



1999

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## Recommended Citation

Eastin, Parker D. (1999) "Should Kentucky Impose an Enforceable Duty on Lawyers to Report Other Lawyers' Professional Misconduct?," *Kentucky Law Journal*: Vol. 87 : Iss. 4 , Article 11.  
Available at: <https://uknowledge.uky.edu/klj/vol87/iss4/11>

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# NOTES

## Should Kentucky Impose an Enforceable Duty on Lawyers to Report Other Lawyers' Professional Misconduct?

BY PARKER D. EASTIN\*

### INTRODUCTION

*While playing in a golf tournament with Friend, Harold Adams recently learned that James Black, a fellow member of the bar, had misallocated a portion of the funds obtained from a settlement agreement that Black had negotiated on behalf of Friend. Adams was not surprised, as Black's reputation for deceitfulness preceded him.*

*Adams, who was not asked to pursue the matter on behalf of Friend, felt obliged to confront Black. Black took the accusation as a tremendous insult. "Look Adams, mind your own business. I handle my clients my way! You should spend more time worrying about all the clients you neglect in pursuit of a better handicap and a better buzz. We both know you're an alcoholic, and you spend more time on the golf course than in your office. That's why you're always asking for extensions and continuances."*

Assuming all of the above accusations are true, what is either lawyer's obligation with respect to this information? Has either attorney done anything that would subject him to professional discipline? Should either attorney be responsible for reporting the misconduct of the other?

For attorneys practicing in Kentucky, there is no recognized duty to report the professional misconduct of other attorneys and no potential discipline for failing to do so.<sup>1</sup> This holds true even though both Adams and

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<sup>1</sup> See *infra* Part II.

Black have knowledge that the other has breached his professional obligations. Is this the best possible state of affairs? Or has the time come for the Kentucky Supreme Court to impose a reporting requirement on the lawyers practicing in this state? To answer this question, a determination must be made as to whether ample justification exists to support the Kentucky Supreme Court's decision not to require lawyers to regulate themselves in this manner. Lawyers in forty-eight other states have imposed upon themselves a duty to report unprivileged information relating to professional misconduct. Kentucky, therefore, is only one of two states which do not compel such disclosure.<sup>2</sup> As one commentator recently noted, however, "[t]he disclosure of unethical or illegal attorney conduct is an integral part of the legal profession's ability to police itself, maintain its integrity and protect society from harm."<sup>3</sup> Ultimately, "it is lawyers themselves who are often in the best, and sometimes the only, position to discover, recognize and report unethical activities within the profession *before* members of the public are seriously harmed."<sup>4</sup>

Part I of this Note provides an overview of the lawyer's reporting requirement, including a historical summary of the origin and development of the lawyer's duty to report professional misconduct.<sup>5</sup> Also included in Part I is a discussion of the general status of the reporting requirement,<sup>6</sup> especially in light of the landmark decision by the Illinois Supreme Court in the case of *In re Himmel*.<sup>7</sup> Part II provides an overview of the current reporting requirement in Kentucky, or more precisely, the lack thereof, and examines some of the potential justifications for this position.<sup>8</sup> Part II also discusses some relevant reporting statistics from Kentucky. Part III highlights potential problem areas under the current reporting requirement found in the Model Rules of Professional Conduct<sup>9</sup> and proposes potential solutions to these problems.<sup>10</sup> Part III also includes a discussion of the ramifications of imposing a reporting requirement on lawyers practicing in

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<sup>2</sup> The other state with no official reporting requirement is California.

<sup>3</sup> Anthony J. Blackwell, *Wieder's Paradox: Reporting Legal Misconduct in Law Firms*, in 1992/1993 ANN. SURV. AM. L. 9, 9 (citing *Winters v. Houston Chronicle Publ'g Co.*, 795 S.W. 2d 723, 729-31 (Tex. 1990) (Doggett, J., concurring)).

<sup>4</sup> *Id.*

<sup>5</sup> See *infra* notes 14-40 and accompanying text.

<sup>6</sup> See *infra* notes 41-66 and accompanying text.

<sup>7</sup> *In re Himmel*, 533 N.E.2d 790 (Ill. 1988).

<sup>8</sup> See *infra* notes 67-93 and accompanying text.

<sup>9</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1998).

<sup>10</sup> See *infra* notes 94-140 and accompanying text.

private firms after the decision in *Wieder v. Skala*,<sup>11</sup> as well as those serving in the judiciary.<sup>12</sup> Finally, this Note concludes that Kentucky should adopt and enforce the reporting requirement as enumerated in the Model Rules of Professional Conduct, but in doing so, should pay close attention to the potential for abuse by unscrupulous lawyers.<sup>13</sup>

## I. THE DUTY TO REPORT PROFESSIONAL MISCONDUCT

### A. *The Historical Development of the Duty to Report*

The responsibility incumbent upon a lawyer to report the misconduct of another lawyer has existed for nearly a century.<sup>14</sup> The duty officially arose in 1908, when the American Bar Association (“ABA”) published the first national code of legal ethics, known as the Canons of Professional Ethics (“Canons”).<sup>15</sup> The Canons consisted of thirty-two norms of behavior for legal practice.<sup>16</sup>

Canon 29, entitled “Upholding the Honor of the Profession,” declared: “Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client.”<sup>17</sup> The Canons, therefore, encouraged intraprofessional reporting and prosecution of corruption and dishonesty in the bar, but they were all bark and no bite. The Canons did not impose an actual duty per se to report misconduct, as the preamble to the Canons noted that the expressions contained therein were not to be considered binding and instead were to be

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<sup>11</sup> *Wieder v. Skala*, 544 N.Y.S.2d 971 (Sup. Ct. 1989), *aff’d*, 562 N.Y.S.2d 930 (App. Div. 1990), *aff’d as modified*, 609 N.E.2d 105 (N.Y. 1992).

<sup>12</sup> See *infra* notes 141-75 and accompanying text.

<sup>13</sup> See *infra* notes 176-80 and accompanying text.

<sup>14</sup> See William L. Hutton, Case Note, *The Lawyer’s Duty to Report Another Lawyer’s Misconduct*, 14 S. ILL. U. L.J. 683, 684 (1990).

<sup>15</sup> CANONS OF PROFESSIONAL ETHICS (1908).

<sup>16</sup> See Eugene R. Gaetke, *Kentucky’s New Rules of Professional Conduct for Lawyers*, 78 KY. L.J. 767, 768 (1990) (noting that between 1908 and 1970, 15 additional Canons were added by the ABA).

<sup>17</sup> CANONS OF PROFESSIONAL ETHICS Canon 29 (stating that lawyers “should strive at all times to uphold the honor and maintain the dignity of the profession and to improve not only the law but the administration of justice”). *But see id.* Canon 28 (“Stirring up strife and litigation is not only unprofessional, but it is indictable at common law.”).

used as a kind of “general guide.”<sup>18</sup> Thus, attorneys who failed to honor this “obligation” were not subject to discipline for their nonfeasance. Interestingly, the ABA Canons remained the national professional model for more than sixty years.<sup>19</sup>

Subsequently, in 1969, the ABA adopted the Model Code of Professional Responsibility (“Model Code”).<sup>20</sup> The Model Code was designed to be more specific in application than its predecessor and was “adopted almost universally by state supreme courts.”<sup>21</sup> The Model Code consisted of both non-binding “Ethical Considerations” and binding “Disciplinary Rules.”<sup>22</sup> In contrast to the Canons, the Model Code’s Disciplinary Rule (“DR”) 1-103 made the duty to report a binding professional obligation rather than a mere suggestion.<sup>23</sup> DR 1-103(A) provides: “A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.”<sup>24</sup> The incorporation of DR 1-102 is a clear indication of the magnitude of this requirement.<sup>25</sup> DR 1-102 provides:

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonestly, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.

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<sup>18</sup> Blackwell, *supra* note 3, at 23.

<sup>19</sup> In 1969, the ABA’s House of Delegates established a new set of rules because of the “difficulty in enforcing the aspirational and precatory language of the Canons.” Gaetke, *supra* note 15, at 768.

<sup>20</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

<sup>21</sup> THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 51 (6th ed. 1995).

<sup>22</sup> The Model Code made clear that Disciplinary Rules were not “aspirational” but were the minimum standard of conduct expected of lawyers. A violation of a Disciplinary Rule subjected the lawyer to discipline. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(1).

<sup>23</sup> *See* Blackwell, *supra* note 3, at 23.

<sup>24</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A).

<sup>25</sup> *See* Ronald D. Rotunda, *The Lawyer’s Duty to Report Another Lawyer’s Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 981.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.<sup>26</sup>

Thus a lawyer has a sweeping obligation under the Model Code to report ethical violations. A lawyer possessing unprivileged knowledge of a violation of a specific Disciplinary Rule, coupled with the knowledge of a violation of any of several "moral" rules, is encumbered with a strictly enforceable duty to report.<sup>27</sup>

Legal commentators roundly criticized the Model Code's formulation of the duty to report.<sup>28</sup> The broad imposition of the duty to report even "de minimis or merely technical infractions," it was argued, would serve only to engender "mutual suspicion and distrust" in the profession.<sup>29</sup> Furthermore, this absolute duty would never be followed, thus fostering even more cynicism with regard to attorney misconduct in general.<sup>30</sup>

In August 1983, prompted by a general dissatisfaction with the Model Code,<sup>31</sup> the ABA adopted the Model Rules of Professional Conduct<sup>32</sup> ("Model Rules"), which were intended to replace the entire Model Code.<sup>33</sup>

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<sup>26</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102.

<sup>27</sup> In 1972, the ABA issued Informal Opinion 1210, noting that the duty of a lawyer under Disciplinary Rule 1-103(a) was to report any unprivileged knowledge of another lawyer's violation of Disciplinary Rule 1-102. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1210 (1972).

<sup>28</sup> *See* Blackwell, *supra* note 3, at 24 ("Among the criticisms was the practical impossibility of separating the Ethical Considerations from the Disciplinary Rules in terms of their binding effect.") (citing GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 555-56 (1989 Supp.)); *see also* Gaetke, *supra* note 16, at 769 ("The Code was not without its problems. The ABA amended the Code every year between 1974 and 1980 in response to judicial and scholarly criticism.").

<sup>29</sup> Blackwell, *supra* note 3, at 24.

<sup>30</sup> *See id.*; *see also* Gaetke, *supra* note 16, at 797 n.176 (noting that there was not a single case prosecuted in Kentucky under DR 1-103(A)).

<sup>31</sup> *See* Gaetke, *supra* note 16, at 769-70.

<sup>32</sup> MODEL RULES OF PROFESSIONAL CONDUCT (1983).

<sup>33</sup> *See* Larry Schafer, Comment, *Attorney and Client: Duty to Report Lawyer Misconduct*, 67 N.D. L. REV. 359, 361 (1991). *See generally* Gaetke, *supra* note 16, at 770 (noting that the initial "reaction" to the Model Rules was not nearly as overwhelming as the previous response to the Model Code); MORGAN & ROTUNDA, *supra* note 21, at 12 (noting, however, that as of 1995 a majority of states have adopted in substantial part the Model Rules).

The Model Rules have a black-letter format and are followed by explanatory "Comments." However, only the Rules themselves are designed to have authoritative effect, while the comments are to be used to "provide guidance" in the application of the Rules.<sup>34</sup>

The duty to report professional misconduct under the Model Rules is markedly different from the duty under the Model Code.<sup>35</sup> Under Model Rule 8.3(a), the duty to report arises only when a lawyer has "knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a *substantial question* as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."<sup>36</sup> As emphasized, only violations which raise a "substantial question" as to a lawyer's fitness to practice law are to be reported. This means that the duty to report misconduct is triggered at a much higher threshold than under the previous Model Code formulation.

The Model Rules version of the duty to report, although clearly more sound than its Model Code predecessor, leaves many questions unanswered.<sup>37</sup> For example, what violations raise "substantial questions" about a lawyer's fitness to practice law?<sup>38</sup> Apparently, it is left to the individual lawyer's discretion to decide what types of misconduct raise this "substantial question."<sup>39</sup> Moreover, should attorneys who fail to honor the obligation to report be subject to discipline absent other professional misconduct? The extent to which any formulation of the reporting rule should or would be independently enforced (i.e., uncoupled with other professional misconduct) was uncertain—uncertain, that is, until the landmark decision by the Illinois Supreme Court in *In re Himmel*.<sup>40</sup>

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<sup>34</sup> Gaetke, *supra* note 16, at 771 (noting that format of the Model Rules was similar to that of the *Restatements* produced by the American Law Institute, and that the comments were designed to "illuminate" the "interpretation and application" of the Rules).

<sup>35</sup> See Schafer, *supra* note 33, at 363; see also John Freeman, *Reporting Lawyer Misconduct*, S.C.LAW., May-June 1994, at 7, 8 (discussing the difference between Model Code reporting requirement and the Model Rules reporting requirement).

<sup>36</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1998) (emphasis added).

<sup>37</sup> See discussion *infra* Part III.

<sup>38</sup> See discussion *infra* Part III.A.2.

<sup>39</sup> See Michael J. Burwick, Note, *You Dirty Rat! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct*, 8 GEO. J. LEGAL ETHICS 137, 137-38 (1994).

<sup>40</sup> *In re Himmel*, 533 N.E.2d 790 (Ill. 1988); see *infra* notes 41-66 and accompanying text.

### B. *The Importance of In re Himmel*

*In re Himmel*<sup>41</sup> is a very significant case, as it represents the first case in which a lawyer was charged *solely* with failing to report the professional misconduct of another lawyer.<sup>42</sup> A brief review of the facts will help bring the significance of the holding to light,<sup>43</sup> and one should keep in mind that DR 1-103 was in effect in Illinois at this time.<sup>44</sup> In October 1978, Tammy Forsberg was injured in a motorcycle accident and retained John Casey as her attorney in a suit to recover for personal injuries.<sup>45</sup> Mr. Casey negotiated a \$35,000 settlement on behalf of Ms. Forsberg, but he failed to deliver Ms. Forsberg's two-thirds share of the funds and instead converted them to his own personal use.<sup>46</sup> Over the next two years, Ms. Forsberg made several unsuccessful attempts to recover her \$23,233.34.<sup>47</sup>

In 1983, Ms. Forsberg hired attorney James Himmel, an eight-year veteran of the profession, to help her in the collection of her funds.<sup>48</sup> Mr. Himmel agreed to represent her in the action and offered to collect as his fee one-third of any monies recovered in excess of Ms. Forsberg's \$23,233.34 share.<sup>49</sup> Mr. Himmel eventually negotiated with Mr. Casey a \$75,000 settlement under which Ms. Forsberg agreed not to pursue any other claims she might have against him.<sup>50</sup> Thereafter, Mr. Casey failed to meet his obligations under the agreement, and Mr. Himmel then filed suit and obtained a \$100,000 judgment on behalf of Ms. Forsberg.<sup>51</sup>

Because Ms. Forsberg had specifically directed him not to do so, Mr. Himmel did not report Mr. Casey's actions to the Illinois disciplinary

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<sup>41</sup> *In re Himmel*, 533 N.E.2d at 790.

<sup>42</sup> *See* Rotunda, *supra* note 25, at 982.

<sup>43</sup> For a comprehensive discussion of the facts of *Himmel*, *see id.* at 982-85.

<sup>44</sup> One should not attach too much significance to the fact that this case was prosecuted under the Model Code formulation since the misconduct in question (the embezzlement of client funds) would have certainly risen to the level of a "substantial" misconduct under the Model Rules. *See infra* Part III.A.2.

<sup>45</sup> *See In re Himmel*, 533 N.E.2d at 791.

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* The agreement specified that Ms. Forsberg would not pursue any civil, criminal, or disciplinary action against Casey.

<sup>51</sup> *See id.* Ms. Forsberg was only able to collect \$15,400 of this amount. Thus, Mr. Himmel ultimately received no fee.



authorities.<sup>52</sup> As a result of the suit, however, the Illinois Attorney Registration and Disciplinary Commission ("IARDC") became aware of the allegations against Mr. Casey and initiated an investigation.<sup>53</sup> Mr. Casey was subsequently disbarred on November 5, 1985.<sup>54</sup> The IARDC then began to look into Mr. Himmel's role in the proceedings. In January 1986, the administrator of the IARDC filed a complaint against Mr. Himmel, alleging that he had violated Rule 1-103(a) of the Illinois Code of Professional Responsibility.<sup>55</sup> The Hearing Board subsequently found that Mr. Himmel had violated the rule but recommended only a private reprimand.<sup>56</sup> On appeal by the administrator, the Review Board found that Mr. Himmel had not violated the rule and recommended dismissal of the complaint.<sup>57</sup> Upon final appeal, the Illinois Supreme Court suspended Mr. Himmel from the practice of law for one year, punishment merely for his failure to report the misconduct of Mr. Casey.<sup>58</sup>

*In re Himmel* was a ground-breaking case in legal ethics.<sup>59</sup> It was the first case on record in which a disciplinary proceeding was instituted solely for a failure to report professional misconduct.<sup>60</sup> Previous disciplinary cases involving an alleged failure to report also involved allegations of additional

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<sup>52</sup> See *id.* Presumably, Ms. Forsberg did not want the misconduct to be reported for fear of upsetting ongoing collection efforts.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* Rule 1-103(a) of the Illinois Rules of Professional Conduct provides: "(a) A lawyer possessing unprivileged knowledge of a violation of Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 103(a) (1987). Rule 1-102(a)(3) and (4) provides: "(a) A lawyer shall not . . . (3) engage in illegal conduct involving moral turpitude; (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *Id.* Rule 1-102(a)(3), (4).

<sup>56</sup> See *In re Himmel*, 533 N.E.2d at 792.

<sup>57</sup> See *id.* The board recommended vindication because Mr. Himmel had honored his client's wishes to not disclose the misconduct.

<sup>58</sup> See *id.* at 796.

<sup>59</sup> Interestingly, Mr. Himmel was quoted as saying, "Frankly, I never really thought of my obligations to the profession in this case. . . . I was just trying to help a client to be made whole after being harmed by another member of my profession." Darryl Van Duch, *Best Snitches: Illinois Lawyers*, NAT'L L.J., Jan. 27, 1997, at A25.

<sup>60</sup> The decision also made clear that a lawyer may not bargain away the duty to report professional misconduct in an attempt to obtain a better settlement for his client. See *Himmel*, 533 N.E.2d at 796.

ethical or legal misconduct.<sup>61</sup> Whether or not one agrees with the outcome of this particular case, the decision effectively demonstrates the potential breadth of a reporting requirement that is strictly enforced.

Today, *In re Himmel* remains one of the few cases subjecting a lawyer to discipline solely for failing to report another lawyer's professional misconduct. Because very few states have followed the lead of the Illinois Supreme Court, the long-term precedential effect of this decision remains uncertain.<sup>62</sup> In Illinois, however, the decision has been taken very seriously by the legal community. In 1988, the year *In re Himmel* was decided, only 154 attorneys reported the professional misconduct of their peers to the IARDC.<sup>63</sup> A year later, that number jumped to 992.<sup>64</sup> Over the next five years, an average of about 570 attorney complaints were received annually by the agency, a benchmark no other state has come close to approaching.<sup>65</sup> These numbers indicate that a strictly enforced reporting requirement can cause lawyers to police themselves more fervently and abandon their "conspiracy of silence."<sup>66</sup>

## II. KENTUCKY'S REPORTING STATUS

### A. Kentucky's Current Rules Relating to the Reporting of Misconduct

In July 1989, the Kentucky Supreme Court adopted the Model Rules of Professional Conduct using a form of selective incorporation.<sup>67</sup> As noted

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<sup>61</sup> See Rotunda, *supra* note 25, at 982.

<sup>62</sup> See Burwick, *supra* note 39, at 146-47 ("In the wake of this decision, there has been a great deal of commentary, but surprisingly few instances of other courts and disciplinary bodies following the lead of the Illinois Supreme Court.").

<sup>63</sup> See Van Duch, *supra* note 59, at A25.

<sup>64</sup> See *id.* But see Burwick, *supra* note 39, at 147. Burwick examined Illinois reporting statistics in 1989 and noted that, ultimately, "there was no significant change in the number of attorneys charged or disciplined before or after the decision." *Id.* This implies that while the *In re Himmel* decision caused many more lawyers to report professional misconduct the following year, much of the alleged misconduct was not based on colorable claims.

<sup>65</sup> See Van Duch, *supra* note 59, at A1 ("New York attorneys, for instance, have reported only 'a handful' of colleagues to state authorities during the 1990s . . .").

<sup>66</sup> *Id.* at A25; see also Cynthia L. Gendry, Comment, *Ethics—An Attorney's Duty to Report the Professional Misconduct of Co-workers*, 18 S. ILL. U. L.J. 603, 609 (1994) ("Many legal scholars recommend more severe sanctions as a means of advancing compliance with the reporting mandates. A drastic increase in reports . . . by attorneys shortly after *Himmel* indicates the merit of this theory.").

<sup>67</sup> See generally KY. SUP. CT. R.; Gaetke, *supra* note 16, at 767 ("On July 12, 1989, the Kentucky Supreme Court adopted its own version of the . . . Model Rules

above, the court chose not to incorporate the reporting requirement found in Model Rule 8.3.<sup>68</sup> Hence, Kentucky lawyers have no officially recognized duty to report professional misconduct.<sup>69</sup> This means that lawyers practicing in Kentucky are not subject to discipline for failing to report the professional misconduct of their colleagues no matter how improper or egregious that misconduct might be.<sup>70</sup>

Interestingly, the only rule that speaks directly to the issue of attorney discipline for reporting professional misconduct is Kentucky's Rule 3.4(f), which instructs a lawyer not to "[p]resent, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter."<sup>71</sup> This rule rightly subjects lawyers to discipline for the over-zealous use of either the criminal or disciplinary process in order to gain a competitive edge.<sup>72</sup> Rule 3.4(f) presumably has its roots in DR 7-105(A), which provides, "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."<sup>73</sup> However, Rule 3.4(f) is broader than its Model Code counterpart in a fundamental respect. Rule 3.4(f) applies this prohibition to both civil and criminal matters, which represents a more extensive prohibition than that of its apparent predecessor in the Model Code.<sup>74</sup>

Combining the supreme court's decision not to incorporate the reporting requirement of Model Rule 8.3 with the decision to expand the scope of Rule 3.4(f), one could reasonably interpret this as sending a strong message to the Kentucky bar. One can imagine the supreme court saying,

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of Professional Conduct.").

<sup>68</sup> See *supra* Introduction. The court altered and omitted several other provisions as well. See generally Gaetke, *supra* note 16, at 774-800.

<sup>69</sup> Lawyers remain free to come forward based upon their own convictions.

<sup>70</sup> See generally Gaetke, *supra* note 16, at 796 ("Even more disturbing than the deletion of Model Rule 3.3(a)(3) is the Kentucky Supreme Court's deletion of the requirement that lawyers report serious ethical violations committed by other lawyers.").

<sup>71</sup> KY. SUP. CT. R. 3.130-3.4(f). Interestingly, the Model Rules contain no such provision. See Gaetke, *supra* note 16, at 781.

<sup>72</sup> See Gaetke, *supra* note 16, at 781 ("Prohibitions on such threats and actions . . . are justifiable on several grounds.").

<sup>73</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-105(A) (1980); see also Gaetke, *supra* note 16, at 781 (noting that 3.4(f) is "similar to a proscription under the [Model] Code").

<sup>74</sup> See Gaetke, *supra* note 16, at 781.

“Not only are we refusing to require lawyers to report the professional misconduct of their colleagues, we are willing to discipline those lawyers who file or threaten to file complaints that we believe are being pursued solely for ulterior motives.”

### *B. Potential Justifications for Kentucky's Position*

Why would the court adopt such a defensive posture, especially when forty-eight other states have not found it necessary to do so? There are several possible justifications, but whether or not these justifications are satisfactory is arguable. The expansive wording of Rule 3.4(f) and the absence of the Model Rules' reporting requirement confirm that one of the court's primary fears is that lawyers will abuse a reporting requirement in order to gain a competitive advantage in litigation. The court apparently fears that subsequent to the adoption of a reporting requirement, lawyers would file or threaten to file charges against other lawyers for malevolent reasons and would attempt to do so under the guise of adherence to the rule. This fear seemingly represents a strong argument against the imposition of a reporting requirement.<sup>75</sup> However, there is no empirical data to support the contention that lawyers would seize the opportunity to abuse the system in this manner,<sup>76</sup> and this notion seems to presume a sort of ever-present scienster in the minds of Kentucky lawyers. Furthermore, there is no obvious reason why Rule 3.4(f) could not effectively complement any reporting requirement the court chooses to adopt. In other words, these two rules are not necessarily mutually exclusive.<sup>77</sup>

Opponents could also argue that the uncertainty inherent in Model Rule 8.3's language of “substantial question,” and the necessarily subjective determination which must therefore be made by each lawyer, make the rule's adoption that much more problematic.<sup>78</sup> As this Note demonstrates,

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<sup>75</sup> As Professor Gaetke notes, “The Kentucky rule . . . serves a valuable public interest function in discouraging the misuse of criminal and disciplinary charges for private gain.” *Id.*

<sup>76</sup> The author has at least found no such statistical data. However, in 1990, the Illinois Supreme Court adopted a rule similar to Kentucky's Rule 3.4(f), making it unethical to threaten to snitch during pending civil litigation “because too many of the state's lawyers were using skeletons in their opponents' closets to gain negotiation leverage.” Van Duch, *supra* note 59, at A25.

<sup>77</sup> See also *infra* Part III.A.5 (arguing that 3.4(f) is defectively drafted).

<sup>78</sup> See *infra* Part III.

however, much of the confusion surrounding Model Rule 8.3 can be clarified by the adoption of a carefully articulated rule.<sup>79</sup>

Opponents might also argue that the decision to report a fellow member of the bar should “stem from an attorney’s own moral convictions rather than an attempt to determine whether another individual’s actions fall within the reporting requirements of a specific statutory provision.”<sup>80</sup> While this appeal to the conscience of lawyers rings true in an idealistic judicial system, lawyers need clear guidelines and enforceable rules to function most effectively.

A final justification against the imposition of a duty to report is that there is a general distaste for snitching and its encouragement, both in and out of the legal profession.<sup>81</sup> Though this may be true, the unfortunate decline in public respect for lawyers over the last several decades should cause the court to adopt proactive measures that will likely decrease the amount of lawyer misconduct that led to much of this criticism.<sup>82</sup> Similarly, such a move by the court would be an intelligent public relations maneuver, as it would demonstrate to the public that the legal profession strives for improvement over the status quo. Furthermore, the adoption of a reporting requirement, substantiated by the threat of disciplinary proceedings, makes reporting seem less like snitching and more like adherence to a recognized rule of law.<sup>83</sup> As a practical matter as well, “[a]mong the various participants in the legal process, lawyers are the most informed regarding legal

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<sup>79</sup> See *infra* Part III.

<sup>80</sup> Burwick, *supra* note 39, at 153.

<sup>81</sup> See *id.*

<sup>82</sup> See Gaetke, *supra*, note 16, at 797 (“From the public’s viewpoint, the absence of a reporting requirement undermines the effectiveness of the planned operation of the disciplinary process.”).

<sup>83</sup> As Professor Gaetke states:

Some insist that the requirement places lawyers in the awkward position of having to judge the conduct of their opponents and even their colleagues. Yet lawyers are quite willing to “judge” other lawyers for any number of purposes as long as it serves their own private interests or those of their clients. They judge the legality of their opponents’ discovery demands. They judge opposing lawyers’ conduct for purposes of appeals from lower court decisions. They judge actions taken by opponents for purposes of pursuing sanctions. All these judgments involve the lawyer’s evaluation of whether another lawyer’s conduct comports with the law. The reporting requirement of Model Rule 8.3 merely expects such judgments to further the public interest.

*Id.* at 799 (footnotes omitted).

ethics and the most likely to be aware of the misconduct of lawyers involved in a given matter. Thus, lawyers collectively are the best source of informed complaints about lawyers' misconduct.<sup>84</sup> Therefore, since lawyers are the best, and sometimes the only, participants in the process capable of making these determinations, it seems illogical to excuse them from the responsibility of serving the profession in this capacity. Ultimately, arguments against the imposition of a reporting requirement in Kentucky exist, but can they overcome the arguments in favor of such a duty?

### C. *Kentucky Statistics on Lawyer Discipline*

The following statistics, provided by the Kentucky Bar Association's Office of Bar Counsel, represent the three most recent fiscal years (1995-1998), as well as 1989, the fiscal year following the decision in *In re Himmel*.<sup>85</sup> The numbers shown reflect the following information:

1. The number of lawyers licensed to practice in the state of Kentucky.
2. The number of disciplinary complaints filed against these lawyers.<sup>86</sup>
3. The number of complaints which led to disciplinary proceedings.
4. The number of complaints which resulted in actual disciplinary action.<sup>87</sup>

	1989	1995-1996	1996-1997	1997-1998
1.	9,712	11,835	12,075	12,741
2.	619	717	778	672
3.	83	93	108	112
4.	36	39	40	40

<sup>84</sup> *Id.* at 797.

<sup>85</sup> See Letter from Edie Armstrong, Bar Counsel Paralegal, Kentucky Bar Association, to Parker Eastin, *Kentucky Law Journal* (Nov. 10, 1998) (on file with author); see also *supra* Part I.B.

<sup>86</sup> The numbers indicate only the total number of complaints filed, as separate records are not maintained that record the number of complaints filed by attorneys.

<sup>87</sup> Pursuant to SCR 3.150(1) ". . . nothing connected with a disciplinary case shall be made public unless so ordered by the Court," therefore, the figures below reflect only final public orders issued by the Supreme Court of Kentucky. These statistics do not include private sanctions which [have been] imposed. These figures are based on a fiscal year which ends in June. Letter from Edie Armstrong to Parker Eastin, *supra* note 85.

These statistics demonstrate that over the last three years, an average of about one in seventeen attorneys licensed to practice law in Kentucky had a disciplinary complaint filed against him or her.<sup>88</sup> Of the complaints filed, an average of about one in seven actually led to disciplinary proceedings.<sup>89</sup> Of the complaints that led to disciplinary proceedings, an average of about one in 2.5 resulted in public disciplinary action.<sup>90</sup> Thus, on average, only one in every eighteen complaints filed against lawyers in Kentucky culminated in public disciplinary action. Summarily stated, an average of six percent of Kentucky's lawyers had complaints filed against them annually, but only about five percent of these complaints result in public disciplinary measures. Interestingly, the numbers generated in 1989, the year following the decision in *In re Himmel*,<sup>91</sup> are consistent with recent Kentucky averages,<sup>92</sup> which indicates that the decision had relatively little, if any, effect on the frequency of reporting in this state.<sup>93</sup>

### III. SHOULD KENTUCKY ADOPT AN EXPRESS REPORTING REQUIREMENT?

#### A. *Problems with Adopting Model Rule 8.3*

Whether the imposition of the Model Rules reporting requirement would benefit the profession in Kentucky is debatable. Assuming the Kentucky Supreme Court were to adopt Model Rule 8.3,<sup>94</sup> there are several

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<sup>88</sup> The numbers for each individual year are as follows: 1995-96, 1 in 16.5; 1996-97, 1 in 15.5; and 1997-98, 1 in 18.9. *See id.*

<sup>89</sup> The numbers for each individual year are as follows: 1995-96, 1 in 7.7; 1996-97, 1 in 7.2; and 1997-98, 1 in 6. *See id.*

<sup>90</sup> The numbers for each individual year are as follows: 1995-96, 1 in 2.4; 1996-97, 1 in 2.7; and 1997-98, 1 in 2.8. *See id.*

<sup>91</sup> *See supra* Part I.B.

<sup>92</sup> The numbers for 1989 are as follows: 1 in 15.7 lawyers had complaints filed against them; 1 in 7.5 of these complaints lead to disciplinary proceedings; and 1 in 2.3 of these proceedings lead to public disciplinary measures. *See* Letter from Edie Armstrong to Parker Eastin, *supra* note 85.

<sup>93</sup> *See generally* Burwick, *supra* note 39, at 147 (similarly arguing that there was no statistically significant change in the prevalence of meritorious complaints in Illinois after the *Himmel* decision); *see also supra* note 64.

<sup>94</sup> Rule 8.3 provides in its entirety:

Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial

questions that remain unanswered but need to be resolved before effective implementation could occur.<sup>95</sup> These include but are not limited to: (1) what constitutes a violation of the Kentucky Rules of Professional Conduct?<sup>96</sup> (2) which of these violations would constitute “substantial” violations under the “new” Kentucky Rule 8.3?<sup>97</sup> (3) what level of knowledge would be required under the Kentucky Rules before reporting would be mandated?<sup>98</sup> and (4) what information is confidential under the Kentucky Rules?<sup>99</sup> Furthermore, once these four questions are answered, careful consideration must be given to a fifth question: (5) how do we prevent abuse of the reporting requirement (i.e., its use as a tactical weapon by opposing counsel)?<sup>100</sup>

### 1. *What Constitutes Professional Misconduct?*

Model Rule 8.4,<sup>101</sup> the catch-all rule defining the parameters of professional misconduct, provides in pertinent part that “[i]t is professional

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question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of an approved lawyers assistance program to the extent such information would be confidential if it were communicated subject to the attorney-client privilege.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1998).

<sup>95</sup> See Burwick, *supra* note 39, at 153.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

<sup>101</sup> Rule 8.4 provides in its entirety:

Misconduct

It is professional misconduct for a lawyer to:

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

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



misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, . . . [or] engage in conduct involving dishonesty, fraud, deceit or misrepresentation."<sup>102</sup> Kentucky's formulation of this rule is nearly identical to Model Rule 8.4.<sup>103</sup> The breadth of what constitutes professional misconduct under the Kentucky Rules, therefore, is clear: everything from client neglect to armed robbery. All of the conduct would be subject to a newly-adopted reporting requirement. However, there is an important limitation on the types of misconduct a lawyer is responsible for reporting under the Model Rules: only those actions which raise a *substantial question* as to that lawyer's honesty, trustworthiness, or fitness to practice law should be reported.

## 2. *What Violations Constitute a "Substantial Question"?*

The obvious implication of the "substantial" requirement in Model Rule 8.3 is that not all violations of professional conduct rules should be reported.<sup>104</sup> The comment to Model Rule 8.3 provides some assistance by pointing out that whether a "substantial question" is raised depends upon the seriousness of the violation and not upon the amount of evidence known by the reporting lawyer.<sup>105</sup> The comment specifically provides that Model Rule 8.3 "limits the reporting obligation to those offenses that a

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

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

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1998).

<sup>102</sup> *Id.*

<sup>103</sup> See KY. SUP. CT. R. 3.130-8.3. The Kentucky Supreme Court chose to delete subsection (d) when it adopted Model Rule 8.4 as Kentucky's Rule 8.3. This subsection was a general prohibition on engaging in conduct prejudicial to the administration of justice. See Gaetke, *supra* note 16, at 781 n.97 (generally applauding the deletion of subsection (d) but discussing a few potentially negative ramifications).

<sup>104</sup> See Michael Daigneault, *Am I My Brother's Keeper?*, 43 FED. LAW. 9, 10 (1996).

<sup>105</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 cmt.

self-regulating profession must vigorously endeavor to prevent.”<sup>106</sup> As defined under the Kentucky Rules, the word “‘substantial’ when used in reference to degree or extent denotes a material matter of clear and weighty importance.”<sup>107</sup> A measure of judgment, therefore, would be required in complying with the provisions of this rule.<sup>108</sup> “The conversion of client funds, the forgery of a signature, or the conviction for a felony offense, are examples of a substantial breach.”<sup>109</sup> Less clear are situations involving drug or alcohol abuse, sexual relations with clients, or other situations involving legal but immoral behavior.<sup>110</sup>

The practical insufficiency of the definition and commentary is obvious. Therefore, a more transparent, administrable standard should be adopted. This could be achieved by the adoption of a nonexclusive but lengthy list of common instances of lawyer misconduct and its appropriate classification (i.e., those violations that tend to raise a substantial question and those that do not),<sup>111</sup> or perhaps by a more detailed definition of “substantial.”<sup>112</sup> At the same time, the “substantial question” determination obviously places a great deal of importance on a lawyer’s own judgment, but as a lawyer must make important decisions on a daily basis, this should not create an insurmountable impediment.

### 3. *What Level of Knowledge is Required?*

Assuming a particular violation raises a “substantial question” as to the lawyer’s fitness to practice law, what is the appropriate quantum of knowledge required before the duty to report is triggered? Must knowledge of another lawyer’s misconduct rise to the level of certainty? According to the Terminology section of the Model Rules, “‘knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question.”<sup>113</sup> Significantly,

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<sup>106</sup> *Id.*

<sup>107</sup> KY. SUP. CT. R. 3.130 Terminology.

<sup>108</sup> *See id.*

<sup>109</sup> Thomas M. Carpenter, *A Question of Duty and Honor, The Requirement to Report Lawyers Who Violate the Code*, ARK. LAW., Winter 1995, at 16, 18.

<sup>110</sup> *See id.*

<sup>111</sup> *But see* Gendry, *supra* note 66, at 609-10 (discussing the practical problems of attempting to create such a list and concluding that such a list would either be “extraordinarily long or underinclusive”).

<sup>112</sup> Gendry suggests that the bar should provide more detailed guidelines for making such a determination. *See id.* at 610.

<sup>113</sup> MODEL RULES OF PROFESSIONAL CONDUCT Terminology (1998). The Kentucky Rules of Professional Conduct borrow this definition verbatim. *See* KY.

the section further provides that “[a] person’s knowledge *may be inferred* from circumstances.”<sup>114</sup> The Rules, therefore, do not insist on actual knowledge.<sup>115</sup> Unfortunately, neither the Model Rules nor the Kentucky Rules offer other helpful criteria for determining adequacy of “knowledge,” though it remains clear that the drafters “do not want lawyers reporting lawyers on the basis of rumor or speculation.”<sup>116</sup> Thus, under the current definition, the required knowledge must go beyond suspicion or rumor but need not be actual knowledge.<sup>117</sup>

The adoption of either a higher threshold requirement for “knowledge,” such as clear and convincing knowledge of the fact in question, or of a relatively low standard, such as reasonable suspicion, would alleviate much of the confusion surrounding the obtuse “knowledge” requirement currently utilized.<sup>118</sup> To encourage meritorious claims, however, the higher threshold would be preferable.<sup>119</sup>

#### 4. *What Information Is “Confidential” and Therefore Not Subject to Disclosure?*

Determining the boundaries of confidential information is important because of the exception created in Model Rule 8.3(c), which provides: “This rule does not require disclosure of information otherwise protected by Rule 1.6.”<sup>120</sup> Model Rule 1.6 is intended to establish what information possessed by lawyers is confidential (i.e., protected information that should not be disclosed).<sup>121</sup> Model Rule 1.6 provides generally that “[a] lawyer

SUP. CT. R. 3.130 Terminology.

<sup>114</sup> MODEL RULES OF PROFESSIONAL CONDUCT Terminology; KY. SUP. CT. R. 3.130 Terminology (emphasis added).

<sup>115</sup> See Daigneault, *supra* note 104, at 10.

<sup>116</sup> Carpenter, *supra* note 109, at 16.

<sup>117</sup> See Daigneault, *supra* note 104, at 10. *But see* Burwick, *supra* note 39, at 142 (noting that in some jurisdictions “even uncertain suspicions should be reported”) (citing Cleveland Bar Ass’n Prof’l Ethics Comm., Op. 85-1 (1985)).

<sup>118</sup> See Burwick, *supra* note 39, at 153-54.

<sup>119</sup> This higher requirement would also mesh well with the prohibitive KY. SUP. CT. R. 3.4(f). See *supra* Part II.A.

<sup>120</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (1998).

<sup>121</sup> See *id.* Rule 1.6. The Kentucky counterpart to Model Rule 1.6 is Kentucky Rule 1.6, Confidentiality of Information. Kentucky’s version is the same as the Model Rules formulation with one insignificant addition. See KY. SUP. CT. R. 3.130-1.6.

shall not reveal information relating to representation of a client.”<sup>122</sup> The comment to Model Rule 1.6 makes clear the extent to which the umbrella of confidentiality should apply, as it states that “confidentiality” encompasses information protected by both the attorney/client privilege (as established by the law of evidence) and the general rule of confidentiality (as established by the law of ethics).<sup>123</sup> Thus, lawyers should not report misconduct that they learned about through confidential communication.

However, Model Rule 1.6 identifies four exceptions to this general prohibition on disclosure.<sup>124</sup> The four exceptions are: (1) when the client, after consultation, agrees to the disclosure;<sup>125</sup> (2) when disclosure is “impliedly authorized in order to carry out the representation;”<sup>126</sup> (3) when the disclosure is necessary to prevent the commission of a future crime “likely to result in imminent death or substantial bodily harm;”<sup>127</sup> and (4) when the disclosure is necessary to “establish a claim or defense” in a dispute between the lawyer and client and “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.”<sup>128</sup> These are four specific situations in which the duty not to disclose confidential information is overcome by other professional responsibilities.<sup>129</sup> Ultimately, this means that the exception under Model Rule 8.3 for information protected by Model Rule 1.6 would not apply in these four distinct situations.

Therefore, a lawyer *representing* another lawyer in such matters is most likely not under an obligation to reveal the represented lawyer’s misconduct.<sup>130</sup> Unfortunately, where this bar to disclosure falls in other

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<sup>122</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a).

<sup>123</sup> *See id.* Rule 1.6 cmt.

<sup>124</sup> *See id.* Rule 1.6.

<sup>125</sup> *See id.* Rule 1.6(a).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* Rule 1.6(b).

<sup>128</sup> *Id.*

<sup>129</sup> *See Daigneault, supra* note 104, at 10. The Kentucky rule also explicitly authorizes disclosure of confidential information “to comply with other law or a court order.” KY. SUP. CT. R. 3.130-1.6(3). However, this additional exception is insignificant in light of the fact that the comments to Model Rule 1.6 provide for the same result. *See Gaetke, supra* note 16, at 777-78 (noting that “[t]he Kentucky rule is preferable, but it does not alter the likely practical effect” of Model Rule 1.6).

<sup>130</sup> *See Carpenter, supra* note 109, at 16.

circumstances is less clear.<sup>131</sup> For example, in *In re Himmel*, Mr. Himmel learned directly from and was asked directly by his client not to report the other lawyer's conversion of client funds.<sup>132</sup> This seems to indicate that the communication was privileged and therefore protected from disclosure.<sup>133</sup> It presumably would have been except for the fact that Mr. Himmel obtained permission from his client to discuss the case with outside parties.<sup>134</sup> The court found that Mr. Himmel had talked to too many people about the misconduct, including the client's mother, fiancé, and an insurance company attorney.<sup>135</sup>

The adoption of a broader concept of confidentiality with respect to the potential disclosure of lawyer misconduct, one that would protect lawyers in "Himmelesque" situations, would be both appropriate and remedial.<sup>136</sup> This would ensure greater client confidentiality and provide lawyers with a clearer understanding of the types of disclosures that should remain protected notwithstanding the reporting requirement.

### 5. *How Do We Prevent Abuse?*

The fear that reporting misconduct would be used as a weapon in litigation is a strong argument against implementing an official reporting requirement.<sup>137</sup> The possibility that an unscrupulous attorney might make unfounded allegations in order to gain a competitive advantage is a realistic consideration and one that must be dealt with before adoption of a reporting requirement is feasible. However, those in favor of a reporting requirement can attempt to allay this fear on two grounds. First, such fears assume that many lawyers are eagerly awaiting an opportunity to abuse the process and will seize the opportunity to comply with a reporting require-

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<sup>131</sup> See *id.*

<sup>132</sup> See *In re Himmel*, 533 N.E.2d 790, 792 (Ill. 1988).

<sup>133</sup> See *Carpenter*, *supra* note 109, at 16.

<sup>134</sup> See *id.*

<sup>135</sup> See *In re Himmel*, 533 N.E.2d at 794.

<sup>136</sup> See *Burwick*, *supra* note 39, at 153; see also *In re Ethics Advisory Panel Opinion*, 627 A.2d 317 (R.I. 1993) (discussing the tension between protecting client confidences and the duty to report professional misconduct and concluding a lawyer should obtain client consent before reporting another lawyer's misconduct that he learned about from the client).

<sup>137</sup> See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-383 (1994) (recognizing the problem and recommending postponement of the reporting until the conclusion of the case).

ment. This predisposition is not commensurate with the professionalism expected of and exhibited by most licensed practitioners of law in Kentucky. There have been no studies suggesting that abuse is currently a problem or that it will become one following the adoption of a reporting requirement.<sup>138</sup> Second, Rule 3.4(f), the existing rule designed to deal with this problem, is in and of itself defective as a deterrent because of its narrow language, and thus should be repealed and replaced with a more effective alternative.

Rule 3.4(f) provides that no lawyer shall “[p]resent, participate in presenting, or threaten to present criminal or disciplinary charges *solely* to obtain an advantage in any civil or criminal matter.”<sup>139</sup> What about lawyers who report other lawyers’ professional misconduct *primarily* or *principally* to gain such an advantage? Are they not equally culpable? It seems plausible to assume that any lawyer willing to behave in such a manner as to bring Rule 3.4(f) into play would certainly be able to come up with a more civic-minded reason as well, thus avoiding any liability for bringing such a charge “solely” to gain an advantage.<sup>140</sup>

Through the adoption of an official reporting requirement, as well as by broadening Rule 3.4(f) to include those who report or threaten to report “primarily” or “principally” or even “in part” to obtain an advantage, the court could send a strong message to the bar and public alike. Finally, abuse can be avoided by imposing a mandatory stay of all disciplinary proceedings brought immediately prior to or during litigation unless exigent circumstances warrant an immediate investigation. Close scrutiny of any complaint filed by a lawyer at such an inopportune time should also ensue.

### *B. A Problematic Setting Under Model Rule 8.3*

When the relationship between two lawyers is adversarial, it will presumably be easier for a lawyer to choose to report the other.<sup>141</sup> When two lawyers are practicing together in a firm, however, a completely different set of dynamics comes into play.<sup>142</sup> Therefore, an important setting in which clear standards for reporting need to be developed is the

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<sup>138</sup> The author at least has failed to locate any such evidence.

<sup>139</sup> KY. SUP. CT. R. 3.130-3.4(f) (emphasis added).

<sup>140</sup> *Id.*

<sup>141</sup> So easy, in fact, that this is likely where the fear of abuse originates.

<sup>142</sup> Other potentially difficult situations arise when the lawyers are relatives, spouses, practice together in a public office, and the like.

private law firm. Assuming a lawyer has the requisite knowledge of a violation that raises a “substantial question” about another lawyer *practicing in the same firm*, what is the lawyer’s appropriate course of conduct?<sup>143</sup> The lawyer’s duty to report the offending individual is clear under Model Rule 8.3, for it unequivocally provides that “[a] lawyer having knowledge that *another lawyer* has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, *shall inform the appropriate professional authority*.”<sup>144</sup> The rule makes no exception for lawyers practicing together in firms other than not requiring disclosure if such information is protected by confidentiality (Rule 1.6) or is learned pursuant to participation in a lawyer’s assistance program.<sup>145</sup> Confidential information is generally created by an attorney/client relationship, so only a lawyer *representing* another lawyer in the matter would be immune from the disclosure requirement. The exception for information learned through participation in a lawyer’s assistance program, presumably designed to encourage offending lawyers to confide in other participants or facilitators and seek their counsel, would only apply in very narrow circumstances.<sup>146</sup> Assuming the absence of either an attorney/client relationship or a lawyer’s participation in an assistance program, the lawyer’s obligation to report the offending individual appears to be absolute.

Nevertheless, it seems logical to assume that, within a law firm setting, other considerations would be weighed by the attorney before he or she would automatically adhere to the reporting requirement. One cannot forget that lawyers in firms are often friends, count on each other for continued economic viability, and share the risk that public disclosure of a rotten apple might indirectly spoil the bunch. Thus, a lawyer might hesitate to report misconduct out of a feeling of loyalty or dedication to the firm or its members. More disturbing, however, is that some lawyers will hesitate based on the fear they will either be discriminated against or outright ostracized by the firm and on the belief that the professional consequences of reporting simply outweigh the potential benefits. Since lawyers practicing together are often the only ones with access to the information indicating misconduct, they may feel that they face a greater danger “of

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<sup>143</sup> See Daigneault, *supra* note 104, at 10; MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1998).

<sup>144</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (emphasis added).

<sup>145</sup> See *id.* Rule 8.3(c).

<sup>146</sup> See *id.*

discovery and retaliation.”<sup>147</sup> Furthermore, as *In re Himmel*<sup>148</sup> remains one of the few cases on record subjecting a lawyer to discipline solely for failing to report misconduct, the lawyer might feel that the minute risk of discipline is worth taking in light of the other, potentially devastating, professional consequences. Presumably, certain ethical violations will garner more sympathy from colleagues than others (e.g., the unfortunate alcoholic versus the conniving thief). Assuming a more sympathetic violation, the lawyer might prefer to discuss the problem with the offending lawyer and privately suggest ways either to alleviate or remedy the situation.<sup>149</sup> Alternatively, the lawyer might choose to discuss the circumstances with the firm’s management in an effort to rectify the problem while maintaining firm privacy.<sup>150</sup> Thus, although Model Rule 8.3 clearly requires disclosure in most instances, the reality of the law firm environment justifies further inquiry.

An important case in this area is *Wieder v. Skala*.<sup>151</sup> *Wieder* represents the first case to “address the conflict between a lawyer’s duty to report an unethical colleague and a law firm’s right to fire the reporting attorney in retaliation for his disclosure.”<sup>152</sup> Howard Wieder was an associate with the law firm of Feder, Kaszovitz, Isaacson, Weber & Skala.<sup>153</sup> Mr. Wieder asked the firm to do a real estate closing for him, and Larry Lubin, an associate at the firm, was assigned to handle the transaction.<sup>154</sup> Mr. Wieder subsequently discovered that Mr. Lubin had neglected his duties relating to the transaction and had misrepresented to Mr. Wieder that the necessary actions had been taken. Mr. Wieder ultimately “incurred nearly \$27,000 in additional financing costs” as a result of Mr. Lubin’s misconduct.<sup>155</sup> Thereafter, Mr. Wieder reported Lubin’s misconduct to the firm and persistently asked that the firm comply with the professional conduct rules

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<sup>147</sup> Gendry, *supra* note 66, at 606. Gendry notes that allowing anonymous reporting would alleviate some of the fear of retaliation but that such a system might lead to abuse. *See id.* at 611-12.

<sup>148</sup> *See supra* Part I.B.

<sup>149</sup> *See Daigneault, supra* note 104, at 11.

<sup>150</sup> *See id.*

<sup>151</sup> *Wieder v. Skala*, 544 N.Y.S.2d 971 (Sup. Ct. 1989), *aff’d*, 562 N.Y.S.2d 930 (App. Div. 1990), *aff’d as modified*, 609 N.E.2d 105 (N.Y. 1992).

<sup>152</sup> Blackwell, *supra* note 3, at 11.

<sup>153</sup> *See Wieder*, 609 N.E.2d at 105-06.

<sup>154</sup> *See Blackwell, supra* note 3, at 12.

<sup>155</sup> *Id.* at 12-13.



requiring disclosure.<sup>156</sup> The firm declined to do so and attempted to discourage Wieder from filing such a report himself.<sup>157</sup>

Consequently, Wieder faced a serious dilemma: he could either honor the firm's wishes and risk disciplinary action for failing to report the misconduct, or, contrary to the firm's wishes, he could report the misconduct and risk losing his job.<sup>158</sup> The firm eventually forced Mr. Lubin to leave the firm and reported his misconduct to the appropriate tribunal.<sup>159</sup> About three months later, Mr. Wieder was fired pursuant to an at-will employment contract, but allegedly in retaliation.<sup>160</sup> Mr. Wieder thereafter filed a wrongful discharge suit against Lubin and the firm's named partners.<sup>161</sup> The trial court dismissed Wieder's wrongful discharge suit on the grounds that the at-will employment doctrine conclusively resolved the issue, a decision that was affirmed by the appellate division.<sup>162</sup> After a considerable amount of procedural wrangling, the Court of Appeals of New York eventually agreed to re-examine the case.<sup>163</sup> The court ultimately reaffirmed the employment at-will doctrine, but with respect to the facts at issue, held for Wieder, as summarized by Anthony Blackwell:

When a law firm hires an associate . . . "there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession." Thus, the court held that both Wieder and his firm were contractually as well as ethically obligated to report intra-professional misconduct. . . . Once the firm, as Wieder alleges, insisted that he "act unethically and in violation of . . . [this] primary professional rule[]," it intentionally took action to prevent Wieder from fulfilling his part of the agreement. Accordingly, the Court of Appeals concluded that "[Wieder]

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<sup>156</sup> See *id.* at 13; *Wieder*, 609 N.E.2d at 106.

<sup>157</sup> See *Wieder*, 609 N.E.2d at 106.

<sup>158</sup> See *Daigneault*, *supra* note 104, at 11.

<sup>159</sup> See *Blackwell*, *supra* note 3, at 13.

<sup>160</sup> See *id.* at 13-14. Generally speaking, at-will employment means an employment relationship characterized by the fact that it may be terminated at any time by either the employer or the employee with or without cause. See *Gendry*, *supra* note 66, at 607.

<sup>161</sup> See *Blackwell*, *supra* note 3, at 13.

<sup>162</sup> See *Wieder*, 609 N.E.2d at 106-07.

<sup>163</sup> See *Blackwell*, *supra* note 3, at 14-19.

ha[d] stated a valid claim for breach of contract based upon an implied-in-law obligation in his relationship with the defendants.”<sup>164</sup>

Thus, the court in *Wieder* chose to protect a lawyer who sought to honor his professional obligation to report the misconduct of his colleague through an implied-in-law contractual obligation. Assuming a reporting requirement is adopted in Kentucky, the state’s courts must be cognizant of the potential discrimination arising from reporting and should send a similar message that retribution of any kind in such situations will not be tolerated. The courts should also keep in mind the essential reporting role that lawyers play in the firm context, as many violations are not easily discovered by outsiders (such as conflicts of interest) and as clients are often ignorant of what constitutes an ethical violation.<sup>165</sup> Lawyers practicing in firms are likely to be invaluable sources of information concerning misconduct and, as such, must be vigilantly protected.

Ultimately, the court system must protect whistleblowers and can do so by rendering decisions in these matters with an eye towards encouraging individuals to honor their professional responsibilities.<sup>166</sup> Whether this will be best achieved by reaffirming the implied-in-law contract theory from *Wieder* or by creating some sort of public policy exception to the employment-at-will doctrine for lawyers honoring their code of ethics<sup>167</sup> is arguable. What is clear, though, is that “[a]ttorneys are much more likely to report co-worker misconduct if they are assured that they will have their day in court should their employer fire them for reporting the misconduct of another attorney in the firm.”<sup>168</sup>

Another important player in this dilemma is the law firm itself, since “the ethical atmosphere of a firm can influence the conduct of all its members.”<sup>169</sup> Law firms should therefore take the initiative to educate employees about their ethical obligations and implement appropriate guidelines and procedures to encourage the reporting of misconduct.<sup>170</sup> Lawyers should understand that their firm advocates reporting the

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<sup>164</sup> *Id.* at 19-20 (quoting *Wieder*, 609 N.E.2d at 180, 110) (footnotes omitted).

<sup>165</sup> See Gendry, *supra* note 66, at 609.

<sup>166</sup> See *id.* at 614-16.

<sup>167</sup> Such an exception was suggested in an article by Seymour Moskowitz. See Seymour Moskowitz, *Employment-at-Will & Code of Ethics: The Professional’s Dilemma*, 23 VAL. U. L. REV. 33, 44-46 (1988).

<sup>168</sup> Gendry, *supra* note 66, at 615-16.

<sup>169</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 cmt. (1998).

<sup>170</sup> See Gendry, *supra* note 66, at 613.

misconduct of co-workers and that no negative ramifications will ensue upon a good faith filing of a complaint.<sup>171</sup> Such policies would serve to encourage both loyal and intimidated lawyers to honor their ethical obligations.

In conclusion, the law firm is undoubtedly an environment in which disclosure of misconduct can be problematic. Some lawyers might hesitate to report misconduct based on misguided loyalty to the firm. These lawyers need to understand their indispensable role in the disciplinary process, and they need to receive encouragement accordingly.<sup>172</sup> Also, it would be imprudent to fail to recognize that lawyers who honor their obligation to report professional misconduct “may not only embarrass and incur the animus of the partners and associates in their own firms, but the effect might carry over to other firms as well.”<sup>173</sup> Such hostility “may manifest itself in the form of retaliatory personnel action against the reporting attorney, who may receive undesirable work assignments, be denied partnership, or in the extreme, be summarily dismissed from the firm.”<sup>174</sup> Attorneys witnessing professional misconduct may be forced to decide “between preserving their ethics or preserving their jobs.”<sup>175</sup> No lawyer, however, should face discrimination or termination for reporting professional misconduct in accordance with the legal profession’s ethical obligations. The legal community as a whole simply should not tolerate such retribution.

### C. Other Problematic Settings

There are various other situations that warrant discussion concerning proper application of the reporting requirement, most of which go beyond the scope of this Note. Briefly, though, attorneys serving as judges should be equally obligated to report known instances of professional ethics

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<sup>171</sup> Gendry discusses the possibility of including such information in the firm’s policy manual but concludes that most firms would be unwilling to include such language because it could provide the basis of a breach of contract action. *See id.*

<sup>172</sup> In New York, for example, a “law firm” rule has been developed by the courts whereby entire firms can be held liable for the misconduct of a single “unknown” employee. Such a rule would probably encourage hesitant lawyers with pertinent information to step forward. *See Van Duch, supra* note 59, at A25.

<sup>173</sup> Blackwell, *supra* note 3, at 10-11.

<sup>174</sup> *Id.* at 11 (citing *Wieder v. Skala*, 544 N.Y.S.2d 971 (Sup. Ct. 1989), *aff’d*, 562 N.Y.S.2d 930 (App. Div. 1990), *aff’d as modified*, 609 N.E.2d 105 (N.Y. 1992)).

<sup>175</sup> *Id.*

violations. Judges, because of their unique role in the judicial system, can serve as valuable sources of misconduct reporting. Importantly, judges do not encounter the same type of peer pressure as lawyers practicing in private firms. Furthermore, given the fact that judges maintain a unique vantage point from which they can observe the conduct of lawyers, judicial insight and experience could serve as valuable tools in policing misconduct since certain ethical matters are too complicated for the average client to understand. The relative unreliability of client complaints due to their (understandable) ignorance of professional ethics, coupled with the hesitation undeniably felt by lawyers practicing in private firms, makes the judge's potential role in the disciplinary process paramount.

### CONCLUSION

Little can be done to reconcile the general distaste for snitching on colleagues with the clear need to maintain discipline and high standards within the legal profession. The debate essentially comes down to a prioritization of fundamental values. We must ask ourselves as a profession, where we choose to draw the proverbial line. Does the very integrity of the legal profession and the right of self-regulation depend on lawyers honoring the duty to report fellow misconduct?<sup>176</sup> Or is the profession better served by not encouraging the kind of animosity that could follow from such a reporting requirement? The answer is uncertain, but as a primarily self-regulated profession,<sup>177</sup> do we owe it to the public and ourselves to police ourselves in this manner?

As stated in an article found in the *American Bar Foundation Research Journal*, the policy goals behind imposing such a duty to report are threefold: "(1) to identify and remove from the profession all seriously deviant members (the 'cleansing function'); (2) to deter normative deviance and maximize compliance with norms among attorneys (the 'deterrence function'); and (3) to maintain a level of response to deviance sufficient to forestall public dissatisfaction (the 'pubic image function')."<sup>178</sup> These three objectives seem quite sound and should be carefully contemplated by the Kentucky Supreme Court the next time the reporting

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<sup>176</sup> See Carpenter, *supra* note 109, at 18.

<sup>177</sup> See MODEL RULES OF PROFESSIONAL CONDUCT 8.3 cmt. (1998); see also Rotunda, *supra* note 25, at 992.

<sup>178</sup> Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917, 999-1014.

requirement is proposed. Furthermore, as is clearly explained in the Preamble to the Model Rules,

[t]he legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.<sup>179</sup>

In order to maintain the privilege of policing ourselves, lawyers should accept the responsibility of scrupulously enforcing the rules of professional conduct.<sup>180</sup> Despite the arguments against the imposition of such a duty, there exist strong arguments in its favor. One must consider the intangible benefits to the profession that would result from the decision to require reporting. Such a decision would denote professionalism and responsibility by demonstrating both to the bar and the public that misconduct will not be tolerated and will be disclosed in the interests of the public and the profession. Forty-eight other states have seen fit to impose such a requirement. It seems it is time for the Kentucky Supreme Court to adopt and enforce the duty to report professional misconduct.

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<sup>179</sup> MODEL RULES OF PROFESSIONAL CONDUCT Preamble. The Preamble was not adopted by the Kentucky Supreme Court.

<sup>180</sup> See generally Gaetke, *supra* note 16, at 798 ("To the public it must be hard to imagine the rationale for calling the practice of law a self-regulating profession when lawyers are perfectly free to remain silent even in the face of grossly unethical conduct on the part of other lawyers.").