

Comment,
**UNETHICAL ACCUSATIONS:
MAINTAINING ETHICAL INTEGRITY IN
THE PROFESSION THROUGH THE
PROPER USE OF MANDATORY
REPORTING RULES**

As members of a self-regulating profession, lawyers can often find themselves in a difficult position, stuck between the interests of the client, duties to the profession, and an unspoken code of silence. But the pressures of representation and the nature of family law practice can cause a host of ethical dilemmas for a lawyer. In a competitive environment with emotionally volatile clients, ethical duties can often be neglected or misused in a way that degrades the integrity of the profession and puts the practitioner's license at risk.

Experienced family lawyers are familiar with the emotional turmoil that can make practice in this field so difficult. As a family's dynamic changes, clients often experience a variety of emotions that can complicate even the simplest of legal issues. This puts the lawyer in the position of both counselor and legal adviser, two jobs that are often difficult to reconcile.

To complicate matters further, many lawyers have different approaches and strong opinions about how those positions should be reconciled. The American Academy of Matrimonial Lawyers recognizes three different approaches to handling the attorney-client relationship: directive, client centered, and collaborative/cooperative.¹ Each approach has faults and the differing schools of thought can lead opposing counsel to feel the other side is not looking out for the best interests of the family.

For example, the client centered approach allows the client to lead and control the relationship, but if taken too far, could sometimes lead to expensive fights fueled by emotions and lingering animosity if the attorney does not check the client. Alternatively, the directive approach puts the lawyer in charge, acting

¹ *Introduction to Attorney Styles: 3 Models of Lawyer-Client Relationships*, AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, <http://www.aaml.org/aaml-video/best-practices-educational-video-series>.

as the voice of reason, guiding the client to minimize cost, manage expectations and promote long-term harmony. But that can mean strongly guiding the client away from courses of action the lawyer deems damaging, which may be viewed as overly controlling. The collaborative approach would seem to avoid the pitfalls of the other approaches by having the client and attorney share control of the representation, but it can be difficult to implement if the client has a limited ability or willingness to fully participate in the litigation.

These differing schools of thought about models of representation can lead to fundamental disagreements between lawyers when these approaches clash in a case. For example, lawyers often complain that the opposing counsel is not “controlling” his or her client. Or perhaps the lawyer is overly invested in his or her client’s position to the point of losing objectivity. The adversarial nature of representation can exacerbate this clash. In these contentious situations where the clients are highly emotional, the lawyers feel differently about how to represent their clients and perhaps they disagree regarding a point of law, the situation can become a tinderbox waiting for a match.

It is in situations like these when ethical obligations can become twisted either from reporting inappropriately, threatening to report, or failing to report. In Part I, this comment will review the duty to report, in Part II the inappropriate use of ethical complaints is discussed, in Part III failure to report misconduct will be addressed, and Part IV will discuss the best practices for handling reporting dilemmas.

I. Duty to Report Under the Model Rules of Professional Conduct

Many attorneys loathe the idea of being forced to report the misconduct of a fellow attorney.² Children learn tattling is bad, but attorneys are obligated to rat out their friends by a rule that has been dubbed the “squeal” or “snitch” rule,³ which hardly inspires confidence that one is doing the right thing by reporting.

² See e.g. Kate A. Toomey, *Practice Pointer: The Snitch Rule*, 17 UTAH B.J. 24, 24 June/July 2004.

³ See, e.g., Geoffrey C. Hazard, Jr., “Squeal Rule” Considered for Change, NAT’L L.J., Mar. 26, 1990; Toomey, *supra* note 2, at 24.

And to further disincentivize reporting, attorneys often face harsh professional consequences for reporting.⁴ Other attorneys may invoke rules to report even the smallest ethical violation.⁵ But love it or loathe it, practitioners must understand their duty to report misconduct. To facilitate this understanding, a quick refresher of the Model Rules of Professional Conduct may be in order.⁶

First, “[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.”⁷ However, there is an exception for “information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.”⁸

Rule 1.6(a) provides, “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”⁹ In most cases, if the “knowledge” of misconduct was gained in the course of representation, the client must give consent for the lawyer’s duty to apply.¹⁰

Second, the duty to report is one that arises only when a “substantial question” is raised regarding the “lawyer’s honesty, trustworthiness or fitness as a lawyer.”¹¹ While reporting is permitted for less serious violations, it is not required.¹² Some cau-

⁴ See *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998) (allowing expulsion of a partner after she reported another partner was overbilling based on a good-faith belief the misconduct was occurring).

⁵ See e.g., Toomey, *supra* note 2, at 24.

⁶ For further review, see Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175 (1999).

⁷ MODEL RULES OF PROF’L. CONDUCT R. 8.3(a).

⁸ MODEL RULES OF PROF’L. CONDUCT R. 8.3(c).

⁹ MODEL RULES OF PROF’L. CONDUCT R. 1.6(a).

¹⁰ The most notable exception is *In re Himmel*, 533 N.E.2d. 790 (Ill. 1988); however, Illinois’ reporting rule only protects privileged communication without reference to Rule 1.6 or confidential information.

¹¹ MODEL RULES OF PROF’L. CONDUCT R. 8.3(a).

¹² MODEL RULES OF PROF’L. CONDUCT R. 8.3 cmt. 3.

tion is advisable when determining whether minor violations should be reported, particularly if the lawyers are involved in ongoing litigation.¹³ If the problem with opposing counsel can be solved within the litigation, it is likely best to try to resolve the situation in that forum.¹⁴ Excessive or frivolous complaints lead to degradation of the rule and potential harm to one's reputation in the legal community. In addition, improper bar complaints have landed lawyers in the very position they threatened to put others, as is discussed below.

II. Unethical Use of Reporting Ethical Complaints

A. Threatening Complaints¹⁵

Threatening a bar complaint is generally not a sound course of action for several reasons. First, if a lawyer has enough knowledge of the misconduct to make a threat, she likely has the requisite knowledge necessary to mandate reporting.¹⁶ Second, making such a threat instead of reporting misconduct gives the impression that the motivation for the threat is to obtain an advantage over the accused lawyer and the effect may be to circumvent the purpose of the rule, which is to maintain the standards of the profession and protect the public.¹⁷ Some states prohibit threatening or bringing "disciplinary charges solely to obtain an

¹³ See e.g., Toomey, *supra* note 2, at 24 (stating, "the rule offers an ostensible cloak of 'duty' for people who in my opinion are borderline tattletales, reporting easily remedied transgressions and insults from opposing counsel, or attempting to use a Bar complaint as leverage for settlement.").

¹⁴ "[I]nformal complaints made by the opposing counsel, often while litigation is pending, and although many of the alleged transgressions might constitute rule violations, often they do not arise to the level at which Rule 8.3 would have been invoked. That is to say, although they may be a legitimate basis for a Bar complaint, and some sort of discipline ultimately may ensue, these are reports that the reporter need not have made because the information did not raise 'a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.'" Toomey, *supra* note 2, at 25.

¹⁵ See also Douglas R. Richmond, *Saber-Rattling and the Sound of Professional Responsibility*, 34 AM. J. TRIAL ADVOC. 27, 52-70 (2010) (Part IV discussing threatening professional discipline).

¹⁶ See Kentucky Bar Ass'n v. Blum, 404 S.W.3d 841, 850 (Ky. 2013).

¹⁷ See *id.* at 852.

advantage in a civil matter.”¹⁸ Although attorneys often try to word these threats to veil their intent, the result is often the same — a disciplinary proceeding for the threatening lawyer.

Inappropriate use of reporting was an issue in *Attorney U v. Mississippi Bar*,¹⁹ in which Attorney U was accused of improperly using his information regarding an ethical violation to coerce settlement. Pulmonary Function Laboratory (PFL) allegedly agreed to split fees for clients Attorney S referred to PFL for medical testing.²⁰ PFL believed S had failed to comply with the alleged agreement and sought the advice of Attorney U regarding enforcement.²¹ Without knowing the identity of S, U advised PFL that the contract was unenforceable because it violated the Rules of Professional Conduct.²² S denied ever having such an agreement with PFL.²³ A new agreement was suggested by U and negotiations went through U and Frank Trapp who represented S.²⁴

U stated in letters that he had advised PFL of its ability to file a complaint with the state bar and indicated that if an agreement could not be reached, PFL would “seek relief through whatever legal avenues are available to it.”²⁵ In addition, the new agreement sought a grossly inflated fee for the testing procedures to be provided by PFL.²⁶

Although the Mississippi Committee on Professional Responsibility dismissed the charge of improper threats due to lack of probable cause, Justice McRae’s dissent called the attorney’s actions no less than “baldfaced blackmail” and suggested that the lack of probable cause was based upon the “unabashed bias in favor of partners in major Jackson[, Mississippi] law firms.”²⁷

While U avoided discipline for his actions, another lawyer did not emerge unscathed. Timothy Barrett, a lawyer in Virginia, was going through a divorce from his wife of eleven years, Vale-

¹⁸ VA. SUP. CT. R. 6 § 2, VA. RULES OF PROF’L. CONDUCT R. 3.4(i).

¹⁹ 678 So.2d 963, 964 (Miss. 1996).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 966.

²⁴ *Id.* at 965.

²⁵ *Id.* at 965.

²⁶ *Id.* at 975.

²⁷ *Id.* at 975, 977.

rie Jill Rhudy.²⁸ Mr. Barrett chose to represent himself, while his wife retained a lawyer.²⁹ The divorce quickly became heated between Mr. Barrett and Ms. Rhudy's lawyer, Lanis Karnes, beginning with Mr. Barnes referring to Ms. Karnes by her former married name which he felt she had no right to change for religious reasons.³⁰ Mr. Barrett made repeated comments regarding her religious failings and incompetence as a lawyer.³¹ In addition to personal attacks, Mr. Barrett made four threats to file disciplinary actions against Ms. Karnes for everything from filing inaccurate pleadings to typographical errors in pleadings.³² The Virginia Rules of Professional Conduct included a prohibition on threats to file "disciplinary charges solely to obtain an advantage in a civil matter."³³ Mr. Barrett was ultimately found to have violated four rules of professional conduct, including improperly threatening disciplinary complaints.³⁴ Since that decision, two more disciplinary matters have proceeded against Mr. Barrett which ended in his license being revoked in 2009.³⁵

Yet another example of improper threats came from Jeffery Blum, who was suspended for 181 days, in part for threatening bar complaints against two attorneys.³⁶ The conduct in question related to his representation of a terminated teacher in a tribunal and later in a federal lawsuit.³⁷ Blum claimed a good faith belief that unethical conduct was occurring.³⁸ However, the court found based on the circumstances, his true motive for the threats was to gain an advantage for his client.³⁹ The court further found this "saber-rattling" undermined the purpose of the Model Rules.⁴⁰

²⁸ Barrett v. Virginia State Bar, 611 S.E.2d 375, 377 (Va. 2005).

²⁹ *Id.* at 379.

³⁰ *Id.* at 379-80.

³¹ *Id.*

³² *Id.* at 381.

³³ *Id.*; VA. SUP. CT. R. 6 § 2, VA. RULES OF PROF'L. CONDUCT R. 3.4(i).

³⁴ Barrett, 611 S.E.2d at 381.

³⁵ Barrett v. Virginia State Bar, 634 S.E.2d 341 (Va. 2006); Barrett v. Virginia State Bar, 675 S.E.2d 827, 832 (Va. 2009).

³⁶ Blum, 404 S.W.3d at 857.

³⁷ *Id.* at 843-44.

³⁸ *Id.* at 850.

³⁹ *Id.* at 849-52.

⁴⁰ *Id.* at 852.

Some of Blum's most outlandish conduct did not subject him to discipline. Blum was both admonished and sanctioned by the federal court for improper filings including personal attacks on opposing counsel, excessive "instruction" to the court on the proper resolution of the matter, and statements such as, "[t]he historical docudrama exercise in this case occupies a position about halfway between a bona fide tribunal hearing and a rape."⁴¹ The federal court admonished Blum in open court, but did not issue an order barring Blum from future inappropriate conduct.⁴² After the case had been dismissed, the federal court, on its own motion, issued sanctions.⁴³ While the Kentucky Supreme Court strongly disapproved of Blum's actions, the court found he was not subject to discipline for that incident because he had not violated a court order.⁴⁴

Blum was ultimately found to have violated three rules by making improper disciplinary threats, disrupting a tribunal, and making false statements regarding the hearing officer.⁴⁵ It should also be noted that a suspension of more than 180 days would require a review by the Character and Fitness Committee before Blum could be reinstated.⁴⁶

While threats of complaints can get a lawyer into trouble, even more danger is faced by a lawyer who files an erroneous complaint.

B. False Complaints

The case that sparked this article was *In re Ireland*.⁴⁷ Kimberly Ireland, a Kansas attorney going through a highly contentious divorce, was ordered to attend mediation with district court judge Kevin Moriarty.⁴⁸ Mediation was unsuccessful and Ms. Ireland believed Judge Moriarty behaved in a highly inappropriate manner.⁴⁹ In a complaint to the Commission on Judi-

⁴¹ *Id.* at 847.

⁴² *Id.* at 847-849.

⁴³ *Id.* at 847.

⁴⁴ *Id.* at 848-49.

⁴⁵ *Id.* at 858.

⁴⁶ *Id.*

⁴⁷ 276 P.3d 762 (Kan. 2012).

⁴⁸ *Id.* at 763.

⁴⁹ *Id.* at 763-65

cial Qualifications, Ms. Ireland accused Judge Moriarty of cursing at her, intimidating her, making inappropriate comments regarding her undergarments and sex life, and (most egregiously) appearing to masturbate behind the bench.⁵⁰ While Judge Moriarty admitted to using profanity, the other allegations were denied by both the judge and his staff.⁵¹

The Commission found the remaining allegations were unsupported and referred Ms. Ireland's complaint to the Disciplinary Administrator.⁵² Ms. Ireland repeated her complaints in that proceeding and in a complaint she filed in the U.S. District Court for the District of Kansas.⁵³ The federal court action was voluntarily dismissed about three months after it was filed and Ms. Ireland issued a press release expressing her regret "for alleging wrongful conduct that she mistakenly believed took place."⁵⁴

After a lengthy appeal process, Ms. Ireland was given a two year suspension for knowingly violating Kansas Rule of Professional Conduct 8.2(a)⁵⁵ by making repeated false allegations regarding Judge Moriarty's qualifications or integrity.⁵⁶ Perhaps the most disturbing fact is that despite her inability to substantiate any part of the sexual allegations in the five years between the initial allegations and the conclusion of the matter, Ms. Ireland's testimony in the case indicated she regretted she had not gathered evidence before making the initial allegation.⁵⁷

While this is an extreme case, it shows the potential impact of a false allegation of unethical conduct. However, a lawyer does not have to make a false report to become entangled in a disciplinary action. Lawyers may also be subject to discipline for failing to report misconduct.

⁵⁰ *Id.*

⁵¹ *Id.* at 765

⁵² *Id.*

⁵³ *Id.* at 765-67

⁵⁴ *Id.* at 767

⁵⁵ "(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." KAN. SUP. CT. R. 226, KAN. RULES PROF'L. CONDUCT R. 8.2.

⁵⁶ *Ireland*, 276 P.3d at 770.

⁵⁷ *Id.* at 769.

III. Unethical Failure to Report

As the cases above have illustrated, bar complaints should not be threatened and should only be made when there is a good faith belief that misconduct has occurred. The other side of the coin is failing to report unethical conduct. Lawyers have an affirmative duty to report unethical conduct under 8.3(a) of the Rules of Professional Conduct.⁵⁸

But there are several issues that can complicate matters. A lawyer must have “knowledge” of misconduct to be required to report. The question becomes what is knowledge?

A. What Is Required for Knowledge?

Often the main focus of analysis when a lawyer fails to report misconduct is whether the lawyer had sufficient knowledge of the misconduct to be required to report. Some cases present clear violations, such as when senior partners request illegal gratuities be paid to county officials to obtain rulings on motions.⁵⁹ In that case, the mere requests to pay the bribes should have been reported.⁶⁰ But not all cases are so easily discerned.

Attorney U, who was discussed above,⁶¹ was not just accused of making improper threats. The misconduct that was being reviewed was whether U had the knowledge necessary to require he report S’s inappropriate conduct.⁶² The court engaged in a lengthy discussion of the topic and its treatment in several jurisdictions. Knowledge is not defined by Rule 8.3, but Rule 1.0 does define, “[k]nowingly,” “known,” or “knows” as “denot[ing] actual knowledge of the fact in question.”⁶³ It further notes, “[a] person’s knowledge may be inferred from circumstances.”⁶⁴ The Mississippi Supreme Court examined cases and ethics opinions with various ways of defining knowledge, including “substantial degree of certainty,”⁶⁵ “possession of facts that

⁵⁸ MODEL RULES OF PROF’L. CONDUCT R. 8.3(a). *See supra* discussion in text at notes 2-13.

⁵⁹ *In re Lefkowitz*, 105 A.D.2d 161, 162 (N.Y. 1984).

⁶⁰ *Id.*

⁶¹ *Attorney U*, 678 So.2d 963. *See supra* discussion in text at notes 19-26.

⁶² *Id.* at 964.

⁶³ MODEL RULES OF PROF’L. CONDUCT R. 1.0(f).

⁶⁴ *Id.*

⁶⁵ *Attorney U*, 678 So.2d at 70 (citing Maine Ethics Op. 100 (1989)).

472 *Journal of the American Academy of Matrimonial Lawyers*

clearly establish a violation,”⁶⁶ and “a clear belief.”⁶⁷ After a review of the law, the court found the predicate for knowledge is that “[t]he supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred.”⁶⁸

When the court applied this standard, the majority found that the information received from PFL was not enough to “demonstrate by clear and convincing evidence that U had sufficient evidence before him such that a reasonable lawyer would have formed a firm opinion that the conduct alleged by his client had in fact occurred.”⁶⁹ In this case, U’s information was based on his client’s assertion that a verbal fee-splitting contract had been made with Attorney S.⁷⁰ The majority did not believe these facts were enough for U to have formed a firm belief regarding S’s misconduct.⁷¹ While U ultimately avoided discipline in this case, Justice McRae’s dissent in the case strongly disagreed and argued if U had enough knowledge to threaten a bar complaint, he certainly had the requisite knowledge for the reporting requirement.⁷²

Louisiana also utilized the “firm belief” standard when determining whether Michael Riehlmann had knowledge of misconduct.⁷³ Riehlmann met socially with his friend and former prosecutor Gerry Deegan.⁷⁴ At this meeting, Deegan informed Riehlmann he had received a terminal cancer diagnosis and went on to confess he had once withheld exculpatory blood evidence from defense counsel.⁷⁵ The circumstances of the disclosure, on the heels of Deegan being told he was dying, and Riehlmann’s own description of his reaction, indicated Riehlmann had a firm belief that misconduct had occurred.⁷⁶

⁶⁶ *Id.* (citing New York City Ethics Op. 1990-3 (1990)).

⁶⁷ *Id.* at 971 (citing D.C. Bar Op. 246 (Revised 1994)).

⁶⁸ *Id.* at 972.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 980.

⁷³ *In re Riehlmann*, 891 So.2d 1239, 1247 (La. 2005).

⁷⁴ *Id.* at 1241.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1248.

While these cases shed light on what constitutes knowledge, a second issue can arise when that information is conveyed during the course of representation of a client.

B. Knowledge Covered by Rule 1.6

While enough information may be apprehended to constitute knowledge under the rule, if that information is covered under the exception set out in Rule 8.3(c), the duty to report is negated, unless the client consents to the disclosure.⁷⁷ In other words, when the reporting requirement conflicts with a lawyer's duty to maintain confidentiality, confidentiality wins.

An interesting and enlightening comparison was made by Peter K. Rofes, who argued that the interplay between the rules is similar to that of the Fourth Amendment and privacy.⁷⁸ Incriminating evidence may be suppressed if a search is improperly conducted. This is necessary for the protection of society from illegal searches and seizures and it is deemed to be more vital than convicting a single defendant. Confidentiality and reporting have a similar tension and the rules clearly set out the victor. Rightly or wrongly, the rules find a lawyer's duty to keep a client's information confidential more important than the duty to report.

Despite that rather stark pronouncement, actual conflict between the two rules is likely to be limited. An attorney is encouraged to obtain the client's consent to disclose⁷⁹ and in many cases the client would be willing to consent to disclosure. The problems arise in determining whether Rule 1.6 has been implicated.

One of the first cases where misconduct was found for failure to report was *In re Himmel*.⁸⁰ The court imposed serious discipline and grabbed the attention of many observers. However, its applicability outside Illinois is limited because Illinois does not follow the Model Rules regarding reporting. The client in this matter originally sought an attorney regarding a motorcycle

⁷⁷ See MODEL RULES OF PROF'L. CONDUCT R. 8.3 cmt. 2.

⁷⁸ Peter K. Rofes, *Another Misunderstood Relation: Confidentiality and the Duty to Report*, 14 GEO. J. LEGAL ETHICS 621, 638 (2001).

⁷⁹ MODEL RULES OF PROF'L. CONDUCT R. 8.3 cmt. 2.

⁸⁰ *In re Himmel*, 533 N.E. 2d 790 (Ill. 1988).

474 *Journal of the American Academy of Matrimonial Lawyers*

accident.⁸¹ John Casey took her case, obtained a settlement, and deposited the settlement into his account; however, Casey failed to give the client her portion of the settlement.⁸²

After attempting and failing to obtain her settlement, the client contacted James Himmel to assist her in collecting the amount due.⁸³ Himmel investigated and found Casey had misappropriated the funds.⁸⁴ Himmel negotiated and prepared an agreement in which Casey would pay the client the settlement funds and an additional amount, for which the client agreed to release Casey from any claims, including disciplinary proceedings.⁸⁵ Casey failed to pay as agreed under the settlement and the matter eventually ended up in court.⁸⁶ Casey was later disbarred after the litigation and the discovery of other ethical violations.⁸⁷

After Casey's disbarment, a complaint was filed against Himmel for failing to report Casey's misconduct regarding client funds.⁸⁸ While Himmel argued his client did not want him to disclose the misconduct, the Illinois reporting rule does not exempt confidential information, but instead exempts only privileged information.⁸⁹ Because the information regarding Casey's misconduct was not privileged, the court found Himmel had failed to comply with his duty to report and he was suspended for one year.⁹⁰

While a situation like this would not happen under the Model Rules of Professional Conduct, it does serve to underscore just how important it is to understand the rules. Even an attorney attempting to do the right things can be subject to discipline if he fails to understand his obligations.

Rhode Island directly addressed the conflict between reporting and confidentiality within the Model Rules in an advisory opinion that dealt with a common way misconduct is discovered

81 *Id.* at 791.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 791-92.

89 *Id.* at 792-94.

90 *Id.* at 794-96.

— when a lawyer takes over representation from another lawyer.⁹¹ Because this was an advisory opinion, no names were disclosed and the facts were less detailed.

The inquiring attorney took over litigation from Attorney X, who acted as corporate counsel for the client.⁹² Attorney X was holding the client's settlement funds in trust pending litigation or settlement by the inquiring attorney.⁹³ When the funds were needed, it was discovered that Attorney X had embezzled the funds.⁹⁴ The inquiring attorney informed the client, but the client refused to consent to disclosure for fear it would interfere with obtaining the funds from Attorney X.⁹⁵ The funds were replaced by Attorney X, but the client still refused to authorize disclosure.⁹⁶ The inquiring attorney wrote to the disciplinary counsel to determine what, if any, duty he had to report Attorney X's misconduct.⁹⁷

In evaluating whether the information was covered under Rule 1.6, the court relied heavily on a comment, which states in part, "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."⁹⁸ The court also specifically recognized that *Himmel* applied a narrower exception than that in the Model Rules.⁹⁹

Ultimately, the court concluded that in this case, the information was covered by Rule 1.6 because it was information relating to the representation; therefore, the inquiring attorney had no duty to report unless the client consented to disclosure.¹⁰⁰

⁹¹ *In re Ethics Advisory Panel Op. No. 92-1*, 627 A.2d 317, 318 (R.I. 1993).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 321-22 (citing R.I. SUP. CT. ART. V MODEL RULES OF PROF'L CONDUCT R. 1.6) (emphasis omitted). See also MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

⁹⁹ *In re Ethics Advisory Panel Op. No. 92-1*, 627 A.2d at 322.

¹⁰⁰ *Id.* at 323.

The court was troubled by this outcome and questioned whether changes were needed to maintain the integrity of the profession.¹⁰¹

Even when attorneys understand the scope of confidentiality, they can sometimes misunderstand to whom the obligation of confidentiality is owed. In another Rhode Island case, Daniel Silva acted as an attorney for two companies and acted as a closing attorney for mortgage transactions between the two.¹⁰² One company was owned by Edward Medeiros, a fellow attorney and friend of Silva.¹⁰³ Silva became aware that Medeiros was diverting funds from the mortgage transactions and failing to pay off mortgages on the properties.¹⁰⁴ Silva did not report the misconduct to any party because he believed (and Medeiros told him) he was prohibited from disclosing by the attorney-client privilege.¹⁰⁵

Because Silva acted as an attorney for the companies, not Medeiros personally, the court found no attorney-client privilege or duty of confidentiality prevented reporting.¹⁰⁶ Therefore, Silva violated his duty to report the misconduct and was censured by the court.¹⁰⁷

Connecticut addressed at least one family law scenario that might be instructive as well. In an advisory opinion, the Committee on Professional Ethics addressed whether knowledge obtained through discovery and trial regarding the opposing party, who was also a lawyer, must be reported.¹⁰⁸ While the client was willing to consent to disclosure, the inquiring attorney feared that course of action might be harmful to the client.¹⁰⁹

The Committee did not address the Rule 1.6 exception since the client had agreed to consent, but did address the issue of harm by stating, “[w]e do not think that the issue of ‘harm’ to

¹⁰¹ *Id.*

¹⁰² *In re Silva*, 636 A.2d 316, 316 (R.I. 1994).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 316-17. It should be noted that while the decision discusses privilege, the court is interpreting Rule 1.6, which extends the exception to confidential information beyond the scope of privilege.

¹⁰⁶ *Id.* at 317.

¹⁰⁷ *Id.*

¹⁰⁸ Conn Bar Ass’n Comm. on Prof’l Ethics, Informal Op. 94-11 (1994).

¹⁰⁹ *Id.* at *1-2.

your client excuses you from making the report, particularly since the client has indicated her willingness to cooperate in allowing you to make the report.”¹¹⁰

What is interesting about this opinion is that it seems to indicate that an attorney might have a conflict regarding whether to advise the client to consent to reporting in some situations. When the reporting duty is triggered, “a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client’s interests.”¹¹¹ If, as in the instant case, the client may suffer some harm or prejudice, should the lawyer advocate for that course of action in order to safeguard the public? Such considerations are important when discussing reporting issues with a client. In order to make an informed decision regarding whether to waive confidentiality, a lawyer should be prepared to discuss the potential consequences of reporting.

IV. Best Practices

If this discussion has left you in a state of paralysis due to the fear of making a false move, you are likely not alone. And as my ethics professor explained to us, ethics education should make you afraid. This area of law *is* the horror story of how everything went wrong and careers unraveled. It does not take long for research in this area to leave a person feeling that the only safe practice is one without any clients. But before you decide to take down your shingle, there are practical ways to approach this issue if you become aware of possible misconduct. The information below attempts to condense all that has been discussed into a few things to consider both before and after an ethical issue of this type arises.

A. Proactive Reading of the Applicable Rules

With the exception of California, all states have professional conduct rules similar in format to the Model Rules of Professional Conduct, but it is important to review the rules of the rele-

¹¹⁰ *Id.* at *2.

¹¹¹ MODEL RULES OF PROF’L CONDUCT R. 8.3 cmt. 2.

478 *Journal of the American Academy of Matrimonial Lawyers*

vant state.¹¹² In addition, even a quick review of the law can help a lawyer to understand what triggers the duty to report. With all the different demands on a lawyer's time, it can sometimes be difficult to recognize an ethical issue has arisen. Learning some of the typical situations where reporting is required can make it easier for a harried practitioner to recognize them in practice. Peter K. Rofes identifies three typical people who may give rise to the reporting duty: predecessor counsel, non-client lawyer, and firm colleague.¹¹³

Once a potential issue has been identified, it is important to evaluate how the situation should best be handled. This evaluation can be broken down into parts based upon the Model Rules or the law of the particular state.

B. Knowledge

As discussed above, knowledge can be difficult to define. While a mere rumor or suspicion is unlikely to be knowledge, it is important to remember knowledge can be inferred. Would the information lead a reasonable attorney to believe a violation occurred? If so, there is likely the knowledge necessary to report. A review of the specific jurisdiction's case law may also be instructive regarding what constitutes knowledge.

C. Seriousness of the Violation

As discussed above, the Model Rules do not require reporting for every possible infraction. If the misconduct does not raise a "substantial question" as to "honesty, trustworthiness or fitness" there is no duty to report. It is important to remember the purpose of this rule is not as sword, but to help regulate the profession. Reporting misconduct should not be used as a tool for settlement negotiations, or for punishing disagreeable opposing counsel. It is important, however, to report misconduct and protect the public.

The types of conduct that generally trigger a duty to report can be broken down into a few categories. First, any conduct

¹¹² AMERICAN BAR ASS'N, ABOUT THE MODEL RULES, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

¹¹³ Rofes, *supra* note 78, at 632-51.

that would be punished by disbarment would require reporting.¹¹⁴ Second, “dishonest, deceitful or fraudulent conduct” particularly regarding property of another, regardless of whether the conduct would be criminal, would also be sufficiently serious.¹¹⁵ Finally, conduct involving moral turpitude or dishonest actions during litigation would also warrant reporting.¹¹⁶ It is also important to remember that an attorney’s conduct in his or her personal life may also form the basis of the misconduct, not just the attorney’s conduct in a professional capacity.¹¹⁷

D. Source of the Information

The Model Rules broadly define confidentiality as “information relating to the representation of a client.” As such, it is best to obtain the client’s consent if the information is in any way related to the representation in order to avoid any issues with violating Rule 1.6. As discussed above, the Model Rules indicate lawyers should encourage their clients to consent to disclosure. However, there could be reasons why disclosure would be harmful to the client’s interests. In that situation it may be best to review any opinions from that state’s advisory board, submit the issue to the advisory board, or consult an associate or partner in your firm.

V. Conclusion

Ethical issues are surrounded by a great deal of noise, from lawyer jokes to the perception that ethical issues are easy to avoid. The truth is that most lawyers strive to do the right thing, but sometimes that “right thing” is not as clear as it should be. When it comes to reporting ethical issues, the water is murky and lawyers are often reluctant to wade in for a closer look. If nothing else, perhaps this discussion will lend some assistance to un-

¹¹⁴ Richmond, *supra* note 6, at 195.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

480 *Journal of the American Academy of Matrimonial Lawyers*

derstanding the rule and spur readers to look a little deeper to ensure they understand and can comply with the reporting requirement.

Elizabeth Fessler