report another attorney's failure to report a known violation.[15] As one critic put it, the plain language of DR 1-103(A) makes it "a violation for attorney A to fail to report that attorney B failed to inform on attorney C."[16]

This strict requirement to report other attorneys has been the subject of many of the changes made by state bar associations in the Code of Professional Responsibility originally propounded in 1969 by the ABA Committee on Ethics and Professional Responsibility.[17] While most state bar associations have adopted most of the Code verbatim or with minimal change,[18] DR 1-103(A) has undergone some significant reworking. Several states, including Arizona, have changed the phrase "shall report" to read "should report,"[19] apparently in an attempt to make the duty to report aspirational rather than mandatory.[20] Going a step further, the District of Columbia Court of Appeals amended Canon One of the Code in 1972 by deleting DR 1-103(A) altogether.[21]

These efforts to emasculate[22] the provision or to reject it altogether

impression, the state of being aware). The scope of an attorney's duty to report would vary considerably depending upon which of the two interpretations was used. Under the former interpretation he would only be responsible to report misconduct of which he had no doubt, while under the latter, the presence of a doubt that the conduct took place would not excuse the duty to report.

14. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102 (1976), *quoted supra* note 11.

15. Failure to make a report violates DR 1-103(A) and thereby violates DR 1-102(A)(1) which states that "[a] lawyer shall not: Violate a Disciplinary Rule." *Id.* DR 1-102(A)(1). Therefore, a failure to make a disclosure is a violation of DR 1-102 and, under DR 1-103(A), must be reported by any lawyer who obtains knowledge of it.

16. Brown, *A.B.A. Code of Professional Responsibility: In Defense of Mediocrity*, TRIAL, Aug./Sept. 1970, at 30.

17. *See* S. TISHER, L. BERNABEI, & M. GREEN, BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 84 (1977) [hereinafter cited as S. TISHER].

18. Hood, *supra* note 10, at 738.

19. ARIZ. SUP. CT. R. 29(a); FLA. BAR R., Integration Rule of the Florida Bar, art. 10, (West Supp. 1977).

20. *Compare* Brown v. Southall Realty Co., 237 A.2d 834, 837 n.5 (D.C. App. 1968) ("shall" ordinarily connotes language of command), *with* Hannon v. Myrick, 118 Vt. 428, 432, 111 A.2d 729, 731 (1955) ("should," while expressing some obligation, is synonomous with "ought"). Replacing the "shall" in DR 1-103(A) with "should" results in the anomaly of a provision having the effect of an aspirational ethical consideration being included in the disciplinary rules, which are intended to be mandatory. See discussion note 11 *supra*. *See* D.C. CT. R. X, app. a.

21. The D.C. Bar Association had conducted a poll in which 72% of the responding attorneys agreed that DR 1-103(A) should be deleted from the Code. M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 250 (1975). Massachusetts also deleted DR 1-103(A) from its version of the Code. GEN. R. SUP. JUD. CT. MASS. 3:22.

22. At the risk of appearing to set up a "straw man," it could be argued that the replacement of "shall" with "should" in DR 1-103(A) is not intended to eliminate the duty to report totally. Rather, this argument goes, the amended disciplinary rule still requires a report, but allows the individual attorney the discretion of deciding when a report is necessary, providing a form of "escape clause" to avoid requiring reports in instances of "minor" misconduct. This argument is not persuasive. There is no language in the amended disciplinary rule to guide the attorney in distinguishing between those types of misconduct which merit a report and those which do not. *See* ARIZ. SUP. CT. R. 29(a). The absence of such a guide is not consistent with a serious intent to require reports in certain types of cases.

are not the only evidence of the bar's hostility toward a mandatory duty to report attorney misconduct. There is a considerable amount of commentary indicating that the majority of lawyers are simply ignoring DR 1-103(A) by failing to report unethical conduct.[23] The few attorney-initiated complaints that are made often deal with violations of the advertising or solicitation rules rather than with real crimes.[24] The absence of reported cases or ethics opinions imposing discipline upon attorneys for failure to report misconduct[25] suggests that the practicing bar's indifference toward DR 1-103(A) is fostered by courts[26] and state bar disciplinary bodies,[27] those with the initial responsibility for disci-

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Second, to leave the decision to report totally within the individual's discretion is inconsistent with the principle of setting a "minimum level of conduct below which no lawyer can fall" which is the purpose of the disciplinary rules and the characteristic that distinguishes them from the ethical considerations. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement 1C (1976). This lack of a "minimum level" means that the reviewing entity will not have available a standard by which to judge the propriety of a lawyer's behavior and will probably result in lawyers being unassisted by disciplinary agency guidelines in making their decisions about whether or not to report.

While the reviewing entity could conceivably conduct an after-the-fact review of the attorney's decision, such a standard is no standard at all. "To allow the individual lawyer's belief to determine the standards of professional conduct will in time reduce the ethics of the profession to the practices of the most unscrupulous." *In re* Ryder, 263 F. Supp. 360, 369 (E.D. Va. 1967). Thus, the "escape clause" argument does not realistically explain what was intended and accomplished by the amendment of DR 1-103(A).

23. For example, one study of the complaints received by a state disciplinary agency found that of 277 complaints received over a two year period, 34, or less than 13%, were filed by lawyers. Thode, *supra* note 1, at 99. A survey conducted in Boston revealed that over 60% of the attorneys responding would not report a flagrant and serious ethical violation. Burbank & Duboff, *supra* note 9, at 100. A lay member of a state disciplinary body reports that even members of that agency often failed to initiate an investigation of an attorney suspected of misconduct. Lobe, *Confessions of a Non-Lawyer on a Disciplinary Board*, 51 FLA. B.J. 76, 77 (1977). The overwhelming majority of complaints filed with the State Bar of Arizona are from clients. Ariz. Daily Star, Dec. 11, 1977, § F, at 1, col. 4.

24. S. TISHER, *supra* note 17, at 84. This special concern by lawyers for enforcing certain parts of the Code and the prior Canons is reflected in the reported Ethics Opinions of the ABA, 40% of which concern advertising, solicitation, and the functioning of non-legal intermediaries. *Id.* at 61. This type of information might lead one to believe that lawyers are more concerned about stifling competition than about insuring integrity and competence in the bar. However, the results of the Arizona survey do not support such a disturbing hypothesis. *See* text & notes 51-52, 94 *infra*.

25. Aside from the enforcement of the anti-competitive rules, few cases focus on the ethical responsibility of a lawyer *qua* lawyer. Burbank & Duboff, *supra* note 9, at 70. "The conclusion one draws from looking at (or looking for) cases on ethics is that the dirty laundry of the legal profession is hung privately, if at all." *Id.* at 70-71.

26. There are very few cases dealing with this area. In *In re* Brown, 389 Ill. 516, 59 N.E.2d 855 (1945), the court imposed a six-month suspension on an attorney for failing to report his law partner's participation in a scheme to kick back legal fees to a client to build up a political slush fund. The case arose while the old Canons were in effect, but they were not mentioned in the opinion. While this case is phrased in terms of imposing discipline for failing to "protest" another lawyer's misconduct, the suspension may have been based on Brown's role as a participant. *See id.* at 524, 59 N.E.2d at 858. However, since a six-month suspension seems excessive for the minor role Brown played, his failure to disclose the fraud may have been a factor in his punishment.

27. There are two ethics opinions which discuss the duty to report. ABA Informal Opinion No. 1203 involved a junior partner's conviction that to withhold certain information would amount to perpetuating fraud upon the court. After a senior partner instructed him to not reveal the information, the junior partner sought the advice of the ABA Committee on Professional Ethics on whether he should report the senior partner to a disciplinary body. The committee advised that he should withdraw from the case and not report his senior, as such a report would be

pline in the legal profession.[28]

In an effort to discover the attitudes of the Arizona bar concerning DR 1-103(A), the *Arizona Law Review* conducted a survey of Arizona lawyers. Specifically, the survey was intended to explore the willingness of lawyers to report their peers' misconduct to the appropriate disciplinary authorities. In addition, the survey attempted to determine whether this willingness was affected by factors such as experience, income, type of ethical training, and others. This Note will report the result of that survey and discuss its implications.

THE SURVEY

Methodology

The survey was conducted through the use of a questionnaire mailed[29] to approximately one-fourth of the lawyers with membership in the state bar. The questionnaire itself[30] consisted of three sections. Questions one through six were biographical, intended to provide background information on the individual responding to the questionnaire. Questions seven through sixteen posed hypothetical acts of misconduct[31] and asked the respondents what they would do after learning of

premature. The committee added that if the junior partner received knowledge that a disciplinary rule was violated, then a report should be made. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1203 (1976). This opinion leaves several questions unanswered, the most obvious of which is what additional acts by the senior partner would make a report timely. Presumably the junior partner was left to thrash out this problem for himself.

The second ethics opinion is New York State Bar Association Formal Opinion No. 177. This opinion posed the question of whether an attorney for the beneficiary of an estate had a duty to notify authorities that the executor, another attorney, had admitted to misconduct in caring for the assets of the estate. Instead of relying on the mandatory requirement of DR 1-103(A), the opinion cited Ethical Consideration [EC] 1-4 which states that a lawyer *should* reveal such knowledge. The opinion ends with the cryptic statement "see DR 1-102(A) and DR 1-103(A)." N.Y. STATE BAR ASSOCIATION COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS, No. 177 (1971). This citation to the mandatory reporting rule does not dispel the implication left by the opinion that the decision to report under those facts is discretionary.

28. McCracken, *The Maintenance of Professional Standards: Duty and Obligation of the Courts*, 29 S. CAL. L. REV. 65, 72 (1955). The recent round of judicial criticism of incompetent trial lawyers has spurred many state bar associations into pushing for increased quality control for attorneys. S. TISHER, *supra* note 17, at 73. Perhaps public judicial criticism of the ethical misconduct of those who practice before judges would have a similar impact.

29. The fact that the survey was conducted totally by mail may have introduced a certain amount of bias in the results, because the people who took the time to fill out the questionnaire might give different answers than those lawyers who deposited it in the wastebasket. J. SIMON, BASIC RESEARCH METHODS IN SOCIAL SCIENCE 249 (1969).

30. The questionnaire and its results are reproduced in the Appendix A, p. 537-42 *infra*.

31. The hypotheticals were drawn from situations found in the reported court decisions and bar opinions concerning lawyer misconduct. For cases involving a lawyer overcharging a client, which was the situation presented in question 7, see Bell v. Samaritan Medical Clinic, Inc., 60 Cal. App. 3d 486, 131 Cal. Rptr. 582 (1976); Cleere v. Ontario County Bar Ass'n, 39 App. Div. 2d 132, 332 N.Y.S.2d 476 (1972); *In re* Kerrigan, 271 Or. 1, 530 P.2d 26 (1975). For examples of lawyers' difficulties with income tax evasion, presented in question 8, see *In re* Lacob, 50 Ill. 2d 277, 278 N.E.2d 795 (1972); Bar Ass'n of Baltimore City v. McCourt, 276 Md. 326, 347 A.2d 208 (1975); *In re* Bunker, 294 Minn. 47, 199 N.W.2d 628 (1972). For a discussion of the ethical questions raised by a lawyer "bugging" telephone conversations with other lawyers, see ABA COMM. ON PROFES-

the situation.[32] The last portion of the questionnaire, questions seventeen through twenty-three, required the respondents to express an opinion concerning the legitimacy and utility of DR 1-103(A).

The sample of Arizona lawyers to be surveyed was selected at random from a list of members of the State Bar of Arizona. The mailing was confined to lawyers practicing in Arizona. Judges, law professors, and lawyers who were also elected officials were not included in order

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SIONAL ETHICS, OPINIONS, No. 337 (1974); ARIZ. ETHICS OPINION 176A (1965). The following cases involve a lawyer accepting referral fees: Taylor v. Mercantile-Safe Deposit & Trust Co., 269 Md. 531, 307 A.2d 670 (1973); State v. Richards, 183 Neb. 184, 159 N.W.2d 317 (1968); *In re* Rockoff, 66 N.J. 394, 331 A.2d 609 (1975). For examples of professional solicitation, see *In re* Nesselson, 43 Ill. 2d 262, 253 N.E.2d 455 (1969); *In re* Bregg, 61 N.J. 476, 295 A.2d 360 (1972); *In re* Barret, 269 Or. 264, 524 P.2d 1208 (1974). Question 12 involved bribery; for examples, see *In re* Brown, 389 Ill. 516, 59 N.E.2d 855 (1945); *In re* Bradburn, 248 Ind. 29, 221 N.E.2d 885 (1966); *In re* Sabatino, 65 N.J. 548, 324 A.2d 20 (1974). Question 13 dealt with a lawyer making misrepresentations to a court, and was based on cases such as *In re* Sullivan, 283 Ala. 514, 219 So. 2d 346, *cert. denied*, 396 U.S. 826 (1969); Kentucky State Bar Ass'n v. Bach, 483 S.W.2d 575 (Ky. 1972); *In re* Norton, 106 Utah 179, 146 P.2d 899 (1944). Question 14 involved a lawyer embezzeling clients' funds, and was based on *In re* Moore, 110 Ariz. 312, 518 P.2d 562 (1974); State v. Barrett, 207 Kan. 178, 483 P.2d 1106 (1971); *In re* Hoffman, 30 App. Div. 2d 163, 291 N.Y.S.2d 260 (1968). Question 15 posits the case of an attorney representing conflicting interests, and is illustrated by *In re* Steyer, 24 Ariz. App. 148, 536 P.2d 717 (1975); Florida Bar v. Pfeilmair, 330 So. 2d 130 (Fla. 1976); State v. Hartmen, 54 Wis. 2d 47, 194 N.W.2d 653 (1972). Question 16 involved a lawyer who destroyed evidence damaging to his client. Analogous situations can be found in *In re* Ryder, 263 F. Supp. 360 (E.D. Va. 1967); McMahon v. State Bar, 39 Cal. 2d 367, 246 P.2d 931 (1952); *In re* Williams, 221 Minn. 554, 23 N.W.2d 4 (1946).

32. The directions on the questionnaire instructed the respondents to assume that they had "no doubt" that the described misconduct had taken place. Commentators have suggested that lawyers and judges do learn of attorney misconduct. ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 167 (1970); *cf.* Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 202 (stating that lawyers and judges have sufficient exposure to other lawyers' conduct to evaluate the quality of their performance). However, it is likely that in many instances the lawyer does not have firsthand knowledge of the misconduct and, thus, is not without doubts about whether it actually occurred. Indeed, the most common criticism about the questionnaire was that it posed an unrealistic situation because a lawyer is rarely, if ever, positive that another lawyer is misbehaving.

There are three responses to that criticism. First, the survey was primarily intended to discover whether Arizona lawyers were willing to report misconduct, and it was felt that this willingness could best be tested by not adding additional considerations such as sufficiency of knowledge or questions of privilege. Second, the assertion that lawyers and judges rarely have sufficient reliable evidence concerning their colleagues' misconduct is probably overstated. Lawyers who prosecute malpractice actions against other lawyers would seem to have access to evidence of misconduct sufficient to dispel most doubts that the conduct actually occurred, but complaints to disciplinary committees are not often made in those situations. Nachbar, *Legal Malpractice: Improper Representation of Conflicting Interests*, in AN ATTORNEY'S GUIDE TO MALPRACTICE LIABILITY 197, 200-01 (D. Stern ed. 1977). For an example of this type of non-reporting despite knowledge, see Yokozeki v. State Bar, 11 Cal. 2d 436, 521 P.2d 858, 113 Cal. Rptr. 602, *cert. denied*, 419 U.S. 900 (1974) (lawsuit filed against attorney in early 1965; complaint filed with disciplinary board of the state bar by client five years later). In answering question 19, concerning why lawyers were not deterred from misconduct by the possibility of being reported by other lawyers, only eight percent thought lack of knowledge of the misconduct was a major factor.

The third answer to those who argue that lawyers rarely know for sure about the misconduct of their peers is that DR 1-103(A) does not depend on "knowledge without a doubt." Depending upon how one defines "knowledge," see discussion note 13 *supra*, DR 1-103(A) may require a lawyer to make a report to an investigatory body where he is aware of facts giving rise only to a "reasonable belief" that a disciplinary rule has been violated. While such a standard would not limit required reports to those based on firsthand knowledge of misconduct, it would also not necessarily require the reporting of every breath of scandal.

to confine the survey to the practicing bar since that is the group which is most likely to encounter situations giving rise to the duty imposed by DR 1-103(A).[33]

Of the 1,017 mailed out, 522 usable[34] questionnaires were returned by the cut-off date. This constitutes a return of over fifty percent, which is considerably more than enough to constitute a valid sample.[35]

The Willingness to Disclose Misconduct

The first question that arises during a consideration of the obligation imposed by DR 1-103(A) is whether lawyers will actually "snitch"[36] on their colleagues. As noted earlier,[37] other studies have found that the number of lawyer-initiated complaints of professional misconduct is small. 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.[38] In contrast to these figures, the survey results show that from twelve to eighty-eight percent of the respondents say they would report misconduct of other lawyers, depending on the type of the misconduct.[39]

Generally, where the misconduct involved significant harm to the client or the obstruction of justice, a majority of the respondents ex-

33. It is likely that judges are often exposed to attorney misconduct, *see* Marks & Cathcart, *supra* note 32, at 202, yet they seldom initate complaints. *Id.* A future survey of judges might be useful in finding out why this is so.

34. Several of the questionnaires were returned totally or substantially unanswered which rendered them useless. Others were returned after the data compilation had been completed which resulted in their being discounted.

35. Bethel, *Economics and the Practice of Law*, ARIZ. B. J., Oct. 1976, at 5. "Industry and advertising concerns consider a 19% return sufficient to provide meaningful results. A return of 33% of a group of survey questionnaires mailed is excellent. . . ." *Id.*

36. The term "snitch" was one of the more frequent descriptions of the duty to report used by the respondents. Other characterizations were more colorful, but less printable.

37. See text & note 23 *supra*.

38. Letter from Lawrence D. Mattice, Staff Bar Counsel, State Bar of Arizona, to *Arizona Law Review* (Nov. 3, 1977) (on file at Arizona Law Review). This rate is fairly close to that experienced by the Utah Bar Association. *See* discussion note 23 *supra*.

39. The large difference between the number of respondents who say they would report misconduct and the number of reports actually received by the state bar may be due to several reasons. First, while the questionnaire asked the respondent to assume that he or she had no doubt that misconduct had taken place, this certainty may not be so frequent in real life. *See* discussion note 32 *supra*. Second, it is at least possible that many lawyers who would be willing to report misconduct do not learn about it at all. *But see* discussion note 32 *supra*. Finally, it is very possible that some, if not most, respondents indicated a willingness to report on the questionnaire, but would not do so if faced with that responsibility in a real-life situation. This possibility is indicated by the overall response to question 20. *See* text & notes 104-06 *infra*. The only other survey published to date which investigated the duty to report obtained results quite different from the Arizona study. In a 1973 mail survey of Boston lawyers, only 6.3% of the respondents would report a member of the same firm for violating a canon of which the respondent approved. Burbank & Duboff, *supra* note 9, at 100. Some of the difference in the results of the two studies may be accounted for by the fact that the Boston study required the respondent to report another member of the same firm, while this factor was not present in the Arizona study. Even taking this distinction into account, the Boston study casts doubt on the apparent willingness of lawyers to report their peers' misconduct.

pressed a willingness to report the malefactor to a disciplinary body. Focusing on harm to the client, question fourteen presented an attorney who had forged the client's name on a settlement check, deposited the money in a personal account, and then used it for personal expenses.[40] Approximately eighty-nine percent of the respondents indicated that they would report an attorney guilty of this practice to a disciplinary body.[41] In question fifteen, eighty-two percent indicated that they would report a lawyer-executor who was compromising the interests of the estate he was supposed to protect in favor of his other clients who had claims against the estate.[42]

Where obstruction of justice was the misconduct, a majority of the respondents were also willing to make a report, although to a lesser degree than where a client's interests were violated. The destruction of essential evidence would be reported by seventy-nine percent of the respondents,[43] while sixty-one percent would report a deliberate misrepresentation to a court. The fact that misconduct which constitutes an obstruction of justice is reported less often than harm to the client—substantially less often in one instance,[44]—seems to suggest that lawyers do not take their responsibility as officers of the court[45] as seriously as they do their duty towards clients.[46] This occurs in spite of the fact that the obstruction of justice by a lawyer is a serious offense which can result in disbarment.[47]

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40. Harm to the client is one of the three most common subjects of disciplinary proceedings against lawyers. Schnapper, *The Myth of Legal Ethics*, 64 A.B.A.J. 202, 203 (1978).

41. Appendix A, question 14, p. 540 *infra*.

42. *Id.*, question 15, p. 540 *infra*.

43. The 79% figure is the total of all respondents who would report the evidence tampering to some authority. Approximately 7% would report the destruction to the police, 29% to the state bar and 40% to both. Appendix A, question 16, p. 540 *infra*.

44. While over 80% of the lawyers would report conduct which harmed a client, only 60% would report a deliberate lie to a court. Almost 20% of the respondents, over one hundred lawyers, would take absolutely no action upon learning that another lawyer routinely lied to the court. Another 91 respondents, about 17.5% of the total, would take some other form of action, which ranged from informing the court to merely speaking with the attorney involved. While disclosure of the misrepresentation to the court would probably satisfy the obligation imposed by DR 1-103(A), it would not necessarily guarantee that disciplinary action would be taken against the offending attorney. *See* Garcia v. Silverman, 70 Misc. 2d 537, 334 N.Y.S.2d 474 (1972), where a deliberate misrepresentation to a court only resulted in a stern warning of punishment for future acts. *Id.* at 538, 334 N.Y.S.2d at 476.

45. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(A)(5) (1976) states:

(A) In his representation of a client, a lawyer shall not:

. . . .

(5) Knowingly make a false statement of law or fact.

46. The lawyer's duty toward the client is stated by the ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON NO. 7: "A lawyer should represent a client zealously within the bounds of the law." This concern with protecting the client's interests is evident throughout much of the Code, ranging from keeping information about a client secret, *see id.* DR 4-104, to avoiding conflicts of interest between lawyer and client, *see id.* DR 5-101, or between two clients, *see id.* DR 5-105.

47. *See, e.g., In re* Troy, 505 F.2d 746, 747 (1st Cir. 1974), *cert. denied*, 420 U.S. 982 (1975); *In re* Wright, 69 Nev. 259, 265, 248 P.2d 1080, 1083 (1952), *cert. denied*, 346 U.S. 812 (1953); *In re* Hyett, 61 N.J. 518, 537, 296 A.2d 306, 316 (1972).

At the other end of the spectrum, the survey revealed that a majority of attorneys would not report misconduct which did not appear to them to harm a client substantially or to obstruct justice, even though that conduct might constitute a criminal act or a clear violation of the ethical code. For example, over half of the respondents would take no action upon learning that an attorney had willfully evaded paying taxes, and less than twenty-three percent would report such conduct to a disciplinary body.[48] Even fewer lawyers would report an attorney for deliberately overcharging a client.[49] This distinction between harmful and nonharmful conduct even holds true where the conduct is specifically proscribed by the Code of Professional Responsibility. For example, over sixty-five percent of the respondents would not report a lawyer who solicited business from the administrator of a local hospital,[50] even though solicitation is specifically forbidden by DR 2-103(C),[51] and bar associations consider certain types of solicitation a serious offense.[52]

Although the number of respondents willing to report seems to depend on the seriousness of the misconduct involved, the responses to two questions do not intially seem to fit into this pattern. Question ten involved a lawyer who referred injured clients to a doctor and received a commission from the doctor for each patient's visit. Although harm to the client was not indicated in the questionnaire, over sixty-eight percent of the respondents would report this conduct to a disciplinary

48. Appendix A, question 8, p. 538 *infra*. Of the approximately 20% of the attorneys who chose a third alternative, over half would report the tax evader to the IRS or other federal authorities. *Id.* Hopefully it is not overly cynical to suppose that the provision of a monetary reward for such a report, *see* 26 C.F.R. § 301.7623-1 (1977), played a role in at least some of these choices. The IRS has reported that a higher percentage of lawyers are found guilty of violating federal tax laws than any other profession. *See* Clark, *Changing Times*, 1 HOFSTRA L. REV. 1, 6 (1973). Perhaps this is because lawyers are more willing to turn in their colleagues than are other professionals.

49. Appendix A, question 7, p. 538 *infra*. Overcharging a client causes obvious harm to the client's interests. Based on responses to other survey questions, it might be expected to be considered a serious offense meriting a report. *See* text & notes 39-46 *supra*. This apparent inconsistency may be explained by the fact that the hypothetical posed a situation where the overbilling was only for a few hours extra, and thus not of substantial harm to the client. This is confirmed by written comments on the questionnaires, which indicate that many lawyers feel that overcharging a client is minor misbehavior. However, the Oregon Supreme Court disagrees that overcharging is not a serious ethical lapse. *See In re* Kerrigan, 271 Or. 1, 530 P.2d 26 (1975) (attorney suspended for deliberate overcharging). There the court said that "[s]tealing by overcharging is still stealing." *Id.* at 6, 530 P.2d at 28.

50. Appendix A, question 11, p. 539 *infra*.

51. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(C) (1976) states, in pertinent part:

> A lawyer should not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner . . . .

52. *In re* Cornelius, 520 P.2d 76, 85, *rehearing* 521 P.2d 497 (Alas. 1974) (solicitation and other acts resulted in 42-month suspension); *In re* Campbell, 95 Idaho 87, 90, 502 P.2d 1100, 1103 (1972) (calling on private home without invitation warranted six-month suspension); *In re* Nesselson, 35 Ill. 2d 454, 462, 220 N.E.2d 409, 412 (1966) (mail solicitation of personal injury victims warranted three-year suspension). See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 467-68 (1978).

body.[53] Question twelve presented misconduct by two lawyers—one for kicking back legal fees to a client's political slush fund, the other for remaining silent after learning of the situation. Over seventy-five percent of the respondents indicated that they would make some kind of report in this instance, even though the client was not harmed.[54] Both questions do involve unethical conduct,[55] but this does not explain the difference because a majority of respondents would not have reported the conduct in questions seven (over-billing),[56] eight (tax evasion),[57] nine (recording telephone conversations),[58] and eleven (solicitation),[59] even though such conduct is also unethical.[60]

A possible explanation for the result in the referral fee question could be that the respondents felt that the client's interests in avoiding unnecessary or incompetent medical care would not be served by his lawyer having a financial interest in which doctor the client visited. If accurate, this explanation would result in the response to that question conforming more closely with the serious-nonserious standard for reporting misconduct suggested earlier.[61] However, the results of question twelve, involving the kickback of legal fees to set up a slush fund, do not appear to support the serious-nonserious criteria. The client's interests are advanced rather than frustrated, assuming that such a fund is an asset in transactions with politicians, and the crime involved does not appear any more serious than possible income tax evasion by

53. Appendix A, question 10, p. 539 *infra*. Compare this figure with the response to question 13, where only 61% would report a lawyer who routinely lied to the court. *Id.*, question 13, p.539 *infra*.

54. Appendix A, question 12, p. 539 *infra*.

55. In regard to question 10, ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-107(A)(2) (1976) provides:

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

. . . .

(2) Accept from one other than his client anything of value related to his representation of or his employment by his client.

See also ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 304 (1962) (an attorney may not receive a commission for recommending title insurance without fully disclosing to the client his financial interest in the transaction).

In regard to the kickback of legal fees, see *In re* Brown, 389 Ill. 516, 59 N.E.2d 855 (1945) (junior partner suspended for six months for not disclosing to authorities that his senior partner was kicking back legal fees to a corporate client).

56. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106(A) (1976) proscribes an "illegal or clearly excessive" fee. See discussion note 49 *supra*.

57. I.R.C. § 7201 makes it a felony to willfully evade paying federal income taxes. It has been held that the willful evasion of income taxes is a crime involving moral turpitude. *See, e.g., In re* Lacob, 50 Ill. 2d 277, 279, 278 N.E.2d 795, 796 (1972); Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 547, 318 A.2d 811, 815 (1974); *In re* Kline, 156 Mont. 177, 179, 477 P.2d 881, 882 (1970).

58. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 337 (1974) (recording phone conversations without consent of other party unethical); ARIZ. ETHICS OPINION 176A (1965) (lawyer should not record telephone conversation with another lawyer without disclosure).

59. See discussion notes 51, 52 *supra*.

60. Appendix A, questions 7-9, 11, p. 538-39 *infra*.

61. The reader should be wary of empirical studies which extrapolate from their data to support their hypothesis rather than conforming their hypothesis to explain the data.

the corporation. Yet a substantial majority of the respondents would have reported at least one, if not both, of the lawyers involved.[62] An explanation for this unexpected result could be that recent revelations about political scandals and the use of slush funds for "dirty tricks," as well as the part played by lawyers in these activities, have made lawyers sensitive about the image of the profession and willing to take extraordinary steps to protect it.[63]

In summary, with the possible exception of these two questions, and considering the possibly unrealistic nature of the hypotheticals,[64] the survey indicates a willingness of lawyers to report serious misconduct on the part of other lawyers, and to take no formal action[65] regarding conduct which does not seriously injure clients or obstruct justice. This explanation of the results is reinforced by the answers to question seventeen, which asked the respondents to indicate how they felt other lawyers viewed the duty to report. Almost sixty-five percent indicated that other lawyers would only report "serious" violations of ethical standards.[66] However, whether all the respondents who were willing to report would actually disclose another lawyer's misconduct in real life is doubtful.[67]

Factors Influencing the Willingness to Report

The first section of the survey was composed of six questions designed to elicit descriptive information about the individual filling out the questionnaire. This information was later cross-tabulated against the answers to the hypotheticals for the purpose of determining whether such factors as type of law practice, size of firm, formal education in ethics, and income level had any influence on the willingness of the lawyer to report misconduct. While some interesting patterns were exposed, generalizations about those patterns should be viewed with

62. Appendix A, question 12, p. 539 *infra*.

63. That the legal profession is concerned about fallout from its role in political scandals may be seen by the number of articles appearing on the subject. *See, e.g.*, Becker, *In Defense of Lawyers and the Legal Profession*, 47 N.Y. ST. B.J. 93 (1975); Ervin, *Campaign Practices and the Law: Watergate and Beyond*, 23 EMORY L.J. 1 (1974); Hertzberg, *Watergate: Has the Image of the Lawyer Been Diminished?*, 79 COM. L.J. 73 (1974).

While Watergate may have made lawyers more aware of the dangers of political intrigue, it also seems to have made them more aware of its utilitarian value. One respondent, in answering question 12, stated that he or she would use information of the misconduct politically "if it served those I supported."

64. *See* discussion notes 32, 39 *supra*.

65. While all of the questions elicited some responses indicating that lawyers would take some form of private action upon learning of misconduct, question nine was the most significant in this respect. Approximately 47% of the respondents indicated that they would warn other lawyers upon learning that an attorney recorded telephone calls with opposing attorneys, while only 36% would make a report to a disciplinary body. Appendix A, question 9, p. 538 *infra*.

66. Appendix A, question 17, p. 540-41 *infra*.

67. See discussion note 39 *supra*.

caution; the same set of "empirical" data is often subject to several contradictory interpretations.[68] The following discussion is merely an attempt to point out these patterns and suggest possible explanations.

In a survey of the New York City Bar conducted in 1960, it was discovered that the size of a lawyer's firm was highly correlated with his conformance to ethical standards.[69] The results of the Arizona survey demonstrate a similar pattern: generally, as the size of the lawyer's firm increased, the percentage of lawyers willing to report misconduct also increased, with sole practitioners demonstrating the least willingness to report.[70] The relationship between size of firm and reporting may be explained in at least two ways. First, it is possible that lawyers who practice alone or in small firms are less inclined to conform to professional norms than lawyers in the more structured environment of the large firm.[71] Another possible explanation is that the pressures which work to discourage reporting[72] are more intense on sole practitioners or members of small firms who do not have the professional clout to enable them to withstand the expected negative peer reaction a report is thought to cause.[73]

Another factor which was cross-tabulated against the willingness to report was the respondent's training in legal ethics. When the ethics background of the respondents was cross-tabulated with the answers to the hypotheticals, the results seemed to indicate that taking a required or non-required course in legal ethics had little impact on whether a lawyer would report misconduct.[74] In only one of the questions involv-

68. According to an old saying, there are three kinds of falsehood: lies, damned lies, and statistics. An attempt has been made to avoid the more obvious mistakes, such as trying to generalize about a class from an insufficient population: for example, three out of the five lawyers specializing in antitrust answered question 20 "yes," therefore, 60% of antitrust lawyers are ethical.

69. J. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 119 (1966).

70. *See, e.g.*, Appendix B, figure 1, p. 543 *infra*. Of the ten hypotheticals which tested the willingness to report misconduct, only three did not reflect this pattern. In question seven, regarding overcharging clients, the smaller firm lawyers were more willing to take action than big firm lawyers. Only 40.8% of sole practitioners would do nothing as opposed to 60.5% of lawyers in 10-25 lawyer firms, and 54.7% of lawyers in over-25 lawyer firms. In the other two question, 11 and 12, the size of the firm did not seem to have any constant relation to the willingness to report.

71. J. CARLIN, *supra* note 69, at 123.

72. See text accompanying notes 115-16 *infra*.

73. Several of the respondents noted that "professional politics" plays a large role in the decision whether to report misconduct. Judging from the written comments, there is a feeling that the bar association is dominated by large firms and that individual practitioners or members of small, non-influential firms who report suffer more in the long run than the person reported. Other observers of the Arizona bar have noted that some lawyers fear that harrassment from other lawyers will result if they attempt to take the ethical rules too seriously. *See* Ariz. Daily Star, *supra* note 23, at 4, col. 1.

74. The reason for the lack of impact of legal ethics courses may be that the duty to report is not given much consideration. For example, a casebook currently in use at the University of Arizona College of Law devotes less than two full pages to a discussion of the attorney's duty to report misconduct. *See* M. PIRSIG & K. KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 22, 49 (3rd ed. 1976). Another possible explanation is that courses in legal ethics typically meet for a minimal number of hours and carry a minimal number of credits, Burbank &

ing "minor" misconduct were ethics-trained respondents more likely to report another attorney.[75] In several of these questions those who had never had an ethics course would report more often than those who had been required to take such a course.[76]

For several of the questions involving more serious misconduct, such as lying to the court (question thirteen) or compromising a client's interest in favor of other clients (question fifteen), those who had never attended an ethics course were more willing to report than were either those had been required to attend or those who had taken such a course on their own initiative.[77] These results suggest that increased ethical training has not been successful in increasing significantly attorneys' willingness to follow the requirement of disclosing misconduct.[78]

The type of law practiced by the attorneys who answered the questionnaire did not seem to have any significant influence on whether they would be willing to report misconduct, with the exception of those who concentrated their practice in domestic relations. For every question, individuals in this category were less willing to report than were the other respondents. This difference was especially true for question thirteen, which involved misrepresentations made to the court by a lawyer who concentrated on divorce actions.[79] Only forty-six percent of lawyers concentrating in domestic relations would report this misconduct to a disciplinary body, while sixty-three percent of all other lawyers would do so. Thirty-four percent of domestic relations lawyers would do nothing while only nineteen percent of all others would take

Duboff, *supra* note 9, at 68, which means there is little time to spend on any one aspect of legal ethics.

75. Approximately 14% of the ethics-trained lawyers (those who had taken required or non-required courses) would report a lawyer for overcharging his client. Only 8% of those who had not attended an ethics course would do so. See Appendix A, question 7, p. 538 *infra*.

76. *See* Appendix A, question 9, p. 538-39 *infra*. A higher percentage of those never attending an ethics course would report an attorney who recorded telephone calls than would those required to take an ethics course (37.3% and 35.4%, respectively), although the difference is probably not statistically significant.

77. *See* Appendix A, questions 13, 15, p. 539-40 *infra*. In question 15, 86.3% of the non-attendees would report the misconduct while only 82.8% of the required attendees and 80% of those who went on their own initiative would do so.

78. "[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." S. TISHER, *supra* note 17, at 81. *See also* text & notes 64-71 *infra*.

79. The following table compares the answers to question 13 of lawyers specializing in domestic relations with the lawyers in other specialities.

SPECIALTY	DO NOTHING	REPORT	OTHER
Domestic Relations	14(34.1%)	19(46.3%)	8(19.5%)
Other Specialities Combined	90(19%)	300(63.4%)	83(7.5%)

no action.[80] A possible explanation for this result is that the size of the sample involved might have distorted the outcome. Only forty-one individuals identified themselves as concentrating their practice on domestic relations. With a sample size this small each individual answer assumes a percentage significance which may be out of proportion with the number of domestic relations specialists who would have actually answered in that manner.[81] Accordingly, this result should be viewed with caution.

The next factor considered in the survey was the experience of the respondent. Of the ten hypotheticals measuring willingness to report, only three did not show a relation between the number of years the respondent had been practicing and the willingness to report.[82] For two questions, the percentage of respondents willing to report increased as the number of years of experience increased.[83] These questions, numbers ten and eleven, involved violations of self-imposed professional restrictions[84] rather than violations of moral standards commonly accepted by the public. However, in four of the ten questions, the percentage of respondents who were willing to report the misconduct decreased as the number of years of experience increased.[85] Of these questions, one involved substantial injury to a client's interest,[86] one involved misconduct which may or may not be significantly harmful to the client,[87] and two involved the obstruction of justice.[88] It thus appears that an increase in experience does not generally lead to an increased willingness to report and may have just the opposite effect in some situations.[89]

80. Approximately 20% of both categories would not report but would take some action, such as admonishing the lawyer involved, ceasing referrals to that lawyer, or informing the court.

81. For example, if only 4 more of the 41 domestic relations specialists had indicated a willingness to report, the percentages would have changed substantially. In that case, 56% would have reported the misconduct instead of only 46%. However, in the category of non-domestic relations lawyers, which contained 473 respondents, the change of four answers would not have made a significant difference. The result would have increased by only 1%.

82. *See* Appendix A, questions 8, 9, 14, p. 538-39, 540 *infra*.

83. *See id.* questions 10, 11, p. 539 *infra*. In question 13, the percentage of those who would report increased as the years of practice increased, but the percentage of those who would do nothing remained about the same. The increase in reporting came from a decrease in the number of respondents who would take action other than reporting the misconduct to the state bar.

84. Question 10 involved a lawyer accepting referral fees. Question 11 involved solicitation of clients.

85. *See* Appendix A, questions 7, 12, 15, 16, p. 538-40 *infra*. For an example of the relationship between experience and willingness to report see Appendix B, figure 3, p. 545 *infra*.

86. Question 15 concerned a lawyer who was compromising an estate's interests.

87. Question 7 dealt with a lawyer routinely overcharging a client.

88. Question 12 involved a lawyer aiding a client in gathering a slush fund; question 16 involved the destruction of incriminating evidence.

89. A newspaper investigation of self-regulation in the Arizona bar concluded that younger lawyers were "more open to ethics issues." Ariz. Daily Star, *supra* note 23, at 4, col. 1.

The possibility that experienced lawyers may be reluctant to meet their duty to report misconduct has implications for the possibility of success in increasing reporting through law school ethics courses. See text & notes 173-74 *infra*.

Finally, the survey attempted to determine if there was a relation between a lawyer's income and a willingness to report the misconduct of other lawyers. The survey results reveal only a very general pattern. The lowest income group[90] was most often the most reluctant to report misconduct,[91] with the lowest percentage of reports in seven out of ten questions.[92] At the same time, the highest income group had the highest reporting standards, with the highest percentage of reports for six questions.[93] The low income group had the highest percentage of reports for only one hypothetical, which involved solicitation of clients.[94] While the survey did not reveal a direct link between income level and all measures of willingness to report,[95] the fact remains that the lowest

90. The lowest income group had annual incomes of $10,000 or less.

91. *See, e.g.*, Appendix B, figure 5, p. 547 *infra*.

92. The income group most often reporting particular misconduct can be seen in the table below.

QUESTION	INCOME GROUP WITH HIGHEST PERCENTAGE OF REPORTS
8-10, 13, 14, 16	Highest Income Group (over $40,000)
7, 15	Middle Income Group ($10,000 to $40,000)
11, 12	Lowest Income Group (Under $10,000)

93. The income group least often reporting each type of misconduct can be seen in the table below.

QUESTION	INCOME GROUP WITH LOWEST PERCENTAGE OF REPORTS
7-10, 13, 15, 16	Lowest Income Group (under $10,000)
11, 12, 14	Middle Income Group ($10,000 to $40,000)
7	Highest Income Group (over $40,000)

94. *Compare* Appendix B, figure 4, p. 546 *infra, with* Appendix B, Figure 5, p. 547 *infra*. In response to question 11, 40% in the lowest income group would have reported a lawyer who solicited business through a hospital. Only 23.5% of all the other income groups would have made such a report. One explanation for the difference is that it is those lawyers who are in the lowest income group that can least afford the loss of business that could result if another lawyer were allowed to solicit clients. While this theory is attractively simple, it is not borne out by the survey data. If the lowest income group was willing to report in order to protect their financial positions, one would expect to find the percentage of reports decreasing as the incomes increase, since those lawyers more financially secure would not need to stifle competition. However, just the opposite was true for question 11; the next to lowest income group ($10,000 to $15,000) had the lowest percentage of reports, and the percentage of reports increased with each successive increase in income.

95. Only for questions 9 and 11 did the percentage of reports directly increase in conjunction with an increase in income.

income group was the least likely to report and the highest income group the most likely.[96] A possible explanation for this result could be that the lowest income group does not feel sufficiently financially secure to withstand the professional repercussions[97] that are perceived by many to be the result of reporting another lawyer's misconduct.[98]

DUTY TO REPORT AND SELF-REGULATION

One way to determine whether an ethical standard is effective is to measure its value as a deterrent to misconduct.[99] In order to test the deterrent value of DR 1-103(A), question eighteen asked whether the possibility of disclosure of misconduct by other lawyers kept lawyers from succumbing to temptation. Fifty-four percent responded that the possibility of being reported was not a deterrent to misconduct.[100] For those individuals who felt that possible disclosure was not a deterrent, question nineteen asked why not. Over half of those responding stated that there was no deterrent in the possibility of disclosure because lawyers simply did not report other lawyers' misconduct. In addition, nine percent stated that even if a report were to be made, it was unlikely that any action would be taken.[101]

The significance of these figures lies in the nature of the self-regulatory process itself. If self-regulation is to be effective, there must be a large number of lawyers who follow ethical guidelines simply because they will be punished for violating them.[102] Where a large percentage of lawyers believe either that their misconduct, even if discovered by other lawyers, will not be reported to disciplinary authorities, or that even if reported, little or no action will be taken, it is unrealistic to expect self-regulation to be a viable concept. The status of lawyers as

96. These results tend to refute the charge that fear of competition is a prime motivator of reports. *See* text accompanying note 24 *supra*.

97. *See* text & notes 72-73 *supra*, 115-16 *infra*.

98. In a preliminary study for his survey of the New York City Bar, one commentator found that a favorite sanction used by lawyers against other lawyers for unethical behavior was the cessation of referrals to the wrongdoer. J. CARLIN, *supra* note 69, at 163 n.9. Given the hostile attitudes of many of the survey respondents to the duty to report misconduct, *see* text & notes 107-08 *infra*, a lawyer could reasonably be deterred from reporting by the possibility of a loss of referrals. This deterrent would logically be strongest for those who have the greatest need of more business—the attorneys earning a low income.

99. The Arizona Supreme Court has stated that the purpose of disciplining an attorney who violates the ethical code is to protect the public and to deter other lawyers. *In re* Peterson, 108 Ariz. 255, 256-57, 495 P.2d 851, 852-53 (1972).

100. Appendix A, question 18, p. 541 *infra*.

101. *Id.*, question 19, p. 541 *infra*. This belief seems to be justified by the record of discipline imposed on lawyers. Of the 1,757 lawyers disciplined in the United States in 1976, 475 received suspensions and only 136 were disbarred. U.S. NEWS & WORLD REPORT, June 6, 1977, at 35. Over half of the total number were given private reprimands. *Id.* Considering the fact that most disciplinary proceedings involve clear criminal violations, Burbank & Duboff, *supra* note 9, at 70, the number of sanctions actually imposed seems relatively insignificant.

102. Arkin, *Self-Regulation and Approaches to Maintaining Standards of Professional Integrity*, 30 U. MIAMI L. REV. 803, 828 (1976).

professionals is based, in part, on the premise that they are capable and willing to establish and enforce standards of decency and competence.[103] The lawyer who fails to carry out the sometimes disagreeable task of self-regulation undermines the validity of that premise and thus threatens the professional status and privileges of all lawyers.[104]

Responses to question twenty are further evidence of the unreality of expecting the bar to be self-policing. This question asked whether respondents believed that attorneys should be subject to discipline for failure to disclose knowledge of their peers' misconduct. Over fifty-nine percent of the lawyers replied in the negative.[105] This result is fairly consistent with question twelve, where only thirty-seven percent of those respondents willing to make a report to a disciplinary authority indicated a willingness to report the junior partner whose ethical violation was a failure to report misconduct.[106]

The reasons given for not imposing sanctions for nondisclosure were numerous, but the reason listed most frequently was that the lawyers found the idea of playing the role of a policeman distasteful.[107] Many of these answers employed the term "Gestapo tactics" or described the duty to disclose as "un-American." While these responses to DR 1-103(A) are shared by some legal commentators,[108] others have

103. Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411, 417 (1977).

104. Those concerned by the apparent ineffectiveness of the disciplinary machinery of the legal profession should not be without hope. Recent figures indicate that some small strides are being made in increasing the effectiveness of self-regulation. *See* U.S. NEWS & WORLD REPORT, *supra* note 101, at 33, reporting that there has been a 172% increase over the past four years in the disciplinary action taken against lawyers by disciplinary committees.

105. Appendix A, question 20, p. 541 *infra*.

106. *But see In re* Brown, 389 Ill. 516, 524, 59 N.E.2d 855, 858-59 (1945) (indicating that a failure to report was grounds for suspension). There is some reason for skepticism that all 37% of the lawyers who expressed a willingness to report a failure to disclose would really do so if actually faced with that situation. One commentator has contended that violations are rarely reported by the corporate bar. *See* Pierce, *The Code of Professional Responsibility in the Corporate World: An Abdication of Professional Self-Regulation*, 6 U. MICH. J. L. REF. 350, 353 (1973) (discussing the abdication of self-regulation by those attorneys who serve business corporations). Yet the Arizona survey revealed that members of the large corporate firms, in response to question 20, expressed the highest percentage of support for the duty to report of all Arizona lawyers. If the group with the greatest degree of support for DR 1-103(A) rarely reports misconduct, then perhaps the profession's disciplinary machinery is no more than "window dressing," as one critic has charged. *Id.* at 353-54.

107. This response, worded in various ways, was given by 15% of those who answered question 21. Other frequently listed reasons for not imposing discipline on lawyers who failed to disclose misconduct were: the rule cannot be enforced (9.9%); the ethical standards are too vague and subject to abuse to impose discipline for failure to report (8.3%); and reporting misconduct should be a matter of personal choice rather than a duty (7.1%). Judging from the large number of unintelligible responses (30.6%), this question may have been incorrectly worded and the results may need to be viewed with some skepticism.

108. *See, e.g.*, Arkin, *supra* note 102, at 815 (it is unseemly to abandon basic human decency to become avid informers); Brown, *supra* note 16, at 30 (legally requiring attorneys to police each other is a "true Gestapo informer system"); Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 282 (1970) ("It is sometimes difficult to distinguish between an honor system and a gestapo system.").

expressed doubts that it is "American" for a profession supposedly concerned with the administration of justice to condone misconduct by withholding unprivileged knowledge about it.[109] Since the legal profession's monopoly on the selection and enforcement of ethical standards has resulted in the lay public being deprived of any real voice in the operation of the bar,[110] and since lawyers are in the best position to ferret out professional misconduct,[111] it does not seem unreasonable for the public to expect that lawyers will do their own housekeeping, distasteful as that chore might be.

Increasing Disclosure Under DR 1-103(A)

Although the survey results indicate that in some situations[112] a majority of Arizona lawyers would be willing to disclose knowledge of misconduct,[113] the number of actual attorney-initiated complaints is relatively small.[114] Perhaps there is some modification or change in DR 1-103(A) or its application that could capitalize on this expressed, but as yet unexercised, willingness to report. Question twenty-three of the survey asked lawyers what changes they thought would lead to increased disclosure and elicited almost a score of suggestions.

The most common suggestion was that the identity of the attorney making the disclosure be kept confidential, or that he be granted immunity from defamation actions.[115] This suggests that fear of retaliation plays a role in some lawyers' decisions not to disclose knowledge of misconduct.[116] While a lawyer is entitled to due process in a discipli-

109. M. FREEDMAN, *supra* note 21, at 251. As to the "Americanism" of requiring an individual to report another's misconduct, this nation's oldest and newest military academies (West Point and the Air Force Academy), both have honor codes that require the reporting of infractions. M. ROSE, A PRAYER FOR RELIEF 176 (1973). The very "American" American Medical Association provides in § 4 of its Code of Ethics that physicians "should expose, without hesitation, illegal or unethical conduct of fellow members of the profession." AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS § 4 (1957). When doctors refuse to abide by this duty by remaining silent about their colleague's incompetence, lawyers get exercised over the medical profession's "conspiracy of silence," while the thought of lawyers reporting misconduct seems, at least to some members of the legal profession, a violation of "basic human decency." Arkin, *supra* note 102, at 815; *see* Brown, *supra* note 16, at 30.

110. *See* Hapgood, *The Screwing of the Average Man,* JURIS DOCTOR, Nov. 1974, at 19.

111. Thode, *supra* note 1, at 98; *see* Marks & Cathcart, *supra* note 32, at 202.

112. Situations eliciting the largest number of reports were those involving serious misconduct where the lawyer had no doubts that it had actually occurred. *See* text & notes 39-47 *supra.*

113. The reader should again take note that the survey is based on a premise criticized as "unrealistic." See discussion note 23 *supra.*

114. See text & note 23 *supra.*

115. Several courts have held that the duty to report is a defense in defamation actions. Bufalino v. Teller, 209 F. Supp. 866, 868 (M.D. Pa. 1962); Kerpelman v. Bricker, 23 Md. App. 628, 632, 329 A.2d 423, 426 (1974). Granting immunity to lawyers who report other lawyers' misconduct is supported by the same public policy which discourages malicious prosecution suits—the desire to encourage proceedings against those apparently guilty of misconduct. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS §119, at 841 (4th ed. 1971).

116. Twenty-two percent of the individuals responding to the question made this suggestion. At first this percentage seems anomalous because only 9.6% of the respondents in question 17 thought that the possible professional and social repercussions of reporting are the reasons lawyers

nary hearing,[117] which would presumably include the right to confront his accusers, it would not seem to be a deprivation of due process to keep the informant's name confidential at least through the investigatory stage of the action.[118] Thus, there seems to be little reason not to adopt this suggestion.

The second most common suggestion was to limit the application of the duty to report to serious misconduct.[119] While this change would correspond to what the survey showed the majority of Arizona lawyers were willing to report,[120] it would seem rather anomalous for the bar to prohibit numerous practices, presumably for the protection of the public, but then only require the disclosure of violations of some of them.[121] Perhaps this suggestion could best be implemented without creating inconsistency by removing the sanctions against conduct which does not injure clients or the administration of justice.[122]

The third most common suggestion was that DR 1-103(A) be enforced,[123] and that sanctions be applied against those who knew of misconduct but did not disclose it. As to what sanctions should be applied, a majority, approximately fifty-three percent of those answering question 22, felt that censure was the appropriate discipline.[124] However, at least one commentary has suggested that censure is an illusory sanc-

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do not report. The actual number of people who made these consistent answers is about the same: 50 for question 17, 47 for question 23. The percentages are different because approximately twice as many people answered question 17 as answered question 23.

117. *In re* Ruffalo, 390 U.S. 544, 550 (1968).

118. *Cf. In re* Troy, 364 Mass. 15, 25, 306 N.E.2d 203, 208 (1973) (respondent had no right to be present or cross-examine persons being questioned at the investigatory stage of a bar disciplinary proceeding). The provision of anonymous complaints may require an amendment to Rule 32(d)(3) of the Rules of the Supreme Court of Arizona, which allows the accused attorney or his counsel to inspect the record of "any investigation."

119. This was suggested by 16.3% of those responding. Several suggested that only misconduct which was a crime or involved moral trupitude should constitute "serious" misconduct. Merely eliminating the duty to report "nonserious" conduct would probably not, by itself, increase reporting of serious ethical violations. However, such a change might make bar disciplinary bodies less reluctant to impose sanctions for failure to report, which could, in turn, lead to more reporting.

120. *See* text accompanying notes 64-65, 99 *supra*.

121. Were the duty to disclose misconduct limited to criminal acts, it would presumably not apply to that part of the Code which prohibits competitive, rather than criminal, conduct. For a discussion of the anti-competitive nature of the Code of Professional Responsibility, see S. TISHER, *supra* note 17, at i; Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977). It should be noted that non-professional conduct which is generally victimless may, in some cases, actually have "victims." For example, advertising by lawyers, generally regarded as beneficial, *see* Bates v. State Bar of Arizona, 433 U.S. 350, 376-77 (1977), may be detrimental if false or misleading. The solution suggested by the Supreme Court in *Bates* was for the bar to prohibit such forms of advertising, *id.* at 383-84, and presumably the duty to disclose misconduct would apply to such fraudulent practices.

122. Conduct of this type could be labeled as "victimless crimes," defined as those acts which injure the "dignity" of the legal profession rather than its clients. *See* S. TISHER, *supra* note 17, at 101-02.

123. Fourteen percent of the respondents indicated that enforcement of the rule would probably lead to more frequent reporting, although some expressed the feeling that such a change would not be welcome.

124. Another large group of those answering the question, 33%, thought that the discipline should depend on the circumstances of each case. Factors to be considered included the serious-

tion,[125] so it may be doubtful whether its imposition will spur increased disclosure.[126]

Another method to increase reporting by lawyers having knowledge of misconduct, which was *not* suggested by any of the respondents, would be to allow clients who suffer harm at the hands of nefarious lawyers to sue any lawyer who had prior knowlege of the misconduct but did not report it. Such an action would be allowed where an attorney learned of another lawyer's misconduct but failed to make a report and as a result of that failure the client suffered further damage.[127] The action could be based on the theory that DR 1-103(A) imposes a professional duty to disclose misconduct, the breach of which constitutes professional malpractice.[128] The California Supreme Court allowed a similar type of action to be brought against a physician who treated a child for injuries resulting from child abuse but failed to report the case to authorities, as required by California law.[129] While the award of monetary damages to the injured client of an unethical lawyer against an attorney who failed to disclose his colleague's misbehavior would probably not provide a cure-all for the problems which limit the attorney disclosure of misconduct,[130] it would certainly destroy the state of apathy that seems to surround DR 1-103(A).[131]

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ness of the conduct which was undisclosed, the proximity of the disciplined attorney to the misconduct, and whether the attorney had failed in the past to make disclosure.

125. *See* Marks & Cathcart, *supra* note 32, at 219.

126. The deterrent value of a censure might be increased if the names of censured attorneys were routinely published in a local newspaper, along with a description of the ethical rules that they violated. That would be one type of "legal advertising" which all lawyers would take pains to avoid. *Cf.* S. TISHER, *supra* note 17, at 96-98 (discussing reluctance of lawyers to impose public sanctions).

127. An example of such a case would be where a lawyer acting as guardian for an incompetent was misappropriating the estate's funds and another lawyer discovered the conversion but took no action. A cause of action would lie not only against the guardian for the funds misappropriated but also against the non-reporting attorney for the amount converted after the lawyer learned of the scheme. *Cf.* Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (1976) (allowing suit against guardian's attorney for failing to discover that the guardian was misappropriating funds of the guardianship estate).

128. Such an action could be analogized to negligence per se, the doctrine which imposes liability upon one who violates a statute. *See* RESTATEMENT (SECOND) OF TORTS § 286 (1965). For such liability to be imposed, the statute violated must be intended to protect a class of persons, which includes the one whose interest is invaded, from the kind of harm which has resulted. *Id.* Arguably these requirements would be met in a suit by an aggrieved client since the Code of Professional Responsibility was formulated to assure to the public ethical conduct by lawyers. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1976).

129. Landeros v. Flood, 17 Cal. 3d 399, 410 n.8, 551 P.2d 389, 394 n.8, 131 Cal. Rptr. 69, 74 n.8 (1976).

130. The same factors which limit an injured client's ability to sue his attorney would seem to preclude, in many cases, an action for failure to report. *See* text & notes 142-50 *infra*.

131. Another step that would cure the complacency surrounding self-regulation would be holding state bar associations liable for injuries caused by unethical lawyers if the association had received prior knowledge of that lawyer's misconduct but took no action. The bar association could be held liable for damages incurred by the plaintiff after the association had received knowledge of the attorney's misconduct. In a somewhat analogous situation, the Arizona Court of Appeals has held a hospital liable for the negligence of a doctor using its facilities because the hospital had failed to take any action to protect the public after it received notice of the doctor's

Even if all these suggestions were adopted and incorporated into the Code of Professional Responsibility, it is still questionable whether significantly more lawyers would willingly come forward with information about other lawyer's misconduct. First, one study has found that the vast majority of lawyers studied do not normally rely on the Code of Professional Responsibility for guidance in the resolution of real-life problems, even though they agree that they should abide by its rules.[132] Presumably, regardless of what steps are taken to strengthen it, DR 1-103(A) would hold no greater attraction to lawyers than any of the other disciplinary rules which are currently ignored.[133] Second, even if DR 1-103(A) were enforced, there is substantial evidence, based on experience with the honor codes of the military academies[134] and with statutes requiring physicians to report suspected child abuse,[135] which indicates that most misconduct would still go unreported.

Finally, it has been suggested that enforcement of the disclosure rule might be counterproductive since the threat of sanctions for nonreporting could dry up sources of information about other ethical violations. Bar officials who attempt to enforce another disciplinary rule could encounter difficulties in getting lawyers to testify in disciplinary proceedings. Prospective lawyer-witnesses who had not previously reported the misconduct to a disciplinary agency would be reluctant to testify, since their earlier failures to report would be punishable as violations of DR 1-103(A).[136] A possible way to avoid such reluctance would be to grant these witnesses immunity from discipline under DR 1-103(A). Such immunity might even encourage lawyers to testify against their misbehaving peers.

The conclusion that can be drawn from the survey is that, even

prior negligent acts. Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P.2d 335 (1972). The court stated that "the negligence of the hospital was predicated upon failure to perform its obligation to . . . see to it that only professionally competent persons were on its staff." *Id.* at 83, 500 P.2d at 343. Such language seems equally applicable to a bar association charged with enforcing the legal profession's standards. *But see* Bollotin v. California State Personnel Bd., 131 Cal. App. 2d 197, 200, 280 P.2d 509, 511 (1955) (client cannot recover from state bar for lack of disciplinary action). The *Bollotin* court did not engage in any discussion of the public policies which support or undercut the decision not to hold public officials responsible in tort for their actions. This lack of analysis and reasoning contrasts sharply with that found in Grimm v. Arizona Bd. of Pardons & Paroles, 115 Ariz. 260, 564 P.2d 1227 (1977), wherein the Arizona Supreme Court did away with the policy of granting public officials absolute immunity. *See id.* at 265, 564 P.2d at 1232.

132. Burbank & Duboff, *supra* note 9, at 93. Instead, most lawyers were found to rely on their own presumably *ad hoc* standards in making legal decisions involving moral questions. *Id.*

133. The former president of the American Bar Association was quoted as saying that the guidelines established by the Code's disciplinary rules, which were more specific than the old canons, have not had any discernible impact. Comment, *The Bar and Watergate: Conversation with Chesterfield Smith*, 1 HASTINGS CONST. L.Q. 31, 34 (1974).

134. *See* M. ROSE, *supra* note 109, at 178. One study conducted at the United States Air Force Academy in 1966 found that 57.8% of cadets studied would not report a friend for violating the cadet honor code. *Id.* at n.1078.

135. Comment, *Civil Liability for Failing to Report Child Abuse*, 1977 DET. C.L. REV. 135, 139.

136. Hood, *supra* note 10, at 741-42.

with knowledge of misconduct beyond a doubt, most Arizona lawyers would report, if at all, only the most serious infractions of the legal profession's ethical standards. This means that most complaints about lawyer misconduct will have to originate from some other source. However, the present methods of discovering attorney wrongdoing have serious shortcomings.

INCREASING DISCLOSURE OF ATTORNEY MISCONDUCT

Although most disciplinary bodies have the authority to institute investigations on their own,[137] few ever exercise this authority.[138] The result is that response to client complaints is the almost exclusive approach of most disciplinary agencies.[139] Since the vast majority of complaints come from clients,[140] many types of attorney misconduct never come to light.[141] This is true for several reasons.

First, the average client is unaware of what constitutes eithical misconduct[142] and usually finds it difficult to evaluate the lawyer's performance.[143] One study has found that many clients who have complaints against their lawyers never voice them,[144] perhaps because they are not familiar with grievance procedures,[145] or because they doubt that lawyers are willing to take action against other lawyers.[146] Even

137. ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 60 (1970) [hereinafter cited as CLARK REPORT]. ARIZ. SUP. CT. R. 33(a)(1) allows the local disciplinary committee to conduct an informal investigation without a complaint being received.

138. CLARK REPORT, *supra* note 137, at 60. In the eight years since the Clark Report commented on the failure of state disciplinary agencies to initiate investigations, the State Bar of Arizona has apparently done little to solve the problem. It still relies primarily upon client complaints. Ariz. Daily Star, *supra* note 23. The response by the organized bar to the serious criticisms voiced in the Clark Report has been miminal, having the effect, as one commentator put it, "of a feather dropped in a well." Lieberman, *Crisis at the Bar*, STUDENT LAW., Apr. 1978, at 43.

139. Marks & Cathcart, *supra* note 32, at 206-07.

140. Thode, *supra* note 1, at 99. The chairman of a local disciplinary agency reported to ABA officials that only slightly more than one percent of the signed complaints received by his committee came from lawyers. CLARK REPORT, *supra* note 137, at 167.

141. Relying solely on clients' complaints has an additional drawback which blunts the effectiveness of the disciplinary machinery. The type of lawyer conduct clients most often complain about does not involve serious breaches of the ethical rules. For example, in Arizona, the overwhelming majority of complaints to the bar relate to a client's dissatisfaction with the outcome of a case or with the fee charged. Ariz. Daily Star, *supra* note 23. While this type of complaint certainly deserves action, it is not as serious as conflicts of interest, defalcation, or obstruction of justice, and thus should not monopolize the time of the entire disciplinary staff. However, this is reported to be the situation facing the disciplinary agency of the Arizona bar. *Id.* § F, at 1, col. 4.

142. Arkin, *supra* note 102, at 830. *See* CLARK REPORT, *supra* note 137, at 62.

143. MORGAN, *supra* note 121, at 705.

144. U.S. NEWS & WORLD REPORT, *supra* note 101, at 35. The executive director of the National Resource Center for Consumers of Legal Services contends that "the bars don't find out about the vast numbers of consumer complaints." *Id.*

145. Arkin, *supra* note 102, at 830.

146. A nationwide survey conducted by the ABA Special Committee to Survey Legal Needs revealed that more than one-third of the public surveyed believed that lawyers were not concerned about doing anything with the legal profession's "bad apples." *See* Oaks, *Ethics, Morality and Professional Responsibility*, 1975 B.Y.U.L. REV. 591, 592. Even more dismal is the result of a

when clients do voice complaints,[147] a large number of the complaints do not involve major ethical violations.[148]

A second reason why it is unsatisfactory to base the initiation of disciplinary action solely on client complaints is that there will be little or no way to discover unethical lawyers who are joined in their misbehavior by clients.[149] Finally, lawyers who do not deal with individual clients—for example, those who work for government or corporations—are almost totally exempt from any review.[150] The impact of these problems is the failure of the self-regulatory process to function in a meaningful fashion.[151]

Possible Solutions

The failure of bar disciplinary bodies to undertake investigations on their own and the inherent weaknesses of relying on complaints from lawyers or clients make the present system of initiating disciplinary action against lawyers only partially effective at best. Therefore, alternative means of handling lawyer misconduct must be considered. One alternative, already available and enjoying increasing popularity,[152] is the possibility of malpractice actions against lawyers by clients. This alternative will probably not be a completely effective method of controlling the ethics of the profession for, in addition to suffering from the same drawbacks as the client-complaint based disciplinary system,[153] malpractice actions have several problems of their own.

First, since a client must prove that he suffered damage from the lawyer's conduct,[154] misconduct by a lawyer which does not result in

Nebraska survey of non-lawyers, which found that only 24% of the respondents believed that lawyers were doing a good job of keeping each other honest. Comment, *Public and Professional Assessment of the Nebraska Bar*, 55 NEB. L. REV. 57, 70 (1975). Perhaps one reason for the public's lack of faith in the profession's self-regulatory efforts is the fact that some local bar associations actually seem to try to discourage complaints from clients. S. TISHER, *supra* note 17, at 94-95.

147. More than 37,000 complaints were filed against lawyers in the United States in 1976. U.S. NEWS & WORLD REPORT, *supra* note 101, at 33.

148. *See* Arkin, *supra* note 102, at 812. These include, for example, minor fee disputes, disagreements in personal business transactions, and disagreements not attributable to misconduct. *Id.* at 812 n.38. In Arizona, up to 90% of the complaints received by the bar do not involve criminal misconduct or raise ethical questions. Ariz. Daily Star, *supra* note 23.

149. Garbus & Seligman, *supra* note 6, at 51.

150. *Id.* As one commentator put it, "[t]he chairman of [the board of directors of a major corporation] would have no interest in writing a letter to tell the New York City Grievance Committee that his general counsel has just bribed a federal judge." Lieberman, *supra* note 138, at 42.

151. *Id.* at 49. In 1972, bar associations disciplined only 357 lawyers, or roughly one-tenth of one percent of the nation's lawyers. *Id.* at 48. In Arizona, only 76 lawyers were disciplined between 1970 and 1977. Ariz. Daily Star, *supra* note 23, at 1, col. 2.

152. The incidence of legal malpractice actions increased between 40-50% during the years 1974-75. Kroll, *First Doctors, Now Lawyers*, 223 NATION 553, 553 (1976).

153. Since the client must first learn of the lawyer's misconduct before a suit can be brought, few actions for unethical behavior will arise. *See* text & notes 142-50 *supra*.

154. Nachbar, *supra* note 32, at 200-01.

harm to his client might not be subject to control by direct action against the lawyer.[155] Second, analysis of malpractice claims has found that the typical causes of malpractice are not the same as those which lead to professional disciplinary action.[156] Hence, unethical conduct might not be subject to control. Finally, available data indicate that a majority of attorney malpractice actions are settled out of court.[157] As far as curbing unethical behavior is concerned, this latter fact has two negative effects. The most obvious of these is that an errant lawyer may be permitted to buy peace with the plaintiff and continue misconduct involving other clients without having to weather the public exposure of a fully litigated lawsuit.[158] The client often agrees, as part of the settlement agreement, not to make a complaint to the courts or bar association,[159] thus insuring against disclosure of the attorney's misconduct.[160] Second, the unethical lawyer may steal from other clients in order to make restitution to the complainant.[161] Losing a malpractice suit and incurring money damages would also have this effect, but the resulting publicity would at least give warning to other clients, whereas a quiet settlement affords less exposure and, consequently, less chance of warning. Thus, while malpractice actions may provide an incentive to the profession to raise its standards of competence, such actions may have little beneficial effect on ethical standards.[162]

155. An example of such conduct would be lying to the court or subornation of perjury. For an example of the former, see Garcia v. Silverman, 70 Misc. 2d 537, 334 N.Y.S.2d 474 (Civ. Ct. 1972). While lawyer misconduct of this type may not directly injure the client, it could indirectly cause harm which might form the basis for a malpractice action. For example, subornation of perjury by a lawyer could harm the client in that a judgment obtained through such perjury could be set aside. *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2861, at 195-96 (1973). However, the likelihood of the client suffering a vacated judgment is generally slight. *See* Note, *Civil Remedies for Perjury: A Proposal for a Tort Action*, 19 ARIZ. L. REV. 349, 353 (1977). Thus, while there may always be some risk that a lawyer's conduct may indirectly harm his client and lead to a malpractice action, that risk seems too insignificant to serve as an effective disciplinary device.

156. D. Stern, *The Virginia Attorney Malpractice Experience*, in AN ATTORNEY'S GUIDE TO MALPRACTICE LIABILITY, 445, 447-48 (D. Stern ed. 1977). Malpractice usually involves an act of negligence. *See* Rothstein, *Lawyer's Malpractice*, 9 TRIAL LAW. Q. 33, 33 (1973). While negligence may indeed be an ethical violation, *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-101(A)(1)-(3) (1976), the bar conducts almost no regulation of attorney performance or competence. Marks & Cathcart, *supra* note 32, at 203.

157. Comment, *Improving Information on Legal Malpractice*, 82 YALE L.J. 590, 605 n.64 (1973). Of the claims made against one large insurer of attorneys between 1967 and 1970, approximately 75% were settled. *Id.*

158. *See* CLARK REPORT, *supra* note 137, at 168.

159. Nachbar, *supra* note 32, at 202 n.31. Even if such an agreement was void on public policy grounds, the client would probably not want to risk losing his settlement money by filing a complaint.

The propriety of such settlement contracts is questionable. The Illinois Supreme Court has held that requiring a client to withdraw a complaint lodged with the state bar as a condition of settlement is unprofessional conduct meriting censure. *In re* Jerome, 31 Ill. 2d 284, 286, 201 N.E.2d 440, 441 (1964).

160. As noted earlier, if clients do not complain, probably no one will. *See* text & notes 137-51 *supra*.

161. *See* CLARK REPORT, *supra* note 137, at 168.

162. *See also* text & notes 126, 129 *supra*. A large number of lawyers believe either that there

A second possible solution to the ineffectiveness of the present disciplinary system is intensive education. The supporters of this cure contemplate lawyers, law students, and judges receiving thorough training in legal ethics in general and in the duty to report misconduct in particular. This was the solution recommended by the ABA Special Committee on Evaluation of Disciplinary Enforcement.[163] There are serious doubts that such an approach will provide a significant increase in compliance with DR 1-103(A).

To begin, education in legal ethics aimed at the practicing bar has thus far been negligible,[164] and at least one commentator feels that lawyers are too cynical for it to have much effect.[165] Since ascending to the bench is not known to have a transforming effect on a lawyer,[166] the same person who was too cynical as a lawyer to be affected by exposure to an ethics course will probably not be any more affected as a judge.[167]

The chance of success of the educational solution to non-reporting seems greatest with respect to law students. Law schools are increasingly requiring ethics courses for graduation,[168] and an effective educational program could have a substantial future impact on the ethics of the profession as the number of ethics-trained lawyers increases. Skeptics have suggested, however, that ethical training in law school is either unnecessary or ineffective because an individual's morality is determined by the time of law school matriculation.[169] The common answer to this skeptical view is that law school ethics courses do not attempt to change personal moral perspectives; rather, they are simply

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is little chance that unethical conduct will be reported or that, if reported, it will be punished. *See* text accompanying notes 99-101 *supra*. To these lawyers there appears to be little to balance against the lucrative possibilities of dishonesty except personal integrity. Unlike other professions, in the law a resort to sharp practices does not generally threaten one's livelihood. *See* Schnapper, *supra* note 40, at 202.

163. CLARK REPORT, *supra* note 137, at 167, 175.

164. Kionka, *Education for Professional Responsibility: The Buck Stops Here*, 50 DENVER L.J. 439, 455 (1974).

165. *Id.*; *see* Thode, *supra* note 1, at 101.

166. *See* Rosenberg, *The Qualities of Justices—Are They Strainable?*, 44 TEX. L. REV. 1063, 1064 (1966).

167. The reeducation of judges in the area of legal ethics presupposes that judges generally are concerned about upholding ethical standards. This assumption may be questionable in regard to at least some judges. *See* Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549, 555-62 (1978).

168. A search through a sample of 68 law school catalogues for the academic year 1976-77 revealed that 63 schools offered courses on legal ethics, and that 40 of these schools required such courses for graduation. This figure should be compared with that offered by a commentator several years ago showing that only a minority of law schools had such a requirement. *See* Kionka, *supra* note 164, at 441 n.5. However, the fact that some schools do not even offer such courses means that in some places there still exists "the presumption that such education occurs through osmosis." *Id.* at 441. To maintain ABA approval, law schools must now provide and require instruction in legal ethics. AMERICAN BAR ASSOCIATION, APPROVAL OF LAW SCHOOLS, Standard No. 302(a) (iii) (1977). However, this instruction does not necessarily have to occur in a course specifically concentrating on legal ethics as long as certain subjects are covered. *Id.*

169. Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 275 (1976).

aimed at instilling in students, while they are new to the law, an awareness and appreciation of professional rules and standards.[170] According to this theory, teaching ethics to law students is no different than teaching contracts or torts—all are subjects which are required for the proper practice of law.[171] The survey of Arizona lawyers conducted for this Note indicates that required attendance in ethics courses has little overall impact on whether or not an individual will report misconduct,[172] and thus appears to support the skeptics' position.

Regardless of which view of education in ethics is correct, ethical training in law school, no matter how effective, is not likely to have a sustained impact on the profession if the standards taught in the classroom are at variance with practices in "the real world."[173] 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.[174]

Since it is apparent that the profession's unwillingness to report the misconduct of its members is a significant problem[175] which may not be remediable through reliance on client complaints,[176] one logical solution would be to establish a disciplinary system that was not dependent on reports from clients, lawyers, or judges. One commentator has suggested the formation of investigatory bodies whose major purpose would be to seek out and prosecute ethical violations,[177] with an emphasis on the "seeking out." Instead of waiting for a complaint, such an agency would actively search for misconduct by a variety of methods, such as subscribing to a newspaper clipping service for news articles that raise questions of misconduct,[178] and developing and making use of communication channels with criminal courts, police departments, and government prosecutor's offices.[179] Another technique would be to arrange to have the agency notified automatically whenever a court in the agency's jurisdiction dismisses a case for failure to prosecute. The agency would then investigate to determine whether

170. *Id.*

171. Cheatham, *What the Law Schools Can Do to Raise the Standards of the Legal Profession*, 7 AM. L. SCH. REV. 716, 718 (1933). "We can just as easily direct them to an intelligent consideration of professional standards as to the Rule in Shelley's Case." *Id.*

172. See text & notes 75-78 *supra*.

173. *Cf.* M. ROSE, *supra* note 109, at 179. Air Force Academy graduates, who are taught a strict honor code while at the Academy, are disillusioned by the hostile response to their efforts to adhere to the code after graduation. *Id.*

174. *See* text & note 23 *supra*. The survey indicated that as lawyers became more experienced they were less likely to report misconduct. *See* text & notes 86-89 *supra*. This would tend to support the argument that the benefits of legal ethics courses dissipate as lawyers become more experienced and cynical.

175. *See* text & notes 107-09 *supra*.

176. *See* text & notes 141-51 *supra*.

177. Weckstein, *supra* note 108, at 282; *see* Thode, *supra* note 1, at 101.

178. Arkin, *supra* note 102, at 831. The Clark Report noted that such a service was being utilized in Wisconsin. CLARK REPORT, *supra* note 137, at 63.

179. Arkin, *supra* note 102, at 831.

the dismissal resulted from attorney neglect.[180] Unannounced audits of client trust funds by the agency would not only discover past embezzlement by lawyers, but would deter its occurrence in the future.[181] This is only a sample of the techniques that have been utilized or suggested by various sources. Though they are quite diverse proposals, all have in common non-reliance on clients or the bar for initiating the process, apparently a necessary condition to the success of any method.

As noted earlier, attorneys often have many reasons for their reluctance to report colleagues for misconduct.[182] This reticence is sometimes shared by the professional members of disciplinary bodies.[183] To keep feelings of professional courtesy or the inability to be objective from affecting the performance of the investigatory agency, it could be partly or primarily administered by non-attorneys, with supporting legal staff where needed.[184]

CONCLUSION

Underlying any discussion of how best to initiate the exposure and eradication of attorney misconduct is the assumption that, unless lawyers sense that their conduct is being reviewed, the efforts of many[185] to comply with professional standards will be minimal at best.[186] The survey of Arizona lawyers demonstrates that the present methods of most disciplinary agencies have failed to instill in the majority of lawyers

180. CLARK REPORT, *supra* note 137, at 65. Such a system has been established in Michigan. *Id.*

181. Manahan, *Lawyers Should Be Audited*, 59 A.B.A.J. 396, 396-97 (1973). The Arizona Supreme Court has adopted a rule that allows client's trust funds to be audited by disciplinary officials. ARIZ. SUP. CT. R. 29(F). The rule as adopted requires a showing of good cause to believe that Canon One and/or Nine of the Code of Professional Responsibility have been violated before an audit will be authorized. If the intent of the rule is to deter lawyers from misusing client trust funds, it would seem more effective to adopt a system of routine spot checks and discard the good-cause requirement. *See* Manahan, *supra*; Marks & Cathcart, *supra* note 32, at 207 n.25. This would provide more of a deterrence to misconduct, which is, after all, one of the purposes of professional discipline. *In re* Peterson, 108 Ariz. 255, 256-57, 495 P.2d 851, 852-53 (1972).

182. *See* text & note 123 *supra*.

183. Lobe, *supra* note 123, at 76-77.

184. The inevitable response from the legal profession to a proposed review by non-lawyers is the charge that laymen lack the capacity to evaluate lawyer performance. Marks & Cathcart, *supra* note 32, at 229. This criticism is probably true when applied to the average layman with no exposure to the relevant facts and pertinent rules of a particular question. *See* text & notes 142-43 *supra*. However, the American legal system is based on the premise that laymen on a jury can render proper decisions on complex legal questions, including legal malpractice, when provided with sufficient facts and rules of law. *See* Marks & Cathcart, *supra* note 32, at 229. There is no reason why they could not perform just as effectively on an attorney review board.

185. While bar leaders are quick to point out that only a small fraction of lawyers are unethical, many practicing lawyers apparently disagree. *Compare* Meserve, *A New Day in Professional Discipline*, 59 A.B.A.J. 5, 5 (1973) ("Lawyers know that most of their colleagues abide by the ethical code . . . ."), *with* Powell, *The Challenge to the Profession*, 51 A.B.A.J. 148, 149 (1965) ("27% of Missouri lawyers think that perhaps half of their fellow lawyers fail to live up to the canons.").

186. Arkin, *supra* note 102, at 828.

this sense of systematic review.[187] This failure makes a mockery of the claim that the legal profession can and does police itself.[188] It is likely that public tolerance for such a state of affairs will soon be exhausted.[189] Unless meaningful changes are forthcoming, lawyers may one day find themselves stripped of the privilege of self-regulation.

187. *See* text & notes 99-101 *supra*; Marks & Cathcart, *supra* note 32, at 235.

188. *See* J. HANDLER, THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED COMMUNITY 144 (1966).

189. *See* Leach, *The New Look in Disciplinary Enforcement in England*, 61 A.B.A.J. 212, 213 (1975); Smith, *Rules of Professional Conduct—1975 State Bar of California Analysis and Comments*, 2 ORANGE COUNTY B. J. 589, 598 (1975).

APPENDIX A: SURVEY

The numbers on the right represent the percentage of the 522 questionnaires selecting the particular response indicated.

1. Which of the following best describes your type of law practice:
   - Sole practitioner 19.3
   - 2 lawyer firm 11.3
   - 3-9 lawyer firm 25.3
   - 10-25 lawyer firm 8.4
   - Over 25 lawyer firm 10.5
   - Government agency 21.1
   - In house counsel 3.6
2. Which of the below best describes the law school you attended:
   - Law school associated with a state university 72.4
   - Law school associated with a private university 23.6
   - Law school not associated with any university (proprietary law school) 3.6
   - No response 4
3. Which of the below best describes your background in legal ethics?
   - You attended a required course on legal ethics 70.1
   - You attended a non-required course on legal ethics during law school or after graduation 9.8
   - You did not attend a course on legal ethics 19.7
   - No response 4
4. In which of the following areas would you say you concentrated your practice—choose no more than two; if two are chosen, rank them first and second in order of time spent:

	% ranked as first choice
Criminal law	20.7
Taxation	5.2
Workmen's Compensation	2.1
Antitrust	1.0
Personal Injury	18.6
Domestic Relations	7.9
General Corporate Law	14.0
Real Estate	10.0
Public Interest Law	2.7
Other (please specify)	23.4

5. How long have you practiced law?

1-3 years	26.2
4-10 years	36.8
Over 10 years	36.6
No response	.4

6. OPTIONAL: Which of the choices below best approximates your annual income?

Under $10,000	2.9
$10,000 to $15,000	9.6
$15,000 to $25,000	31.8
$25,000 to $40,000	28.7
Over $40,000	24.5
No response	2.5

In answering questions 7 through 16, assume that in an unprivileged conversation you learn of the hypothetical situation described in the question. There is no doubt in your mind that the described activity has taken place. The lawyer involved practices in your community. What would you do after receiving this information? Check only one.

7. A lawyer routinely bills his clients for a few more hours than he actually spends working on their case. You would:

Do nothing	46.6
Report him to the disciplinary body of the State Bar	12.6
Try to convince him to stop	33.1
Other (please specify)	5.9
No response	1.7

8. A lawyer has willfully failed to pay her federal income tax for the last three years. You would:

Do nothing	55.7
Report her to the disciplinary body of the State Bar	22.6
*Other (please specify)	19.7
No response	1.9

*Breakdown of "other" (% of 103)

Report to IRS	51.5
Talk to attorney	34.0
Threaten to report if attorney not pay	4.9

9. A lawyer routinely records telephone conversations held with opposing attorneys without advising them of the recording. You would:

Do nothing	10.2
Report him to the disciplinary body of the State Bar	36.0
Warn other lawyers of the recording	46.6

Other (please specify) 6.3
No response 1.0

10. A lawyer refers clients who have suffered medical injuries to a medical specialist and accepts "referral fees" from the specialist for each client's visit. You would:

Do nothing 22.2
Report her to the disciplinary body of the State Bar 68.6
Other (please specify) 7.7
No response 1.5

For this question there was a marked difference between the responses from personal injury lawyers and other lawyers, shown in the following chart:

	Do Nothing	Report
P.I. lawyer	8.3	83.3
Others	25.8	66.5

11. A lawyer is a good friend of the administrator of the emergency room of the local hospital. His law business has slowed down and he asks the administrator to keep him in mind if accident victims ask advice about a lawyer. You would:

Do nothing 65.6
Report him to the disciplinary body of the State Bar ... 25.1
Other (please specify) 8.0
No response 1.3

Responses to this question showed no significant difference between P.I. and other lawyers.

12. The senior partner of a law firm has been billing a corporate client for non-existent legal services and then kicking back the fees so that the client will have a political slush fund. A junior partner learns of this activity, but fails to take any steps to stop it. You would

Do nothing 17.2
Report both lawyers to the disciplinary body of the State Bar 28.2
Report only the senior partner to the disciplinary body of the State Bar 46.2
Other (please specify) 6.9
No response 1.5

13. A lawyer who concentrates on divorce actions routinely misrepresents to a court that the parties to the divorce are bona fide state residents. It is unlikely that the court will ever become aware of this activity on its own. You would:

Do nothing 19.9

Report him to the disciplinary body of the State Bar ... 61.1
Other (please specify)..... 17.4
No response..... 1.5

For this question there was a marked difference between the responses of domestic relations lawyers and other lawyers, as indicated in the following table.

	Do Nothing	Report
Domestic Relations Attorneys	34.1	46.3
Others	19.0	63.4

14. An attorney endorses clients' names on settlement checks without authority, deposits the money in her personal account without notification to the clients, and uses the funds for personal expenses. You would:

Do nothing 4.2
Report her to the disciplinary body of the State Bar.... 88.5
Other (please specify)..... 6.3
No response..... 1.0

15. A lawyer serving as the executor of an estate has been compromising the estate's interests in favor of his other clients who have claims against the estate. You would:

Do nothing 6.9
Report him to the disciplinary body of the State Bar ... 82.0
Other (please specify)..... 9.6
No response..... 1.5

16. A lawyer destroys some incriminating evidence which is essential to the prosecution's case against her client. You would:

Do nothing 11.3
Report her to the police 6.7
Report her to the disciplinary body of the State Bar.... 28.9
Report her to the police and the State Bar 40.4
Other (please specify)..... 8.8
No response..... 3.8

In answering the remaining questions, consider DR 1-103(A) of the Code of Professional Responsibility, which states:

> A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

17. In your opinion, which of the following statements most accurately reflects the actions and opinions of other lawyers:

They take DR 1-103(A) seriously and will report any misconduct..... 1.1

They will only report serious violations of ethical standards 64.6
They will only report the misconduct of someone they do not like 10.9
They will not report because lawyers should not have that duty 2.1
They will not report because it would hurt professional or social relations with other lawyers 9.6
Other (please specify)..... 9.4
No response..... 2.3

18. Generally speaking, do you think that lawyers are deterred from misconduct by the thought that other lawyers may report them to a disciplinary authority.
Yes 43.7
No..... 54.4
No response..... 1.9

19. If your answer to Question 18 was No, explain why not:
Breakdown of answers: (number represents % of 235 responses)
Do not think they will be reported..... 50.6
Individual's own ethics are deterrant..... 11.9
Even if report is made, little chance of violator being punished..... 8.9
Do not think others will learn of misconduct..... 7.7
People misbehave without considering consequences.... 5.1
Illegibile or single response 14.9

20. In your personal opinion, should attorneys who have knowledge of the misconduct of other lawyers and fail to report it to the appropriate disciplinary body be subject to discipline?
Yes 40.4
No..... 59.2
No response..... .4

21. If your answer to Question 20 was No, explain why not:
See text & notes 105-11 *supra*.

22. If you answered Question 20 Yes, what disciplinary action should be taken? (Number represents % of 212 responses.)
Disbarment 5
Suspension..... 5.2
Censure..... 52.8
Other (please specify)..... 41.5

23. Assuming that lawyers should report ethical misconduct, what changes

could be made in DR 1-103(A) or its application that would make it more effective in leading to the disclosure of attorney misconduct?

There were a wide variety of responses to this question. For a discussion of them, see text & notes 115-26 *supra*.

APPENDIX B: RELATIONSHIP GRAPHS

The graphs below demonstrate the relationship between various factors, such as type of practice, and the willingness to report misconduct in a particular fact situation. For example, Figure 1 illustrates that respondents from firms of 25 or more lawyers were the group most willing to report the destruction of evidence (question 16).

Figure 1. Size of firm (question 1) x willingness to report destruction of evidence (question 16).

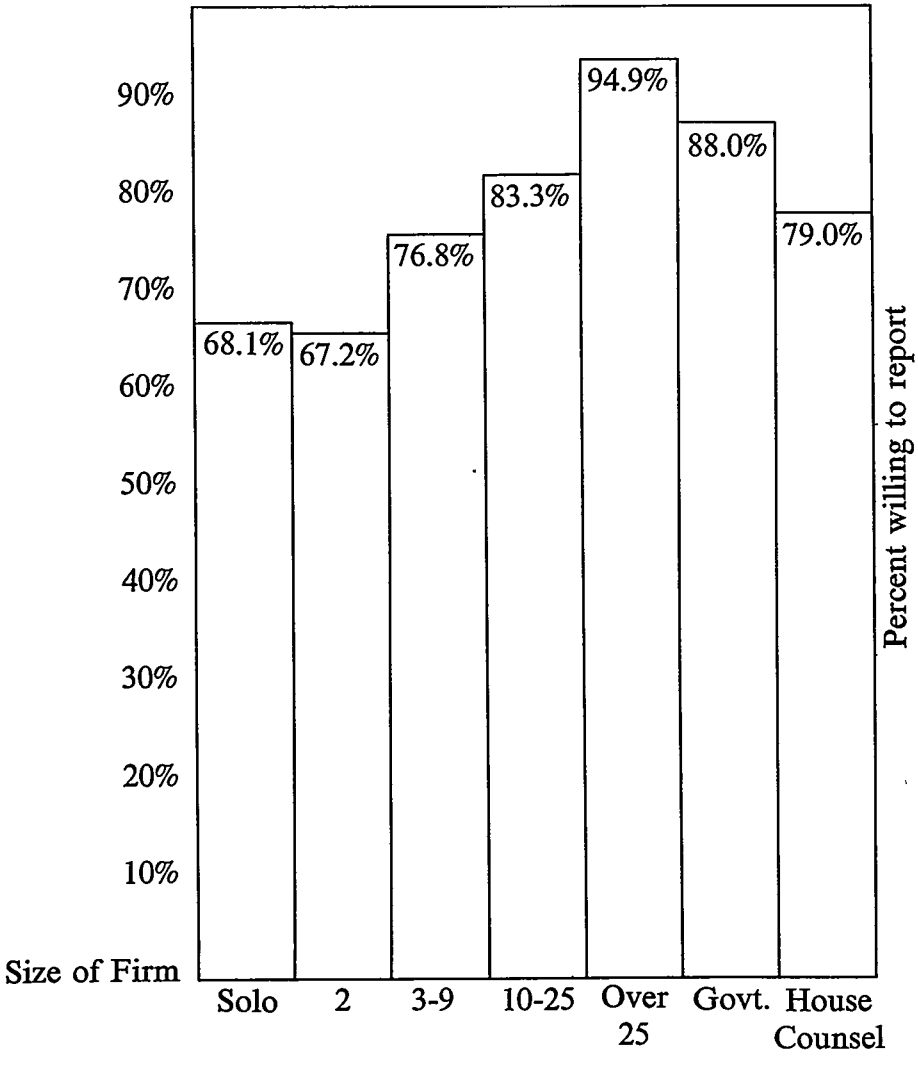

Figure 2. Size of firm (question 1) x willingness to report conflict of interest (question 15).

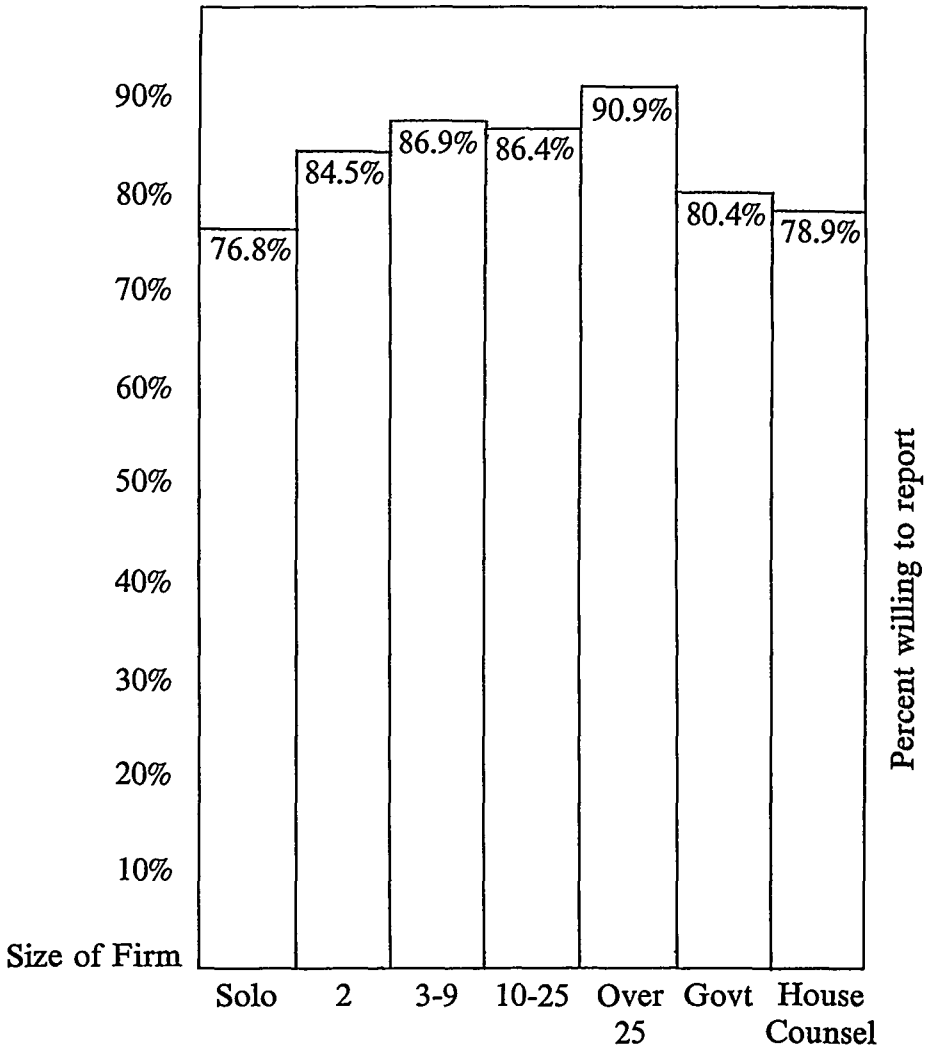

Figure 3. Experience (question 5) x willingness to report destruction of evidence (question 16).

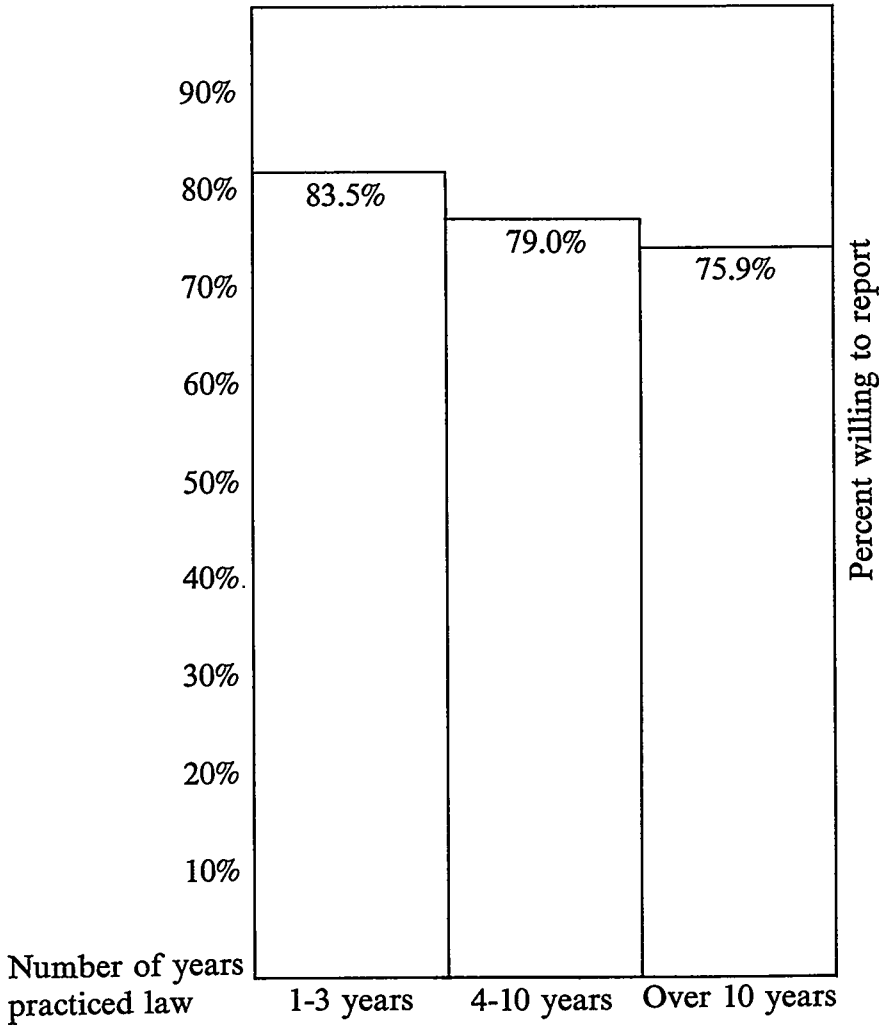

Figure 4. Annual income (question 6) x willingness to report solicitation (question 11).

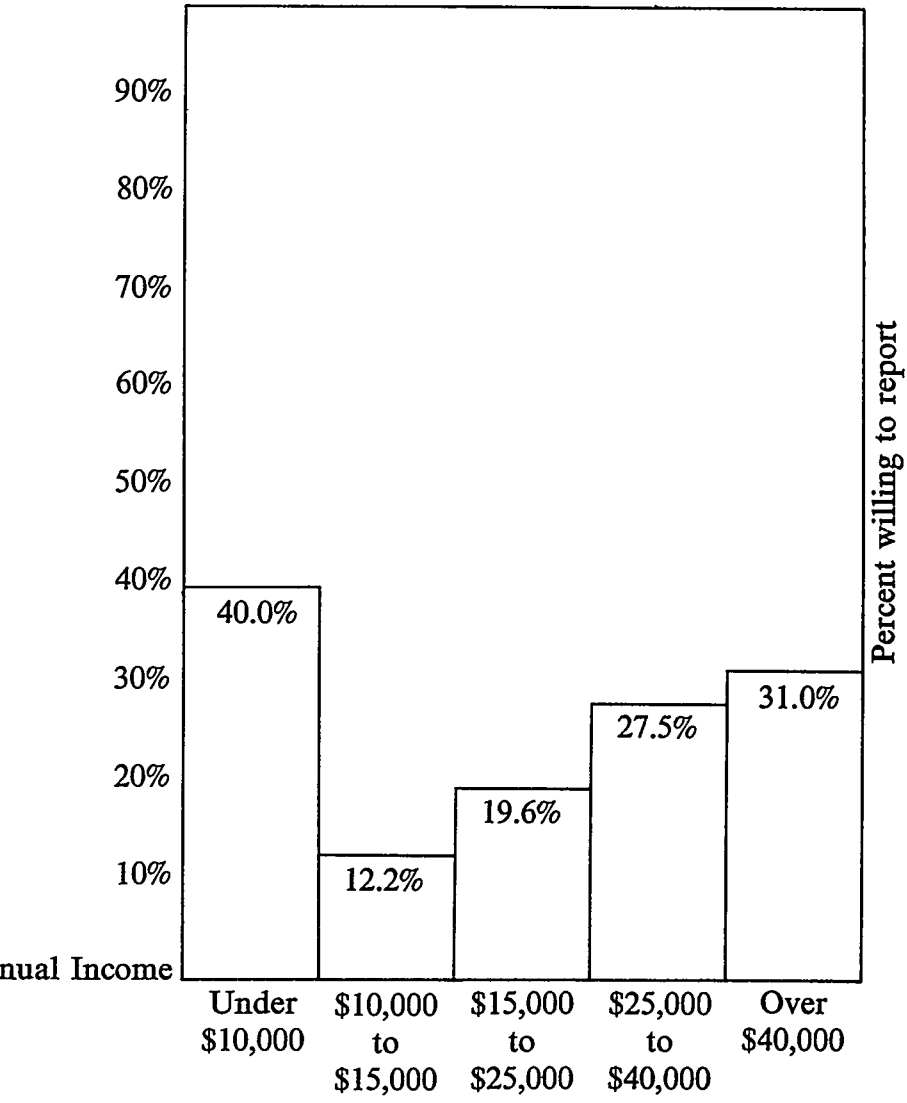

Figure 5. Annual income (question 6) x willingness to report perjury (question 13).