



ST. MARY'S
UNIVERSITY

Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

2011

Legal Malpractice Litigation and the Duty to Report Misconduct

Vincent R. Johnson

St. Mary's University School of Law, vjohnson@stmarytx.edu

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Law Commons](#)

Recommended Citation

Vincent R. Johnson, Legal Malpractice Litigation and the Duty to Report Misconduct, 1 *St. Mary's J. on Legal Malpractice & Ethics* 40 (2011).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu, egoode@stmarytx.edu.

ARTICLE

Vincent R. Johnson

Legal Malpractice Litigation and the Duty to Report Misconduct

Abstract. Lawyers participating in legal malpractice litigation sometimes encounter evidence of serious disciplinary rule violations. Whether, and how soon, those lawyers are required to report this information to grievance authorities is a question that has received little attention from courts and scholars, despite the fact that most states have mandatory reporting rules. The dilemma for lawyers serving as testifying experts is particularly troublesome because nonreporting may result not only in discipline, but testimonial impeachment. The better view is that an expert in a *pending* case ordinarily has no mandatory obligation to report misconduct. This conclusion is supported by an analysis of the narrowness of the reporting obligation, the exceptions to the rule, public policy considerations related to malpractice litigation and grievance procedures, and customary professional practices. However, after litigation ends, an expert (and other lawyers) may have a duty to call evidence of serious misconduct to the attention of disciplinary authorities.

Author. Professor of Law, St. Mary's University School of Law, San Antonio, Texas. B.A., LL.D., St. Vincent College; J.D., University of Notre Dame; LL.M., Yale University. Professor Johnson's books include *Legal Malpractice Law: Problems and Prevention* (Thomson/West 2008) (with Susan Saab Fortney) and *Legal Malpractice Law in a Nutshell* (West 2011).

ARTICLE CONTENTS

I.	The Dilemma.....	44
A.	Testifying Experts.....	44
B.	Malpractice Litigators.....	49
II.	The Narrow Duty to Report.....	50
A.	The Importance of Reporting.....	51
B.	The Knowledge Requirement.....	55
1.	Mere Possibility.....	55
2.	Second-Hand Information.....	57
3.	Substantial Certainty or Firm Opinion.....	58
a.	Undisputed Documentary Evidence.....	59
b.	Uncontroverted Versus Disputed Evidence.....	60
c.	Objective Versus Subjective Standard.....	61
C.	“Honesty, Trustworthiness, or Fitness”.....	63
1.	Raising a “Substantial Question”.....	64
a.	Examples.....	65
b.	Narrower and Broader Rules.....	68
2.	One-Time Transgressions.....	68
3.	“As a Lawyer”.....	69
D.	Disciplinary Statutes of Limitations.....	71
III.	Confidentiality.....	73
A.	Client Consent and Other Exceptions.....	74
1.	Seeking Client Permission to Disclose.....	75
B.	Narrow Formulations of the Confidentiality Limitation on Disclosure.....	77
C.	Broad Formulations of the Confidentiality Limitation on Disclosure.....	77
D.	The Meaning of “Protected by Rule 1.6”.....	78

1. Information from Other Sources or Publicly Known.....	80
IV. Public Policy Considerations Against Reporting During Pending Litigation	82
A. Deference to the Malpractice Process	82
B. The Expert’s Proper Role	84
C. Protection of the Grievance Process.....	85
V. Customary Practice and Precedent.....	87
A. In Favor of Delayed Reporting.....	87
B. Against Delayed Reporting.....	90
VI. Duty to Report After the Malpractice Action Terminates	92
A. Promptness.....	93
B. Disclosure to a Court	93
1. What is an “Appropriate Professional Authority”	94
a. Disciplinary Bodies	94
b. Peer Assistance Programs	96
c. Courts.....	97
d. Particular Entities	97
2. Shifting Responsibility.....	98
C. How the Malpractice Action Was Resolved	100
1. Proven Versus Unproven Malpractice Claims	100
a. Judicial Findings of Liability.....	100
b. Judicial Findings of No Liability	101
c. Non-Judicial Resolution of Malpractice Claims.....	102
D. Misconduct Reported by Others or Publicly Known	103
E. Relying on Another to Make a Report.....	105
F. Relying on Another’s Judgment About the Need to Report	106

G. Contracting Around the Duty to Report.	106
1. Agreements Not to File a Grievance.	106
2. Hiring the Expert to Provide Counsel Relating to a Possible Grievance	109
3. Mixing the Roles of Consulting and Testifying Expert	110
VII. Conclusion.	111

I. THE DILEMMA

A. *Testifying Experts*

Experts who testify in legal malpractice cases sometimes encounter indisputable evidence of lawyer misconduct, such as documentary proof of an impermissible fee agreement¹ or a settlement offer imposing improper restrictions on a lawyer's right to practice.² In these instances, does the expert have a duty to report the errant lawyer to disciplinary authorities? If the expert is a licensed lawyer—as is usually true in legal malpractice cases³—the operative rule, at first blush, would seem to impose a reporting obligation. In virtually all states, the ethics code for lawyers contains a provision similar to one in the Model Rules of Professional Conduct. With exceptions, discussed below,⁴ Model Rule 8.3 states in mandatory terms:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.⁵

1. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5(d) (2010) (prohibiting certain types of contingent fees).

2. See *id.* R. 5.6(b) ("A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.").

3. There are rare exceptions. Some experts are law professors who teach professional responsibility but are not currently licensed to practice law. In certain states, there are strict requirements. For example, in Georgia, "an expert in a professional malpractice action must be licensed *and* practicing (or teaching) in one of the states of the United States at the time the alleged negligent act occurred." *Wilson v. McNeely*, No. A10A2268, 2011 WL 198378, at *1 (Ga. Ct. App. Jan. 24, 2011) (quoting *Craig v. Azizi*, 687 S.E.2d 198, 203 (Ga. Ct. App. 2009)) (excluding testimony in a legal malpractice case).

4. See *infra* Part III (discussing the confidentiality limitation on disclosure).

5. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2010). Under Model Rule 8.3(a), there is no duty to report one's own misconduct because the reporting obligation arises only when there is knowledge of a violation by "another lawyer." *Id.*; see also Conn. Bar Ass'n. Comm. on Prof'l Ethics, Informal Op. 38 (1997), available at 1997 WL 816059 (finding that a lawyer who embezzled trust funds had no duty to report his own misconduct). However, some state ethics codes have been interpreted as also requiring self-reporting. See Ohio Bd. of Comm'rs on Grievances & Discipline, Informal Op. 001 (2007), available at 2007 WL 1232241 ("A lawyer is required to self-report his or her professional misconduct, as well as report others' misconduct . . ."). Applicable state law usually requires a lawyer to report that discipline has been imposed on a lawyer in another jurisdiction. See *id.* (discussing the duty to report under Ohio State Bar R. V, § 11(F)(1)).

Similar language can be found in the *Restatement (Third) of the Law Governing Lawyers (Restatement)*,⁶ the Texas Disciplinary Rules of Professional Conduct,⁷ and the ethics codes of numerous states.⁸ Only a few jurisdictions have language or procedures to the contrary. California has never adopted a reporting rule.⁹ In addition, the ethics codes in Georgia¹⁰ and Washington¹¹ provide that a lawyer with knowledge of

6. The language in the *Restatement* is virtually identical to the text of the Model Rules. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5(3) (2000) (“A lawyer who knows of another lawyer’s violation of applicable rules of professional conduct raising a substantial question of the lawyer’s honesty or trustworthiness or the lawyer’s fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.”).

7. See TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 8.03(a), reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9) (“Except as permitted in paragraphs (c) [(addressing confidential client information)] or (d) [(regarding confidential information gained in “an approved peer assistance program”)], a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority.”).

8. See generally STEVEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS (2010 ed.) (detailing variations in states’ ethics codes).

9. See Nikki A. Ott & Heather F. Newton, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747, 755 (2003) (indicating that California has not adopted the reporting requirement). Recently, the California State Bar Board of Governors considered adopting a very limited reporting rule, which provided in part:

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer shall inform the appropriate disciplinary authority.

(b) Except as required by paragraph (a), a lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.

Comm’n for the Revision of the Rules of Prof’l Conduct, State Bar of Cal., Rules & Concepts that Were Considered but Are Not Recommended for Adoption 2010, http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=_wFtsNXUZ84%3d&tabid=2669 (last visited May 9, 2011). The rule, however, was not adopted. *Id.*

10. GA. RULES OF PROF’L CONDUCT R. 8.3 (2010). “There is no disciplinary penalty for a violation of this Rule.” *Id.* R. 8.3.

11. WASH. RULES OF PROF’L CONDUCT R. 8.3 (2010). In 2004, the Washington State Bar Association Board of Governors recommended that the Model Rule version of Rule 8.3 be adopted, rejecting the recommendation of the sharply divided state bar Ethics 2003 Committee to retain non-mandatory reporting. See Wash. State Bar Ass’n, Bd. of Governors’ Revisions to Ethics 2003 Committee Recommendation 20–21 (July 2004), <http://wsba.org/lawyers/groups/ethics2003/boardofgovernorsrevisionswithcomments.doc> (reporting the Ethics 2003 Committee’s decision declining the recommended adoption of Model Rule 8.3). The Washington Supreme Court did not adopt the change; no reason was given. See Explanatory Memorandum from the Wash. State Bar Ass’n to the Ethics 2003 Committee on Proposed Rules of Prof’l Conduct 212–13 (March 2004) (hereinafter Explanatory Memorandum), available at <http://wsba.org/lawyers/groups/ethics2003/reportpart3.doc> (indicating that the majority of the Washington Supreme Court concluded that

misconduct “should[, not shall,] inform the appropriate professional authority.”¹²

Model Rule 8.3 contains no express exception to the reporting duty for lawyers serving as experts. Moreover, the obligations imposed by the reporting rule, unlike many other ethical strictures, do not hinge upon whether the lawyer is “representing” a client.¹³ The predicate for action is simply whether “[a] lawyer . . . knows”¹⁴ that serious misconduct¹⁵ has been committed. (In this Article, “serious misconduct” is a shorthand reference to “a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” as that phrase is used in Model Rule 8.3 and similar state provisions.)¹⁶

The risk behind the reporting dilemma is not so much that the lawyer serving as a *testifying* expert would be subject to discipline for failure to report the infraction.¹⁷ With notable examples to the contrary,¹⁸ lawyers

permissive reporting should be retained).

12. GA. RULES OF PROF'L CONDUCT R. 8.3(a) (2010); WASH. RULES OF PROF'L CONDUCT R. 8.3(a) (2010).

13. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 2.1 (2010) (“*In representing a client*, a lawyer shall exercise independent professional judgment . . .” (emphasis added)); *id.* R. 4.2 (“*In representing a client*, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter . . .” (emphasis added)); *id.* R. 4.4 (“*In representing a client*, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . .” (emphasis added)); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 433 (2004) (“Most, but by no means all, ethical duties under the Model Rules spring from a lawyer’s representation of clients.”).

14. MODEL RULES OF PROF'L CONDUCT R. 8.3 (2010); *see infra* Part II(B) (discussing the knowledge requirement).

15. Model Rule 8.4 defines “misconduct” as including: a direct or indirect violation or attempted violation of the Rules of Professional Conduct; certain criminal acts, “conduct involving dishonesty, fraud, deceit, or misrepresentation”; and “conduct that is prejudicial to the administration of justice,” including knowingly assisting a judge or judicial candidate in violating the rules governing judicial conduct, or representing that one has the ability to improperly influence a judge. *Id.* R. 8.4.

16. *Id.* R. 8.3.

17. A distinction is drawn between testifying experts and consulting experts. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997) (stating that a lawyer serving as a testifying expert witness does not “provide a ‘law-related service’ . . . within the purview of Model Rule 5.7 such as would render his services as a testifying expert subject to the Model Rules of Professional Conduct”). The hallmark of the former is independence and objectivity. *See id.* (opining that a testifying expert “is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates”). In contrast, consulting experts are normally akin to partisan advocates, serving as a type of associated co-counsel. *See id.* (stating that “zealous partisan advocacy [is] characteristic of an expert consultant”). This Article is concerned with the duties of

are rarely sanctioned for that type of conduct.¹⁹ For example, there are currently more than 86,400 active members of the State Bar of Texas.²⁰ Grievances resulting in the imposition of sanctions are reported monthly in the *Texas Bar Journal*.²¹ During the five-year period from 2006 through 2010, published reports indicate that only one lawyer was sanctioned for violating the duty to report knowledge of misconduct by another lawyer.²²

The real risk for the legal malpractice expert (or, more accurately, for the client at whose behest the expert appears) is that the expert's failure to report will be exploited for partisan litigation purposes. Specifically, a lawyer-expert might be subjected to cross-examination and impeachment

testifying experts.

18. See, e.g., *In re Riehlmann*, 891 So. 2d 1239, 1249–50 (La. 2005) (publicly reprimanding a lawyer who had a firm belief that a former prosecutor had suppressed exculpatory evidence in a criminal case but failed to make a prompt report of the misconduct to the Office of Disciplinary Counsel); *In re Daley*, No. 98 SH 2, 2000 WL 1844454, at *8–9 (Ill. Att'y Registration & Disciplinary Comm'n Aug. 8, 2000) (imposing a nine-month suspension based in part on failure to report misconduct); see also *In re Hampton*, No. 03-0918, 2005 WL 6317758, at *8 (Ariz. Disciplinary Comm'n June 9, 2005) (stating that in *In re Lustig*, No. SB-01-02149-D (Ariz. Sep. 7, 2001), a lawyer was censured based in part on failing to report another lawyer's "misconduct of fee sharing with a non-lawyer"). In *In re Himmel*, 533 N.E.2d 790 (Ill. 1988), a well-known and controversial decision, a lawyer was suspended from practice for one year for not reporting misconduct. *Id.* at 796. *Himmel* was the first case to discipline a lawyer for nothing other than failing to report another lawyer's misconduct. RONALD D. ROTUNDA & MICHAEL I. KRAUSS, LEGAL ETHICS IN A NUTSHELL 447 (2006).

19. "[F]ew reported lawyer-discipline decisions involve claimed violations of such a rule." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. i, reporters' note (2000) (citing a small number of cases); see also Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 13 (2004), available at 2004 WL 3413897 ("Lawyer discipline cases involving only a charge of failure to report another lawyer's professional misconduct are rare."); THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 56 (10th ed. 2008) (describing the reporting rule as "one of the most underenforced rules of professional conduct").

20. *About Us FAQs*, STATE BAR OF TEX., http://www.texasbar.com/AM/Template.cfm?Section=About_Us_FAQs&Template=/CM/HTMLDisplay.cfm&ContentID=10432#many (last visited May 9, 2011).

21. See, e.g., *Disciplinary Actions*, 74 TEX. B.J. 101, 162–65 (2011) (listing recent resignations in lieu of discipline, suspensions, and reprimands).

22. This research was performed by Katy Stein, a reference librarian at St. Mary's University School of Law. In the case where discipline was imposed, the *Bar Journal* entry indicated that a 33-year-old San Antonio lawyer "accepted a two-year, fully probated suspension" because the "[t]he 285th District Court of Bexar County found that [the lawyer] failed to inform the appropriate disciplinary authority of the professional misconduct of another lawyer." *Disciplinary Actions*, 69 TEX. B.J. 178, 181 (2006). The lawyer was "ordered to pay \$2,500 in attorney's fees and costs." *Id.* The lawyer's failure to report was apparently the only violation of the ethics rules at issue or established. *Id.*

in the malpractice case based on failure to file a grievance. It is easy to picture a lawyer representing a malpractice defendant demanding of the plaintiff's expert, in front of the jury: "Well, if this was such a serious example of lawyer misconduct, why didn't you file a grievance like the Rules require? Aren't *you* the one who has acted unethically?"

There is a paucity of legal authority dealing directly with the question of whether malpractice experts have a duty to report. In fact, there are no published court decisions or ethics opinions expressly addressing the issue. However, the reporting obligation is often expansively construed. For example, an American Bar Association ethics opinion opined that there is a duty to report misconduct by a "non-practicing lawyer. . . . even if it involves activity completely removed from the practice of law."²³ As one illustration, the committee indicated that a member of the bar serving on a law faculty has a duty to contact disciplinary authorities upon learning of "misconduct by another law professor who is a licensed lawyer exclusively engaged in teaching."²⁴ According to the committee, "[e]ven misconduct arising from purely personal activity must be reported if it reflects adversely on the lawyer's fitness to practice law."²⁵ Viewed against this backdrop, the idea that a legal malpractice expert might have a duty to report knowledge of misconduct related to the malpractice action is hardly fanciful.

Nevertheless, the better view is that an expert in a *pending* legal malpractice case ordinarily has no mandatory obligation to file a report of malpractice-related misconduct with disciplinary authorities.²⁶ As discussed below, this conclusion is supported by an analysis of the narrowness of the reporting obligation (*see* Part II), the exceptions to the rule (*see* Part III), public policy considerations related to malpractice litigation and grievance procedures (*see* Part IV), and customary professional practices (*see* Part V). However, after malpractice litigation ends, an expert *may* have a duty to call evidence of a serious disciplinary rule violation to the attention of grievance authorities (*see* Part VI).

23. ABA Comm. on Ethics & Prof'l Responsibility, Formal. Op. 433 (2004).

24. *Id.*

25. *Id.*

26. *But see infra* Part V(A) (discussing instances of reporting in cases of "reasonably certain future harm").

B. *Malpractice Litigators*

Lawyers representing parties to a malpractice lawsuit presumably will learn about the same serious misconduct that comes to the attention of a testifying expert. However, because those lawyers normally do not take the witness stand, there is little risk that nonreporting will result in their testimonial impeachment. There is still the risk of discipline, but that risk is greatly reduced by the fact there is a broad exception to the reporting obligation that relates to confidential client information (*see* Part III). Thus, the reporting dilemma arising from misconduct unearthed in a legal malpractice case is far more problematic for testifying experts than for other lawyers involved in the lawsuit. Accordingly, this Article will focus primarily on the reporting duties of testifying experts, mindful of the fact that many of the same principles will be applicable in scrutinizing the reporting duties of malpractice litigators.

In some cases, a lawyer has a duty to report another lawyer's misconduct *to an affected client*.²⁷ The resolution of that type of issue in the context of civil liability is sometimes influenced by whether the lawyer also had a duty to report the misconduct to disciplinary authorities.²⁸ Notwithstanding the importance of issues related to client disclosure obligations,²⁹ this

27. *See* VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 456–60 (West 2011) (discussing a lawyer's limited duty to disclose his or her own malpractice to clients).

28. *See* Nathan M. Crystal, *Professionalism and Reporting Misconduct of Other Lawyers*, 20 S.C. LAW., July 2008, at 8, 8 (discussing *Estate of Spencer v. Gavin*, 946 A.2d 1051 (N.J. Super. Ct. App. Div. 2008)). Because the opinion in *Estate of Spencer* is complex, it is difficult to fully understand the reach of the New Jersey appellate court's holding. A lawyer represented the estates of a mother and her two daughters. *Estate of Spencer*, 946 A.2d at 1055. A second lawyer, enlisted by the first lawyer, did a small amount of work related to only one of the three estates. *Id.* at 1058. The appellate court stated that if the second lawyer knew that the first lawyer was misappropriating funds from the estates, he could be liable to all three estates for harm resulting from nondisclosure of that information. *Id.* at 1066–68. One of the estates was a client of the second lawyer because he did legal work for it. *Id.* at 1066–67. Consequently, there were several grounds on which the second lawyer could be liable to that estate for harm caused by nondisclosure. Viable theories of liability presumably included at least negligence, breach of fiduciary duty, fraud, and negligent misrepresentation. However, the court recognized that the other two estates, even if classified as "non-clients," could also state a claim for damages. *Id.* at 1067. According to the court, "an attorney may be liable to a nonclient in certain situations where the attorney knows, or should know, that the nonclient will rely on the attorney." *Id.* (citing *Petrillo v. Bachenberg*, 655 A.2d 1354 (N.J. 1995)). Because the three estates were interrelated in terms of their disposition of assets, such reliance was to be expected.

29. *See* Vincent R. Johnson, "Absolute and Perfect Candor" to Clients, 34 ST. MARY'S L.J. 737, 742–50 (2003) (discussing duties arising under the principles governing negligence and fiduciary duty); Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers About Credentials or*

Article focuses solely on whether a lawyer, serving as an expert, has a duty to report misconduct that is enforceable by professional discipline rather than whether failing to make disclosure to the affected client could subject an expert to civil liability.³⁰

The following discussion frequently cites ethics opinions issued by various national, state, and local advisory committees. While these opinions are not binding on courts or disciplinary authorities,³¹ they are important to attaining a proper understanding of the duty to report misconduct because they generally reflect the wisdom, understanding, and customs of responsible lawyers engaged in the practice of law. Lawyers are rarely subject to discipline for actions undertaken in reliance on the advice offered in pertinent ethics opinions addressing similar facts.³²

II. THE NARROW DUTY TO REPORT

The duty to report misconduct is a controversial,³³ albeit now well-

Experience, 57 OKLA. L. REV. 529, 536–76 (2004) (discussing duties arising under the law of fraud, negligent misrepresentation, and informed consent).

30. There is ordinarily no attorney-client relationship between a testifying expert witness and the client on whose behalf the expert has been engaged. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997); see discussion *infra* Part VI(G)(3) (identifying the independent nature of a testifying expert witness). Therefore, a testifying expert could be liable for failure to disclose only on some theory of nonclient liability. There are at least a dozen theories under which nonclients sometimes prevail in actions against lawyers. SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION 134–36 (2007). Many of these theories of liability are recognized even in “strict privity” states. See VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 161 (West 2011).

31. See Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2008-12 (2009), available at 2009 WL 467850, for an example of a typical disclaimer. In a footnote the committee stated:

The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

Id.; see also Ohio Bd. of Comm'rs on Grievances & Discipline, Informal Op. 001 (2007), available at 2007 WL 1232241 (“Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions . . .”).

32. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 67 (1986) (“Most jurisdictions . . . seem to defer to ethics opinions to the extent that a lawyer who has acted in accordance with a recent ethics committee recommendation is ordinarily given the benefit of the doubt in disciplinary proceedings.”).

33. See Explanatory Memorandum 212 (March 2004), available at <http://wsba.org/lawyers/groups/ethics2003/reportpart3.doc> (describing the mandatory duty to report professional misconduct as controversial); Wash. State Bar Ass'n, Bd. of Governors' Revisions to Ethics 2003 Committee Recommendation 20–21 (July 2004), <http://wsba.org/lawyers/groups/ethics2003/>

established, rule of legal ethics. Its roots can be traced to the 1969 American Bar Association Model Code of Professional Responsibility.³⁴ Prior to that point, lawyers “were encouraged, but not required, to report other lawyers’ misdeeds, and could keep silent about their peers’ misconduct without fear of related punishment.”³⁵ As far back as 1887, the Alabama Code of Ethics stated, in aspirational terms, that “[a]ttorneys *should* fearlessly expose before the proper tribunals corrupt or dishonest conduct in the profession.”³⁶ Of course, “should” is different from “shall.”

A. *The Importance of Reporting*

Today, many authorities describe the duty to report misconduct in a manner suggesting that the obligation is essential to the ethical practice of law. For example, law professor Nathan Crystal says that the duty is one of the “central” aspects of professionalism.³⁷ Douglas R. Richmond, a legal ethics expert from the insurance field, likewise argues that the duty to

boardofgovernorsrevisionswithcomments.doc (“Among the most controversial issues addressed by the [Washington State] Ethics 2003 Committee was the question of whether the duty to report professional misconduct under Rule 8.3 ought to be mandatory or discretionary.”); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. i (2000) (summarizing arguments for and against the rule and noting that “[s]ome lawyers have objected to the duty to disclose another lawyer’s wrongdoing”); Gerard E. Lynch, *The Lawyer As Informer*, 1986 DUKE L.J. 491, 492 (describing the mandatory reporting rule as “extraordinary”). The controversial nature of the reporting obligation undoubtedly results in underreporting. Similar issues have arisen with respect to the duty to report judicial misconduct. See David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909, 927–36 (2009) (discussing why judicial misconduct goes unreported).

34. See Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 177–78 (1999) (reviewing the history of the reporting rule). “[T]he mandatory reporting Rule of the Code of Professional Responsibility . . . was deleted in a number of jurisdictions and was amended in others by substituting the words ‘should report’ for ‘shall report.’” 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.2, at 64-5 (3d ed. Supp. 2009).

35. Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 177 (1999).

36. CAROL RICE ANDREWS ET AL., *GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES’ 1887 CODE AND THE REGULATION OF THE PROFESSION* 117 (2003) (emphasis added) (quoting Rule 11 of the Code of Ethics adopted by the Ala. State Bar Ass’n on December 14, 1887). The substance of the Alabama rule was carried forward into Canon 29 of the American Bar Association’s Canons of Professional Ethics (1908). Canon 29 provided in relevant part that “[l]awyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession.” *Id.*

37. See Nathan M. Crystal, *Professionalism and Reporting Misconduct of Other Lawyers*, 20 S.C. LAW., July 2008, at 8, 8 (“Professionalism has many aspects, but one of the central ideas is the duty to report misconduct by other lawyers and judges . . .”).

report misconduct is “crucial” for at least three reasons.³⁸ First, lawyers are often in the best position to recognize misconduct; second, the legal profession has a duty to maintain high standards; and, third, absent a duty to report misconduct, there is a risk that the profession’s privilege of self-regulation would be lost.³⁹ In part, Richmond’s argument reflects the idea, recognized cross-culturally, that “[t]he promise of ethical conduct is one reason why governments grant a monopoly over legal services to legal professions.”⁴⁰ Richmond’s argument also accepts as a given the need for professional independence.⁴¹ “An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”⁴²

Nevertheless, questions can be raised about whether a duty to report misconduct is a “fundamental” pillar of legal ethics, as some courts have suggested.⁴³ By far, clients, former clients, and other nonlawyers file more grievances than do lawyers.⁴⁴ Even absent reporting by lawyers, there would be an almost endless supply of grist for the disciplinary mill. Lawyers could still devote, with great purpose and effect, a huge amount of time to sorting out allegations of misconduct as members of grievance committees or as disciplinary special prosecutors.⁴⁵ Indeed, whatever time lawyers now spend policing the ranks of the profession is devoted largely to

38. Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 175 (1999).

39. *Id.* at 175–76.

40. Andrew Boon, *Legal Ethics*, in 1 ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES 503 (David S. Clark ed., 2007).

41. Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 175 (1999).

42. OHIO RULES OF PROF'L CONDUCT pmb1. § 11 (2011), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf>.

43. See *In re* Ethics Advisory Panel Op. No. 92-1, 627 A.2d 317, 318–19 (R.I. 1993) (characterizing the duty to report as a “fundamental ethical obligation[] of [lawyers] engaged in the practice of law”); see also Ohio Bd. of Comm’rs on Grievances & Discipline, Informal Op. 001 (2007), available at 2007 WL 1232241 (describing the duty to report misconduct as a “solemn responsibility of the legal profession”).

44. See Tim Strauch, *Busy Beginning for Discipline Counsel*, 28 MONT. LAW., Apr. 2003, at 10, 10 (stating that in Montana, during calendar year 2002, “[c]lients or ex-clients filed about 75 percent of all complaints. Opposing counsel filed about 8 percent, while opposing parties filed about 7 percent. Third parties or other non-categorized complainants made up the remaining 10 percent”).

45. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.2, at 85 (Practitioner’s ed. 1986) (discussing volunteer lawyers investigating and prosecuting misconduct).

the resolution of charges initiated by nonlawyers.

Moreover, while lawyers may be best able to spot certain types of misconduct, particularly ethics violations of a technical variety such as impermissible conflicts of interest, it seems likely that clients have no trouble identifying the most common bases for discipline such as neglect, abusive fee arrangements, and mishandling of funds and property.⁴⁶ Clients are now far better informed than at any point in the past about their right to file a grievance and, to that extent, are more likely to do so. Information about resolving disputes with lawyers is readily available on the Internet,⁴⁷ and, in some states, clients are squarely advised about their rights. For example, in Texas, lawyers have a statutory obligation to disclose the availability of a grievance process to clients via brochures or signs posted in the lawyer's place of business, or by including language in the lawyer-client contract or in bills for legal services.⁴⁸

Doubts about the importance of the mandatory reporting rule are also raised by broad exceptions to the duty, discussed below, and by the uncertain contours of the reporting obligation. As Professor Crystal has asserted—in terms which many law students studying the rule would likely agree—“the precise scope of [the duty to report] is remarkably vague.”⁴⁹ Finally, even before 1969, when mandatory reporting requirements were first promulgated, lawyers played an important role in professional self-regulation.⁵⁰ Presumably, the same is true today in California, Georgia,

46. See Justice Edward Kinkeade, *The Top Ten Reasons Clients File Grievances Against Their Lawyers*, 5 TEX. WESLEYAN L. REV. 35, 35–38 (1998) (listing neglect, termination-related errors, and mishandling of client funds as the top three reasons); *Attorney Discipline 101*, 70 TEX. B.J. 866, 867 (2007) (indicating, in Texas, during 2006–2007 the “most common allegations were neglect, failure to communicate, and complaints about the termination or withdrawal of representation”).

47. For example, on the first page of the Texas State Bar website, in the first frame, under a heading that states “For the Public,” there is a starred link that reads: “Complaints against a lawyer? Get information on the process.” STATE BAR OF TEX., <http://www.texasbar.com> (last visited May 9, 2011).

48. TEX. GOVT. CODE ANN. § 81.079(b) (West 2010).

49. Nathan M. Crystal, *Professionalism and Reporting Misconduct of Other Lawyers*, 20 S.C. LAW., July 2008, at 8, 8; see also Nikki A. Ott & Heather F. Newton, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747, 750 (2003) (describing the reporting rule as “rife with vague standards”).

50. See generally Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343 (2008) (recounting in detail the history of American legal ethics from the early nineteenth century to early twenty-first century).

and Washington where, as noted, reporting is not mandatory.⁵¹

However, even if requiring lawyers to report misconduct is not a *sine qua non*⁵² of professionalism, it is certainly consistent with the pursuit of high ethical standards. When retired United States Supreme Court Justice Tom C. Clark headed the American Bar Association committee,⁵³ whose report ultimately proved pivotal to the reform of lawyer disciplinary systems nationwide,⁵⁴ the Clark Committee identified the reluctance of lawyers to report misconduct as a serious deficiency⁵⁵ that contributed to a “scandalous” state of affairs in the field of lawyer self-regulation.⁵⁶ Not only did the Clark Report call for sanctions to be imposed “in appropriate circumstances[] against attorneys and judges who fail to report attorney misconduct,”⁵⁷ but Justice Clark personally led by example. “While chairing the ABA Special Committee, Justice Clark received a complaint from a layperson about an attorney who allegedly acted unethically in connection with the settlement of a case and disbursement of funds.”⁵⁸ Within eight days that letter was “forwarded to the appropriate local grievance committee [o]n behalf of Justice Clark.”⁵⁹

Yet even when the importance of lawyer reporting of professional misconduct is acknowledged, it is clear that the current version of the relevant disciplinary rule usually imposes a duty to report only in a narrow range of cases. The contours of the obligations imposed by the rule are discussed below.

51. See *supra* Part I (detailing the respective lack of a reporting requirement).

52. “An indispensable condition or thing; something on which something else necessarily depends.” BLACK’S LAW DICTIONARY 1511 (9th ed. 2009) (defining “*sine qua non*”).

53. See generally MIMI CLARK GRONLUND, SUPREME COURT JUSTICE TOM C. CLARK: A LIFE OF SERVICE 249–52 (2009) (discussing the Clark Committee), reviewed by Vincent R. Johnson, Book Review, 56 FED. LAW., Dec. 2009, at 76.

54. See Vincent R. Johnson, *Justice Tom C. Clark’s Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 39 (2005) (describing how Justice Clark’s efforts catalyzed more than three decades of reform in the area of lawyer professional responsibility).

55. See ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS & RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 167 (Final Draft 1970) (hereinafter “Clark Report”) (recommending “[g]reater emphasis in . . . continuing legal education courses on the individual attorney’s responsibility to assist the profession’s efforts to police itself by reporting instances of professional misconduct”).

56. *Id.* at 1.

57. *Id.* at 167.

58. See Vincent R. Johnson, *Justice Tom C. Clark’s Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 58–59 (2005).

59. *Id.* at 59 & n.165 (alteration in original) (citation omitted).

B. *The Knowledge Requirement*

The first significant limitation on the duty to report lawyer misconduct is the knowledge requirement. A duty is triggered by the facts of a case only when a lawyer “knows” of a serious violation of the ethics rules.⁶⁰

According to the terminology section of the Model Rules, the word “‘knows’ denotes actual knowledge,” and “[a] person’s knowledge may be inferred from [the] circumstances.”⁶¹ However, the import of this definition is far from clear. Presumably, “actual knowledge” must be distinguished from “constructive knowledge.”⁶² Even if that is so, it is also true that courts, ethics committees, and commentators have struggled with the meaning of the knowledge requirement as it relates to mandatory reporting. One court found that the range of theoretical possibilities stretched “‘any information,’ [on the one hand,] to [the type of] ‘personal knowledge’ sufficient to qualify one as a witness under . . . rules of evidence,” on the other hand.⁶³

1. Mere Possibility

All authorities agree that “knowledge” entails more than a hunch, a feeling,⁶⁴ or a suspicion.⁶⁵ They also agree that absolute certainty is not required. However, something approaching certainty seems to be essential.⁶⁶ There must be, at a minimum, “objective facts that are likely

60. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2010).

61. *Id.* R. 1.0(f).

62. *Black's Law Dictionary* explains that “actual knowledge” means “[d]irect and clear knowledge, as distinguished from constructive knowledge <the employer, having witnessed the accident, had actual knowledge of the worker's injury>.” BLACK'S LAW DICTIONARY 950 (9th ed. 2009). “Constructive knowledge” is defined as: “Knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person <the court held that the partners had constructive knowledge of the partnership agreement even though none of them had read it>.” *Id.*

63. *Att'y U v. Miss. Bar*, 678 So. 2d 963, 964 (Miss. 1996).

64. See Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 13 (2004), available at 2004 WL 3413897 (“Sometimes one has a visceral reaction to conduct that produces a ‘feeling’ that the conduct ought to be reported. That is a reasonable starting point for sorting things out. But it is not enough.”).

65. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. i (2000) (“Knowledge is assessed on an objective standard. It includes more than a suspicion that misconduct has occurred, and mere suspicion does not impose a duty of inquiry.”); see also S.C. Bar Ethics Advisory Comm., Op. 04 (2005), available at 2005 WL 483384 (opining that a mere “suspicion of double-billing, without other corroborating evidence, does not constitute knowledge”).

66. Cf. SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW:

to have evidentiary support.”⁶⁷ However, a mere possibility, or even a likelihood, that a violation occurred falls short of establishing “knowledge.” The fact that another lawyer “probably committed malpractice” is too uncertain to create a duty to report.⁶⁸

In discussing “knowledge” in the context of the duty to disclose fraud to an opposing party, an ethics committee in Philadelphia wrote: “Although the inquirer is in possession of an expert witness opinion that it is ‘likely’ that fraud of some type has been committed, the Committee doubts that an opinion from a non-lawyer expert that fraud is ‘likely’ rises to the level of ‘actual knowledge’ that the Rule requires.”⁶⁹ Then, turning to the related duty to report misconduct to disciplinary authorities, the committee further opined that, in light of the demands of the “knowledge” requirement, “any uncertainty as to whether there has been fraud, compounded with the inquirer’s assessment that it is only ‘possible’ that opposing counsel either purposefully or negligently failed to report that fraud, relieves the inquirer of any obligation to inform the Disciplinary Board.”⁷⁰

Similarly, an ethics committee in South Carolina illustrated the strict conditions of the knowledge requirement while discussing whether a lawyer (Jane) had a duty to report suspected double-billing by another lawyer (John) who did unrelated work while attending a deposition.⁷¹ The committee wrote:

[E]ven if Attorney John made the statement about billing 15 hours in one day, Attorney Jane would still have no actual knowledge of a violation, and therefore, would not be required to report. Attorney Jane has no “firm knowledge” of Attorney John’s schedule, or whether his statement reflects

PROBLEMS AND PREVENTION 122 (2007) (stating that “[k]nowledge” in the law of torts means a state of mind indicating that a result is ‘substantially certain’ to occur” and discussing how knowledge can be proven circumstantially); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 41 (4th ed. 2009) (emphasizing that knowledge requires “substantial certainty” and that “[w]hile substantial certainty does not mean absolute certainty, it means certainty for all practical purposes”). See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §1 (2010) (discussing knowledge).

67. Tex. Comm. on Prof'l Ethics, Op. 520, 60 TEX. B.J. 490 (1997).

68. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 08 (1997), available at 1997 WL 103495.

69. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 07 (2005), available at 2005 WL 5544951.

70. *Id.*

71. S.C. Bar Ethics Advisory Comm., Op. 04 (2005), available at 2005 WL 483384.

anticipated time to be spent during the evening or already spent on early morning work.⁷²

Likewise, an Illinois ethics committee found that there was no duty to report a lawyer's failure to segregate or pay over funds belonging to a third person.⁷³ It reasoned: "Although keeping the money after its ownership has clearly been established may raise a strong suspicion of the intent to permanently deprive, these facts [are] insufficient to establish knowledge of lawyer theft."⁷⁴

An ethics committee in Philadelphia addressed the issue of whether lawyers handling a legal malpractice case had a duty to report misconduct by the malpractice defendant related to the improper execution of a client's name on documents.⁷⁵ It wrote:

It is important that Rule 8.3(a) addresses actual knowledge of misconduct and not suspect[ed] misconduct. As such, since you do not have any actual knowledge that any attorney at the defendant law firm had any knowledge of its employees' conduct with respect to the signing and notarization of the Release and Trust Agreement, you are not required . . . to report these facts to the Disciplinary Board.⁷⁶

2. Second-Hand Information

"Second-hand" knowledge is unlikely to trigger a duty to report. Thus, an Illinois ethics committee opined that "the obligation to report misconduct under Rules 8.3 and 8.4 would not likely be triggered by reports [of lawyer misconduct] read in a newspaper."⁷⁷

In Virginia, the reporting rule is triggered by a lawyer having "reliable information" rather than "knowledge."⁷⁸ Presumably, in that state, some second-hand information might be deemed reliable, and other second-hand information not reliable.

72. *Id.*

73. Ill. Jud. Ethics Comm., Op. 01-04 (2002), *available at* 2002 WL 127195.

74. *Id.*

75. Phil. Bar Ass'n Prof'l Guidance Comm., Op. 03 (1997), *available at* 1997 WL 428087.

76. *Id.* (citations omitted).

77. Ill. State Bar Ass'n., Op. 91-19 (1992), *available at* 1992 WL 754617.

78. VA. RULES OF PROF'L CONDUCT R. 8.3(a) (West 2010).

3. Substantial Certainty or Firm Opinion

Although there are illustrations to the contrary,⁷⁹ bar association ethics committees have often articulated the knowledge requirement in demanding terms, stating that what is required is: a “substantial degree of certainty,”⁸⁰ “substantial basis,”⁸¹ “facts that clearly establish,”⁸² “clear belief,”⁸³ or “firm knowledge.”⁸⁴ This is not surprising because, as various writers have noted, “accusing another lawyer of misconduct is a serious matter that should not be undertaken lightly.”⁸⁵ Reflecting the gravity of charging another lawyer with wrongdoing, a Connecticut ethics opinion cautioned:

[O]ne should be clear about what one “knows.” . . . [O]ne should (a) take Rule 1.6 [(client confidentiality)] into account; (b) have a clear understanding of the specific conduct in question, including giving consideration to the available evidence; (c) identify other applicable rules; (d) be able to articulate how the conduct violates the rules; and then (e) decide whether the conduct raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness to practice law in other respects The goal is

79. For example, a North Carolina ethics opinion appears to have endorsed a “reasonably believes” standard. See N.C. State Bar, Formal Op. 2 (2009), available at 2009 WL 1425513 (“If, after communicating with John Doe, buyer/borrower’s counsel reasonably believes that John Doe is knowingly assisting the title company in the unauthorized practice of law, and plans to continue participating in such conduct, buyer/borrower’s counsel must report John Doe to the State Bar.”). However, an earlier decision of the same committee spoke in more demanding terms. See N.C. State Bar, Formal Op. 2 (2003), available at 2003 WL 24306941 (stating that “reporting to the State Bar is not required unless a lawyer has knowledge of an actual violation of the Rules of Professional Conduct”); see also Conn. Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 33 (1997), available at 1997 WL 816054 (opining that “if on the basis of the facts . . . , coupled with your experience, it is reasonable for you to infer, and you do infer, that plaintiff’s lawyer has engaged in conduct which violates the Rules . . . , then you have knowledge”); La. State Bar Ass’n Rules of Prof’l Conduct Comm., Op. 010 (2006), available at <http://www.lsba.org/DocumentIndex/EthicOpinions/06-010RPCCPublication.pdf> (stating that the “knowledge” requirement is satisfied if “a reasonable lawyer could infer that improper behavior more than likely occurred”).

80. Me. Prof’l Ethics Comm’n, Op. 100 (1989), available at http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_oversers_ethics_opinions&cid=91501&v=article.

81. N.M. Ethics Advisory Comm., Formal Op. 08 (1988), available at <http://www.nmbar.org/legalresearch/eao/1988/1988-8.doc>.

82. N.Y.C. Ass’n of the Bar Comm. on Prof’l & Jud. Ethics, Formal Op. 03 (1990), available at <http://www.abcnyc.org/Ethics/eth1990-3.htm>.

83. D.C. Bar, Op. 246 (1994), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion246.cfm; see also S.C. Bar Ethics Advisory Comm., Op. 13 (2002), available at 2002 WL 31452387 (stating that the South Carolina reporting rule “requires actual knowledge of, or believing clearly that there has been a violation”).

84. S.C. Bar Ethics Advisory Comm., Op. 04 (2005), available at 2005 WL 483384.

85. *Id.* (citing S.C. Bar Ethics Advisory Comm., Op. 13 (2002)).

to reach an objective, independent judgment consistent with one's obligations to one's client.⁸⁶

A Pennsylvania ethics opinion took a similarly demanding position. In determining whether there is a duty to report, it advised a lawyer that “[k]nowledge may be inferred from circumstances[; however,] you must point to a specific Rule that you believe has been violated.”⁸⁷ The committee opined that on the given facts the lawyer had no obligation to report a suspected conflict of interest.⁸⁸ The committee wrote:

After consultation with his clients, both consented to the attorney's double representation. To report a violation now you should have reliable information to show that the lawyer's double representation will adversely affect his relationship with one or both of his clients.

From our neutral position you appear to have a high and probably an unsustainable burden.⁸⁹

In Maine, a lawyer representing a client in a legal malpractice case requested an ethics opinion because his client strongly contended that at least one of three documents executed by his former lawyer was fraudulently prepared.⁹⁰ Because the client's new lawyer did “not share his client's conviction” that the malpractice defendant was guilty of fraud, the committee found that the lawyer lacked “knowledge” and therefore had no obligation to report misconduct.⁹¹

a. Undisputed Documentary Evidence

In some cases, a lawyer's knowledge of undisputed documentary evidence may provide a basis for concluding that the lawyer knew with substantial certainty, or must have had a firm opinion, that another lawyer

86. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 13 (2004), *available at* 2004 WL 3413897 (last alteration in original) (footnote & citation omitted); *see also* N.Y.C. Ass'n of the Bar Comm. on Prof'l & Jud. Ethics, Formal Op. 03 (1990), *available at* <http://www.abcny.org/Ethics/eth1990-3.htm> (indicating that “a lawyer must be in possession of facts that clearly establish a violation of one or more Disciplinary Rules by another lawyer before an obligation [to report] arises”).

87. Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 40 (1997), *available at* 1997 WL 816643.

88. *Id.*

89. *Id.*

90. Me. Prof'l Ethics Comm'n, Op. 100 (1989), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=91501&cv=article.

91. *Id.*

violated applicable disciplinary rules. Presumably, this would be true where documents show that a lawyer entered into an agreement under which the amount of the lawyer's fee was contingent on the sum of alimony awarded in a divorce⁹² or which gave the lawyer sole authority to accept or reject settlement offers.⁹³

Similarly, suppose that replacement counsel discovers that predecessor counsel falsified answers to interrogatories, and then amends the answers, but does not report the initial lawyer's misconduct to disciplinary authorities. The relevant documentary evidence would appear to prove indisputably that the lawyer knew of predecessor counsel's serious misconduct.⁹⁴

b. Uncontroverted Versus Disputed Evidence

If the evidence of a lawyer's misconduct is clear and uncontroverted, or acknowledged by the lawyer in question,⁹⁵ as by the signing of an affidavit verifying the receipt of a previously undisclosed improper finder's fee,⁹⁶ it is easier to conclude that an expert with knowledge of that evidence has a duty to report the information to disciplinary authorities. In contrast, if the evidence of misconduct is circumstantial, uncorroborated,⁹⁷ or contested, it is less likely that the expert has the firm belief that is a

92. See MODEL RULES OF PROF'L CONDUCT R. 1.5(d) (2010) ("A lawyer shall not enter into an arrangement for, charge, or collect . . . any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof . . .").

93. See *id.* 1.2(a) ("A lawyer shall abide by a client's decision whether to settle a matter."); *id.* R. 1.4 cmt. 2 (providing that, with limited exceptions, "a lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance"). "Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement . . ." *Id.* R. 1.8 cmt. 13.

94. See 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 64.5, illus. 64-2, at 64-16 (3d ed. Supp. 2009) (opining, on similar facts, that "Lawyer B obviously knew of Lawyer A's violation, because he was the one who discovered it").

95. S.C. Bar Ethics Advisory Comm., Op. 04 (2005), available at 2005 WL 483384 (expressing the view that an earlier ethics opinion of the same committee correctly held that where the offending lawyer acknowledged contacting a represented person, in violation of applicable ethics rules, there was a duty to report the misconduct).

96. See Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 173 (1995), available at 1996 WL 928112 (involving such an affidavit).

97. Cf. S.C. Bar Ethics Advisory Comm., Op. 04 (2005), available at 2005 WL 483384 (indicating that uncorroborated suspicion of double-billing did not constitute knowledge of misconduct, even though the lawyer in question observed another lawyer doing unrelated work during a deposition and filling in a time sheet).

necessary predicate for reporting to be mandatory.

In *Attorney U v. Mississippi Bar*,⁹⁸ the Supreme Court of Mississippi concluded that there was no duty to report misconduct on the facts of the case.⁹⁹ The court reasoned as follows:

The circumstances under consideration here reflect that U's client told him of an arrangement which appeared to be fee splitting. The record tells us nothing concerning corroboration of the client's story or of the client's trustworthiness. The other party to the purported arrangement denies that it existed. These circumstances do not dictate a firm opinion on the part of a reasonable lawyer that the conduct in fact occurred.¹⁰⁰

c. Objective Versus Subjective Standard

The *Restatement (Third) of the Law Governing Lawyers* provides that “[k]nowledge is assessed on an objective standard.”¹⁰¹ According to the *Restatement* commentary, “[k]nowledge exists in an instance in which a reasonable lawyer in the circumstances would have a firm opinion that the conduct in question more likely than not occurred.”¹⁰² The circumstances may be such that, despite the lawyer's protestations to the contrary, “a disciplinary authority will infer that [a] lawyer *must* have known.”¹⁰³ Various courts have embraced the “firm opinion” standard.¹⁰⁴

For example, in *In re Riehlmann*,¹⁰⁵ the Supreme Court of Louisiana summarized the law as follows:

[I]t is clear that absolute certainty of ethical misconduct is not required before the reporting requirement is triggered. The lawyer is not required to conduct an investigation and make a definitive decision that a violation has

98. *Att'y U v. Miss. Bar*, 678 So. 2d 963 (Miss. 1996).

99. *Id.* at 972.

100. *Id.*

101. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. i (2000); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 433 (2004) (“Most cases and ethics opinions conclude that ‘knowledge’ is determined by an objective standard.”).

102. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. i (2000).

103. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 402, Intro. at 26 (2d ed. Supp. 1998).

104. *See Att'y U*, 678 So. 2d at 972 (holding that a lawyer did not have before him evidence that would have caused a reasonable lawyer to form a firm opinion that another lawyer had entered into an improper fee agreement, and therefore there was no violation of the reporting rule).

105. *In re Riehlmann*, 891 So. 2d 1239 (La. 2005).

occurred before reporting; that responsibility belongs to the disciplinary system and this court . . . [R]eporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred.¹⁰⁶

The *Restatement* and cases like *In re Riehlmann* are correct in emphasizing the importance of objective evidence in determining what the reporting attorney knew. The fact that a reasonable lawyer would have known that there was serious misconduct provides a basis for concluding that the lawyer in question *must have known* of the misconduct.

However, viewed from the perspective of the Model Rules of Professional Conduct and similar state provisions, *Riehlmann* was wrong in stating that “knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question.”¹⁰⁷ The language in the Model Rules, and similar standards, requires “knowledge,” which is defined as “actual knowledge.”¹⁰⁸ The Model Rules do not purport to impose a reporting duty on a lawyer who merely *should have known* that another lawyer engaged in serious misconduct. The relevant inquiry is ultimately subjective, not objective. The question is what the lawyer who failed to make the report *knew*, not what some hypothetical, reasonably prudent, lawyer *would have known* or *should have known*.

In some cases, it will make a difference whether the standard is framed subjectively, rather than objectively. For example, even if there is documentary evidence of another lawyer’s serious violation of applicable disciplinary rules, there is a duty to report that misconduct only if the lawyer in question realizes what the evidence means. A lawyer who can convince a disciplinary tribunal that he or she never read the documentary evidence, or never appreciated that its terms⁵⁵⁰ were unethical, should not be found to have violated a reporting standard that requires actual knowledge.

The relevance of objective evidence to the subjective inquiry into actual knowledge is sometimes framed in terms of whether a lawyer pursued a

106. *Id.* at 1247.

107. *Id.*

108. See MODEL RULES OF PROF’L CONDUCT R. 1.0(f) (2010) (defining knowledge); *id.* R. 8.3(a) (referring to Rule 1.0).

course of deliberate ignorance. For example, an American Bar Association ethics committee touched on the issue of objectivity in an opinion stating that “[a] lawyer who believes that another lawyer’s mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer’s consequent violation of Rule 1.16(b)(2), which requires that she withdraw from the representation of clients.”¹⁰⁹ Addressing the issue of whether a lawyer has knowledge of such misconduct, the committee explained that even though lawyers are not mental health professionals, “a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment.”¹¹⁰ In a related vein, a New York City ethics committee noted that “[s]tudious ignorance of readily accessible facts is . . . the functional equivalent of knowledge.”¹¹¹

C. “Honesty, Trustworthiness, or Fitness”

There is only a duty to report misconduct that is sufficiently serious that the “profession must vigorously endeavor to prevent” it.¹¹² Thus, the relevant Model Rule says that there must be a “substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”¹¹³ According to the official comment, the Model Rule uses the term “substantial” to refer to “the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.”¹¹⁴ Numerous state ethics codes contain similar language. Moreover, as explained by a Philadelphia ethics committee, in language which the Model Rules use,¹¹⁵ “[t]he term ‘substantial’ denotes a material matter of clear and weighty importance.”¹¹⁶

According to an American Bar Association ethics opinion, “It generally is agreed that reporting under . . . [Model Rule 8.3] is required only when

109. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 431 (2003).

110. *Id.*

111. N.Y.C. Ass'n of the Bar Comm. on Prof'l & Jud. Ethics, Formal Op. 003 (1990), available at <http://www.abcnyc.org/Ethics/eth1990-3.htm>.

112. MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (2010).

113. *Id.* R. 8.3.

114. *Id.* R. 8.3 cmt. 3.

115. See, e.g., *id.* R. 1.0(l) (defining “substantial”).

116. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 07 (2005), available at 2005 WL 5544951.

the conduct in question is *egregious*.”¹¹⁷ However, a South Carolina ethics committee applied a looser standard, suggesting that actions indicating disloyalty were “substantial because [that] conduct constitutes *more than a mere technical violation* of the Rules of Professional Conduct.”¹¹⁸

1. Raising a “Substantial Question”

“A ‘substantial’ violation of the rules alone is not enough [to make reporting mandatory]; the violation must be of such a nature that the conduct raises a ‘substantial’ question about the fitness of the offending lawyer to carry out his professional role.”¹¹⁹

Thus, a lawyer may have no duty to make a report to disciplinary authorities either because another lawyer’s act or omission does not amount to misconduct¹²⁰ or because, though constituting misconduct, it does not raise a substantial question about honesty, trustworthiness, or fitness. For example, an ethics committee in North Carolina was asked to address whether there was a duty to report that a lawyer had submitted to a court a brief that “contained eight pages, verbatim, from an appellate brief previously drafted and filed” by another lawyer in a different firm in an unrelated case.¹²¹ The committee opined that reporting was not necessary, reasoning that, because “[u]pon filing with a court, a brief enters the public domain,” there was no misconduct.¹²² The committee did not need to reach the question of whether the alleged misconduct was sufficiently serious that notification of disciplinary authorities was mandated. Presumably, if the committee had found the use of the unattributed material constituted misconduct, the infraction would have

117. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 453 (2008) (emphasis added).

118. S.C. Bar Ethics Advisory Comm., Op. 15 (2002), *available at* 2002 WL 31717779 (emphasis added).

119. Conn. Bar Ass'n. Comm. on Prof'l Ethics, Informal Op. 04 (2001), *available at* 2001 WL 694583 (quoting 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 8.3:201, at 945 (2d ed. Supp. 1996)).

120. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 429 (2003) (“No obligation to report exists under Rule 8.3(a) if the impairment [of a lawyer who left the firm] has not resulted in a violation of the Model Rules.”).

121. N.C. State Bar, Formal Op. 14 (2008), *available at* 2009 WL 435074.

122. *Id.*

reflected on the user's honesty, and there would have been a duty to report the misconduct.

An Ohio ethics opinion took the position that “[i]f a lawyer has doubts as to whether misconduct raises questions as to honesty, trustworthiness, or fitness as a lawyer, he or she should err on the side of reporting.”¹²³ However, the same opinion also said that “[a] mere suspicion of misconduct need not be reported. Actual knowledge is the standard.”¹²⁴ Thus, the opinion seems to endorse the idea that, in determining whether there is a duty to report, doubts about whether an ethics rule was violated are more significant than doubts about what the violation says regarding the alleged violator's character and fitness.

For the purpose of emphasizing that only important varieties of misconduct need to be reported, Michigan has inserted the word “significant” before “violation” in its reporting rule.¹²⁵ Thus, the rule provides that there is a duty to report only if “another lawyer has committed a *significant* violation of the Rules of Professional Conduct that raises a *substantial* question as to that lawyer's honesty, trustworthiness, or fitness.”¹²⁶

In contrast, Kansas has potentially broadened the reporting obligation—or perhaps made reporting simply a matter of personal discretion—by dispensing with the usual “misconduct” and the “substantial question” requirements.¹²⁷ The Kansas rule states: “A lawyer having knowledge of any action, inaction, or conduct[,] *which in his or her opinion constitutes misconduct* of an attorney under these rules[,] shall inform the appropriate professional authority.”¹²⁸

a. Examples

The Ohio ethics opinion mentioned above declined to list all of the types of misconduct that would serve as the predicate for a duty to report. Rather, the opinion simply noted that “[a] review of disciplinary cases will

123. Ohio Bd. of Comm'rs on Grievances & Discipline, Informal Op. 001 (2007), *available at* 2007 WL 1232241.

124. *Id.*

125. MICH. RULES OF PROF'L CONDUCT R. 8.3(a) (2010).

126. *Id.* (emphasis added).

127. KAN. RULES OF PROF'L CONDUCT R. 8.3(a) (2010).

128. *Id.* (emphasis added).

provide ample guidance as to the types of misconduct that raise a question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer to the level of reporting."¹²⁹ Presumably, that category includes such things as misuse of client funds or property,¹³⁰ misconduct that resulted in significant harm to a client,¹³¹ serious criminal¹³² or fraudulent¹³³ conduct, and improper manipulation of legal processes. The last-named subcategory would likely include knowingly filing a backdated motion,¹³⁴ falsely

129. Ohio Bd. of Comm'rs on Grievances & Discipline, Informal Op. 001 (2007), *available at* 2007 WL 1232241.

130. *Cf.* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.3, at 64-6 (3d ed. Supp. 2009) (opining that "self-dealing with trust funds" would require reporting); *id.* § 64.8, at 64-20 (indicating that "misappropriation of a client's funds . . . is obviously a serious violation" of professional standards).

131. *Cf.* FLA. RULES OF PROF'L CONDUCT R. 3-5.1(b)(1)(B) (2010) (stating that, in the context of disciplinary sanctions, conduct is not minor if "the misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights, or valuable property rights) to a client or other person").

132. *See* MASS. RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (2010) (addressing this point in detail). A comment to the Massachusetts reporting rule provides:

[A] lawyer must report misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including misconduct that would constitute a "serious crime" as defined in S.J.C. Rule 4:01, § 12(3). Precedent for determining whether an offense would warrant suspension or disbarment may be found in the Massachusetts Attorney Discipline Reports. Section 12(3) of Rule 4:01 provides that a serious crime is "any felony, and . . . any lesser crime a necessary element of which . . . includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another to commit [such a crime]." In addition to a conviction of a felony, misappropriation of client funds or perjury before a tribunal are common examples of reportable conduct.

Id. (alterations in original); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 433 (2004) (opining that "[e]ven criminal conduct that is arguably minor or personal may be found to" adversely reflect on a lawyer's honesty, trustworthiness, or fitness (internal quotation marks omitted)); *cf.* N.C. RULES OF PROF'L CONDUCT R. 1.15-2(o) (2010) ("A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar.").

133. *See* Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 20 (1996), *available at* 1996 WL 785137 (finding that an associate had a duty to report another associate's fraudulent alteration of billing statements); 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.4, at 64-11 (3d ed. Supp. 2009) (indicating this would be true even if the criminal or fraudulent conduct is unrelated to provision of legal services, as in the case of personal tax fraud or illegal securities transactions).

134. *See* Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 04 (2001), *available at* 2001 WL 694583 (asserting that a lawyer with knowledge of such a violation has a duty to report that misconduct).

witnessing a deed, either personally¹³⁵ or by ordering or ratifying the conduct of another;¹³⁶ improperly redacting a medical report to conceal unfavorable information;¹³⁷ destroying evidence under subpoena;¹³⁸ bribing witnesses;¹³⁹ and suborning perjury.¹⁴⁰

However, the duty to report is not limited to such clear instances of wrongdoing. Illustratively, courts or committees have determined that there was a duty to report such diverse infractions as assisting a client to file a pro se pleading in a jurisdiction where the lawyer was not licensed,¹⁴¹ disclosure of the terms of a confidential settlement agreement,¹⁴² and misuse of client information.¹⁴³ A South Carolina ethics committee found that “neglect of a client matter may be sufficient to raise a substantial question as to fitness, even though the neglect [does] not result in any actionable injury to the client.”¹⁴⁴

135. See Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 30 (1997), *available at* 1997 WL 816051 (1997) (stating there is a duty to report misconduct by a lawyer who executes an acknowledgment on a deed even though he is not present at the signing or by using his wife's name).

136. See Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 10 (1998), *available at* 1998 WL 993680 (opining that there is a duty to report misconduct by a lawyer who supervises a nonlawyer assistant's false signing of a deed).

137. See Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 33 (1997), *available at* 1997 WL 816054 (requiring disclosure).

138. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.3, at 64-6 (3d ed. Supp. 2009).

139. See N.M. Ethics Advisory Comm., Formal Op. 8 (1988), *available at* <http://www.nmbar.org/legalresearch/eao/1988/1988-8.doc> (concluding “that knowledge of an attempt by an attorney to influence testimony of witnesses in a legal proceeding, including an arbitration proceeding, by offer of monetary reward, meets the seriousness requirement” of the reporting rule).

140. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.3, at 64-6 (3d ed. Supp. 2009).

141. See Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 11 (2002), *available at* 2002 WL 32078007 (finding that the conduct violated Pennsylvania Rule of Professional Conduct 5.5, which prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law).

142. See S.C. Bar Ethics Advisory Comm., Op. 15 (2002), *available at* 2002 WL 31717779 (suggesting that the disclosure violated state ethics rules 8.4(d), “conduct involving dishonesty, fraud, deceit or misrepresentation,” and 8.4(e), “conduct that is prejudicial to the administration of justice”).

143. See *id.* (finding a violation of state ethics Rules 1.6 (addressing confidentiality) and 1.8(b), (dealing with use of information to the disadvantage of a client)).

144. S.C. Bar Ethics Advisory Comm., Op. 13 (2002), *available at* 2002 WL 31452387 (finding that if “Attorney A has knowledge that Attorney B has violated Rules 1.1 [(competence)] and 1.16 (a)(2) [(duty to withdraw)] due to a medical condition materially impairing the attorney's ability to represent a client or clients, and the violations raise a substantial question as to Attorney B's fitness as a lawyer, Attorney A shall inform the appropriate professional authority”).

b. Narrower and Broader Rules

A few states have adopted a narrow definition of the kinds of misconduct that must be reported. For example, in Illinois, lawyers are required to “report other lawyers only for specific types of misconduct, [that is,] certain crimes, fraud, deceit, and misrepresentation.”¹⁴⁵ An ethics committee found that this provision meant there was no duty to report the failure of a lawyer to segregate or pay over a referral fee that belonged to a bar association.¹⁴⁶

Louisiana has omitted the word “substantial” from its rule, which provides that there is an obligation to report misconduct that simply “*raises a question* as to the lawyer’s honesty, trustworthiness or fitness.”¹⁴⁷ By deleting the word “substantial,” the Louisiana rule imposes a “more expansive” reporting obligation than Model Rule 8.3.¹⁴⁸

2. One-Time Transgressions

Whether a one-time transgression needs to be reported depends on the severity of the infraction. Presumably, the issuance of a single erroneous billing statement need not be reported, provided that the amount of the discrepancy is modest. In contrast, consistent overbilling of a client “is serious enough to call into question [a lawyer’s] honesty, trustworthiness, and fitness,” and therefore needs to be reported.¹⁴⁹

An ethics committee in Texas reasoned that it is not necessary to report to disciplinary authorities a single instance in which another lawyer in the same firm gave a client clearly negligent advice, because a “mistake or isolated incident of negligent legal services” did not raise a substantial

145. Ill. Jud. Ethics Comm., Op. 01-04 (2002), *available at* 2002 WL 127195. The Illinois reporting rule states that “[a] lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) [(“a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects”)] or Rule 8.4(c) [(“conduct involving dishonesty, fraud, deceit, or misrepresentation”)] shall inform the appropriate professional authority.” ILL. RULES OF PROF’L CONDUCT R. 8.3(a) (2010).

146. Ill. Jud. Ethics Comm., Op. 01-04 (2002), *available at* 2002 WL 127195.

147. LA. RULES OF PROF’L CONDUCT R. 8.3(a) (2010) (emphasis added).

148. La. State Bar Ass’n Rules of Prof’l Conduct Comm., Op. 010 (2006), *available at* <http://www.lsb.org/DocumentIndex/EthicOpinions/06-010RPCCPublication.pdf>.

149. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 64.7 illus. 64-3, at 64-18 (3d ed. Supp. 2009).

question about the lawyer's honesty, trustworthiness, or fitness.¹⁵⁰

Other authorities have reached similar conclusions.¹⁵¹ However, an ethics committee in South Carolina, considering issues related to improper contact with a represented person,¹⁵² concluded that “[e]ven a one-time violation must be reported if it falls under the guidelines” of the reporting rule.¹⁵³

The commentary to Model Rule 8.3 states: “An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”¹⁵⁴ This suggests that a one-time transgression needs to be reported. However, an ethics committee in Connecticut, addressing identical language in that state's code, downplayed its significance.¹⁵⁵ The committee wrote that “if the occurrence of ‘an apparently isolated violation’ were the standard for triggering a duty to report, lawyers would become full-time informers.”¹⁵⁶

3. “As a Lawyer”

Not everything done in a lawyer's private life implicates his or her fitness as a lawyer. This point was recognized by a Connecticut ethics committee that was asked to address whether there was a duty to report possible perjury by a lawyer in his divorce proceeding, which was later recanted by the lawyer at his second deposition. The committee wrote:

[T]he facts we have been asked to assume, which include correcting the record, do not *by themselves* raise a substantial question about the Deponent-

150. Tex. Comm. on Prof'l Ethics, Op. 523, 60 TEX. B.J. 971 (1997).

151. See SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 51 (2d ed. 2008) (“Less serious matters, such as a single act of incompetence or conflicts of interest that do not cause harm, have been found not to trigger the reporting requirement.”); 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 64.4, at 64-10 (3d ed. Supp. 2009) (suggesting that missing a filing date on one occasion would not likely raise a “substantial” question about a lawyer's honesty, trustworthiness, or fitness).

152. Cf. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010) (prohibiting communication about the subject matter of a lawyer's representation of a client with a person the lawyer knows to be represented by another lawyer).

153. S.C. Bar Ethics Advisory Comm., Op. 04 (2005), available at 2005 WL 483384 (citing S.C. Bar Ethics Advisory Comm., Op. 07 (1995)).

154. MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2010).

155. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 13 (2004), available at 2004 WL 3413897.

156. *Id.* (quoting MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2010)).

Lawyer's honesty, trustworthiness, or fitness *as a lawyer* in other respects. The Deponent-Lawyer's testimony raises questions about his honesty in his marriage and in the context of his divorce However, does the Deponent-Lawyer's testimony raise not merely a question but a *substantial* question about his fitness *to practice law*? . . . With no other information about the Deponent-Lawyer's conduct, it is impossible for us . . . to form a judgment about whether his testimony raises a substantial question about his fitness to practice. Sometimes—perhaps often—people behave quite differently during a hostile divorce than they do in other parts of their lives. And, in this case, the Deponent-Lawyer did correct the record without actually being confronted with evidence that forced him to do so.¹⁵⁷

An American Bar Association committee made essentially the same point in an ethics opinion addressing the question of whether there is a duty to report evidence of another lawyer's disability or impairment.¹⁵⁸ The committee wrote:

[K]nowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not itself enough to trigger a duty to report under Rule 8.3. A lawyer must know that the condition is materially impairing the affected lawyer's representation of clients.¹⁵⁹

Of course, some aspects of private life do reflect on a lawyer's fitness to represent a client. Thus, because "a lawyer's personal tax fraud and illegal securities transactions . . . involve serious dishonesty and untrustworthiness," they are subject to the duty to report.¹⁶⁰

To some extent, the inquiry into a lawyer's fitness to practice law requires an assessment of whether there is a reasonably foreseeable future threat of harm to clients. Reflecting this reality, a committee of the American Bar Association wrote, in an opinion addressing whether there is a duty to report impairment of a firm lawyer, as follows:

If the mental condition that caused the violation has ended, no report is required. Thus, if partners in the firm and the supervising lawyer reasonably believe that the previously impaired lawyer has resolved a short-term psychiatric problem that made the lawyer unable to represent clients competently and diligently, there is nothing to report.¹⁶¹

157. *Id.*

158. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 431 (2003).

159. *Id.*

160. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 64.4, at 64-11 (3d ed. Supp. 2009).

161. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 429 (2003).

D. *Disciplinary Statutes of Limitations*

In some jurisdictions, the duty to report misconduct by another lawyer is presumably limited by the fact that there is a disciplinary statute of limitations.¹⁶² For example, in Texas, the Rules of Disciplinary Procedure provide that:

No attorney licensed to practice law in Texas may be disciplined for Professional Misconduct occurring more than four years before the time when the allegation of Professional Misconduct is brought to the attention of the Office of Chief Disciplinary Counsel, except in cases in which disbarment or suspension is compulsory. Limitations will not begin to run where fraud or concealment is involved until such Professional Misconduct is discovered or should have been discovered in the exercise of reasonable diligence by the Complainant.¹⁶³

162. See, e.g., FLA. STAT. ANN BAR R. 3-7.16(a) (2011) (indicating that, with certain exceptions, “[i]nquiries raised or complaints presented by or to The Florida Bar . . . shall be commenced within 6 years from the time the matter giving rise to the inquiry or complaint is discovered or, with due diligence, should have been discovered”); N.M. STAT. ANN. R. 17-303 (2011) (“Except in cases involving theft or misappropriation, conviction of a crime, or a knowing act of concealment, no complaint . . . shall be considered by the board unless a written complaint is filed with or initiated by chief disciplinary counsel . . . within four (4) years from the time the complainant knew or should have known the facts upon which the complaint is filed.”); Ga. State Bar Rules & Regs., R. 4-222(a) (2011) (“No proceeding . . . shall be brought unless a Memorandum of Grievance has been received at State Bar of Georgia headquarters or instituted by the Investigative Panel within four years after the commission of the act. Provided, however, this limitation shall be tolled during any period of time, not to exceed two years, that the offender or the offense is unknown, the offender’s whereabouts are unknown, or the offender’s name is removed from the roll of those authorized to practice law in this State.”); Mo. Sup. Ct. Rules R. 5.085(a) (2011) (indicating that, with certain exceptions, “[i]nvestigations . . . may be undertaken only within five years after the chief disciplinary counsel knows or should know of the alleged acts of misconduct”); N.H. Sup. Ct. Rules R. 37A (2011) (providing, with numerous exceptions, that “no formal disciplinary proceedings shall be commenced unless a grievance is filed . . . within two (2) years after the commission of the alleged misconduct”); Pa. Disciplinary Bd. Rules § 85.10 (2011) (stating, with exceptions, that “[t]he Office of Disciplinary Counsel or the Board shall not entertain any complaint arising out of acts or omissions occurring more than four years prior to the date of the complaint”); W. Va. Lawyer Discipline R. 2.14 (2011) (“Any complaint filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Rules of Professional Conduct, shall be dismissed by the Investigative Panel.”); see also *In re David*, 651 S.E.2d 743, 745 (Ga. 2007) (finding a grievance barred by the state’s four-year statute of limitations). But see *In re Allison*, 481 S.E.2d 211, 215 (Ga. 1997) (holding that “where a victim or potential victim does not come forward within the four-year statute of limitation under the Bar Rules by filing a grievance against an attorney for misconduct under the professional standards, the State Bar may take advantage of the two-year tolling period” to initiate disciplinary proceedings).

163. TEX. RULES DISCIPLINARY P. R. 15.06, reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A-1 (West 2005). The sections in the Texas Rules of Disciplinary Procedure dealing

Similarly, a Colorado rule provides that:

A request for investigation against an attorney shall be filed within five years of the time that the complaining witness discovers or reasonably should have discovered the misconduct. There shall be no statute of limitations for misconduct alleging fraud, conversion, or conviction of a serious crime, or for an offense the discovery of which has been prevented by concealment by the attorney.¹⁶⁴

If the statute of limitations for discipline has elapsed, no purpose is served by imposing a mandatory duty to report misconduct to disciplinary authorities. Although no case or ethics opinion appears to have addressed this question, presumably the duty to report expires when the potential for discipline lapses. "*Cessante razione legis, cessat et ipsa lex.*"¹⁶⁵ Thus, a statute of limitations on discipline logically narrows the reporting duty.

Whether a disciplinary statute of limitations plays a role in interpretation and application of the mandatory reporting rule is of particular relevance to whether legal malpractice experts or litigators have a duty to report misconduct. Legal malpractice claims may arise from facts that occurred several years before, sometimes more than a decade earlier. Malpractice litigation then often takes years to run its course. If whatever duty a lawyer participating in the suit has to report misconduct does not arise until the litigation terminates, as suggested above¹⁶⁶ and discussed below,¹⁶⁷ it is entirely possible that the potential reporting duty expires before it ever comes to fruition.

However, not all states have disciplinary statutes of limitations.¹⁶⁸ Furthermore, in states with such provisions, like Texas, the pertinent statutory language may create great uncertainties.¹⁶⁹ Consider the Texas

with Compulsory Discipline (Part VIII) indicate that a lawyer shall be suspended during a term of probation for a "serious crime" (Rule 8.06) and disbarred when a conviction for an "intentional crime" becomes final and in other limited circumstances (Rule 8.05).

164. COLO. R. CIV. P. 251.32(i) (2011).

165. *United States v. McLaughlin*, 170 F.3d 889, 895 (9th Cir. 1999). "The reason for the law ceasing, the law also ceases." *Id.* at 895 n.1.

166. *See supra* Part I (discussing the duty to report).

167. *See infra* Parts IV, V (considering public policies, customary practices, and precedent in favor of delayed reporting).

168. *See, e.g., In re Wade*, 814 P.2d 753, 764 (Ariz. 1991) ("[T]he statute of limitations does not apply to bar discipline cases. . . . Laches does not apply when the complaining attorney cannot show any prejudice resulting from the delay." (citations omitted)).

169. *See, e.g., TEX. RULES DISCIPLINARY P. R. 15.06, reprinted in TEX. GOV'T CODE ANN.,*

rule's special treatment of misconduct involving fraud or concealment, which are exempt from the usual limitations period.¹⁷⁰ The Texas provision does not state a simple four-year statute of limitations applicable to every kind of ethics infraction.¹⁷¹ Rather, it imposes that restriction on disciplinary liability only in certain types of cases.¹⁷²

III. CONFIDENTIALITY

According to the *Restatement*, “[t]he duty to disclose wrongdoing by another lawyer typically does not require disclosure of confidential client information”¹⁷³ Consistent with this view, Model Rule 8.3 provides: “This Rule does not require disclosure of information otherwise protected by Rule 1.6 [(confidentiality)] or information gained by a lawyer or judge while participating in an approved lawyers assistance program.”¹⁷⁴ Most states recognize both of these exceptions, although there is authority to the contrary.¹⁷⁵ In practical terms, the exception

tit. 2, subtit. G, app. A-1 (West 2005) (“No attorney licensed to practice law in Texas may be disciplined for Professional Misconduct occurring more than four years before the time when the allegation of Professional Misconduct is brought to the attention of the Office of Chief Disciplinary Counsel, except in cases in which disbarment or suspension is compulsory.”).

170. *See id.* (“Limitations will not begin to run where fraud or concealment is involved until such Professional Misconduct is discovered or should have been discovered in the exercise of reasonable diligence by the Complainant.”).

171. *See id.* (delineating the time limitations on disciplining an attorney).

172. *Id.*

173. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. i (2000).

174. MODEL RULES OF PROF'L CONDUCT R. 8.3(c) (2010).

175. New Jersey departs considerably from the language found in Model Rule 8.3 and many state codes, which create a broad exception to the duty to report knowledge of misconduct gained from participation in a lawyers assistance program. *Compare id.* (exempting information of ethics violations gained through participation in an approved lawyers assistance program from the reporting requirement), *with* N.J. RULES OF PROF'L CONDUCT R. 8.3(d) (2010) (requiring disclosure of ethics violations obtained through participation in lawyers assistance program if the interests of clients are substantially and imminently threatened). In some instances, the New Jersey rule imposes reporting and other obligations. It provides:

(d) [The reporting obligation set forth in paragraph (a)] of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:

(i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irreparable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to

relating to client confidences is far more important than the one dealing with lawyer assistance programs.

A. *Client Consent and Other Exceptions*

It is sometimes said that the confidentiality exception to the reporting obligation means that a lawyer who discovers misconduct while representing a client cannot report the misconduct to disciplinary authorities without the client's consent.¹⁷⁶ This is a useful "rule of thumb," but it is not entirely accurate. In the Model Rules¹⁷⁷ and all state disciplinary codes,¹⁷⁸ there are exceptions to confidentiality other than client consent. If any of those exceptions apply, the public interest underlying the duty to report trumps the client's interest in confidentiality.¹⁷⁹ For example, in *In re Ethics Advisory Panel Opinion No. 92-1*,¹⁸⁰ the Rhode Island Supreme Court approved an ethics opinion which concluded that disclosure would be required if information was not confidential because it could be disclosed

- (1) "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm" or
- (2) in controversies between the lawyer and the client or when the lawyer needs the information to establish a defense to a criminal or a civil charge

disciplinary authorities; and

(ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients.

Id.

176. See *In re Ethics Advisory Panel Op. No. 92-1*, 627 A.2d 317, 319, 322 (R.I. 1993) (holding that state ethics rules prohibited a lawyer from reporting the misconduct of another lawyer without his client's consent if the lawyer learned of the misconduct during the course of representation of the client).

177. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010) (listing exceptions).

178. See THOMAS D. MORGAN & RONALD D. ROTUNDA, 2011 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 152-59 (2010) (setting forth a comprehensive table that lists exceptions by state).

179. See Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 13 (2004), available at 2004 WL 3413897 (recognizing that a lawyer's duty to report misconduct is "subject to the lawyer's duty not to reveal information relating to representation without the client's informed consent or as otherwise permitted by Rule 1.6 [(dealing with confidentiality)]"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. i (2000) ("If disclosure of [confidential] information is subject to an exception, . . . the duty to disclose applies.").

180. *In re Ethics Advisory Panel Op. No. 92-1*, 627 A.2d 317 (R.I. 1993).

involving the lawyer's representation of the client.¹⁸¹

Sometimes no exception to the obligation of confidentiality applies, in which case "Rule 1.6 [or the parallel state provision] takes precedence over any duty to report a client to a disciplinary authority."¹⁸² Thus, a Texas ethics committee opined that, if the relevant information is confidential, a lawyer need not report that another lawyer manifested incompetence and neglect by failing to correct identified deficiencies in a domestic relations order.¹⁸³

In an ethics opinion addressing whether a lawyer with knowledge of a judge's improper failure to recuse had a duty to report that misconduct, an American Bar Association committee reasoned as follows:

[W]e [do not] believe that any of the exceptions for permissive disclosure under Rule 1.6(b) apply. The judge's failure to recuse never would, as a practical matter, result in death or substantial bodily harm. It also is difficult to imagine any circumstance in which the judge's failure to recuse constituted a crime or fraud that would result in substantial financial injury to another, in furtherance of which the judge is using the lawyer's services. The lawyer may, of course, under Rule 1.6(b)(4), reveal the judge's confidential information to another lawyer from whom the lawyer is seeking counsel as to his ethical obligations.¹⁸⁴

1. Seeking Client Permission to Disclose

Lawyers are often urged to seek their clients' permission to disclose evidence of professional misconduct. Thus, the commentary to Model Rule 8.3 says that "a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests."¹⁸⁵ However, according to a Philadelphia ethics committee, if the report of misconduct could disrupt the resolution of a pending case, a

181. *Id.* at 322.

182. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 449 (2007).

183. *See* Tex. Comm. on Prof'l Ethics, Op. 534, 63 TEX. B.J. 808, 808-09 (2000) (stating that disclosure would be required if the information was not confidential).

184. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 449 (2007).

185. MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 2 (2010); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 453 (2008) (determining that in-firm ethics counsel is not required to report knowledge of misconduct by a lawyer in the firm to disciplinary authorities, "so long as the ethics counsel's information is information relating to the representation of her client or clients, but the ethics counsel should seek appropriate client consent to report where disclosure is not likely to harm the firm client").

lawyer, in seeking consent, should “first disclose the circumstances to . . . clients, including the potential for delay in the litigation and/or settlement.”¹⁸⁶ Under a Connecticut advisory opinion, if there are financial risks to the client that might result from reporting, those should be disclosed.¹⁸⁷ According to the American Bar Association, in representation involving a civil claim against another lawyer, a lawyer seeking consent to file a grievance must disclose the possible effect that filing may have “on the client’s ultimate recovery in a malpractice action.”¹⁸⁸

In reality, the duty to disclose misconduct is subject to limitations so potentially huge in scope as to make the “mandatory” nature of the reporting obligation little more than an illusion.¹⁸⁹ These limits include the confidentiality exception to the reporting obligation;¹⁹⁰ the weak injunction that a lawyer “should” (not “shall”) seek client consent; the duty of a lawyer “to advise the client about the client’s power to obliterate” the reporting duty;¹⁹¹ and the inability of a lawyer to second-guess a client’s refusal to agree to reporting.¹⁹² Referring to the rule as “mandatory” may do more to breed cynicism about the standards of the legal profession than to ensure that misconduct is called to the attention of disciplinary authorities.

186. Phila. Bar Ass’n Prof’l Guidance Comm., Op. 13 (1995), *available at* 1995 WL 528158.

187. *See* Conn. Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 13 (2004), *available at* 2004 WL 3413897 (advising, in a discussion of alleged perjury by the client’s husband in their divorce proceedings, that “the Spouse’s Lawyer should make sure the client understands the possible financial risk to her and her children that could be created by the reporting and that she has the right to withhold consent to disclosure”).

188. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 433 (2004).

189. *Cf.* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.8, at 64-23 (3d ed. Supp. 2009) (opining that Model Rule 8.3(c) “effectively eliminates the duty to report another lawyer’s misconduct in most cases that arise in the context of client representation—which is to say most cases”).

190. *See supra* Part III(A) (discussing the confidentiality exception and client consent).

191. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.8, at 64-23 (3d ed. Supp. 2009).

192. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 433 (2004) (“As a practical matter, clients have the ultimate authority when it comes to protecting confidential information.”); Phila. Bar Ass’n Prof’l Guidance Comm., Op. 06 (1996), *available at* 1996 WL 337311 (indicating that the duty to report is “tempered” by the duty of confidentiality).

B. *Narrow Formulations of the Confidentiality Limitation on Disclosure*

In some states, the reporting rule does not exempt all confidential information from the duty to report. For example, in Ohio, the relevant rule provides only that “privileged knowledge” is exempt from the reporting requirement.¹⁹³ In an ethics opinion, the Ohio Board of Commissioners on Grievances and Discipline expressly rejected the argument that this language meant that reporting was not required if the relevant information was protected by the state’s ethics rule on confidentiality.¹⁹⁴ Rather, the Board interpreted “privileged knowledge” as referring to “1) the information imparted in a representation of a client that would be protected by the attorney-client privilege, and 2) the information [relating to lawyer assistance programs] that Rule 8.3(c) identifies as privileged under the reporting rule.”¹⁹⁵ Thus, the Board concluded there was a “significant difference” between the ABA Model Rule and the Ohio Rule, and noted: “Ohio did not . . . choose to shield from the reporting duty all of the information protected by Rule 1.6.”¹⁹⁶

C. *Broad Formulations of the Confidentiality Limitation on Disclosure*

In some jurisdictions, the confidentiality exception to the reporting obligation is worded much more broadly than the parallel provision in Model Rule 8.3. For example, the provision in the Illinois Rules of Professional Conduct governing the reporting of professional misconduct provides that: “This Rule does not require disclosure of information otherwise protected by the attorney-client privilege *or by law . . .*”¹⁹⁷

Arguably, this type of provision might be interpreted to mean that a lawyer serving as an expert has no duty to report knowledge of professional misconduct related to a legal malpractice case. Under agency principles, a testifying expert in a legal malpractice case is obliged to maintain the

193. OHIO RULES OF PROF'L CONDUCT R. 8.3 (2011), *available at* <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf>.

194. *See* Ohio Bd. of Comm'rs on Grievances & Discipline, Informal Op. 001 (2007), *available at* 2007 WL 1232241 (rejecting the interpretation that “Rule 8.3 *requires* disclosure of information relating to a representation *only if* such disclosure is permitted by Rule 1.6(b)”).

195. *Id.*

196. *Id.*

197. ILL. RULES OF PROF'L CONDUCT R. 8.3 (2010) (emphasis added).

confidentiality of nonpublic information entrusted to the expert.¹⁹⁸ Therefore, the relevant information is protected by common law principles, and disclosure might not be required.

D. *The Meaning of "Protected by Rule 1.6"*

Most state ethics codes do not contain language similar to the protected-by-law exception to the reporting obligation that is found in the Illinois rules, discussed above.¹⁹⁹ Nevertheless, it may be possible to reach the same conclusion by a reasonable interpretation of the words that are part of many reporting standards. Model Rule 8.3, like numerous parallel state provisions, provides that the duty to report "does not require disclosure of information otherwise protected by Rule 1.6," which deals with confidentiality of client information.²⁰⁰ Even though there is typically no

198. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997) (assuming that a "testifying expert owes a duty of confidentiality as well as other duties to the party on whose behalf he is engaged to testify"). The Committee also noted that "[c]ourts . . . have either held or assumed that a nonlawyer testifying expert . . . occupies a confidential relationship to the party on whose behalf the expert originally was engaged that is limited to the matters on which he was engaged as an expert." *Id.* at n.9. Some authorities have suggested that an expert witness owes a duty of confidentiality to a client because the expert is a "subagent" of the client because the client's lawyer engages the expert's services. See *id.* (postulating that "most courts would find that the lawyer testifying expert is a subagent of the party on whose behalf he is engaged to testify"). However, Professor DeMott, the reporter for the *Restatement (Third) of Agency* has questioned the validity of the subagency rationale. See Deborah A. DeMott, *The Lawyer as Agent*, 67 *FORDHAM L. REV.* 301, 320 (1998) (explaining why the assumption that a testifying expert is an agent of the lawyer, "if accepted without qualification, is treacherous"). Indeed, the principles ultimately embodied in the *Restatement (Third) of Agency* do not seem to fit expert witnesses. A testifying expert in a legal malpractice case does not, in any usual sense, act "subject to the control" of the engaging lawyer. Cf. *RESTATEMENT (THIRD) OF AGENCY* § 3.15 cmt. b (2006) (stating that in a subagency relationship, the appointing agent has the right and duty to control the subagent). The testifying expert is not performing functions the engaging lawyer has consented to perform, nor is the engaging lawyer responsible for the testifying expert's conduct. Cf. *id.* § 3.15(1) ("A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal."). Moreover, a client is not responsible to third parties for the conduct of a testifying expert. Cf. *id.* § 3.15 cmt. d ("As to third parties, an action taken by a subagent carries the legal consequences for the principal that would follow were the action instead taken by the appointing agent."). Apparently, no case has yet squarely addressed the issue of whether a testifying expert in a legal malpractice case is a subagent. Nevertheless, there is wide agreement that, under some legal theory (perhaps because the testifying expert is a coagent of the lawyer who engages the expert's services), a testifying expert has at least a limited duty of confidentiality to the client on whose behalf the expert serves. See *id.* § 3.15 cmt. b (contrasting subagency with coagency).

199. See *supra* Part III(C) (examining the broad formulations of the confidentiality limitation on disclosure).

200. MODEL RULES OF PROF'L CONDUCT R. 8.3(c) (2010).

lawyer-client relationship between a testifying expert and the client on whose behalf the expert has been engaged,²⁰¹ the relevant information might nevertheless be regarded as protected by Rule 1.6. This is true because (1) the information arises from an attorney-client relationship, (2) a lawyer representing the client has a duty to protect client information in hiring an expert to testify on the client's behalf,²⁰² and (3) the expert has a duty to maintain the confidentiality of client information during and after the engagement.²⁰³ A client would be no less aggrieved by its expert's unconsented use of confidential information in reporting misconduct than it would by similar unconsented actions on the part of the client's lawyer.²⁰⁴ Indeed, "[t]he client may have a reasonable expectation that

201. See *Commonwealth Ins. Co. v. Stone Container Corp.*, 178 F. Supp. 2d 938, 945 (N.D. Ill. 2001) (finding that "the engagement between testifying expert and the retaining party does not form an attorney-client relationship within the meaning of the ethical rules"); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997) (endorsing the view that "a lawyer serving as a testifying expert does not thereby occupy a client-lawyer relationship with the party for whom he is engaged to testify"); *infra* Part IV(G)(3). But see Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M. L. REV. 47, 68 (2006) (footnote omitted) ("The existence of an attorney-client relationship is a question of fact [and i]n any given case, a testifying lawyer-expert may share an attorney-client relationship with the retaining party.").

202. In a wide range of circumstances, ethics opinions have recognized that lawyers entrusting confidential client information to outside agents or businesses have a duty to exercise care. See, e.g., Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 165 (2004), available at 2004 WL 3079030 (dealing with the use of outside contract lawyers); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 842 (2010), available at 2010 WL 3961389 (dealing with online storage of client information); Ohio Bd. of Comm'rs on Grievances & Discipline, Informal Op. 006 (2009), available at 2009 WL 2581719 (dealing with the outsourcing of legal or support services domestically or abroad). In *Cramer v. Sabine Transportation Co.*, 141 F. Supp. 2d 727 (S.D. Tex. 2001), a case denying a motion to disqualify a lawyer, the court stated that "an attorney, in a letter retaining an expert, should clarify the expert's obligations of confidentiality." *Id.* at 733 (citing ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997)). The court's citation to Formal Opinion 97-407 as authority for this proposition appears to have been a misreading of that opinion, which talks about the duty of the lawyer-expert (not the retaining lawyer) to clarify matters relating to the engagement. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997) ("In order to avoid any misunderstanding that no client-lawyer relationship is created, the testifying expert should make his role clear at the outset of the engagement. A written engagement letter accepted by both the engaging law firm and its client is much to be preferred.").

203. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 n.15 (1997) ("The testifying expert's duties of confidentiality continue after the relationship with the party terminates."); see also Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M. L. REV. 47, 73 (2006) ("Lawyer-experts . . . owe duties of loyalty to the parties that retain them under agency law principles . . .").

204. Of course, the client's grievance might not be justified if the client was informed at the outset of the relationship that the expert has a duty to disclose to disciplinary authorities knowledge of professional misconduct. Cf. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997) (stating that the testifying expert's "engagement letter should define the relationship, including its scope and limitations, and should outline the responsibilities of the testifying expert,

the expert will maintain confidential communications unless required to divulge the information in the course of testimony.”²⁰⁵

It would be appropriate and judicious for a court or ethics committee to adopt this line of analysis. Nevertheless, the matter is unresolved because the question appears not to have been addressed.

1. Information from Other Sources or Publicly Known

Whenever the issue of an expert's duty to report misconduct is properly raised, it may be necessary for the relevant authority to carefully consider whether Rule 1.6 or similar language in the state reporting rules protects the facts in question. Part of what an expert learns while working on a legal malpractice case comes not from the client, but from the opposing party. Much of that material is part of the public record, either by reason of filing in court or as a result of testimony before a tribunal. Once facts have entered the public domain, it might be argued that the information is no longer confidential, for, as the *Restatement* explains, “Confidential client information consists of information relating to representation of a client, other than information that is generally known.”²⁰⁶ Moreover, “the concept of confidentiality is not of unlimited scope, and it might not include A's personal observation of outwardly visible signs of [misconduct, such as] substance abuse.”²⁰⁷ Thus, the source of the facts relating to misconduct, or the public nature of those facts, might be deemed relevant to whether that information should be treated as protected by Rule 1.6.

Existing court decisions and ethics opinions dealing with reporting obligations have generally not focused on these matters.²⁰⁸ Rather, with

especially regarding the disclosure of client confidences”).

205. Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 S. TEX. L. REV. 421, 451 (2001).

206. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2000); see also MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(1) (2010) (allowing use of information relating to the representation of a former client “when the information has become generally known”); cf. VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 77 (West 2011) (advising that “an expert must treat information learned in the course of working on the case confidentially, unless the information has become a matter of public record or common knowledge, or some other consideration permits revelation or use”).

207. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.8, illus. 64-4, at 64-24 (3d ed. Supp. 2009).

208. *But see* Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 S. TEX. L. REV. 421, 451 (2001) (stating that “[s]ome courts have held

rare exceptions,²⁰⁹ they have treated any information related to a case as confidential within the meaning of Rule 1.6 or parallel state provisions.²¹⁰ Thus, the comment to Model Rule 1.6 states, “The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”²¹¹ Whether authorities will continue to broadly interpret the protection of client confidences when addressing the reporting obligations of experts, rather than disclosures by the client’s lawyer, is an unresolved matter. The answers to these questions are not clear.²¹² Perhaps rather than expansively construe the “protected by Rule 1.6” language, authorities will hold that, just as an expert is required to disclose confidential information in his or her testimony,²¹³ the expert is also required to

that expert witnesses can have a duty to maintain the confidences of clients to the extent that such information did not have to be disclosed in the course of testimony” and citing authorities to support this contention).

209. See Pa. Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Informal Op. 173 (1995), available at 1996 WL 928112 (addressing whether a law firm had a duty to report that one of its lawyers failed to disclose to various investors that he received substantial finder’s fees related to the firm’s representation of the investors in two or three transactions). The lawyer received this information from one of the clients and from a third-party developer. *Id.* The opinion took the position that “you would need consent from your client to reveal confidential information obtained from the client. But, any information which was disclosed/revealed not only by a client, but also by ‘a third party developer not represented by the law firm’ is not confidential, and not subject to [the] consent requirement.” *Id.* (footnote omitted).

210. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 433 (2004) (“[Model Rule 1.6] is not limited to communications protected by the attorney-client privilege or work-product doctrine. Rather, it applies to all information, whatever its source, relating to the representation. Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.” (footnotes omitted)); see also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 431 (2003) (addressing the issue of whether there is a duty to report knowledge of another lawyer’s mental impairment). The committee first noted that “[i]n the usual case, information gained by a lawyer about another lawyer is unlikely to be information protected by Rule 1.6, for example, observation of or information about the affected lawyer’s conduct in litigation or in the completion of transactions.” *Id.* The committee then quickly reversed course, stating, “Given the breadth of information protected by Rule 1.6, . . . the reporting lawyer should obtain the client’s informed consent to the disclosure in cases involving information learned in the course of representation through interaction with the affected lawyer.” *Id.* (footnote omitted).

211. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 3 (2010).

212. See 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.8, at 64-22 (3d ed. Supp. 2009) (stating that “[i]t is not clear how broadly courts will interpret Rule 8.3(c) [(the confidentiality exception)]”).

213. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 407 (1997) (stating that when a testifying expert becomes privy to confidential client information, the expert may need to remind the engaging law firm and client “that his testifying may require the disclosure of

disclose confidential information by the reporting rule.

IV. PUBLIC POLICY CONSIDERATIONS AGAINST REPORTING DURING PENDING LITIGATION

If an expert has a duty to report knowledge of another lawyer's misconduct arising from the same facts as a malpractice claim, there are good reasons for concluding that reporting *may* (and normally *should*) be deferred until the conclusion of the malpractice litigation. These reasons, which are discussed below, relate to the integrity of the malpractice and grievance processes and the proper role of expert witnesses.

A. *Deference to the Malpractice Process*

Even without the distractions of a parallel disciplinary proceeding, the prosecution of a malpractice suit is difficult, complex, time-consuming,²¹⁴ expensive, and emotionally draining.²¹⁵ Filing a grievance during the pendency of a legal malpractice case would add to those challenges another set of demands by ensnaring some of the principal participants in the malpractice proceeding in a simultaneous and related, but nevertheless different, controversy. In that ancillary dispute, the stakes would be high, the procedures and standards of proof different, and the deadlines distracting and potentially more demanding.²¹⁶ Presumably, the expert filing the complaint, and perhaps other lawyers involved with the malpractice proceeding, would have a duty to cooperate with the investigation and prosecution of the disciplinary complaint. Most states have a provision similar to Model Rule 8.1, which reads:

[A] lawyer . . . in connection with a disciplinary matter, shall not . . . fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand

confidences”).

214. See VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 8–10 (West 2011) (discussing the “costs of legal malpractice” and noting that legal malpractice litigation “frequently takes years to run its course”).

215. See Jennifer Knauth, *Legal Malpractice: When the Legal System Turns on the Lawyer*, 35 ST. MARY'S L.J. 963, 965 (2004) (discussing the emotional and economic costs of being a malpractice defendant).

216. See, e.g., TEX. RULES DISCIPLINARY P. R. 15.05, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (West 2005) (identifying numerous mandatory deadlines in the Texas grievance process).

for information from a[] . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.²¹⁷

At the very least, there is a risk that filing a grievance will divert time and attention from the malpractice litigation in a way that makes the prosecution of that type of civil proceeding even more costly and less efficient than usual.

Courts have traditionally been sensitive to these types of systemic disruption issues in their construction of ethics rules. For example, the Second Circuit narrowly limited the duty of a lawyer to disclose fraud on a tribunal to cases involving only “actual knowledge” in *In re Grievance Committee of the U.S. District Court, District of Connecticut*.²¹⁸ The court wrote:

Our experience indicates that if any standard less than actual knowledge was adopted in this context, serious consequences might follow. If attorneys were bound as part of their ethical duties to report to the court each time they strongly suspected that a witness lied, courts would be inundated with such reports. Court dockets would quickly become overburdened with conducting these collateral proceedings. . . . We do not believe that the Code’s drafters intended to throw the court system into such a morass.

. . . .
. . . [T]he proper forum for resolving [the question of fraud] is not a collateral proceeding, but is the trial itself.²¹⁹

Except in cases where the alleged misconduct poses a clear and substantial risk of future harm to a particular person or the public in general, it can reasonably be argued the interests of the malpractice action clients (both the plaintiff and the defendant), in obtaining a prompt and efficient adjudication of their rights, weighs in favor of delayed reporting to disciplinary authorities. Reflecting these types of concerns, some ethics committees have declined to require *trial lawyers* to immediately report alleged misconduct occurring during litigation. Thus, an ethics committee in Connecticut wrote: “We are reluctant to create a bright line test . . . that would turn trial lawyers into informers . . . thereby introducing another contentious and disruptive element into litigation, which is, all too often,

217. MODEL RULES OF PROF'L CONDUCT R. 8.1(b) (2010).

218. *In re Grievance Comm. of U.S. Dist. Court, Dist. of Conn.*, 847 F.2d 57 (2d Cir. 1988).

219. *Id.* at 63.

complicated, emotional, expensive, and protracted.”²²⁰

In an opinion condemning threats of disciplinary action in civil litigation, an American Bar Association committee suggested that, at least in some cases, reporting of misconduct may be delayed:

A lawyer who becomes aware of professional misconduct that raises a substantial question as to a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects should report that misconduct promptly, to the extent required by Rule 8.3(a), and not use it as a bargaining chip in the civil case. On the other hand, a well-founded report of misconduct which is not required by Rule 8.3(a) to be reported, and which is not within the jurisdiction of the trial court where the civil matter is pending, *usually can and should be postponed to the conclusion of the civil proceeding.*²²¹

Fear of interference with civil litigation also often influences the conduct of state and local ethics committees. The authorities normally decline to issue an advisory opinion addressing issues that are the subject of pending court proceedings.²²²

B. *The Expert's Proper Role*

In legal malpractice cases, testifying expert witnesses typically play a limited role. Often, they are not engaged until the parties are well into the litigation, pleadings have been filed, numerous documents produced, and many depositions taken.²²³ Generally, testifying experts do not participate in the formulation of litigation strategy.²²⁴ In fact, the testifying expert may never even meet the client on whose behalf the expert serves. In many instances, the law firm that hires the expert deliberately withholds work product-related information from the expert, such as the

220. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 13 (2004), *available at* 2004 WL 3413897.

221. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 383 (2004) (footnote omitted) (emphasis added).

222. *See, e.g.*, Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 04 (2001), *available at* 2001 WL 694583 (noting that "it is generally the practice of the Committee on Professional Ethics to decline to issue an Informal Opinion in matters which are pending before the superior court").

223. *See generally* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 74–77 (West 2011) (discussing the role of expert witnesses).

224. *Cf.* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997) (stating that "in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy are characteristic of an expert consultant, who ordinarily is *not expected to testify*" (emphasis added)).

lawyers' concerns about factual support for issues in the case, the credibility of witnesses, or appraisals of a suit's "settlement value." This is done because the expert would have a duty to disclose that information under oath if asked about those subjects by opposing counsel. Thus, a testifying expert is normally not a full and active partner in the management of the litigation. Ordinarily, the job of the testifying expert is simply to review the facts in light of the legal standard of care and relevant ethical considerations, and then formulate and express opinions related to the issues in the case.

Not only would it be highly unusual for a testifying expert to file a grievance against a lawyer participating in the malpractice litigation, but it would also threaten to undermine the expert's role in the lawsuit. Experts are supposed to be objective, not partisan.²²⁵ An expert who files a grievance during the pendency of a malpractice suit may be challenged by opposing counsel as having lost his or her objectivity and taken on the role of an advocate. Those charges could undermine the expert's effectiveness. Consequently, reporting alleged misconduct to disciplinary authorities while the malpractice lawsuit is pending might not only complicate and delay the resolution of the civil claim, it might also damage the legal interests of the client on whose behalf the expert has been hired.

C. *Protection of the Grievance Process*

For disciplinary processes to be effective, they must not only be fair, but must also have the appearance of fairness.²²⁶ If an expert were to report knowledge of serious misconduct during a pending malpractice suit, it would look as though the grievance was filed to gain a strategic or tactical

225. See *id.* (stating that the testifying expert is "presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates"); VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 76-77 (West 2011) (discussing independence versus partisanship).

226. Appearances of fairness are important in all areas of public life. See, e.g., Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL'Y 1, 14 (2006) ("[An] objective in regulating lobbyists is to preserve public confidence in political institutions by ensuring that they are fair not only in operation, but also in appearance. In other words, it is necessary to avoid the 'appearance of corruption.' Perceived corruption, like corruption itself, can destroy a democratic institution." (footnotes omitted)); Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL L. REV. 715, 735 (2006) (asserting that "the appearance of impropriety is often as destructive of public confidence in government as impropriety itself").

advantage in the malpractice litigation rather than to protect the public. Courts, ethics committees, and other authorities have rightly expressed concern about the abuse of legal procedures that occurs when a party currently involved in litigation *threatens to file* a grievance against another lawyer involved in the suit.²²⁷ Similar concerns can be raised about the actual filing of a disciplinary complaint.

In many instances, it will benefit the disciplinary process for a malpractice suit to run its course before that regime's limited resources are devoted to the resolution of malpractice-related charges of misconduct. If the alleged misconduct arises out of the same facts as the malpractice claim, the development of the evidence that occurs in the civil litigation process will typically provide a more complete record of what actually took place than could usually be expected from a disciplinary investigation. Those facts may assist the disciplinary tribunal in the resolution of disputed issues. Moreover, a judicial finding that serious misconduct (e.g., a nonwaivable conflict of interest) did not occur may obviate the need for reporting of such conduct to, or investigation of such conduct by, disciplinary authorities.

In some instances, disciplinary tribunals have abstained from deciding

227. It is ordinarily unethical to threaten to file disciplinary charges to gain an advantage in a civil cause of action. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 383 (1994) (citing state ethics opinions and offering multiple reasons why threats may violate the Model Rules, even though the Model Rules do not contain a rule expressly addressing that subject); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. i (2000) (stating that "the objection has been made that threats to report an opposing lawyer are used unfairly by unprincipled lawyers on the pretense that the disclosure rule requires it"). Texas has a rule specifically dealing with disciplinary threats. See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.04(b), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9) (providing that: "A lawyer shall not . . . threaten to present: (1) . . . disciplinary charges solely to gain an advantage in a civil matter"); see also Me. Prof'l Ethics Comm'n, Op. 100 (1989), available at http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&cid=91501&v=article (construing a similar provision and broadly stating that "[it] is clear that it would be unethical for Attorney A to threaten to present a grievance in order to enhance the chances of a favorable settlement of [a] malpractice claim against Attorney Z"). It is important to note that both the Texas rule and the Maine rule at issue in Ethics Opinion 100 refer to threatening to present a grievance "solely to obtain an advantage." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.04(b); Me. Prof'l Ethics Comm'n, Op. 100 (1989), available at http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&cid=91501&v=article. Presumably, many threats are made with mixed motives and therefore might escape the literal terms of a rule using the word "solely."

charges of misconduct that are the subject of pending litigation.²²⁸ Professors Thomas D. Morgan and Ronald D. Rotunda, two of the nation's leading legal ethics experts, assert:

If there is a civil or criminal action pending involving the same conduct, disciplinary authorities often prefer that the lawyer [with a duty to report] wait until that action is completed. If the information comes in earlier, the disciplinary authorities often suspend or abate their own inquiry so as to be able to work with a complete record and avoid duplicative investigation.²²⁹

Thus, many authorities recognize that deferred reporting of misconduct is often consistent with the operation of both the civil justice system and disciplinary processes.

V. CUSTOMARY PRACTICE AND PRECEDENT

A. *In Favor of Delayed Reporting*

The public policy considerations in favor of not requiring a report of lawyer misconduct during the pendency of litigation are reflected in prevailing professional customs. According to the *Restatement*: "With respect to timing of a report of wrongdoing, the requirement is commonly interpreted not to require a lawyer involved in litigation or negotiations to make a report until the conclusion of the matter in order to minimize harm to the reporting lawyer's client."²³⁰

Commentators have expressed similar views. For example, Professor Arthur F. Greenbaum of Ohio State University, who has written extensively about lawyers' and judges' reporting obligations,²³¹ states that "unless there is a need to report the lawyer immediately to protect the public, the report can properly be delayed until the case has concluded."²³²

228. THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 58 (10th ed. 2008).

229. *Id.*

230. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. i (2000).

231. See generally Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 298 (2003).

232. Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 548 (2009).

An official comment to the Massachusetts ethics rules addresses the point squarely. The comment states:

In most situations, a lawyer may defer making a report under this Rule until the matter has been concluded, but the report should be made as soon as practicable thereafter. An immediate report is ethically compelled, however, when a client or third person will likely be injured by a delay in reporting, such as where the lawyer has knowledge that another lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.²³³

Thus, some authorities suggest that the option of delayed reporting is not unqualified. Nevertheless, there is much to be said in favor of a bright-line rule that a testifying expert has no duty to report knowledge of litigation-related misconduct during the pendency of the suit. To begin with, there is a need for clarity in the interpretation and application of ethical standards. Rules of professional conduct are most effective when they give lawyers clear guidance about what they must or must not do.²³⁴ Requiring lawyers engaged in litigation to undertake a quadruple-layered analysis about reporting obligations is undesirable because it threatens to make litigation more difficult, expensive, and time-consuming.²³⁵ Moreover, in reality, a postponed reporting obligation will have little effect on what occurs before the resolution of a case. Lawyers who feel morally compelled to report misconduct will be sufficiently persuasive to secure their clients' consent to the making of a report.²³⁶ Lawyers who are reluctant to initiate disciplinary proceedings will persuade clients that using confidential information for the purpose of reporting is unwise, and therefore, reporting will not be required.²³⁷ It is highly unlikely that a judge hearing a legal malpractice case will, pursuant to obligations of legal²³⁸ or judicial²³⁹ ethics, make a report of misconduct before the

233. MASS. RULES OF PROF'L CONDUCT R. 8.3 cmt. 3A (2010).

234. Cf. Vincent R. Johnson, *Corruption in Education: A Global Legal Challenge*, 48 SANTA CLARA L. REV. 1, 33 (2008) ("Ethics codes should be clearly written. Whenever possible, they 'should contain bright-line rules and never three-armed lawyer gobbledygook—that is, on the one hand this, on . . . the other hand that, and on the third hand something else.'" (quoting Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y. L. SCH. L. REV. 177, 178–79 (1995))).

235. See *supra* Part IV(A) (detailing the inherent difficulties of prosecuting a malpractice suit).

236. See *supra* Part III(A) (discussing the requirement of client consent).

237. *Id.*

238. See MODEL RULES OF PROF'L CONDUCT R. 8.3 (2010) (providing the reporting duties of lawyers). Of course, some judges are not lawyers or are lawyers not currently licensed to practice

conclusion of the suit.²⁴⁰ Otherwise, the judge might, quite appropriately, be subject to challenge on the ground of having prejudged the merits of the case or otherwise demonstrated prejudice against the lawyer in question.²⁴¹ Consequently, the only lawyer participating in malpractice litigation who is likely to be compelled to make a report during litigation by reason of the lack of a bright-line rule is the legal malpractice expert, who, as explained above, should, but may not, be permitted to invoke the argument that the information is “protected by Rule 1.6.”²⁴² Yet, for the reasons alluded to earlier, requiring a testifying expert to report misconduct before the conclusion of the litigation threatens to disrupt the prosecution of civil action and call into question the expert’s independence and objectivity, all to the disadvantage of the client on whose behalf the expert appears.²⁴³ The better view is that testifying experts ordinarily should not be required to report litigation-related misconduct during the pendency of suit, even though, as a matter of discretion, that is their option.

Professors Hazard and Hodes caution that “disciplinary . . . authorities might look askance at any absolute right to delay reporting as imposing too high a cost on the public.”²⁴⁴ If authorities ultimately do not adopt a bright-line rule wholly excusing testifying experts from a duty to report misconduct during the pendency of litigation, then the duty to report during that interval should be limited to the clearest of cases. Only where

law. In either case, those judges are not subject to lawyers’ reporting obligations. See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE* 1237 n.2 (2010–2011) (indicating that in 1983, 14,000 judges were not licensed to practice law).

239. See MODEL CODE OF JUD. CONDUCT R. 2.15(B) (2010) (setting forth the reporting duties of judges); see also *supra* Part VI(B)(2) (discussing judicial reporting responsibilities).

240. It is interesting to note that in the best-known case imposing discipline for litigation-related nonreporting, *In re Himmel*, 533 N.E.2d 790 (Ill. 1988), a lawyer was sanctioned, but a judge who became privy to the same facts was not sanctioned. See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE* 1229–30 (2010–2011) (discussing the significance of the *Himmel* decision and the court’s omission of any discussion with regard to a judge’s duty to report).

241. See MODEL CODE OF JUD. CONDUCT R. 2.2 (2010) (discussing the duties of impartiality and fairness).

242. See *supra* Part III(D) (discussing the “protected by Rule 1.6” language).

243. See *supra* Part IV(B) (detailing the expert’s proper role in pending litigation).

244. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.8, illus. 64-4, at 64-25 (3d ed. Supp. 2009) (“Delay for the duration of a litigated case might mean that a lawyer could continue to avoid discipline for several years, and such a long delay could interfere with later prosecution of the disciplinary matter.”).

reasonably certain future harm to a particular person, or the public in general, could be avoided by subjecting a lawyer to disciplinary action for “known”²⁴⁵ prior misconduct should an expert be obliged to report an ethical violation related to on-going litigation.

Some lawyers undoubtedly carry out their reporting obligations and assist disciplinary authorities with the task of policing the profession.²⁴⁶ Nevertheless, it may be that the current reporting regime—with its mandatory rule, strict requirements, and broad exceptions—is “unworkable, unwanted, and subject to massive civil disobedience.”²⁴⁷ If that is the case, the solution is not to construe the rules in a way that broadly places testifying experts under a duty to disclose misconduct relating to legal malpractice actions. Rather, the solution is to address the root of the problem by abolishing the duty to report and making reporting discretionary, or reconsidering the broad exception relating to certain types of confidential information.²⁴⁸

B. *Against Delayed Reporting*

Some authorities, on particular facts, have endorsed a position against delayed reporting. For example, in *Schuff v. A.T. Klemens & Son*,²⁴⁹ the defendant in a wrongful death suit unsuccessfully sought to disqualify the plaintiffs’ lawyers on grounds of conflict of interest.²⁵⁰ After six years of litigation,²⁵¹ the defendant’s lawyers argued that the verdict in favor of the plaintiffs was “so tainted” by the conflict that the defendant should be “allowed a new trial with respect to both liability and damages.”²⁵² Although the Supreme Court of Montana rejected that argument, the

245. See *supra* Part II(B) (discussing the knowledge requirement).

246. See, e.g., *In re Wirth*, No. 07-0588, 2008 WL 5340120, at *3 (Ariz. Disciplinary Comm’n July 8, 2008) (indicating that a successor lawyer filed a complaint against the predecessor pursuant to Arizona Rule 8.3); *In re William E. O’Keefe*, No. BD-2005-015, 2005 WL 5177206, at *2 (Mass. State Bar Disciplinary Bd. March 18, 2005) (stating that a matter that led to a lawyer’s nine-month suspension came to the “attention of bar counsel pursuant to Mass. R. [Prof’l Conduct] 8.3”).

247. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.9, at 64-27 (3d ed. Supp. 2009).

248. *Id.* (opting for the latter alternative).

249. *Schuff v. A.T. Klemens & Son*, 16 P.3d 1002 (Mont. 2000).

250. *Id.* at 1006, 1010, 1014.

251. *Id.* at 1012.

252. See *id.* at 1010, 1012 (arguing that the plaintiffs’ claim should be barred by the doctrine of laches).

court referred the matter to state disciplinary authorities to consider whether the plaintiffs' lawyers had violated the conflict of interest rules and whether the defendants' lawyers had failed to make a timely report of serious misconduct.²⁵³ As the court explained:

If the "obvious" prejudice suffered by its client was in fact so severe, and the court's failure to disqualify the Marra firm was "entirely inconsistent with public policy," it would seem that a reasonable course of action would include the timely observance of Rule 8.3's mandate.

Instead, what the record reveals is that Klemens did nothing for six years. . . .²⁵⁴

The Montana Supreme Court emphasized that the case was "unusual" in that defense counsel had argued that the alleged misconduct was "so serious that we should . . . set aside a substantial jury verdict in favor of an innocent widow and her children . . . [and] send a case that already has been in litigation for ten years back to the District Court for retrial."²⁵⁵ The court remarked that:

[T]he [ethics] Rules are not designed to be employed as arrows in the litigator's quiver, to be loosed from time to time at targets of opportunity as the ebb and flow of an adversarial proceeding may appear to dictate. Quite simply, a serious . . . violation [of the state's Rules of Professional Conduct] is a serious matter that needs to be taken seriously and reported promptly to the Commission.²⁵⁶

Ultimately, the *Schuff* decision resulted in the filing of disciplinary complaints against six lawyers. The ensuing litigation consumed three years. Three of the lawyers were publicly sanctioned.²⁵⁷ No public sanctions were imposed for failure to report misconduct. The lawyer who prosecuted those six cases pro bono received an award from the Montana State Bar for his pivotal role in resolving them.²⁵⁸

253. *Id.* at 1016.

254. *Id.* at 1014.

255. *Id.* at 1015.

256. *Id.* at 1016.

257. See *In re Marra*, 87 P.3d 384, 384 (Mont. 2004) (representing two directly adverse clients without the client's consent led to the public censure of a lawyer); *In re Wenz*, 87 P.3d 376, 377 (Mont. 2004) (sanctioning an attorney for violating Rule 1.10, concerning conflicts of interest); *In re Johnson*, 84 P.3d 637, 637 (Mont. 2004) (censuring a lawyer publicly for dual representation of two clients who were directly adverse).

258. 2004 Award Winners, 30 MONT. LAW., Sept. 2004, at 5, 6 (indicating that the disciplinary commission's recommendations were approved).

Some lawyers (perhaps incorrectly) have interpreted the Montana Supreme Court's decision in *Schuff* as imposing a broad duty to report *possibly unethical* conduct to disciplinary authorities. In one case, a lawyer wrote a letter to opposing counsel pointing out a "potential positional conflict [of interest]."²⁵⁹ Unsatisfied with opposing counsel's response, the lawyer reported the matter to the Montana Office of Disciplinary Counsel because "she believed it was her duty to do so" under Montana Rule 8.3 and the *Schuff* decision.²⁶⁰

VI. DUTY TO REPORT AFTER THE MALPRACTICE ACTION TERMINATES

Even if a lawyer serving as an expert witness in malpractice litigation is excused from reporting misconduct during the pendency of the suit, the expert may have a duty to disclose the misconduct after the litigation terminates (if confidentiality obligations are not interpreted to bar such reporting²⁶¹ and if a disciplinary statute of limitations has not expired).²⁶² In this regard, it is useful to remember that cases suggest that exceptions to the reporting obligation should be no greater than necessary.

For example, in *In re Ethics Advisory Panel Opinion No. 92-1*,²⁶³ the Rhode Island Supreme Court held that confidentiality of client information creates an exception to the reporting obligation.²⁶⁴ The court nevertheless opined with regret that, when the reporting rule is construed in a way that does not facilitate the investigation and prosecution of errant lawyers, there is "correspondingly a failure of the legal profession to regulate itself effectively" and "[t]his failure fuels the perception that under a cloak of confidentiality, the legal profession is engaged in a coverup of attorney misconduct."²⁶⁵

259. *In re Best*, 229 P.3d 1201, 1202 (Mont. 2010).

260. *Id.*

261. *See supra* Part III (analyzing the confidentiality exception to the duty to report).

262. *See supra* Part II(D) (describing the effect of disciplinary statutes of limitations on the duty to report).

263. *In re Ethics Advisory Panel Op. No. 92-1*, 627 A.2d 317 (R.I. 1993).

264. *Id.* at 319–21.

265. *Id.* at 323.

A. *Promptness*

If there is a post-litigation duty to report misconduct, questions arise as to how soon the report must be made. Cases sometimes suggest that performance of the duty to report misconduct cannot be delayed. Thus, the Louisiana Supreme Court held that:

Once the lawyer decides that a reportable offense has likely occurred, reporting should be made promptly. The need for prompt reporting flows from the need to safeguard the public and the profession against future wrongdoing by the offending lawyer. This purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented.²⁶⁶

However, other writings suggest that, with respect to the reporting of lawyer misconduct, the maker of the report has some degree of discretion. For example, a New York state ethics committee opined that: “The report need not be made immediately or without some reasonable effort at remediation, particularly where the consequences of reporting the violation may be more harmful to the lawyer’s client than some alternative course of action.”²⁶⁷

B. *Disclosure to a Court*

In some cases, the misconduct in question will have been disclosed to a

266. *In re Riehlmann*, 891 So. 2d 1239, 1247 (La. 2005) (citations omitted); see also Laurel Fedder, *Obstacles to Maintaining the Integrity of the Profession: Rule 8.3’s Ambiguity and Disciplinary Board Complacency*, 23 GEO. J. LEGAL ETHICS 571, 574–77 (2010) (explaining how the lack of timely reporting undermines the policies underlying the reporting obligation).

267. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 822 (2008), available at 2008 WL 8013056. However, one ethics opinion offered the following advice:

The Committee has not read the desirability of prompt reporting to exclude the possibility of some delay in reporting when a lawyer’s ethical obligation to a client necessitates such a delay. There may be situations in which it is appropriate for a lawyer to balance a client’s interest, which may be furthered by a delay in reporting, against the public’s interest in prompt reporting of misconduct by a lawyer who may engage in similar misconduct again if not disciplined. In determining whether there is room for judgment as to how promptly a report must be made, a lawyer should balance the severity of the misconduct engaged in by the other lawyer and the likelihood that he or she will engage in such misconduct again in the future to the detriment of other clients against the degree of prejudice that the reporting lawyer’s client will suffer from prompt reporting. While it may be permissible in certain limited circumstances to postpone reporting for a brief period of time, . . . “once a lawyer decides that he or she must disclose under DR 1-103(A), any substantial delay in reporting would be improper.”

N.Y.C. Ass’n of the Bar Comm. on Prof’l & Jud. Ethics, Formal Op. 03 (1990) (citation omitted).

court during the malpractice litigation, either by the expert's own testimony or otherwise. In other cases, the relevant infractions will not have been called to the malpractice tribunal's attention.

In cases where a judge has become aware of the allegedly unethical conduct, it may be asked whether that disclosure extinguishes whatever duty the expert may have to report the misconduct. In answering this question, at least two issues need to be considered. Those issues relate to the meaning of "appropriate professional authority," as that term is often used in reporting rules, and the concept of "shifting responsibility." These matters are discussed below.

1. What is an "Appropriate Professional Authority"

Model Rule 8.3, like similar provisions in many states, mandates that a report of serious misconduct by another lawyer be made to the "appropriate professional authority."²⁶⁸ The question is whether a court presiding over malpractice litigation comes within the scope of that term.

a. Disciplinary Bodies

The term "appropriate professional authority" presumably includes at least a grievance authority that is part of the state's professional disciplinary process. Thus, a Philadelphia ethics committee opined that "it is clear that the duty to report misconduct as contained in Rule 8.3(a) refers to making a report to the Disciplinary Board of the Supreme Court of Pennsylvania."²⁶⁹ The committee found that "[a]lthough a report may have been made to [the] court during a trial, reporting to the Court is distinct from the obligation to report to the Disciplinary Board."²⁷⁰ Further, the committee noted that "[e]ven if a report to the court has already been made, a subsequent report to the Disciplinary Board still requires a waiver based on informed consent . . . of any confidential information needed to make the report."²⁷¹

Similarly, in *Schuff v. A.T. Klemens & Son*, mentioned earlier, the

268. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2010).

269. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2008-12 (2009), available at 2009 WL 467850.

270. *Id.*

271. *Id.*

Montana Supreme Court held that even though an alleged conflict of interest was called to the attention of a district court as the ground for an unsuccessful disqualification motion, the misconduct should also have been reported to disciplinary authorities.²⁷² Noting that the relevant Montana ethics rule provided that a lawyer “shall inform the appropriate professional authority,”²⁷³ the court explained: “[T]his Court, and the agency to which it has delegated disciplinary authority, the Commission on Practice, has the exclusive authority to discipline or sanction the unprofessional conduct of attorneys admitted to practice before it.”²⁷⁴

Likewise, the Ohio Board of Commissioners on Grievances and Discipline concluded that the phrase “shall inform a disciplinary authority,”²⁷⁵ in the Ohio ethics rules, required that a report be made “to either the Office of Disciplinary Counsel or to a certified grievance committee of a bar association.”²⁷⁶ Specifically, the board wrote:

The reporting duty is not fulfilled by reporting a lawyer’s misconduct to a tribunal. A tribunal is not a disciplinary authority empowered to investigate or act upon reports of lawyer misconduct. A tribunal has authority to supervise members of the bar appearing before it, including the power to disqualify attorneys in specific cases, but that authority is distinct from the exclusive disciplinary authority vested in the Supreme Court of Ohio through its inherent and constitutional powers.²⁷⁷

However, in some states, the term “appropriate professional authority,” or similar language, may cover a broader range of options than simply reporting misconduct to state disciplinary officials. For example, “a few federal courts maintain their own disciplinary agency; in those jurisdictions, therefore[,] a lawyer might report misconduct relating to a federal matter directly to such an agency.”²⁷⁸

In an ethics opinion addressing what a law firm should do when it

272. *Schuff v. A.T. Klemens & Son*, 16 P.3d 1002, 1012 (Mont. 2000).

273. *Id.*

274. *Id.* at 1010–11.

275. OHIO RULES OF PROF’L CONDUCT R. 8.3(a) (2011), available at <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf>.

276. Ohio Bd. of Comm’rs on Grievances & Discipline, Informal Op. 001 (2007), available at 2007 WL 1232241.

277. *Id.*

278. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.5, at 64-13 (3d ed. Supp. 2009) (footnote omitted).

discovers that a lawyer who recently joined the firm provided false information about his qualifications, a Texas committee opined that “other appropriate authorities would include the Board of Law Examiners, Admissions Committee and the Unauthorized Practice of Law Committee of Texas and other states to which he may have applied for admission.”²⁷⁹ The opinion suggested that the firm was obliged to report the misconduct to all of these entities, not just one of them.²⁸⁰ However, that view may have been expressed because the committee misread the reporting rule as referring to “appropriate disciplinary *authorities*,”²⁸¹ plural, even though the Texas reporting rule obliges a lawyer to disclose misconduct to “the appropriate disciplinary *authority*,” singular.²⁸²

b. Peer Assistance Programs

The Texas ethics rules sometimes permit reporting to a body other than a disciplinary tribunal.²⁸³ The relevant rule provides:

A lawyer having knowledge or suspecting that another lawyer or judge whose conduct the lawyer is required to report . . . is impaired by chemical dependency on alcohol or drugs or by mental illness may report that person to an approved peer assistance program rather than to an appropriate disciplinary authority. If a lawyer elects that option, the lawyer’s report to the approved peer assistance program shall disclose any disciplinary violations that the reporting lawyer would otherwise have to disclose to the [appropriate disciplinary authority]. . . .²⁸⁴

Scholars have expressed the view that, even in the absence of this type of provision, “it would seem that . . . reporting to a Lawyers Assistance Program should be sufficient to constitute reporting to the appropriate professional authority.”²⁸⁵

279. Tex. Comm. on Prof'l Ethics, Op. 522, 60 TEX. B.J. 970 (1997).

280. *Id.*

281. *Id.* (emphasis added).

282. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.03(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9) (emphasis added).

283. *Id.* R. 8.03(c).

284. *Id.*

285. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 64.5, at 64-14 (3d ed. Supp. 2009) (internal quotation marks omitted); *see also id.* § 64.8 illus. 64-4, at 64-24 (stating that, “[i]n at least some states, reporting to a lawyer’s assistance committee is sufficient to satisfy” the reporting obligation, and a “report to the disciplinary authority is not necessary”).

c. Courts

In some jurisdictions, the relevant reporting provision may expressly allow a lawyer to report misconduct to a court, rather than to a disciplinary committee.²⁸⁶ For example, Rule 8.3 of the North Carolina Rules of Professional Conduct requires a lawyer to report serious misconduct to “the North Carolina State Bar *or the court having jurisdiction over the matter.*”²⁸⁷ Similarly, Rule 8.3 of the New York Rules of Professional Conduct now provides that “a lawyer shall report [serious misconduct] *to a tribunal* or other authority empowered to investigate or act upon such violation.”²⁸⁸ Interpreting similar language in an earlier New York ethics code, an advisory opinion found that “a violation in the course of litigation could be reported to the tribunal before which the action is pending.”²⁸⁹ The New York state ethics committee further opined that “[o]nce a report has been made to an appropriate authority, notwithstanding the existence of other authorities to which the report could have been made, the reporting lawyer’s obligation . . . will be deemed satisfied.”²⁹⁰ Thus, in some states, calling the attention of a court to litigation-related misconduct discharges a lawyer’s duty to report.

This may be true even in the absence of language in a reporting rule expressly providing for disclosure to a court. Thus, Professors Geoffrey C. Hazard, Jr. and W. William Hodes have argued that “[a]nother ‘authority’ well positioned to receive reports of lawyer misconduct might be the tribunal itself, when the misconduct involves conduct occurring during litigation,” and that this approach of reporting to the tribunal is often sound.²⁹¹

d. Particular Entities

Some states have eschewed the Model Rules’ reference to “appropriate

286. *See supra* Part VI(B)(1)(a) (discussing disciplinary authorities other than courts).

287. N.C. RULES OF PROF’L CONDUCT R. 8.3(a) (2010) (emphasis added).

288. N.Y. RULES OF PROF’L CONDUCT R. 8.3(a) (2010) (emphasis added).

289. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 822 (2008), *available at* 2008 WL 8013056.

290. *Id.*

291. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.5, at 64-14 to 64-15 (3d ed. Supp. 2009) (noting that “lawyers . . . might reasonably assume that a report to the court is a report to ‘the system,’ broadly speaking”).

professional authority” in their respective reporting rules and clearly specify who must be informed about misconduct. For example, in Kentucky, a lawyer “shall inform the Association’s Bar Counsel,”²⁹² and in Louisiana, the lawyer “shall inform the Office of Disciplinary Counsel.”²⁹³ In North Dakota, a lawyer must “initiate proceedings under the North Dakota Rules for Lawyer Discipline.”²⁹⁴

2. Shifting Responsibility

Under the law of most jurisdictions, judges have a duty to address serious lawyer misconduct that comes to their attention.²⁹⁵ In states with judicial ethics codes patterned after the American Bar Association’s Model Code of Judicial Conduct, a judge with “*knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects” has a duty to “inform the appropriate authority.”²⁹⁶ “‘Appropriate authority’ means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported.”²⁹⁷ In addition, “[a] judge who receives information indicating a *substantial likelihood* that a lawyer has committed a violation of the Rules of Professional Conduct” need only “take appropriate action.”²⁹⁸ “Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body.”²⁹⁹

292. KY. RULES OF PROF’L CONDUCT R. 3.130(8.3)(a) (2010).

293. LA. RULES OF PROF’L CONDUCT R. 8.3(a) (2010).

294. N.D. RULES OF PROF’L CONDUCT R. 8.3(a) (2010).

295. Although judges have a duty to report serious misconduct including criminal activity, by lawyers and judges, they generally do not have a duty to report such misconduct on the part of a witness who is not a lawyer or a judge. See Ill. Jud. Ethics Comm., Op. 01 (2002), *available at* 2002 WL 32181518 (citing authorities from various jurisdictions and stating that “[t]o require the reporting of every incident of past or present marijuana use, building code violations, tax violations, bad checks, consumer fraud, or any of the other myriad of criminal violations a judge may become aware of would immerse the judge in side issues, take time away from the judicial function and likely compromise the judge’s appearance of impartiality”).

296. MODEL CODE OF JUD. CONDUCT R. 2.15(B) (2010) (emphasis added).

297. MODEL CODE OF JUD. CONDUCT Terminology.

298. *Id.* R. 2.15(D) (emphasis added).

299. *Id.* R. 2.15 cmt. 2; see also *In re Irons*, 379 B.R. 680, 684 (Bankr. S.D. Tex. 2007) (noting that, under Texas law, a federal bankruptcy court “could refer counsel who violated State Bar

Courts are sometimes diligent in performing these obligations.³⁰⁰ For example, in *Johnson v. Johnson*,³⁰¹ Justice Catherine M. Stone wrote for the Texas Court of Appeals:

In light of counsel's disparaging remarks about the trial court, his firm adherence to those remarks during oral argument, and his claims of error about matters that never occurred or were never presented to the trial court, a substantial question has been raised about counsel's honesty, trustworthiness, or fitness as a lawyer. Consequently, we are bound . . . to inform the State Bar of Texas of this matter. We therefore order the Clerk of the Court . . . to forward a copy of this opinion to the Office of the General Counsel of the State Bar of Texas, for investigation and any other action it may deem necessary.³⁰²

However, according to Professor Greenbaum, "conventional wisdom" and "several recent studies" suggest that the rule requiring judicial reporting of lawyer misconduct "often is ignored" and that there is "severe under-reporting."³⁰³ Greenbaum argues that it is both feasible and desirable for judges to play a greater role in reporting lawyer misconduct and outlines improvements to the current reporting regime that would help to advance that objective.³⁰⁴

Nevertheless, as the system of judicial ethics currently operates, there is little reason to conclude, absent language expressly permitting a lawyer to discharge his or her reporting obligation by calling misconduct to the attention of a tribunal, that the existence of a judicial reporting obligation should or does relieve a lawyer of a duty to make a report to disciplinary authorities.

To put the point slightly differently, does the duty to report shift from the lawyer to the judge once the judge knows of another lawyer's misconduct? General tort principles would argue against that conclusion. Under tort law, a person with a duty to exercise care is generally not

obligations to the appropriate disciplinary authorities").

300. See *Cap Rock Elec. Coop., Inc. v. Tex. Util. Elec. Co.*, 874 S.W.2d 92, 103 (Tex. App.—El Paso 1994, no writ) (noting, on rehearing of a case involving deliberate deception, that the court's "previous directive to forward a copy of the opinion in the instant case to the State Bar of Texas for disciplinary action, while unprecedented, [was] nonetheless appropriate").

301. *Johnson v. Johnson*, 948 S.W.2d 835 (Tex. App.—San Antonio 1997, writ denied).

302. *Id.* at 841 (citations omitted).

303. Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 537–41 (2009).

304. *Id.* at 551, 563.

absolved from liability merely because some other person has a similar obligation. Instead, the responsibility for preventing harm shifts from one person to another only when it is fair to relieve the one of any further duties.³⁰⁵ This is sometimes true where one party has done everything reasonably possible to prevent harm and another person can be trusted to take charge of a matter.³⁰⁶ When this type of analysis is applied to the reporting of lawyer misconduct, there is little reason to conclude that a lawyer with knowledge of serious misconduct should be relieved from a reporting obligation merely because a judge knows of the same misconduct and has an obligation to report it. The lawyer has not done everything possible to prevent the harm that can be caused by nonreporting, and it will often be less than certain that a judge will call the misconduct to the attention of appropriate disciplinary authorities.

C. *How the Malpractice Action Was Resolved*

In thinking about whether a testifying expert has a duty to report misconduct after the conclusion of a malpractice dispute, it is possible to draw a useful distinction between judicially proven claims and unproven claims. However, no useful inferences can be drawn merely from the fact that a malpractice claim was settled or abandoned. These matters are discussed below.

1. Proven Versus Unproven Malpractice Claims

a. Judicial Findings of Liability

The post-litigation duty of a testifying expert to make a report about misconduct would logically be the strongest in a case where the allegedly errant lawyer was found liable for malpractice involving the misconduct in question. In that case, the decision of the jury, judge, or appellate tribunal would obviously be an important factor bearing upon whether a reasonable lawyer would conclude, and therefore the expert must know, that serious

305. See RESTATEMENT (SECOND) OF TORTS § 452(2) & cmts. e-f (1965) (discussing factors bearing upon whether “full responsibility for control of the situation and prevention of the threatened harm has passed to the third person”).

306. See VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 119–24 (West 2011) (discussing the concept of shifting responsibility in legal malpractice law).

misconduct occurred.³⁰⁷ However, it is important to consider the side of the case on which the expert testified.

If the expert testified on the plaintiff's behalf that the defendant lawyer committed malpractice, the expert's own testimony would presumably often show that the expert had a firm opinion that serious misconduct occurred. In the litigation leading to the malpractice judgment, it is likely that the facts relating to the alleged malpractice would have been disclosed. Thus, it would be difficult for the expert to argue that the information relating to the misconduct need not be revealed because it is confidential.³⁰⁸

In contrast, the defendant's expert would stand in a significantly different position. Presumably, the expert would have testified under oath that the defendant did not commit malpractice. If the malpractice was related to the alleged misconduct, this would be a relevant factor in determining whether the expert "knew" that misconduct had occurred. Indeed, it would seem the defendant's expert could be disciplined for post-litigation failure to report misconduct only if disciplinary authorities were ready to conclude that the expert committed perjury in testifying on behalf of the defendant, or that the facts which emerged from the litigation were so strong that the expert was obliged to change his or her opinion. In testimony, defense experts frequently point to all of the weak links in the plaintiff's arguments related to whether the standard of care was violated. A defense expert's consciousness of those facts might well be sufficient to convince disciplinary authorities that, even after the defendant lawyer was found liable for malpractice involving the alleged misconduct, the expert did not have a "firm opinion" that the defendant lawyer engaged in a violation of the ethics rules raising a substantial question as to the lawyer's honesty, trustworthiness, or fitness.

b. Judicial Findings of No Liability

If a verdict in the malpractice action is returned for the defendant, that factor is relevant in determining whether the experts who participated on either side of the litigation have a subsequent duty to report misconduct.

307. See *supra* Part II(B) (examining the reporting rule's knowledge requirement).

308. See *supra* Part III(D) (discussing the confidentiality exception to the reporting obligation).

However, this is true only if the decision was a ruling on the merits of whether the standard of care was violated, and only if the alleged malpractice related to the purported misconduct under the disciplinary rules. In such instances, it could be argued that no expert who participated in the case would have a post-litigation duty to report misconduct because, in the face of the substantive ruling, a reasonable lawyer could not form a firm belief—certainty for all practical purposes³⁰⁹—that misconduct had occurred. The malpractice defendant's triumph in a court of law on the merits would make it difficult or impossible to conclude that, after the litigation, the experts "knew" that misconduct had occurred.

Even an expert who originally believed there was serious evidence of misconduct may be led to question that opinion by the return of an adverse court ruling. Of course, experts, like the lawyers with whom they work, sometimes believe that a judge, jury, or appellate court made a bad decision. Such a belief would not enlarge the scope of the post-litigation duty to report, if the test is phrased in objective terms.³¹⁰ In that case, the question would be whether a reasonable lawyer would have a firm conviction that misconduct was committed. Presumably, what the particular expert personally thought would be irrelevant. However, most states apply a subjective test in determining whether there is a duty to report.³¹¹

Of course, many malpractice actions fail for reasons unrelated to the standard of care. For example, defendants often prevail because a breach of duty did not cause damage or because the claim was barred by the statute of limitations. Such rulings are irrelevant to the issue of whether experts have a post-litigation duty to report, unless the jury made a specific finding that the standard of care was breached.

c. Non-Judicial Resolution of Malpractice Claims

Most malpractice cases are resolved by a negotiated settlement or the plaintiff's abandonment of the claim rather than by a court ruling. It is therefore important to consider how settlement (before or after trial), or abandonment of a claim, affects the duty to report.

309. See *supra* Part II(B)(3) (discussing "substantial certainty" and "firm opinion").

310. See *supra* Part II(B)(3)(c) (discussing whether the test is subjective or objective).

311. *Id.* (analyzing the subjective knowledge standard).

The payment of a settlement is not necessarily an admission of liability.³¹² The settlement may be paid to avoid the expense of presenting a fully valid defense of malpractice charges. Therefore, the payment of a settlement does not, by itself, say anything about whether an expert has a post-litigation duty to report misconduct. The same is true of abandonment of a claim. A plaintiff may cease prosecution of a malpractice action for many reasons unrelated to whether misconduct occurred.

However, in either case—settlement or abandonment—it will be important to consider whether the facts related to alleged misconduct became public through testimony or court filings. If those facts never entered the public domain, it can be argued that whatever the expert learned remains confidential. In that case, for reasons discussed earlier, the expert might be found not to have a duty to report misconduct.³¹³

D. *Misconduct Reported by Others or Publicly Known*

The comments to Model Rule 8.3 suggest that, as a practical matter, the importance of a lawyer's duty to report is to some extent a function of whether the misconduct in question is otherwise likely to be brought to light. Thus, the comments state that “[r]eporting a violation is especially important where the victim is unlikely to discover the offense.”³¹⁴

However, there is nothing in the Model Rule, or typical state variations, which expressly exempts a lawyer from the duty to report merely because a report has already been made. Yet, if a county attorney has notified disciplinary authorities of a lawyer's conviction of an offense,³¹⁵ there would seem to be little use in requiring other lawyers associated with the case to report the misconduct.

Support for this idea, that duplicative reporting of misconduct is not

312. Cf. FED. R. EVID. 408 (stating that evidence of settlement may not be admitted for the purpose of proving liability).

313. See *supra* Part III(D) (delineating expectations of confidentiality when information is not divulged publicly).

314. MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2010).

315. See *In re Member of the State Bar of Ariz.*, Gordon M. Wasson, Nos. 03-1206, 04-0523, 2005 WL 6317922, at *2 (Ariz. Disciplinary Comm'n Jan. 20, 2005) (indicating that the “Chief Deputy County Attorney, Graham County, submitted a complaint to the State Bar of Arizona, pursuant to ER 8.3(a) [(the Arizona reporting rule)] informing the State Bar of Respondent's conviction”).

necessary, can be found in commentary. Professors Hazard and Hodes state, with respect to misconduct by a lawyer in a law firm, "If the partners or supervisory lawyers in fact reported the misconduct," an associate with knowledge of the misconduct "would not be required to make a second redundant report."³¹⁶ However, this would seem to be true only if the associate had reason to think that the relevant facts had been fully disclosed. If the associate knew that important information was not known to, or not disclosed by, the partner or supervising lawyer who made the report, and was unlikely to come to the attention of disciplinary authorities, the associate would arguably have an obligation to disclose those facts.

In *In re Daley*,³¹⁷ a lawyer defending grievance charges argued he was under no duty to report knowledge of dishonest conduct "because it was disclosed in a public forum, a court proceeding, and was widely disseminated the next day in the press, and was disclosed to various law enforcement agencies including the FBI, Illinois State Police, Illinois Liquor Commission, United State[s] Attorney and St. Clair County State[] Attorney's office."³¹⁸ However, the Illinois Attorney Registration and Disciplinary Commission found that "the record did not support" the argument that the other lawyer's misconduct (causing "a false court order to be filed") was a "matter of general knowledge by the Bench or Bar which might relieve" a lawyer of reporting duties.³¹⁹ The commission appears to have left open the possibility that, on other facts, such a defense to a charge of nonreporting might succeed. In *Daley*, the commission imposed a nine-month suspension for a variety of misconduct that, in addition to nonreporting, included multiple failures to communicate with clients and conflicts of interest.³²⁰ Apparently, the sentence would have been more severe if the initial hearing board had not found that the defendant lawyer "believed he was not required to report . . . misconduct under the circumstances," given the "widespread dissemination" of

316. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 64.7, at 64-18 (3d ed. Supp. 2009).

317. *In re Daley*, No. 98 SH 2, 2000 WL 1844454 (Ill. Att'y Registration & Disciplinary Comm'n Aug. 8, 2000).

318. *Id.* at *8.

319. *Id.* at *8-9.

320. *Id.* at *9, *11.

information about the misconduct.³²¹

E. *Relying on Another to Make a Report*

A related question is whether one lawyer can rely upon another lawyer to make a report of misconduct.³²² The issue here is essentially whether an agent can carry out the reporting obligation. It would not be surprising for disciplinary authorities to take the position that the reporting duty is nondelegable. That is, if there is a duty to disclose misconduct to disciplinary authorities, a lawyer who relies on another to make a report is strictly liable for violation of the reporting rule if the report is not made.

However, there is language in the *Restatement* which suggests a different analysis, namely that a lawyer is subject to discipline only for unreasonable delegation. Discussing the duty of lawyers to report misconduct, the *Restatement* opines:

In the case of a junior lawyer in a firm who knows of misconduct by a senior lawyer, including a supervisory lawyer . . . , reporting the violation to the firm's managing body or another senior lawyer does not satisfy the requirement (unless the junior lawyer reasonably assumes in the circumstances that those informed will report the offense), but may impose a similar [reporting] requirement on other lawyers thus informed.³²³

This language appears to endorse fault-based liability, rather than strict liability, for violation of the reporting rule. Of course, the language quoted from the *Restatement* is not an exhaustive treatment of the delegation issue.

321. *Id.* at *10.

322. Nearly a decade ago, Professor Arthur F. Greenbaum wrote:

As a general matter, the duties of lawyers are singular. Each is charged with following the rules. Thus, if multiple lawyers witness misconduct, each is required to report it. Similarly, where both a lawyer and judge witness reportable misconduct in litigation, each may have an independent duty to report the misconduct to disciplinary authorities, notwithstanding the action of the other.

Nevertheless, the opinions are not uniform on this point.

Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 320–21 (2003) (footnote omitted).

323. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. i (2000).

F. *Relying on Another's Judgment About the Need to Report*

If reasonable minds can differ as to whether reporting of misconduct is required, an associate in a law firm may rely upon a supervising lawyer's reasonable resolution of that question.³²⁴ However, if the question is not debatable, an associate is not relieved of the duty to report merely by the fact that a more senior lawyer believes a report need not, or should not, be made, or even instructs the associate not to make a report.³²⁵

For example, a Connecticut ethics committee addressed a situation where an associate had knowledge that another associate in the same firm had fraudulently altered client-billing statements.³²⁶ The committee expressed the view that "the question of whether [the other] associate's conduct 'raises a substantial question' within the meaning of Rule 8.3(a) 'can reasonably be answered only one way.'"³²⁷ Therefore, the associate requesting the committee's advice was personally required to report the misconduct "to the Grievance Committee."³²⁸

G. *Contracting Around the Duty to Report*

1. Agreements Not to File a Grievance

Can a malpractice defendant and the defendant's expert contractually agree, either at the outset of their relationship, or at some later stage, that the expert will not file a grievance as a result of what the expert learns while working on the case? Presumably not. Any such agreement would likely be deemed to be void as against public policy.³²⁹ As the New Jersey Supreme Court has noted, "Public confidence in the legal profession would be seriously undermined if we were to permit an attorney to avoid

324. See MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2010) ("A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.")

325. Cf. *id.* R. 5.2(a) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.")

326. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 20 (1996), available at 1996 WL 785137.

327. *Id.*

328. *Id.*

329. See Fla. Bar v. Fitzgerald, 541 So. 2d 602, 605 (Fla. 1989) (holding that an agreement not to bring misconduct to the attention of the bar is unenforceable).

discipline by purchasing the silence of complainants.”³³⁰

Moreover, by agreeing that a grievance will not be filed, the malpractice defendant and expert might be deemed to have violated applicable disciplinary rules. In discussing settlement covenants or other matters not specifically related to legal malpractice, various authorities have said that any agreement that one of the parties will not file a grievance is unethical.³³¹ In many instances, the making, or attempted making, of such an agreement is deemed to be conduct “prejudicial to the administration of justice,”³³² which in most states is defined as a form of professional “misconduct.”³³³ The underlying principle is broadly construed. Thus, a Missouri ethics committee opined that “an attorney who enters into, or attempts to enter into, a settlement that includes a term that a party to the agreement will *withdraw, refrain from filing, or decline to cooperate regarding*, a complaint” violates that state’s rule against conduct prejudicial to the administration of justice.³³⁴

In some jurisdictions, there is no ethical prohibition against “conduct prejudicial to the administration of justice.” For example, in the Texas ethics code, the drafters substituted the phrase “conduct constituting obstruction of justice,”³³⁵ which has a very different meaning.³³⁶

330. *In re Wallace*, 518 A.2d 740, 743 (N.J. 1986).

331. “It is generally agreed that settlement of a fee or malpractice dispute can never be conditioned upon the client’s consent not to file a grievance or report the misconduct to the appropriate disciplinary authority.” Conn. Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 13 (1997), available at 1997 WL 700627 (citing ABA/BNA Lawyers’ Manual on Professional Conduct, 51:1110).

332. See *People v. Vsetecka*, 893 P.2d 1309, 1310 (Colo. 1995) (en banc) (per curiam) (imposing public censure for various misconduct); see also *People v. O’Leary*, 783 P.2d 843, 846 (Colo. 1989) (en banc) (disbarring an attorney for various misconduct); *Fla. Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000) (per curiam) (suspending an attorney for ninety-one days for various misconduct); *In re Wilson*, 715 N.E.2d 838, 841–42 (Ind. 1999) (ordering an eighteen-month suspension for various misconduct); *In re Cartmel*, 676 N.E.2d 1047, 1050–51 (Ind. 1997) (per curiam) (enjoining an attorney from practicing law for sixty-days due to various misconduct); *In re Blackwelder*, 615 N.E.2d 106, 108 (Ind. 1993) (imposing public reprimand for various misconduct); *In re Tartaglia*, 798 N.Y.S.2d 458, 460–61 (App. Div. 2005) (enforcing a five-year suspension for various misconduct); *In re Boothe*, 740 P.2d 785, 790–91 (Or. 1987) (requiring a six-month suspension for various misconduct).

333. See MODEL RULES OF PROF’L CONDUCT R. 8.4(d) (2010).

334. Mo. Sup. Ct. Advisory Comm., Formal Op. 122 (2006), available at 2006 WL 6239950 (emphasis added).

335. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 8.04(d), reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9).

336. See Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH L. REV.

However, even in the absence of a prohibition of “conduct prejudicial to the administration of justice,” there may be other grounds for discipline. The Oklahoma Supreme Court concluded that an agreement for a client to forebear the filing of a grievance was an improper limitation on a lawyer’s liability to a client for malpractice.³³⁷ Most state codes, including Texas,³³⁸ contain that type of ethical restriction.³³⁹

Some lawyer ethics codes address the issue directly. Connecticut Rule 8.3, immediately after stating the duty to report misconduct by other lawyers, expressly provides: “A lawyer may not condition settlement of a civil dispute involving allegations of improprieties on the part of a lawyer on an agreement that the subject misconduct not be reported to the appropriate disciplinary authority.”³⁴⁰ A proposed revision of the Texas reporting rule provided that “[a] lawyer shall not make, or assist a client in making, any agreement that restricts a lawyer’s . . . obligations under this Rule.”³⁴¹ However, the referendum on the proposed change failed to pass.³⁴²

811, 830 n.94 (1998) (stating that the Texas Disciplinary Rules of Professional Conduct did not carry forward the “conduct prejudicial to the administration of justice” language that was found in the pre-1990 Texas Code of Professional Responsibility, but instead replaced it with “a very different standard which prohibits attorneys from engaging in conduct ‘constituting obstruction of justice,’ which is “substantially narrower”). “The drafters did not intend this new standard to be triggered by conduct significantly less egregious than that involved in the federal criminal offense of obstruction of justice or its state counterparts.” *Id.* (citing Robert P. Schuwerk and John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 1, 475 (1990)).

337. *See Okla. Bar Ass’n v. Colston*, 777 P.2d 920, 925 (Okla. 1989) (finding that a lawyer’s “attempt[] to limit his liability to a client by offering her \$5,000.00 in exchange for an agreement not to pursue the bar grievance” was a “clear violation of the Professional Responsibility Code” because a “member of the bar is guilty of misconduct when he (or she) attempts to exonerate himself from, or limit his liability to, a client for the commission of personal malpractice”).

338. *See* TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.08(h), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9) (restricting agreements limiting liability for malpractice).

339. *Cf.* MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2010) (imposing conditions on agreements limiting liability for malpractice).

340. CONN. RULES OF PROF’L CONDUCT R. 8.3(a) (2010).

341. *Approval of Referendum on Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct*, 73 TEX. B.J. 898, 973 (2010).

342. *State Bar of Texas Referendum 2011 Results*, 74 TEX. B.J. 195, 195 (2011).

2. Hiring the Expert to Provide Counsel Relating to a Possible Grievance

Rather than secure a promise that a grievance will not be filed by an expert, a malpractice defendant might seek to achieve the same result by hiring the expert to provide legal counsel with regard to disciplinary consequences that might arise from the malpractice case. The idea would be to create a lawyer-client relationship which would oblige the expert, now acting as counsel, to keep the relevant facts confidential.³⁴³ However, it is often the case that what cannot be done directly, cannot be done indirectly. Thus, it seems likely that disciplinary authorities might treat this type of arrangement as another form of conduct prejudicial to the administration of justice.³⁴⁴ That would certainly be an appropriate line of analysis if the lawyer-client relationship were nothing more than a sham to defeat the policies underlying the duty to report.³⁴⁵ It might be easy to conclude that such a post-malpractice-litigation agreement to provide counsel relating to a possible grievance lacks bona fides. This is true because, if the expert has a duty to report the misconduct, there is arguably a conflict of interest that requires the expert to decline a post-litigation engagement proffered by the malpractice defendant.³⁴⁶

Moreover, there is authority that “the duty to report misconduct ‘implies a duty by the subject attorney not to frustrate that process, and [that] an attempt to interfere in the grievance process is a basis for discipline.’”³⁴⁷ Therefore, both parties to a specious attorney-client relationship might be subject to discipline: the lawyer-client for having

343. See *supra* Part III (analyzing the confidentiality limitation on disclosure).

344. See *supra* Part VI(G) (discussing conduct prejudicial to the administration of justice).

345. See *supra* Part VI(G) (stating that agreements not to file a grievance are presumptively void as a matter of public policy).

346. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2010) (“A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to . . . a third person or by a personal interest of the lawyer.”).

347. See Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 817 (2009) (quoting Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Miller, 568 N.W.2d 665, 667 (Iowa 1997)) (holding that a lawyer’s demand that her former employer withdraw a complaint against her warranted indefinite suspension with no possibility of reinstatement for sixty days); see also *In re Discipline of Eicher*, 661 N.W.2d 354, 365 (S.D. 2003) (“The duty to report disciplinary violations also embraces a responsibility not to frustrate the reporting by others or dissuading others from cooperating in disciplinary investigations.”).

violated the obligation implied by the terms of the reporting rule, and the expert for having assisted those acts of misconduct.³⁴⁸

It is useful to remember that disciplinary authorities have been assiduous in addressing interference with the disciplinary process. For example, in *In re Discipline of Eicher*,³⁴⁹ the Supreme Court of South Dakota held that a lawyer engaged in professional misconduct by proposing that, if a disciplinary complaint against him were withdrawn, he would not appeal a trial court's decision in his client's underlying action.³⁵⁰

3. Mixing the Roles of Consulting and Testifying Expert

In a widely noted ethics opinion, Formal Opinion 97-407, a committee of the American Bar Association took the position that the role of a testifying expert is different from the role of a consulting expert, and that the distinction carries with it important consequences.³⁵¹ According to the opinion, which is generally well-regarded,³⁵² the hallmark of a testifying expert is independence and objectivity,³⁵³ whereas a consulting expert's role is more akin to that of a partisan advocate serving as a type of associated co-counsel.³⁵⁴ Due in part to this distinction, there is normally no attorney-client relationship between a testifying expert and the person on whose behalf the expert has been engaged, but there is a lawyer-client relationship between a consulting expert and that type of person. From the perspective of the testifying expert, this view has several advantages. The testifying expert's range of future potential conflicts of interest is limited because the former-client conflict of interest rule³⁵⁵ is

348. See MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2010) (providing that "[i]t is professional misconduct for a lawyer to: (a) violate . . . the Rules of Professional Conduct . . . [or] knowingly assist . . . another to do so").

349. *In re Discipline of Eicher*, 661 N.W.2d 354 (S.D. 2003).

350. *Id.* at 364, 371 (finding that the proposal violated the duties imposed by the reporting rule and imposing a 100-day suspension for various acts of misconduct).

351. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997).

352. *But see* Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M. L. REV. 47, 66 (2006) (criticizing Formal Opinion 97-407's conclusion that "testifying lawyer-experts do not share attorney-client relationships with the parties for whom they testify").

353. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997) (opining that a testifying expert "is presented as objective and must provide opinions adverse to the party for whom he expects to testify if frankness so dictates").

354. See *id.* (stating that "zealous partisan advocacy [is] characteristic of an expert consultant").

355. See MODEL RULES OF PROF'L CONDUCT R. 1.9 (2010) (addressing former-client conflicts of interest).

inapplicable. Further, because the testifying expert has no “client,” the chances of being sued for malpractice are greatly reduced.³⁵⁶

However, Formal Opinion 97-407 acknowledged that sometimes the dividing line between consulting expert and testifying expert is blurred, and that an expert could serve in both capacities.³⁵⁷ The committee cautioned that:

When this blending of roles occurs, the lawyer whose principal role is to testify as an expert nevertheless may become an expert consultant and as such, bound by all of the Model Rules as co-counsel to the law firm’s client. The lawyer expert then must exercise special care to assure that the law firm and the client are fully informed and expressly consent to the lawyer continuing to serve as a testifying expert, reminding them that his testifying may require the disclosure of confidences and may adversely affect the lawyer’s expert testimony by undermining its objectivity.³⁵⁸

One further consequence of mixing the roles of consulting and testifying experts is that the expert may stand in a different position with respect to a post-litigation duty to report serious misconduct by another lawyer.³⁵⁹ The expert who serves in both roles could presumably argue in good faith that the information relating to misconduct is “protected by Rule 1.6,” or more specifically the parallel state law provision, and that absent client consent, or some other exception to the ethical obligation of confidentiality, reporting is neither required nor permitted.³⁶⁰

VII. CONCLUSION

As the preceding discussion suggests, there are many unanswered questions relating to whether lawyers serving as expert witnesses in legal malpractice cases have a duty to report knowledge of serious professional misconduct that emerges from the facts of malpractice litigation. Yet it

356. See VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 160 (West 2011) (asserting that “[i]t is still true, and probably always will be, that nonclients have a harder time than clients holding lawyers accountable for the losses they sustain”). Expert witness malpractice is a theory of liability that is virtually unknown. *Id.* at 85–86.

357. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 407 (1997) (indicating that this may be true because “[t]he testifying expert may sometimes become involved in discussion of tactical or strategic issues of the case, or become privy to confidential information pertaining to the case”).

358. *Id.*

359. *Id.*

360. Douglas R. Richmond, *Lawyers as Witnesses*, 36 N.M. L. REV. 47, 61 (2006).

seems clear that courts and ethics committees will begin to address these issues as legal malpractice law, and related litigation, continues to grow as an important field of law.

Experts seeking to escape the obligation to report malpractice-related misconduct may hope that courts will eventually take the position that experts, as subagents of the lawyers who hire them,³⁶¹ “stand in the shoes” of those lawyers; that what they learn about the case is confidential client information “protected by Rule 1.6,”³⁶² and that absent client consent or some other exception to confidentiality,³⁶³ reporting misconduct is not required by the applicable version of Model Rule 8.3. However, this view of experts’ obligations, while plausible, is not yet the law. Experts must therefore struggle with analyzing their own ethical obligations, just as they scrutinize the obligations of malpractice defendants.

In determining whether to make a report of misconduct, a legal malpractice expert may benefit from seeking the guidance of another lawyer not involved in the underlying case.³⁶⁴ That consultant may “bring a measure of objectivity to the analysis that might otherwise be difficult to achieve.”³⁶⁵ Disclosure of otherwise confidential information for the purpose of seeking ethics advice is generally regarded as ethically permissible and appropriate.³⁶⁶

Experts who err on the side of caution by reporting misconduct, which they may have a duty to disclose, have little risk of liability arising from that disclosure. In most states, a person who files a grievance is protected

361. See *supra* text accompanying note 198 (discussing reporting duties in light of agency principles).

362. See *supra* Part III(D) (discussing the meaning of “protected by Rule 1.6”).

363. See *supra* Part III(A) (analyzing the exceptions to the confidentiality limitation on disclosure).

364. Cf. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 431 (2003) (suggesting that, in determining whether to report an apparently impaired lawyer to disciplinary authorities, “a lawyer might consider consulting with a psychiatrist, clinical psychologist, or other mental health care professional about the significance of the conduct observed or of information the lawyer has learned from third parties”).

365. Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 13 n.1 (2004), available at 2004 WL 3413897 (indicating that the consultation must be done in accordance with rules governing confidentiality of client information).

366. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2010) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer’s compliance with these Rules.”).

from liability for defamation by an absolute privilege.³⁶⁷

367. See 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 64.4, at 64-11 (3d ed. Supp. 2009) (indicating that in most states the privilege does not turn on good faith or good cause); see also *Weber v. Cueto*, 568 N.E.2d 513, 519-20 (Ill. App. Ct. 1991) (finding incidental references to a nonlawyer to be absolutely privileged). In many states, the immunity is statutory. For example, a Texas statute provides: "No lawsuit may be instituted against any Complainant or witness predicated upon the filing of a Grievance or participation in the attorney disciplinary and disability system. . . . The immunity is absolute and unqualified and extends to all actions at law or in equity." TEX. RULES DISCIPLINARY P. R. 15.09, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (West 2005).