JUDICIAL REPORTING OF LAWYER MISCONDUCT

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Abstract

It has long been recognized that judges can and should play a central role in the lawyer disciplinary process by reporting substantial lawyer misconduct they observe to disciplinary authorities. Despite the nearly 20-year existence of a mandatory reporting rule in such instances, the conventional wisdom suggests that the rule often is not followed. While the 2007 revision of the ABA Model Code of Judicial Conduct provided a golden opportunity to address this problem, the process resulted in little more than a hortatory reaffirmation of the basic principle. There is a better path.

In this essay, I thoroughly analyze the costs and benefits of mandatory judicial reporting, the outcome of which reaffirms the importance of having a rule that works, set forth the case for why we can realistically expect judges, more so than lawyers, to carry out that duty, and provide concrete steps to achieve that promise.

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The profession has long recognized the role of judges in policing lawyer behavior through the reporting of professional misconduct to disciplinary authorities.¹ In the earliest ABA-sponsored codes of judicial conduct such reporting was encouraged, but not required.²

By the mid-1980's, however, there was a growing recognition that the mere admonition to judges to report lawyer professional misconduct had not generated the degree of reporting that had been hoped for, and the ABA responded. In 1984, the ABA Center for Professional

¹ The ABA first adopted a code of judicial conduct for judges in 1924, the Canons of Judicial Ethics. Canon 11 provided: “A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counselors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities.” CANONS OF JUDICIAL ETHICS CANON 11 (originally adopted 1924) [hereinafter CANNONS OF JUDICIAL ETHICS].

² See, e.g., CANONS OF JUDICIAL ETHICS CANON 11; MODEL CODE OF JUDICIAL CONDUCT CANON 3(B)(3) & commentary (originally adopted 1972) [hereinafter 1972 MODEL CODE OF JUDICIAL CONDUCT] (providing that “A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware” which, as stated in the commentary, “may include reporting a lawyer’s misconduct to an appropriate disciplinary body.”).

In fact, judges, the vast majority of whom are lawyers, were given mixed signals on reporting. While the ABA 1972 Model Code of Judicial Conduct encouraged, but did not require the reporting of lawyer misconduct, the ABA Code of Professional Responsibility required the reporting of Code violations if based on unprivileged knowledge. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (originally adopted 1969). It is generally accepted that both standards apply to the lawyer/judge. Judith A. McMorrow, Jackie A. Gardina, & Salvatore Ricciardone, Judicial Attitudes Toward Confronting Attorney Misconduct: A View From The Reported Decisions, 32 HOFSTRA L. REV. 1426, 1433-34 & n.39 (2004). Although, one could construct a plausible argument that in the face of inconsistent standards the judicial code should take precedence. See, e.g., Ill. Judges Ass’n, Op. 99-6 (Apr. 14, 1999) (employing this analysis with respect to the judicial and lawyer reporting rules). See generally 2B NORMAN J. SINGER & J.D. S. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51.05 (6th ed. 2000-2003) (detailing the canon of “general versus specific acts,” arising when two statutes are in pari materia, such “general and specific acts” are construed and harmonized, with the more detailed prevailing, regardless of which statute is more recent, except in situations when the act drafters intend for the general act to be controlling).
Responsibility and the Standing Committee on Professional Discipline issued a report, *The Judicial Response to Lawyer Misconduct*, that roundly criticized judges for their under-reporting of lawyer misconduct and thoroughly outlined seven areas of misconduct common in the litigation process for which they urged increased reporting - prosecutorial misconduct, incompetence and negligence, deception of the court, frivolous lawsuits and discovery abuse, in-court misconduct, contemptuous behavior, and conflicts of interest.\(^3\)

Two years later the ABA adopted its *Standards for Imposing Lawyer Sanctions*. In its preface, the ABA spoke clearly to judges about the importance of their reporting role:

The Clark Committee concluded that one of the most significant problems in lawyer discipline was the reluctance of lawyers and judges to report misconduct. That same problem exists today. It cannot be emphasized strongly enough that lawyers and judges must report unethical conduct to the appropriate disciplinary agency. Failure to render such reports is a disservice to the public and the legal profession.

Judges in particular should be reminded of their obligation to report unethical conduct to the disciplinary agencies.\(^4\)

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\(^3\) STANDING COMM. ON PROF'L DISCIPLINE, AM. BAR ASS'N, THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT (1984) [hereinafter THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT].

\(^4\) ABA, STANDARDS FOR IMPOSING LAWYER SANCTIONS 2-3 (originally adopted1986).
By 1990, when the ABA adopted a new code of conduct for judges, the duty to report was made mandatory for serious lawyer misconduct about which a judge had knowledge, and recognized as an appropriate response to less serious misconduct or misconduct the judge was less certain had taken place. This new provision was adopted in part to spur additional reporting by judges, with the threat of disciplinary sanction for failure to report.

Now, almost twenty years later, one might think that judicial reporting of lawyer

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5 Model Code of Judicial Conduct Canon 3(D)(2) (originally adopted 1990) [hereinafter 1990 Model Code of Judicial Conduct]. It provides:

A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct ... that raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

The terminology section defines “appropriate authority” as “the authority with responsibility for initiation of disciplinary process with respect to the violation reported.” Id. at Terminology [2]. The official commentary to the Canon notes that “appropriate action” in the first sentence does include, as one option, reporting misconduct to the appropriate authority. Id. at Commentary [1].

This duty lies with the individual judicial officer and cannot be enforced by parties through a motion to compel. Finkelman v. Greenbaum, 2007 NY Slip Op. 50063U, 10 (N.Y. Sup. Ct. 2007).

6 See generally Lisa L. Milord, The Development of the ABA Judicial Code 25 (1992) (noting that under previous code judicial reporting was infrequent, spurring the Code Committee “to articulate the reporting standards more clearly and more comprehensively. The rule was changed to specifically require judges to report to a disciplinary authority significant misconduct of lawyers and other judges, thus to diminish the number of instances in which judges take it on themselves to impose sanctions for professional misconduct without such reporting.”). The change also brought the mandatory reporting duty for judges largely in line with the mandatory reporting duty of lawyers. Id. at 26. See Model Rules of Prof’l Conduct R. 8.3(a) (originally adopted in 1983) [hereinafter Model Rules of Prof’l Conduct].
misconduct would be a common occurrence. Indeed, over the years, various scholars have predicted that judicial reporting was, or would soon be, on the upswing, and some such reporting clearly occurs. But the conventional wisdom suggests that this is still a duty that is largely ignored, and several recent studies seem to confirm that observation. In a recent article


8 Numerous cases include a direction to report lawyer misconduct to disciplinary authorities. See, e.g., Lioce v. Cohen, 174 P.3d 970, 986-7 (Nev. 2008) (en banc) (court referring counsel to disciplinary authorities for repeated misconduct in closing arguments and other trial related conduct); Conklin v. Warrington Tp., 476 F. Supp. 2d 458, 464 (M.D. Pa. 2007) (referral for repeated instances of misconduct); In re Diaz, 348 B.R. 752, 758 (Bankr. S.D. Tex. 2006) (referral for presenting false bankruptcy schedules to the court); Lewis v. State, 714 So. 2d 1201, 1202-03 (Fla. 1998) (referral of prosecutor for intentionally withholding Brady material). And this is but the tip of the iceberg as the vast majority of such reports are undoubtedly done outside the public eye. Cf. Peter A. Joy, Symposium: Happy (?) Birthday Rule 11: The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers, 37 Loy. L.A. L. Rev. 765, 793 & n.110 (2004) (acknowledging that nationwide 40% of all lawyer discipline results in private sanctions, thereby making it difficult to determine whether in those cases a judicial report was involved).

For a particularly public judicial reporting of lawyer misconduct, see Adam Liptak, Federal Judge Files Complaint Against Prosecutor in Boston, N.Y. Times, July 3, 2007, at A11, available at 2007 WLNR 12517080 (sending letter requesting the state disciplinary system to investigate a federal prosecutor for failure to turn over exculpatory evidence; request also made to the United States Attorney General).

in the *Loyola of Los Angeles Law Review*, Professor Peter Joy came to the same conclusion after attempting to assess the degree to which lawyers who are found to have filed frivolous claims are referred to disciplinary authorities by judges. Similarly, in her study of wrongful conviction cases involving prosecutorial misconduct, Professor Yaroshefsky was struck by the dearth of evidence that this misconduct was reported to disciplinary authorities by the court. A more recent California report confirms this observation, finding limited judicial compliance with the automatic reporting requirements in California law pertaining to prosecutorial and criminal defense counsel misconduct.

Given the profession’s purported desire for judicial reporting, and the sense that severe under-reporting occurs, one might assume that the ABA would have rethought its reporting standard when considering its 2007 overhaul of the *Model Code of Judicial Conduct*. While

http://www.wicourts.gov/about/organization/offices/docs/olr0607fiscal.pdf (reporting that .5% of 1896, or 9 cases, were judicially referred).

10 Joy, *supra* note [fill in]. However, as the author suggests, this may stem from the fact that court-imposed sanctions are available and work well, and that Rule 11 misconduct may not rise to the level of conduct that triggers mandatory reporting, or at least involve matters that disciplinary authorities consider lesser misconduct. Id. at 806-15. *But cf. id.* at 803 (forwarding an argument that Rule 11 sanctions are triggered by conduct that raises substantial questions as to the lawyer’s fitness to practice). For an extensive analysis of the interplay between Rule 11 and the reporting requirements see Parness, *supra* note [fill in].


12 CALIF. COMM’N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON PROFESSIONAL RESPONSIBILITY AND ACCOUNTABILITY OF PROSECUTORS AND DEFENSE COUNSEL, 3-7 (Oct. 18, 2007) [hereinafter CCFAJ REPORT] (finding limited compliance with Calif. Bus. & Prof. §6086.7(a)(2)).

changes were made in the reporting area,\textsuperscript{14} the fundamental nature of the judge’s duty to report lawyer misconduct remained unchanged.\textsuperscript{15}

Several explanations come to mind. One is that the ABA is generally satisfied with the level of reporting generated by the current standard. If it ain’t broke, don’t fix it. A second is that there were simply bigger issues to address, or at least there was not a significant enough constituency to push major reconsideration of this issue. A third is that the problem may be intractable, that the disinclination to report the misconduct of others cannot be overcome by a simple rule or other incentives. While I will address each of these explanations, my major

\footnotesize{\textsuperscript{14} The most significant change in this area was the addition of a provision directly addressing the responsibilities of a judge who has a reasonable belief that a lawyer’s or other judge’s performance is impaired by drugs or alcohol, or a mental, emotional, or physical condition. \textsc{Model Code of Judicial Conduct} R. 2.14 (originally adopted 2007) [hereinafter \textsc{Model Code of Judicial Conduct}]. Also added was a provision to encourage judicial cooperation with disciplinary authorities. \textit{Id.} at R. 2.16.

A former provision, Canon 3(D)(1), which declared that acts taken to discharge the Code’s disciplinary responsibilities were absolutely privileged and that judges were immune from civil liability predicted on those acts was eliminated as inappropriate in a code of conduct since “[n]either the ABA nor an adopting court is in a position to grant or deny judicial immunity in the context of judicial conduct standards.”- \textsc{Model Code of Judicial Conduct} R. 2.15 Reporter’s Explanation of Changes.

With respect to the judicial reporting of judicial misconduct, amendments were made to the Code to more closely align that reporting duty to the duty to report lawyer misconduct. \textit{Id.}

These changes are discussed at more length \textit{infra} at text accompanying notes [fill in].

\textsuperscript{15} With respect to the core duty of a judge to report lawyer misconduct where the judge has knowledge of misconduct which raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness, no changes were made. The duty to take appropriate action, which may include reporting, where the judge has received information “indicating that a lawyer has committed a violation of the Rules of Professional Conduct” was heightened. In such circumstances, the former rule indicated that the judge “should” take appropriate action, whereas the new rule indicates that such action “shall” be taken. \textsc{Model Code of Judicial Conduct} R. 2.15 Reporter’s Explanation of Changes. The comments also were amended to stress more directly that responding to judicial and lawyer misconduct is important to promote public respect for the judicial system. \textit{Id.}
concern, and the bulk of this essay, addresses the last factor. I believe judges, much more so than lawyers, are likely to take a reporting duty seriously if given a sufficient charge to do so.
As a threshold matter, it is important to recognize the costs and benefits of requiring judges to report serious misconduct of lawyers. If one concludes after that analysis that reporting is unwarranted, or of only marginal utility, then a mandatory reporting rule might not be necessary, or at least, no one will mind if it is largely ignored.

THE CASE FOR MANDATORY JUDICIAL REPORTING

The case for requiring judges to report substantial lawyer misconduct is fairly straightforward. The starting proposition is that the reporting of professional misconduct to

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16 Judges have a duty to report judicial misconduct as well as the misconduct of lawyers and the two standards are now largely similar. 2007 MODEL CODE OF JUDICIAL CONDUCT R. 2.15. In practice, however, different influences come to bear in the two situations. In the former there may be strong institutional factors at work that might discourage reporting of judicial misconduct that are not present with respect to the reporting of lawyer misconduct. These include the need to preserve relationships among judges serving on the same court, and the possible friction that might arise if reporting were seen as undercutting the authority of the chief judge on that court to police court conduct. See generally McMorrow, Gardina & Ricciardone, supra note [fill in], at 1428 (discussing collegiality among judges as a factor that might influence a judge’s attitude toward confronting misconduct). For this article, however, I wish to put the reporting of fellow judges to one side and focus instead on the judicial reporting of lawyers.

17 The duty to report lawyer misconduct is addressed to judges. As defined in the Code of Judicial Conduct, “A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary.” 2007 MODEL CODE OF JUDICIAL CONDUCT Application I.(B). The provisions on reporting apply to full-time and part-time judges alike. Id. at Application II.-V. “Judge” is an inclusive term which applies to both trial and appellate judges whether on courts of limited or general jurisdiction.

While I treat all judges alike in the text, it must be acknowledged that the nature of the judgeship involved will influence the degree to which reportable misconduct is likely to be observed as the nature of interaction between attorneys and the court will vary. For example, an actively involved magistrate or trial judge will have very different interactions with the lawyers appearing before them than will appellate judges. Cf. Andrew L. Kaufman,
disciplinary authorities is essential to our disciplinary system.\textsuperscript{18} For the most part, disciplinary authorities rely on the filing of disciplinary grievances by clients, lawyers, and judges.\textsuperscript{19} It is these complaints that are then investigated and pursued where warranted. The resulting discipline serves to protect the public and the integrity of the legal system by removing or restraining lawyers involved in past misconduct, deterring future lawyer misconduct, and promoting public confidence in the legal system.\textsuperscript{20}

Judges, by their daily interaction with lawyers, are well-positioned to observe lawyer

\textit{Judicial Ethics: The Less-Often Asked Questions}, 64 WASH. L. REV. 851, 860 (1989) (recognizing that instances requiring reporting do no arise as “frequently for Courts of Appeals judges as it does for district and bankruptcy court judges.”). Some of the constraints on reporting may be less evident at the appellate than the trial level. See John M. Levy, \textit{The Judge's Role in the Enforcement of Ethics - Fear and Learning in the Profession}, 22 SANTA CLARA L. REV. 95, 107 (1982) (noting differences in status and role and degree of interaction with individual lawyers may make it easier for appellate judges to report). As a side note, there is some disagreement on whether appellate referrals should be limited to misconduct that occurs on appeal, or whether it can extend to trial level misconduct that comes to light on appeal. See Lioce v. Cohen, 174 P.3d 970, 986 (Nev. 2008) (en banc) (Justices Parraguirre and Maupin concurring in part and dissenting in part) (“[T]he district court has the benefit of evaluating all conduct during the course of trial and is in a superior position to determine and impose appropriate penalties for attorney misconduct occurring at trial. Absent a finding of appellate abuse in this case, I would decline to refer defense counsel to the state bar.”).

Even among trial judges, the nature of their dockets will influence the kind of interactions they have with the lawyers that appear before them. To the extent questions of role, relationship to the bar, and degree of status play into the reporting equation, these may differ as well.


\textsuperscript{19} See Leslie C. Levin, \textit{The Case for Less Secrecy in Lawyer Discipline}, 20 GEO. J. LEGAL ETHICS 1, 18 (2007) (noting that most complaints come from clients, other lawyers, third parties, and judges). Other actions may be triggered by press reports or facts detailed in court opinions which come to the attention of disciplinary authorities.

\textsuperscript{20} See, e.g., Greenbaum, supra note [fill in], at 264. See also ABA, \textit{STANDARDS FOR IMPOSING LAWYER SANCTIONS} Standard 1.1 cmt. (1992); Levy, supra note [fill in], at 110-12 (recognizing three functions of self-regulation - control of bad actors, deterrence, and forestalling of public intervention in the regulation of the legal profession).
misconduct. As judges take a more involved role in managing the litigation process from filing to conclusion, the types and frequency of interactions they have with lawyers multiply.

Because of their legal training and accumulated expertise over time in the profession and on the bench, judges also are particularly well-positioned to evaluate that conduct to determine if it falls below the profession’s ethical standards. Clients, by and large untrained in the law, are unlikely to identify ethical breaches except the most obvious ones. While lawyers

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21 See, e.g., In re Reinstatement of Hopewell, 736 N.W.2d 864, 876-7 (S.D. 2007) (“We recently examined the importance of a judicial perspective in attorney disciplinary cases. In re Discipline of Laprath, 2003 SD 114, 670 N.W.2d 41. We noted that judges routinely make determinations as to attorney competence. Trial judges have the unique ‘opportunity to observe and evaluate the character, competence, industry and fidelity of lawyers who regularly appear before him [or her] day in and day out.’ ” Id., 2003 SD 114 at ¶ 73, 670 N.W.2d at 63 (quoting State ex rel Lawrence v. Henderson, 1 Tenn.Crim.App. 199, 433 S.W.2d 96 (1968)”; THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT, supra note [fill in], at iii (“Unquestionably, because of their legal training and their work, judges observe a great deal of misconduct and are able to identify it as such.”); Leslie W. Abramson, The Judge’s Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence, 25 HOFSTRA L. REV. 751, 780 (1997) (noting that “judges comprise the one group that is most likely to observe or receive information regarding others’ misconduct”).

22 See, e.g., Sandra F. Gavin, Managerial Justice in a Post-Daubert World: A Reliability Paradigm, 234 F.R.D. 196, 196-97 (2006) (commenting upon the rise of managerial power of judges over the past two decades and that judges currently operate with a high degree of power before a case comes to jury trial.). See generally Judith Resnick, Managerial Judges, 96 Harv. L. Rev. 374, 778-779 (1982) (commenting upon the rise of the managerial system under the implementation of the Federal Rules of Civil Procedure.).

23 Almost every state explicitly requires that—either through statutory provision or constitutional requirement—trial, appellate, and supreme court judges be licensed attorneys, except for Maine and Minnesota, which only require their judges be “learned in the law.” American Judicature Society, Method of Judicial Selection, available at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=.

24 Many of those who serve as judges come to the bench with substantial experience in practice and many remain on the bench for a considerable time. See Albert Yoon, Love’s Labor’s Lost? Judicial Tenure Among Federal Court Judges 1945-2000, 91 CAL. L. REV. 1029, 1047 (2003) (discussing data illustrating that the average age of federal judges upon commission ranges between 50 and 55 and the average tenure of federal judges has steadily increased from 20 years on the bench in 1985 to nearing 30 years at the beginning of 2000.).

25 In addition, it appears that clients often feel aggrieved by conduct that does not warrant discipline. See generally Mary Robinson, Avoiding ARDC Anxiety: A Disciplinary Primer, 84 ILL. B.J. 452, 453-54 (1996) (discussing categories of complaints, often filed by clients, that are summarily dismissed) Jack A. Guttenberg, The Ohio Attorney Disciplinary Process—1982 to 1991: An Empirical Study, Critique, and Recommendations for
are also in a position to observe and evaluate the conduct of other lawyers, and have a reporting
duty similar to that of judges, there are, as discussed below, greater reasons for lawyers than
judges to shy away from the reporting task.

Finally, imposing a reporting duty on judges seems particularly appropriate given their
role in regulating lawyers, and promoting respect for the judicial system. As the Ohio
Supreme Court commented: “[W]e hasten to approve and encourage courts throughout this state
in their efforts to halt unprofessional conduct and meet their responsibilities in reporting
violations of the [professional conduct rules].”

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Change, 62 U. Cin. L. Rev. 947, 964-65 (1994) (noting that during that period clients filed most of the grievances and that approximately two-thirds of all grievances were dismissed on intake or shortly thereafter). Reports by lawyers not surprisingly involve more significant misconduct than do those by lay persons and are far more likely to lead to the filing of a formal complaint by disciplinary authorities. Mary T. Robinson, A Lawyer’s Duty to Report Another Lawyer’s Misconduct: The Illinois Experience, 33rd NAT’L CONF. ON PROFF. RESP., Tab 2 at 3 (2007) (reporting on 1992-2006 data from the Illinois disciplinary process). One suspects the same would be true of reports by judges.

26 Greenbaum, supra note [fill in], at 265.
27 See supra note [fill in].
28 See infra text accompanying notes [fill in]. Cf. McMorrow, Gardina & Ricciardone, supra note [fill in], at 1433 (noting that the imposition of a reporting duty on judges was less controversial than imposing one on lawyers, “suggesting that the judge’s obligation to report was seen on an instinctive level as more compelling -or at least causing less collateral damage ...”).
29 See generally 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c. (2000) (noting that in most states the courts have the inherent power to regulate lawyers and that in many states that power is exclusive).
30 See, e.g., THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT, supra note [fill in], at ii (stressing the judicial role in lawyer discipline, including reporting, as predicated in part on combating the “less immediate but more damaging effect lawyer misconduct has on the moral authority of the justice system and upon the public’s perception of it”); McMorrow, Gardina & Ricciardone, supra note [fill in], at 1442 (“Preservation of popular faith with the judicial system is the court’s foremost consideration” in exercising control over lawyer misconduct.).
THE POTENTIAL COSTS OF MANDATORY JUDICIAL REPORTING

This is not to say that imposing a reporting duty on judges is cost free. In our culture, reporting the misconduct of others is regularly frowned upon - who wants to be a “snitch” or a “tattle-tail.” This reluctance is intensified by context. As members of the bar, and often quite active members, judges may be hesitant to report their fellow lawyers. In addition, some have suggested that reporting may be particularly difficult for judges who need lawyer support for reelection [whether by endorsement or through campaign contributions] or appointment to other posts.

I am not so cynical. On a bar-wide level, appropriate reporting is unlikely to raise the

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33 Cf. Fisher, supra note [fill in], at 1111-1116 (arguing that the interrelationships among judges and the practicing bar make the former subject to regulatory capture); Richard A. Posner, What Do Judges and Justices Maximize? (The Same Things Everybody Does), 3 SUP. CT. ECON. REV. 1, 13 (1993) (“Judges’ desire to be popular with lawyers may express itself in reluctance to impose sanctions upon or even to criticize lawyers who perform below reasonable professional standards ....”).

34 Only nine states have purely appointive selection methods for judges. The remaining states employ some type of public judicial selection, be that retention elections after initial appointment (Alaska, Colo., Iowa, Neb., Utah, Wyo.), partisan elections with or without party labels (Ala., La., Mich., Ohio, Tex., W. Va.), or some other method by which the public is involved in the process of judicial selection. Roy A. Schotland, New Challenges to States’ Judicial Selection, 95 GEO. L.J. 1077, 1085 (2007).

35 Fisher, supra note [fill in], at 1111-112. See also ABA COMM’N ON PROFESSIONALISM, REPORT TO THE BD. OF GOVERNORS AND THE HOUSE OF DELEGATES OF THE ABA: ‘… IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, reprinted in 112 F.R.D. 243, 286-88 (1986) [hereinafter IN THE SPIRIT] (“The reluctance of judges to report misconduct is usually ascribed to (1) fear of reprisals where the judge involved must stand for reelection ....”). Cf. Yaroshesky, supra note [fill in], at 292 (“On a practical level, many state judges, concerned about career advancement, are loathe to sanction or report lawyers to disciplinary committees [for prosecutorial misconduct] because the judge does not want to alienate the powerful prosecutors office.”); Peter A. Joy, A Professionalism Creed for Judges: Leading By Example, 52 S.C.L. REV. 667, 673-74 (2001) (describing how political contributions may have an impact on judicial decisions and citing a Texas study in which “nearly half of the state’s judges responding agreed that campaign contributions have a fairly or very significant influence on courtroom decisions.”).
Bar’s ire. Weeding out lawyers whose misconduct is severe enough to trigger mandatory reporting benefits the Bar as a whole. Lawyers are protected from having to deal with fellow lawyers who lack honesty and trustworthiness, or basic fitness as a lawyer. On an individual level, instances undoubtedly will arise in which friendship or political loyalty inhibits otherwise required reporting, but that is not likely to be the typical situation. Acknowledging that the rule may sometimes be flaunted simply means that attempts at enhancing the reporting regime will not be perfect. It does not doom the enterprise.

There are also some potential risks in involving judges in the reporting business. Indeed, the list of potential costs is lengthy, but most, on closer inspection, are not severe.

One oft expressed concern is that reporting will take substantial judicial resources better spent in moving along the docket. Such a concern appears overblown. The instances of misconduct triggering the reporting requirement for any particular judge are likely to be rare. When such instances arise, the demands of judicial involvement need not be onerous. As to reporting itself, elaborate reports and supporting evidence are not required; a simple letter or phone call will do. As to further investigation of the lawyer’s alleged misconduct, the

36 IN THE SPIRIT, supra note [fill in], at 287 n.141 (noting time burden of reporting as one of the three most common reasons cited for the reluctance of judges to report). Cf. Parness, supra note [fill in], at 45-46 (noting that if a judge chooses referral to disciplinary authorities as the sanction for a Rule 11 violation, the judge may be required to serve as a witness).

37 IN THE SPIRIT, supra note [fill in], at 287 n.141 (noting that “[t]he time burden, in most instances need not be great, since the investigating authority could conserve the time of the judge to a great degree”). In addition, should judges begin to report more often as an appropriate sanction, in lieu of exercising sanctioning power directly, that may actually free up judicial resources.

38 Levin, supra note [fill in], at 18 (noting that most disciplinary actions are initiated by a phone call).
disciplinary authority will do the actual investigation, not the judge.\textsuperscript{39} Further, to the extent the misconduct occurred on the record, much of the proof will be readily available.\textsuperscript{40} While in a contested case the judge’s testimony may be required,\textsuperscript{41} this seems little to ask.

There is also a fear that reporting might be used for improper purposes. Some fear that a politically driven judge, or a very vindictive one, could use the power to report to bring erroneous claims against lawyers\textsuperscript{42} and that the charges alone, if made public, could severely harm the reputation of the reported lawyer.\textsuperscript{43} One suspects that this occurs rarely; at least formal reports of such instances are few and far between. And if it does, word certainly will get out triggering both formal and informal pressures to avoid such conduct in the future. The presence of those pressures may, in fact, discourage such conduct in the first place. If the abuse is flagrant,

\begin{footnotes}
\item See generally \textit{Model Rules for Lawyer Disciplinary Enforcement R.11B} (2002) (describing the investigatory process); Levin, \textit{supra} note [fill in], at 18 (describing the typical lawyer disciplinary process).
\item This is not to suggest that the court should undertake a separate evidentiary inquiry to document the misconduct, but rather that in the course of the action the alleged misconduct may be evident from the record. \textit{See, e.g.}, Mass. Comm. on Judicial Ethics, Op. No. 2002-04 (2002) (finding no requirement for judge to hold a hearing on alleged misconduct before reporting it to disciplinary authorities).
\item In clear cases it seems likely that the reported lawyer would stipulate to the facts, eliminating the need for judicial testimony. Even in cases of factual dispute, other witnesses may be able to provide the necessary testimony.
\item \textit{See, e.g.}, Levy, \textit{supra} note [fill in], at 107-08 (while promoting increased judicial reporting, noting that “[i]f more judges saw their roles as ethical activists there would be a greater likelihood of blatant political use of the process.”). \textit{See also} Geoffrey P. Miller, \textit{Bad Judges}, 83 Tex. L. Rev. 431, 437-48 (2004) (noting many and varied instances of judges abusing their power, including as a way to punish enemies and gain political advantage).
\item Many sources raise the concern that reporting, if public, will in and of itself harm the reputation of the reported lawyer. \textit{See, e.g.}, Kaufman, \textit{supra} note [fill in], at 864 (noting that “[a] concomitant feature of my suggestion that judges take seriously the requirement of initiating disciplinary action against lawyers even if they are not certain that a violation has occurred is that they treat the lawyer fairly when they refer a matter to disciplinary authorities. Judges ought to be careful that they not abuse their power. Public criticism of a lawyer in an opinion in which the court does not undertake the job of fact-finding with all the procedural safeguards involved in a disciplinary proceeding may destroy or severely damage a lawyer's reputation.”); Levy, \textit{supra} note [fill in], at 108-09 (noting the potential harm to the reported lawyer’s reputation from public reporting). \textit{See also} text accompanying notes [fill in]. Unless the report is flagrantly absurd, this would flow from improperly motivated reporting as well.
\end{footnotes}
newspaper exposes are likely, and ultimately disciplinary action against the judge may be warranted. If the abuse is less fragrant, but observable, the judge’s reputation will likely decline, as will support from the legal community. Furthermore, the response to this concern would seem to be to bar judges from reporting at all; otherwise the judge could still report for improper purposes even without a mandatory reporting rule.

Reporting also might interfere with justice in a particular case if the report happens during the case and the reported lawyer learns of the matter, or in future cases if such a report creates a lingering animosity. As to the former concern, unless there is a need to report the lawyer immediately to protect the public, the report can properly be delayed until the case has

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44 Flagrant judicial misconduct is a source of media scrutiny, as judges with possible (or proven) misconduct quickly find themselves the subject of newspaper articles and front page reports. See, e.g., Ken Armstrong, Crooked Judge’s Sentences Doubted 31 Top Lawyers Urge Reopening Death Case, Chi. Trib., Feb. 2, 1997, at 1 (reporting upon Judge Thomas Maloney, a judge in Cook County, Illinois who received bribes to fix murder cases). Some instances of judicial misconduct are so salacious the judge’s exposure extends into popular media, for example, episodes of ‘Law and Order.’ Sewell Chan, ‘Law and Order’ Faces a Libel Case, New York Times, Mar. 19, 2008, available at http://cityroom.blogs.nytimes.com/2008/03/19/law-order-faces-a-case-of-libel-in-fiction/ (noting that the television show ‘Law and Order’ portrayed a judge accepting bribes in exchange for favors from the bench, eerily similar to the real-life situation of Gerald Garson, a former Brooklyn Supreme Court Justice ultimately convicted of extortion, soliciting illegal contributions, and official misconduct in exchange for judicial favors).

45 See, e.g., In re Hocking, 546 N.W.2d 234, 242-43 (Mich. 1996) (judge accused of filing disciplinary charges against counsel in retaliation for counsel’s reporting alleged misconduct by the judge; court rejects finding of Judicial Tenure Committee that judge's reporting was a retaliatory act). Such conduct would seem to violate the duty to avoid the appearance of impropriety, and might implicate the duty to avoid abusing the prestige of the judicial office as well. 2007 MODEL CODE OF JUDICIAL CONDUCT R. 1.2 & 1.3.

46 Although, if the judge is acting out of a purported duty, rather than on a voluntary basis, that may better disguise the improper motivation for the report. See infra text accompanying notes [fill in].

47 Disruption could come in several forms. First, relations between the court and counsel might become increasingly strained. Second, under the duty of communication the lawyer may well be required to inform his client that the judge had reported him. See generally MODEL RULES OF PROF’L CONDUCT R. 1.4. That, in turn, might strain the client-lawyer relationship.

48 Cf. State v. Wade, 839 A.2d 559, 564 (Vt. 2003) (Johnson, J., concurring) (recognizing the difficulty judges have reporting lawyers that appear before them on a day-to-day basis).
concluded. Further, reports at the initial stage are confidential and disciplinary counsel may well postpone consideration of anything but the most pressing matters until after the case is concluded.

The friction generated by reporting may carry over into future cases in which the lawyer appears before that judge. The lawyer may be less cooperative. The judge may view the lawyer’s future conduct with a jaundiced eye. And because of these factors, the future client’s case may suffer. While all possible costs, they are less likely to arise, or at least less likely to be as severe, as they first appear. First, to well represent the future client, the reported lawyer will need to take a reasonable stance in the future case, regardless of the lawyer’s feelings toward the judge. While the judge may still take a skeptical attitude toward the lawyer and his actions in the subsequent case, the judge will likely harbor those feelings in any event - the same reportable

49 See, e.g., MASS. CODE OF JUDICIAL ETHICS § 3D commentary (2003) (“If the lawyer is appearing before the judge, a judge may defer making a report under this Section until the matter has been concluded, but the report should be made as soon as practicable thereafter. However, an immediate report is compelled when a person will likely be injured by a delay in reporting, such as where the judge has knowledge that a lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds”); Abramson, supra note [fill in], at 768 (identifying ethics opinions to the effect that duty to report may not arise until the conclusion of the case in which the misconduct arose). See also Greenbaum, supra note [fill in] at 299 (noting, in the context of lawyer reporting, that while commentators are mixed on whether reporting ought to be delayed where an ongoing case is involved, the ultimate decision should turn on a balancing of the client and system’s interests against disrupting proceedings with the harm to the public resulting from reporting delay).

50 See, e.g., Catherine M. Foti, What a Lawyer Can Expect in Dealing with the Departmental Disciplinary Committee, 80 PLI/NY 407, at 631-32 (2000) (explaining that in New York “[g]enerally, if the alleged misconduct occurred during the pendency of another litigation, the staff will (but does not have to) agree to defer consideration of the complaint until the litigation, or that phase of litigation, is completed”); Hal R. Lieberman, Ethics, Lawyer Misconduct, and Sanctions: The Disciplinary Committee Perspective, C641 ALI-ABA 121, 131-32 (1991) (pointing out that “most disciplinary jurisdictions have adopted a flexible rule giving the disciplinary authority ample latitude either to proceed with an investigation (or, in extreme situations, to move for interim suspension) or to defer action” and setting forth the factors to consider in making that choice). But see Fla. Judicial Ethics Advisory Comm., Op. No. 2005-16 (2005) (finding, in a split vote, that under the Florida Code of Judicial Conduct a judge is required to tell the parties in a pending case that the judge is referring one of the lawyers to disciplinary counsel).
actions were observed by the judge whether or not they are reported. As to the impact on the future client’s case, the consensus is that the impact, if any, is within acceptable bounds. That conclusion would seem to flow from the numerous cases and opinions stating that the mere act of reporting, without more, does not necessitate the judge’s recusal.\(^{51}\)

Another concern is that enhanced judicial reporting might inadvertently curb zealous advocacy by a lawyer appearing before the court.\(^{52}\) Indeed, other sanctioning regimes purportedly have had that effect.\(^{53}\) Nevertheless, if the threshold for required reporting is sufficiently high, a mere good faith pushing of the envelope by an attorney should not result in required reporting. Should the judge choose to report the lawyer to disciplinary authorities, that could occur even in the absence of any reporting rule. Perhaps an increased emphasis on reporting might make voluntary reporting more likely as judges become more accustomed to making such reports, but that is, at best, speculative.

\(^{51}\) See, e.g., U.S. v. Mendoza, 468 F.3d 1256, 1262 (10th Cir. 2006) (act of reporting ethical violations does not demonstrate possible bias or prejudice and therefore does not require recusal); Conklin v. Warrington Tp., 476 F. Supp. 2d 458, 464 (M.D. Pa. 2007) (citing Mendoza with approval and commenting that “the majority of other jurisdictions have held that judicial referrals of counsel for disciplinary review do not, in themselves, constitute grounds for disqualification.”); 5-H Corp. v. Padavano, 708 So. 2d 244 (Fla. 1997) (rejecting argument that judicial referral of lawyer to disciplinary authorities in one case justified disqualification in a subsequent related case). Nevertheless, judicial reporting coupled with other factors may support a finding that the judge’s impartiality might be reasonably questioned requiring recusal. See, e.g., Rollins v. Reed, 495 So. 2d 636 (Ala. 1986) (requiring recusal of judge who filed disciplinary charge against lawyer and continued to harbor negative feelings about the lawyer even after the dismissal of the disciplinary charges two years earlier). See generally Ex Parte Eubanks, 871 So. 2d 862 (Ala. Crim. App. 2003) (finding recusal necessary where judge filed disciplinary charges against lawyer based on lawyer’s alcohol abuse and was to try lawyer as a defendant in a subsequent DUI case).

\(^{52}\) Levy, supra note [fill in], at 108 (recognizing this possible chilling effect).

Concern also has been expressed that misconduct reports from a judge get disproportionate deference from disciplinary authorities.\textsuperscript{54} Perhaps such deference, if it exists, is well justified given the reporter. The judge as informant rightly has more credibility than a client or a lawyer adversary of the reported lawyer. The judge is less likely to have an ax to grind with the reported lawyer\textsuperscript{55} and, as discussed above, is comparatively better situated to carry out the reporting task.\textsuperscript{56} Alternatively, of course, disciplinary authorities may give greater deference to judges because they need to cultivate favor with the judge who may be well vexed to see his complaint fall on deaf ears. This might be particularly true where lawyers who regularly appear before the reporting judge serve on the grievance committee considering the grievance. If this issue were to arise with frequency, a highly problematic scenario, recusal or other protections could be put into place to avoid the problem.\textsuperscript{57}

\textsuperscript{54} Campbell, \textit{supra} note [fill in], at 24 n.9 (1999) (“Such [court disciplinary] referrals will be difficult to defend because of the inherent deference that is ordinarily accorded the rulings of a court by an administrative body.”). \textit{See generally} Parness, \textit{supra} note [fill in], at 54 (reporting comment from Oregon disciplinary official that judicial reports of misconduct would be given great weight). \textit{But cf.} McMorrow, Gardina & Ricciardone, \textit{supra} note [fill in], at 1435 (noting that judicial reporting may be inhibited by a sense that the disciplinary authorities do not follow through on judicial complaints).

\textsuperscript{55} Clients who report often are spurred by a feeling that they were ill-treated in the representation. Lawyers may report to obtain a tactical advantage over a lawyer representing one with conflicting interests, or even as a source of professional advancement if they report a colleague with whom they were competing for clients or power. \textit{See} Greenbaum, \textit{supra} note [fill in ], at 326 & 326 n.389.

\textsuperscript{56} \textit{See supra} text accompanying notes [fill in]. Mary T. Robinson, in her article \textit{A Lawyer’s Duty to Report Another Lawyer’s Misconduct: The Illinois Experience}, 33\textsuperscript{rd} NAT’L CONF. ON PROF’L, RESP., Tab 2 at 3 (2007) notes that lawyer reports in Illinois are twice as likely to lead to the filing of formal disciplinary complaints than reports from other sources. It is likely that judges’ reports will also be of similar or higher quality.

\textsuperscript{57} For example, in Ohio, a matter could be transferred from a certified grievance committee to the state Disciplinary Counsel for investigation and prosecution should such problems arise.
Finally, such reporting may prove unfair to the litigation bar which would be under substantially more scrutiny than other segments of the profession. A judge oversees the litigation conduct of lawyers; no equivalent actor typically views the conduct of transactional lawyers and others outside the courtroom setting. While ferreting out misconduct by any lawyer is better than not, a disproportionate focus on this one segment of the bar might be misread by the public as a sign that litigators are less ethical than other lawyers. While a possibility, one wonders just how likely it is that the public will form that opinion from a reporting regime that typically fails to attract the public eye.

58 A common concern about the lawyer disciplinary system is that the vast majority of lawyers disciplined are sole practitioners. Robinson, supra note [fill in], at 3. This arises in part because those lawyers tend to have smaller clients for whom discipline is their only leverage if they are disgruntled, whereas more affluent clients often resolve disputes short of discipline. Id. at 3-4. Enhanced reporting requirements for lawyers and judges provide a policing mechanism for all lawyers, not just those with a particular client base. Id. at 3. This is certainly true for litigators as they populate small and large firms alike, although the number of appearances and types of cases handled will vary.

59 Cf. Greenbaum, supra note [fill in], at 267-68 (discussing the limited impact the lawyer’s duty to report likely has on the public’s perception of lawyers). On the other hand, at some point anti-trial-lawyer groups might attempt just such a maneuver.
THE COST-BENEFIT ANALYSIS

Admittedly, requiring judges to report serious lawyer misconduct to disciplinary authorities is not free of cost. On balance, however, I believe the benefits substantially outweigh those costs. The reporting duty, if followed, provides the opportunity to police substantial lawyer misconduct and discourage its repetition by others. Judges, in contrast to lawyers and their clients, are especially well-situated to undertake that task. As explored in the last two sections of this essay, there is substantial reason to suspect that, with proper encouragement, judges, due to their role orientation, will, more so than any other group, take the task seriously.\(^\text{60}\)


Conventional wisdom suggests that although judicial reporting of serious lawyer misconduct is desired,\(^\text{61}\) the implementation of the mandatory reporting standard in the 1990 Code of Judicial Conduct has not achieved that goal.\(^\text{62}\) Given that, one might have expected the ABA to seriously revamp the mandatory reporting standard in its most recent revision of the Code, but it did not. Several possible explanations come to mind.

\(^{60}\) See infra text accompanying notes [fill in].

\(^{61}\) See text accompanying notes [fill in] supra.

\(^{62}\) See text accompanying notes [fill in] supra.
One possibility is that there is in fact general satisfaction with the status quo. Perhaps concerns about under-reporting are exaggerated. After all, we have no real data on the number of reportable instances that go unreported. Further, there was no major clamoring by disciplinary counsels calling on judges to report more in comments to the ABA Joint Committee to Evaluate the Model Code of Judicial Conduct. That suggests either that less under-reporting goes on than the conventional wisdom suggests, or, more likely, disciplinary counsels, with limited resources, do not believe litigation misconduct, the bulk of expected judicial reporting, is an area they need to police more vigorously.

Such a belief may be compounded by the fact that judges have extensive power to regulate the conduct of lawyers who appear before them. This includes contempt, pleading and discovery sanctions, and the ability to criticize lawyer behavior in opinions. While reporting

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63 There are statistics on the number of instances in which judges report misconduct. See supra note [fill in]. But they do not tell us the number of instances in which judges failed to report misconduct where reporting was required under the Code. Nor do they tell us the number of those instances in which the misconduct was nonetheless reported by others, such as counsel or parties, involved in the matter in which the misconduct took place. But cf. Parness, supra note [fill in], at 55 (finding no evidence to suggest counsel or parties report serious Rule 11 violations to disciplinary authorities). While reporting by others does not absolve a judge of that judge’s duty to report, it may obviate any concern about under reporting.

64 See http://www.abanet.org/judicialethics/resources/comments.html (setting forth the public comments to the 2007 revision of the Code). Although, disciplinary counsel may well have been active on some of the ABA committees that did file comments.

65 Cf. Joy, supra note [fill in], at 812 (“[l]awyer disciplinary enforcement rules and standards for imposing sanctions disfavor lawyer discipline for litigation conduct”).

and court-imposed sanctions serve different purposes\textsuperscript{67} and are meant to complement rather than supplant each other,\textsuperscript{68} the possibility that misconduct is subject to judicial correction may be seen to off-set a technical lack of reporting.\textsuperscript{69}

A sense of futility might also be at work here. Given the repeated calls to both lawyers and judges for increased reporting of serious lawyer misconduct, and the perception that those calls have gone largely unheeded, some may feel that the issue is largely intractable and cannot be overcome by simple rule changes or other incentives.

\textsuperscript{67} See \textsc{Standards for Imposing Lawyer Sanctions, supra} note [fill in], at 2 (“[T]he lawyer discipline system is in addition to and serves purposes different from contempt powers and other mechanisms available to the judge. Only if all lawyer misconduct is in fact reported to the appropriate disciplinary agency can the legal profession have confidence that consistent sanctions are imposed for similar misconduct.”); \textsc{The Judicial Response to Lawyer Misconduct, supra} note [fill in], at II.4 & V.3 (stressing the need for judicial reporting in addition to court-imposed sanctions in order to create a central record of repeated misconduct by a particular lawyer).

\textsuperscript{68} The tools are meant to be complementary. The fact that disciplinary referral is available does not preclude the judge from entering some form of sanction in the case at hand. Harlan v. Lewis, 982 F.2d 1255, 1260-61 (8th Cir. 1993) (rejecting argument that imposing monetary sanction for litigation misconduct was an abuse of discretion where referral to the disciplinary system is an available option).

\textsuperscript{69} Cf. Joy, \textit{supra} note [fill in], at 814 (explaining the lack of judicial reporting of Rule 11 violations as the product of “an institutional division of authority that recognizes the many advantages judges have over lawyer disciplinary bodies in regulating lawyers’ litigation conduct”). \textit{But cf.} Randall T. Shepard, \textit{Essay: What Judges Can Do About Legal Professionalism}, 32 Wake Forest L. Rev. 621, 630 (1997) (noting in the context of a discussion on judicial reporting of attorney misconduct that “because private warnings and trial sanctions do not provide sufficient incentives for some attorneys to improve their behavior, [s]ometimes only a threat to revoke an attorney’s license to practice sends an adequate message.”); Hoalcraft v. Smithson, No. M2000-01347-COA-R10-CV, 2001 Tenn. App. LEXIS 489, 45-46 (Tenn. Ct. App. July 10, 2001) (“Possible ethics violations surfacing during litigation should generally be referred to the disciplinary machinery established by Tenn. S. Ct. R. 9. Trial courts should not go further unless the ethical violation has tainted or threatens to taint a trial’s fairness.”). In fact, the Code of Judicial Conduct was amended in 1990 to strengthen the reporting requirement “to diminish the number of instances in which judges take it on themselves to impose actions for professional misconduct without such reporting.” Milford, \textit{supra} note [fill in], at 25. Further, in some situations there may not be a sufficient judicial remedy available to sanction the misconduct in question. \textit{See, e.g.}, Ill. Judges Ass’n, Op. 99-6 (Apr. 14, 1999) (finding that if the alleged lawyer misconduct constituted a serious crime warranting suspension or disbarment, reporting is required as any judicially-imposed sanction would be insufficient).
In fact, some commentators have suggested that the reporting rule is a rule that is not intended to be enforced, but instead serves other functions. For lawyers, it spurs reflection on ethical issues by requiring the lawyer to evaluate observed misconduct to determine if reporting is warranted, even if no reporting ultimately takes place. The rule also provides a cover when a lawyer does want to report - harmony between lawyers is better maintained if the report is seen as compelled by law rather than as a choice taken to harm another. In the judicial context, some would argue that it is just for show, to convince the public that we take lawyer discipline and self-regulation of the profession seriously when in fact that is a charade. See, e.g., Gerard E. Lynch, The Lawyer as Informer, 1986 DUKE L.J. 491, 538 (acknowledging critics who argue "the duty-to-report rhetoric is aimed as much at persuading the public to let the bar remain a self-policing entity as it is at encouraging the bar to effectively police itself"). See generally Fred C. Zacharias, Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, 69 NOTRE DAME L. REV. 223, 233-34 (1993) (recognizing that some ethics rules are seldom enforced and serve primarily as public relations devices). Some have suggested that if the rule is no more than window-dressing, it should be deleted so as not to mislead the public. Jeffrey N. Pennell, Ethics, Professionalism, and Malpractice Issues in Estate Planning, C920 ALI-ABA 65, 185 (1994); E. Wayne Thode, The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession, 1976 UTAH L. REV. 95, 100. Cf. Levy, supra note [fill in], at 106-07 (describing judicial failure to report as “the highest level of hypocrisy in the entire regulatory system”); Kaufman, supra note [fill in], at 864 (criticizing the then proposed narrow reporting rule for judges ultimately adopted in the 1990 Code as “a mockery of the judicial claim to authority over the behavior of judges and lawyers”).

I prefer a more benign explanation for why we might have a rule we do not intend to rigorously enforce.

As I have noted in the context of the lawyer’s duty to report professional misconduct:

[A] reporting requirement may overcome some of the psychological impediments to reporting. A voluntary report of misconduct is an affirmatively hostile act as perceived by the reported lawyer. The reporting lawyer chose to act in a way to harm the reported lawyer. With a mandatory requirement, the reporting lawyer has an excuse: "they made me report you." Under these circumstances, the reporting lawyer may feel like less of a "snitch," and the reported lawyer may feel less put upon, because the reporting lawyer had no choice but to report.
evaluating whether the mandatory duty to report is triggered provides the judge an additional lens through which to evaluate lawyer conduct that may in fact inform individual case sanctioning decisions. Also, for judges, as for lawyers, “the rules made me do it” excuse for reporting may help maintain harmony between the judge and the reported lawyer.

Even acknowledging those benefits, they do not outweigh the pernicious consequence of having a mandatory reporting rule that often is ignored. First, and most directly, given that the duty to report lies only for substantial misconduct, failure to follow it shelters from the disciplinary process lawyers whose conduct should be investigated. To outside observers, failure to report such misconduct implies a judicial assessment that the misconduct in question was not that serious. To other judges, failure to report when the rule mandates reporting sends a message that the reporting duty is a hollow one. To lawyers, it may suggest that if judges do not take their reporting duty seriously, neither should lawyers take theirs.

Alternatively, even if there were dissatisfaction with the current standard, tackling that problem may simply have been too low a priority. The impetus for redrafting the Model Code of

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Greenbaum, supra note [fill in], at 271. See also Parker D. Eastin, Note, Should Kentucky Impose an Enforceable Duty on Lawyers to Report Other Lawyers' Professional Misconduct?, 87 Ky. L.J. 1271, 1282 (1998) (arguing that lawyer reporting rule makes reporting "less like snitching and more like adherence to a recognized rule of law"); Ronald Rotunda, The Lawyer's Duty to Report Another Lawyer's Ethical Violations in the Wake of Himmel, 1988 U. ILL. L. REV. 977, 992 (same). Cf. Susan Daicoff, (Oxymoron?) Ethical Decisionmaking by Attorneys: An Empirical Study, 48 FLA. L. REV. 197, 246 (1996) (finding that lawyers were more likely to rely on codified rationales to justify their reporting professional misconduct than in making other decisions involving lawyer's ethics; explaining this result: "When carrying out an unpleasant task, like reporting a colleague's misconduct, it may be easier to accept that the law or legal code of ethics requires some particular action than to justify taking action based on one's own personal standards").
Judicial Conduct lay principally in a concern that the changing nature of judicial elections, and the expanded, more participatory, role of judges in the twenty-first century necessitated new rules to accommodate those realities.\textsuperscript{73} Other major issues that arose during the revision process concerned such matters as whether to retain an “appearance of impropriety” standard as a separate ground for discipline and how to regulate extrajudicial activities of judges.\textsuperscript{74} With so much on their plate, the Model Code drafters may have seen changes to the reporting rules as a lesser concern.

Even when addressing issues somewhat related to reporting, the focus was largely elsewhere.\textsuperscript{75} Attention was given to whether to make taking “appropriate action” mandatory rather than permissive when a court does not know that a judge or lawyer has engaged in major

\textsuperscript{73} \textit{Q\&A with the Chair of the ABA Joint Committee to Evaluate the Model Code of Judicial Conduct}, ABA E-NEWS (ABA, Chicago, Ill.) Nov. 2005, \textit{available at} http://www.abanet.org/media/youraba/200511/article04.html (noted in responding to the question: “What prompted this new look at the code?”).

\textsuperscript{74} \textit{Id.} (noted in responding to a question about the “most important” issues the Commission had addressed). The appearance of impropriety issue, in particular, continued to be hotly contested up to the time the ABA House of Delegates approved the new code. \textit{Conference Report, ABA Midyear Meeting, ABA Revamps Its Model Judicial Code After Amendment Satisfies Most Critics}, 23 LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 93 (2007).

\textsuperscript{75} The drafters did change the duty to report judicial misconduct to have it mirror the duty with respect to reporting lawyer misconduct. \textit{See 2007 MODEL CODE OF JUDICIAL CONDUCT R. 2.15 Reporter’s Explanation of Changes.} Whether the changes were also in response to comments urging a toughening of standards in this area is unclear. \textit{See The American Judicature Society, September 2005 AJS Comments on Preliminary Draft of Revisions to ABA Model Code of Judicial Conduct, available at} http://www.abanet.org/judicialethics/resources/comm_rules_gray_Canon2_091905_ddt.pdf. (urging a “reliable information” trigger for mandatory reporting, an expanded list of misconduct that would justify mandatory reporting, and a mandatory requirement to take some action in the face of less severe violation of the rules of professional conduct). The latter two suggestions were adopted.
ethical misconduct, but only has information creating a substantial likelihood that some ethical
breach has occurred.\(^{76}\) Since reporting can be “appropriate action,” this debate implicates
reporting, but the duty or even advisability of reporting was not the focus.\(^{77}\) Similarly, there was
substantial debate over the propriety of addressing immunity for the exercise of disciplinary
authority in a code of judicial conduct.\(^{78}\) While tangentially relevant to reporting, as immunity

\(^{76}\) See, e.g., ABA Standing Committee on Ethics and Professional Responsibility, Comments and
Suggestions on June 30, 2005 Preliminary Report of ABA Joint Commission to Evaluate the Model Code of Judicial
2007 MODEL CODE OF JUDICIAL CONDUCT R. 2.15 Reporter’s Explanation of Changes.

\(^{77}\) The American Judicature Society unsuccessfully sought to raise the quality of information necessary to
trigger the duty to take “appropriate action,” but lower the certainty the judge had to have that a violation had taken
place. The extant rule only required that the lawyer have “information” about the misconduct, whereas the AJS
proposal required “knowledge or reliable information.” The extant rule required action only where there was a
“substantial likelihood” that a lawyer had engaged in professional misconduct, whereas the AJS proposal found a
mere “likelihood” sufficient. The American Judicature Society, September 2005 AJS Comments on Preliminary

\(^{78}\) The Joint Commission specifically requested comment on this issue. Mark I. Harrison, Chair, ABA Joint
Commission to Evaluate the Model Code of Judicial Conduct, Posting of First (Partial) Draft Proposals For Public

For illustrative comments on this issue see ABA Standing Committee on Ethics and Professional
Responsibility, Comments and Suggestions on June 30 2005 Preliminary Report of ABA Joint Commission to
Committee on Professional Discipline recommended removing immunity and replacing it with a rule requiring
judges to cooperate with disciplinary authority. ABA Committee on Professional Discipline, October 27, 2004

The Minnesota Board on Judicial Standards commented that immunity rules have no place in an ethical code, as
they are legal matter with “no legal affect unless they appeared in the laws of the states or federal government.”
Comments from David S. Paul, Executive Secretary, Minnesota Board on Judicial Standards, available at
http://www.abanet.org/judicialethics/resources/comm_rules_paull_052004.pdf. In contrast, the New York State Bar
Association commented that while judges should have immunity for their actions, the immunity language of 2.20
was more limited than existing law. New York State Bar Association Special Committee to Review the Code of
Judicial Conduct, Comments on the Preliminary Report of ABA Joint Commission to Evaluate the Model Code of
provides a measure of security for doing so, the principal focus was not on the merits of giving immunity, but rather on whether it was proper to mention it in the Code. While a major impetus for the revision of the Code was to add a provision addressing a judge’s duty when encountering impaired lawyers or judges, the thrust of that concern was more on getting these individuals help than on reporting them to disciplinary authorities.

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79 Q&A with the Chair of the ABA Joint Committee to Evaluate the Model Code of Judicial Conduct, ABA E-News (Am. Bar Ass’n., Chicago, Ill.) Nov. 2005, available at http://www.abanet.org/media/youraba/200511/article04.html (noted in responding to the question: “What prompted this new look at the code?”).

80 As adopted, the Code imposes a duty on a judge to take “appropriate action, which may include a confidential referral to a lawyer or judicial assistance program[,]” when the judge has a reasonable belief that a lawyer or judge’s performance is impaired. 2007 MODEL CODE OF JUDICIAL CONDUCT R. 2.14. Similarly, the Reporter’s Explanation of Changes points out that “[o]ften referral to a lawyer or judicial assistance referral program may be the most appropriate course.” 2007 MODEL CODE OF JUDICIAL CONDUCT R. 2.14 Reporter’s Explanation of Changes. Nevertheless, the Code does recognize that at times impairment may lead to conduct that triggers mandatory reporting to disciplinary authorities. 2007 MODEL CODE OF JUDICIAL CONDUCT R. 2.14 cmt. 2. And the Committee did discuss whether the first report could be made to disciplinary authorities instead of a judicial assistance program. ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Summary of Meeting Minutes, Feb. 12, 2005, available at http://www.abanet.org/judicialethics/minutes_sum_021205.pdf.

Many commentators were bothered by Rule 2.14 (draft rule 2.19). Concerns were raised that judges lacked the training necessary to recognize such impairment in other professionals, and that the action required to be taken was unclear, as were the consequences of failure to take such action. Association of Professional Responsibility Lawyers, June 30, 2004 Comments on the Preliminary Draft of the Code, available at http://www.abanet.org/judicialethics/resources/comm_rules_minkoff_063004.pdf; New York State Lawyer Assistance Trust, March 9, 2006 Comments on the Final Draft of the Code, available at http://www.abanet.org/judicialethics/resources/comm_rules_minkoff_063004.pdf. The ABA Senior Lawyers Division commented that the drafter’s word choice was at best vague, suggesting the more concrete “incapacity” and suggesting that if “impairs” was the final word choice, it be defined in the Terminology section. First (Partial) Draft Proposals for Public Consideration and Comment, ABA Senior Lawyers Division, available at http://www.abanet.org/judicialethics/resources/comm_rules_aba_seniorlawyers_071404.pdf. This concern about word choice and definitions was also mirrored by the ABA Standing Committee on Ethics and Professional...
These concerns apparently pushed a discussion of the standard for reporting, although raised in the public comment period, to the sidelines.\(^{81}\) The only change, albeit a salutary one,


\(^{81}\) Two law professors who had written previously on the subject of judicial reporting did file comments suggesting changes. Professor Abramson directed the Joint Commission to his previous article about judicial reporting, which included proposed language for an enhanced reporting rule:

(1) A judge who receives credible information that another judge either is no longer fit to continue in office or has committed a violation of the Code shall inform the appropriate authority. (2) A judge who receives credible information that a lawyer either is no longer fit to practice law or has committed a violation of the applicable rules of professional conduct shall inform the appropriate authority. The judge's obligation to inform does not preclude the judge from handling a lawyer's misconduct by taking additional disciplinary measures against the lawyer.

Abramson, \textit{supra} note [fill in], at 780.


Professor Kaufman, citing Mass. Sup. Ct. R. 3:09, S.J.C. 3:09, suggested the language of the comment to the Massachusetts Rule be incorporated into the comments for Draft Rules 2.17 and 2.18 (Final Rule 2.15), to give greater guidance to judges on what types of conduct would trigger a duty to report or otherwise take appropriate action. That comment provides in part:

While a measure of judgment is required in complying with this Section, a judge must report lawyer misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including knowingly making false statements of fact or law to a tribunal, suborning perjury, or engaging in misconduct that would constitute a serious crime. A serious crime is any felony, or a misdemeanor a necessary element of which includes
was to add a comment reinforcing the importance of the duty to report.\textsuperscript{82}

misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit the above crimes. Section 3D(2) does not preclude a judge from reporting a violation of the Massachusetts Rules of Professional Conduct in circumstances where a report is not mandatory. Reporting a violation is especially important where the victim is unlikely to discover the offense. If the lawyer is appearing before the judge, a judge may defer making a report under this Section until the matter has been concluded, but the report should be made as soon as practicable thereafter. However, an immediate report is compelled when a person will likely be injured by a delay in reporting, such as where the judge has knowledge that a lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.


The ABA Standing Committee on Legal Aid and Indigent Defendants proposed the following amendment to the commentary to Rule 2.15 [draft Rule 2.18]:

Given the responsibility of courts to assure the proper administration of criminal and juvenile justice, it is especially important that a judge be willing to report ethical violations of prosecutors and defense lawyers.

None of these suggestions was adopted.

\textsuperscript{82} Comment [1] to Rule 2.15 provides:

Taking action to address known misconduct is a judge’s obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one’s judicial colleagues or members of the legal profession undermines a judge’s responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

2007 \textsc{Model Code of Judicial Conduct} R. 2.15 cmt. 1.

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It should also be remembered that the reporting standard for judges parallels the reporting standard for lawyers, and the latter, originally adopted in 1983, remained largely unchanged in the major 2002 revision of the *Model Rules of Professional Conduct*.* 83 Two arguments flow from these facts that may have inhibited any rigorous reevaluation. First, with the ABA’s approval of the basic reporting standard but five years before as applied to lawyers, it would hardly seem timely to reopen the fundamental debate over the instances in which reporting should be required. Further, since most judges are lawyers, and are thus bound by both the ethics rules for lawyers and those for judges, 84 using the same standard in each setting provides a useful consistency.

The case for general satisfaction with the reporting rule seems a weak one. The facts strongly suggest that substantial under-reporting occurs, 85 and the argument that other judicial controls obviate the need to report has long been rejected. 86 As to the suggestion that it is futile to expect a mandatory reporting rule to overcome the general reluctance to report, there are substantial reasons to believe that even if that is true with respect to lawyer reporting, it is not true with respect to reporting by judges. 87

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83 The only substantive change clarified the reporting requirements of those who learn of misconduct through participation in an approved lawyers assistance program. See Greenbaum, *supra* note [fill in], at 262 n.7.

84 See text accompanying notes [fill in] *supra*.

85 See text accompanying notes [fill in] *supra*.

86 See text accompanying notes [fill in] *supra*.

87 See text accompanying notes [fill in] *infra*. 
The alternative explanations, in contrast, that the drafters were focused on other priorities, and that maintaining consistency between lawyer reporting and judicial reporting standards is a virtue, ring true. Both support the ABA’s decision to leave the mandatory reporting provision in tact, but neither directly endorses the status quo, nor undercuts arguments for change as the states adopt their own judicial conduct codes in light of the ABA revisions. In fact, all the changes made to the reporting rules, although minor, reflect increased support for lawyer reporting.

THE CONVERGENCE OF JUDICIAL ROLE AND REPORTING DUTIES

In this section of the article, I will make the case that judges, because of their role, will report more readily than lawyers, even given the general psychological inhibitions many have to reporting. In the next section, I will address the steps that could be taken to encourage that behavior.

As the psychological literature amply demonstrates, much of human behavior is role specific.\(^8\) When a person takes on a particular role, the person’s behavior begins to conform to that expected of one in that role.

\(^8\) See, e.g., William W. Lambert & Wallace E. Lambert, Social Psychology 45 (1964) (“Of course the traits, moods, and attitudes of actors help create great individual differences in the way roles are played, but over-all role structure is largely invariant, regardless of individuals.”).
Lawyers, by their role, are largely client focused in their behavior. Certainly they have a duty to the court and to others, but those concerns simply cabin the extremes of what is otherwise a duty to well-represent their client’s interests.

The judicial role, in contrast, carries a different focus. While the principal concern of judges is to fairly adjudicate the cases before them, that is but part of a larger concern. More broadly, judges are called upon to preserve the integrity of the legal system, a goal furthered by the judicial reporting of lawyer misconduct. It also should be noted that in most states it is the

89 See, e.g., MODEL RULES OF PROF’L CONDUCT Preamble 1 (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having a special responsibility for the quality of justice.”). Specific rules require such conduct as Candor Toward the Tribunal (Rule 3.3), Fairness to Opposing Party and Counsel (Rule 3.4), and Respect for the Rights of Third Persons (Rule 4.4).

90 This commitment is clearly provided in both the Model Rules of Professional Conduct and its predecessor Code of Professional Responsibility. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.”); MODEL CODE OF PROF’L RESPONSIBILITY EC 7-19 (“The duty of a lawyer to his client and his duty to the legal system are the same; to represent his client zealously within the bounds of the law.”). Admittedly, some would argue about the weight each of these duties should be given stemming from different conceptions of the lawyer’s role, but that does not fundamentally effect the basic client/no client distinction raised in the text. See generally Symposium: Client Counseling and Moral Responsibility, 30 PEPPERDINE L. REV. 591 (2003).

91 As the new ABA, Model Code of Judicial Conduct explicitly recognizes:

Taking action to address known misconduct is a judge’s obligation. ... Ignoring or denying known misconduct among one’s judicial colleagues or members of the legal profession undermines a judge’s responsibility to participate in efforts to ensure public respect for the justice system.

2007 MODEL CODE OF JUDICIAL CONDUCT R. 2.15 cmt. 1.
judiciary that adopts the code of judicial conduct with which judges must comply. Unlike lawyers, who may see a reporting requirement as something imposed upon them, when the judiciary adopts and enforces professional conduct rules judges are being asked to follow a rule they themselves adopted, so we might expect greater adherence to that rule.\textsuperscript{92} Moreover, it has long been recognized that judges are the true gatekeepers of the profession and must lead by example; they, even more than lawyers, should exemplify the highest ethical standards.\textsuperscript{93} Taken as a whole, it is therefore not unreasonable to expect that judges will be more likely than lawyers to take their reporting responsibility seriously.\textsuperscript{94}

In addition, judges, unlike lawyers, are already in the sanctioning business. They issue Rule 11 and discovery sanctions for lawyer misconduct, and hold lawyers in contempt.\textsuperscript{95} More

\textsuperscript{92} Kaufman, \textit{supra} note [fill in], at 862 (arguing that judges should be held to a higher reporting standard than lawyers because the courts are responsible for the rules being enforced and for regulating the legal profession); Levy, \textit{supra} note [fill in], at 107 (arguing that given the judiciary’s exclusive power to regulate the profession, failure to follow the reporting duty is “indefensible”).

Of course this contrast is not as stark as it might appear. Lawyers typically play an active role in helping shape the professional responsibility rules ultimately adopted by the courts; they are not totally imposed by others. With respect to judicial conduct rules, it typically is the state supreme court which adopts the operative code and that court may not be in sync with the lower courts on these matters. \textit{Cf.} State v. Wade, 839 A.2d 559, 565-66 (Vt. 2003) (Johnson, J., concurring) (identifying special role of state supreme court, in contrast to lower courts, in reporting professional misconduct noting that “[a] public referral in a case like this is particularly important because this Court is ultimately responsible for overseeing the ethical conduct of attorneys admitted to practice in Vermont”).

\textsuperscript{93} See, e.g., JAMES J. ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN, & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS § 1.03, at 1-4 (4th ed. 2007).

\textsuperscript{94} See also text accompanying notes [fill in] \textit{supra}.

\textsuperscript{95} See, e.g., Richard P. Barkley & Jeanine M. Anderson, \textit{The Brave New World of E-Discovery—Part II}, 36 COLO. LAW. 43, 50 (2007) (commenting that in the ten years preceding the article, courts had become increasingly aggressive in sanctioning discovery abuses, and out of a select group of cases, judges granted sanctions 65% of the
broadly, they are often called upon to assess civil penalties against parties before them. In short, judges judge. They hold people accountable for their actions. Negatively evaluating conduct and imposing sanctions for improper conduct is a central part of a judge’s job. Reporting lawyer misconduct is, if anything, a less onerous act since the judge is merely reporting observed misconduct to another trier of fact which will do the final evaluation and recommend the punishment warranted.

Not only are judges better situated by their role to report lawyer misconduct, but they also are immune from, or at least less affected by, some of the factors that often impede lawyers from reporting.

A major exception to reporting by lawyers is contained in Model Rule 8.3(c) which provides that the reporting rule “does not require disclosure of information otherwise protected

time); Herbert M. Kritzer & Frances K. Zemans, Local Legal Culture and the Control of Litigation, 27 LAW & SOC’Y REV. 535, 542-46 (1993) (noting that from 1992-1993, 10% of the attorneys in the Fifth, Seventh, and Ninth Circuits experienced motions which lead to sanctions either of themselves or opposing party); Louis S. Raveson, A New Perspective on the Judicial Contempt Power: Recommendations for Reform, 18 HASTINGS CONST. L.Q. 1, 2 (1990) (commenting that while there is no significant statistical source reporting the frequency of contempt citations, their occurrence is so prevalent that every few minutes an attorney is charged or threatened with contempt, and in Los Angeles County, a public defender is held in contempt every week.).

This is not to suggest that judges enter such sanctions without qualms, see, e.g., William W. Schwarzer, Sanctions Under the New Federal Rule 11——A Closer Look, 104 F.R.D. 181, 205 (1985) (U.S. District Judge noting, "[o]f all the duties of the judge, imposing sanctions on lawyers is perhaps the most unpleasant. A desire to avoid doing so is understandable."), but only that despite their qualms they actively use the devices at hand. See, e.g., In re Complaint of Judicial Misconduct, 2 Cl. Ct. 255, 260-261 (Cl. Ct. 1983) (“Disciplining errant attorneys is never pleasant but judges have a responsibility to the public to police the professional behavior of the officers of their court. The imposition of deserved sanctions upon counsel who abuse the court’s processes is necessary ‘to provide both specific and general deterrence of such conduct.’”) (citations and footnotes omitted).
by Rule 1.6 [the rule protecting from disclosure “information relating to the representation of a
client ....”].”\textsuperscript{96} Rule 1.6, in turn, generally prohibits the lawyer’s disclosure of covered
information subject to some limited exceptions.\textsuperscript{97} The duty to report, in essence, is nullified if
reporting would impinge on the duty of confidentiality. The latter duty is treated as the more
important of the two.

While there is debate about how broadly to read “information relating to the
representation,”\textsuperscript{98} it is clear that in many instances it would be impossible to report without
revealing protected information.\textsuperscript{99} For example, if a lawyer, in the course of representing a client,
observes opposing counsel using tactics worthy of reporting, those observations, which would be
essential to any report, cannot be disclosed absent client consent, as without such consent the
information relates to the representation and no exception to confidentiality applies.\textsuperscript{100}

\textsuperscript{96} \textit{Model Rules of Prof’l Conduct R. 8.3(c)}.

\textsuperscript{97} \textit{Model Rules of Prof’l Conduct R. 1.6}.

\textsuperscript{98} Greenbaum, \textit{supra} note [fill in], at 303-312.

\textsuperscript{99} Greenbaum, \textit{supra} note [fill in], at 305. \textit{See also} 2 Geoffrey C. Hazard Jr. & W. William Hodes, \textit{The
Law of Lawyerin\textsuperscript{g} §§ 64.8, at 64-18 to 64-19 (3rd ed. 2008) (the breadth of Model Rule 1.6’s definition of
confidentiality "effectively eliminates the duty to report another lawyer's misconduct in most cases that arise in the
case of client representation, which is to say most cases"); Peter K. Rofes, \textit{Another Misunderstood Relation:
Confidentiality and the Duty to Report},

14 Geo. J. Legal Ethics 621, 627 (2001) (noting that "[t]he exception to the reporting duty set forth in Rule 8.3(c)
constitutes a huge one because of the expansiveness with which Rule 1.6 - the confidentiality rule - defines the
category of confidential information”).

\textsuperscript{100} \textit{See generally} Rofes, \textit{supra} note [fill in], at 640-45 (noting that “information relating to the
representation” includes information about the misdeeds of other lawyers involved in the matter which is the subject
of the representation).
Judges, in contrast, do not represent clients. For them there is no conflict between the
duty to report and the duty of confidentiality. Thus, a judge who observes opposing counsel
using tactics worthy of reporting must report, even though the lawyer who observed them would
not.\footnote{Cf. Joy, supra note [fill in], at 801-02 (noting that the confidentiality limitation on lawyers does not apply to judges).} 

As a second contrast, the negative impacts of reporting on the reporter are likely smaller
for judges than for lawyers. Lawyers who report other lawyers within their firm fear job loss or
weak recommendations as retribution for reporting.\footnote{Greenbaum, supra note [fill in], at 271 & 300.} Reporting another, whether inside or
outside one’s firm, can have spill-over effects as well in terms of reputational harm in the legal
community if fellow lawyers perceive reporting as a negative act. Further, if the reporting lawyer
is likely to have continued dealings with the reported lawyer, their ability to work on matters in
which both are involved may be made more difficult from the negative feelings reporting may

\footnotesize{In some jurisdictions, which take a narrower view of the confidentiality provision, a different conclusion
may lie. In a non-precedential memorandum decision in In re Condit, SB-94-0021-D (1995), the Arizona Supreme
Court put a narrowing gloss on the Rule 1.6 limitation of the reporting duty. The court reasoned that Rule 1.6 only
prohibits a lawyer from “reveal[ing]” covered information. In situations in which the reportable misconduct was also
the subject of a suit filed by the client, reporting the underlying facts to disciplinary authorities is required. In the
court’s words:} 

\begin{quote}
[O]nce [the client] asked Condit [the lawyer] to file the lawsuit against Eldridge, the alleged acts
of misconduct became a matter of public record. Whatever ER 1.6 means, “reveal” means “to
make publicly known.” Thus, after the action was filed, there was nothing left to reveal and
therefore ER 1.6 did not protect Condit from the requirements of ER 8.3.
\end{quote}
While all of these concerns apply to judges as well, it is to a much lesser degree. Certainly a judge will not be fired for reporting - judges are not at will employees as are most lawyers. The impact, if any, would only be at election time or when being considered for another appointment, and as pointed out before, those concerns are often remote. While the judge’s general reputation may be affected by reporting, once again the impact will be far less than with lawyers. For lawyers, reporting may be seen as a hostile act, or even an unfair “tactic” to influence the outcome of matters they are both handling, an act generally out of line with the courtesy and civility ideals for professional interaction. For judges, reporting is just part of their role which commonly involves sanctioning misbehavior by counsel. Finally as to continued working relations, the incentives for counsel to curry favor with the judges before whom they appear will likely induce most reported lawyers to be cooperative when they next

103 Greenbaum, supra note [fill in], at 271 & 322.

104 See supra text accompanying notes [fill in] .

105 Greenbaum, supra note [fill in], at 326 (discussing the misuse of reporting for tactical purposes). See also supra note [fill in].


107 See supra text accompanying notes [fill in] .
appear before the judge, regardless of the lawyer’s personal feelings. 108

IF YOU BUILD IT THEY WILL COME - ENCOURAGING JUDICIAL REPORTING OF LAWYER MISCONDUCT

If, as I have suggested, efforts to induce judges to more actively report lawyer misconduct hold substantial promise for success, what should those steps be?

First, judges need to be made aware that their increased reporting of lawyer misconduct would be welcomed by disciplinary authorities. The comparative silence of disciplinary counsel on this topic to date may give the opposite impression. 109 Previous research indicates that judicial education about their reporting duty increases reporting. 110 To this end, disciplinary counsel should be active in judicial education programs informing judges that judicial reports of misconduct are essential for the disciplinary system to work effectively. 111

108 See supra text accompanying notes [fill in].

109 See supra text accompanying notes [fill in]. This is not to suggest that individuals involved in disciplinary enforcement do not, from time to time, raise with judges the importance of reporting, but only that these efforts appear sporadic and low key.

110 See, e.g., ABA COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT 125 (1992) (noting increased reporting by judges who attended an educational program, “The Judicial Response to Lawyer Misconduct”). See also CCFAJ REPORT, supra note [fill in], at 4 (noting an increase in reporting by judges upon receiving a letter reminding them of their reporting duties under California law).

111 See supra text accompanying notes [fill in]. See also CCFAJ REPORT, supra note [fill in], at 9, 28-29 (attributing under reporting in part to the ignorance of judges about the duty and about the workings of the disciplinary system, and encouraging more judicial education on these matters). This might also overcome the reluctance of some judges to report premised on a belief that the disciplinary system will not take those reports
Others have suggested going a step further, arguing that disciplining judges for failure to report is necessary to send the message that reporting is not only important, but is also required.\footnote{Failure to report where required is a violation of the judge’s ethical duties under both judicial and lawyer codes of conduct and thus is subject to discipline. \textit{See, e.g.}, 2007 MODEL CODE OF JUDICIAL CONDUCT Preamble [3] & R. 2.15; MODEL RULES OF PROF’L CONDUCT R. 8.3 & 8.4(a). And while discipline appears infrequent, it does at times occur. \textit{See, e.g.}, \textit{In re Laurie}, No. 84 CC5 (Ill. Cts. Comm’n 1985) (judge sanctioned for failing to report attorneys who offered judge bribes). \textit{Cf. In re Voorhees, 739 S.W.2d 178 (Mo. 1987)} (reviewing disciplinary finding that judge failed to report other judges to disciplinary authorities where required to do so, but determining that in the situation a duty to report did not lie). \textit{See also In re Laprath, 670 N.W.2d 41, 63 (S.D. 2003)} (recognizing that “a judge exposes himself or herself to the disciplinary action for failure to report the misconduct of other judges or attorneys to attorney disciplinary bodies and judicial conduct commissions”).} Enforcing the reporting duty with consequences for failure to report might in fact encourage reporting. For example, when an attorney was sanctioned for failure to report in Illinois, reporting by lawyers went up nearly six fold.\footnote{Darryl Van Duch, \textit{Best Snitches: Illinois Lawyers}, NAT’L LAW J., Jan. 27, 1997, at A1 (noting that in the year before the \textit{In re Himmel} decision, which narrowly construed the confidentiality exception to reporting and imposed sanctions on a lawyer for failure to report, 154 Illinois attorneys reported other attorneys to the disciplinary authority. In the year after \\textit{Himmel} the number rose to 922). Since that time, the number of lawyer-} To the extent encouragement can achieve the desired result without the necessity for a real threat of sanctions, however, that would be preferable. This approach reaches largely the same result without taxing disciplinary authorities with judicial discipline proceedings, and without tarnishing the image of members of the judiciary.

Second, reporting likely would increase if the stigma of reporting were lessened. To the extent the duty to report is emphasized with judges, that might, in and of itself, lessen the stigma.
Reporting because one is clearly required to do so softens the impact of reporting.\textsuperscript{114} Reporting is not a personal attack; it is just a required act. Further, as reporting becomes the norm, the stigma of reporting or of being reported may lessen. Neither the judge who reports nor the reported lawyer will stand out as much; reporting will be considered, if not routine, at least not so extraordinary.

A further way to encourage reporting is by public example. If, as sometimes occurs, judges make their acts of reporting more prominent, other judges might be encouraged by those examples to report as well. The fear of being the lone reporter out of touch with the norm for judges would be diminished.

The typical form of judicial signaling in this regard is through written opinions. In numerous cases, judges have identified improper lawyer behavior in opinions and mentioned in the opinions that the matter was being referred to disciplinary authorities.\textsuperscript{115} Such actions signal not only other judges, but also lawyers and the public at large that lawyer misbehavior is being dealt with and will be dealt with in the future.\textsuperscript{116} It also alerts lawyers and judges alike of the

\textsuperscript{114} Cf. Laurie L. Levenson, \textit{Unnerving the Judges: Judicial Responsibility for the Rampart Scandal}, 34 Loy. L.A. L. Rev. 787, 805-06 (2001) (arguing that imposing a mandatory duty on judges to report police perjury or false statements to an appropriate entity would lessen the fear of political reprisal from police supporters for reporting).

\textsuperscript{115} See supra note [fill in].

\textsuperscript{116} See, e.g., Andrew L. Kaufman & David B. Wilkins, \textit{Problems in Professional Responsibility for a Changing Profession} 749 (4\textsuperscript{th} ed. 2002); \textit{The Judicial Response to Lawyer Misconduct}, supra note [fill in].
kinds of behaviors that rise to the level of reportable misconduct and warns them, as well as the public, that certain lawyers may have behaved unethically.

Despite these benefits, certain negative consequences can flow from this practice. The most significant is the harm to the lawyer’s reputation. In the disciplinary process, cases are generally considered confidential, at least until the disciplinary body concludes there is sufficient evidence to file a formal charge. This is done to protect the reputation of lawyers from charges that upon investigation are without sufficient merit, or proof, to warrant pursuit. Judicial opinions notifying the world that a particular lawyer is being reported, and often identifying the reasons for the referral, undercut the privacy/reputation rationale of the disciplinary system. Perhaps we trust judicial reports to be sufficiently likely to be meritorious that this public reporting is worth the cost, but that is an open question.

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117 See generally Levy, supra note [fill in], at 97 & 116 (promoting the educational and deterrent values of courts addressing ethical issues in their opinions).

118 See text accompanying notes [fill in] supra; McMorrow, supra note [fill in], at 42 & n.208 (discussing reputational harm). Other costs potentially implicated include efficiency, and judicial reputation for fair-mindedness. Id. at 42.

119 See Levin, supra note [fill in], at 19 (noting that in most states disciplinary actions become public at the finding of probable cause to proceed with a complaint).

120 See Kaufman & Wilkins, supra note [fill in], at 749-50. See also State v. Wade, 839 A.2d 559, 562 (Vt. 2003) (chastising concurring justice for reporting lawyer misconduct through her concurrence as inconsistent with the confidentiality requirements of the disciplinary system).

121 See supra text accompanying note [fill in].
An extensive treatment of the misconduct in the court’s decision may also lead to some collateral consequences to the system itself. First, the fuller the opinion, the more likely it is that it will be given substantial deference by disciplinary authorities which may, in turn, undercut the system which charges disciplinary authorities with the investigation, prosecution and ultimate sanction recommendation concerning the alleged misconduct. While the disciplinary authority prosecuting the action will still have to prove its case before the trier of fact, an extensive judicial opinion may overly influence the course of the investigation and color the disciplinary authority’s evaluation of the merits.

Further, while the mere act of reporting does not trigger judicial recusal from the case in which the misconduct took place, nor in later cases involving the judge and lawyer, the tenor of the opinion may create a situation in which the judge’s “impartiality might reasonably be questioned.”

If the concern about reputational harm is sufficiently strong, a fall-back approach would be to prominently publish composite data on the number of referrals made. Admittedly, the mere

123 See generally MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (2002).
124 See supra text accompanying notes [fill in].
125 See 2007 MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (stating this as the standard for judicial disqualification in a matter).
reporting of the number of judicial referrals that now takes place in some states has not lead to a substantial increase in judicial reporting to date. 126 However, if the instances of reporting itself become more prominent, not simply a statistic stuck in the middle of a chart in a long report, and the need for reporting is emphasized, a different result is possible.

My final suggestion is that reporting would be encouraged if the reporting standard were clearer. It is commonly acknowledged that the language of the reporting rule is both ambiguous and amorphous. 127 For example, substantial disagreement exists on when the reporter has “knowledge” of misconduct that triggers the reporting duty. 128 The rule is also intentionally amorphous about what conduct should be reported. As the comments to the parallel lawyer’s reporting rule note, “a measure of judgment” is necessary to determine whether the misconduct in question “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer” and thus requires reporting. 129 Some have argued that the reporting standard is sufficiently open-ended as to be unenforceable in many contexts. 130 If there is a general antipathy to reporting and the instances in which reporting is required are murky, many, consciously or

126 See supra note [fill in].

127 See Joy, supra note [fill in], at 803-06 (highlighting ambiguities in the judicial reporting rule). See also Greenbaum, supra note [fill in], at 281-82 (highlighting ambiguities in the identical language in the lawyer reporting rule).

128 See Greenbaum, supra note [fill in], at 290-94 (discussing interpretive problems with identical language in the lawyer reporting rule).

129 Model Rules of Prof’l Conduct R. 8.3 cmt. 3.

130 See, e.g., Joy, supra note [fill in], at 806 (“The numerous qualifications and hurdles necessary before a lawyer or a judge has a mandatory duty to report professional misconduct implicated in Rule 11 sanctions essentially means that for most lawyers and judges there is no mandatory duty to report.”).
unconsciously, may use this confluence of factors to choose not to report.

As I have written in the context of the parallel reporting rule for lawyers, there are a number of revisions that could be made to the rule itself to clarify its application and I won’t repeat those here.\textsuperscript{131} At a minimum, one might add a comment like that appearing in the Massachusetts Code of Judicial Conduct which lists the sorts of misconduct that typically meet the “substantial question” standard.\textsuperscript{132} The 1984 ABA section report, \textit{The Judicial Response to Lawyer Misconduct}, would be another good starting point to generate an illustrative list of conduct for which reporting is required.\textsuperscript{133}

\textbf{CONCLUSION}


\textsuperscript{132} Massachusetts Code of Judicial Conduct Canon 3(D)(2) commentary (“While a measure of judgment is required in complying with this Section, a judge must report lawyer misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including knowingly making false statements of fact or law to a tribunal, suborning perjury, or engaging in misconduct that would constitute a serious crime. A serious crime is any felony, or a misdemeanor a necessary element of which includes misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit the above crimes.”).

\textsuperscript{133} The Judicial Response to Lawyer Misconduct, \textit{supra} note [fill in] (identifying reportable misconduct in the following categories - prosecutor misconduct, incompetence and negligence, deception of the court, frivolous lawsuits and discovery abuse, in-court misconduct, contemptuous behavior, and conflicts of interest). \textit{See also} CCFAJ REPORT, \textit{supra} note [fill in], at 15-21 (listing prosecutor and defense counsel conduct that should be reported); McMorrow, Gardina & Ricciardone, \textit{supra} note [fill in], at 1436-38 (identifying categories of instances in which judge’s have reported lawyer misconduct to disciplinary counsel).
Because of their role, judges are well-situated to identify lawyer misconduct and well-positioned to participate in its policing through the reporting of such misconduct to disciplinary authorities. Their responsibility to safeguard the profession, their intimate involvement in evaluating conduct and imposing consequences for misconduct, and their comparative freedom from the constraints that inhibit lawyer reporting, position judges to take an active role in reporting. Clear guidance about what to report, coupled with a strong signal that reporting is required, and a reduction in the stigma associated with reporting, should go a long way in bringing judicial reporting practices in line with the judiciary’s duties to protect the public from lawyer misconduct and promote respect for the law and the legal process.