

DR 1-103: Lawyer's Duty to Report Ethical Violations

"The first thing we do, let's kill all of the lawyers."¹ The current situation is not quite so drastic but who is to say it might not be in time. The legal profession is perhaps the last remaining profession governed exclusively by a system of self-regulation. In practice, however, this concept of lawyers regulating other lawyers is probably more theoretical than factual. In 1970, the Special Committee on Evaluation of Disciplinary Enforcement² issued the Clark Report outlining the state of the legal profession at that time. The Committee found that, more often than not, lawyers failed to report violations of the Code of Professional Responsibility committed by other lawyers to the appropriate disciplinary authorities and even when such violations were reported, the disciplinary agencies would not take action against those attorneys with whom they may be acquainted.³ "After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility."⁴

A more recent statement of the problem was noted by Eric H. Steele and Raymond T. Nimmer in their article concerning professional regulation. "The legal profession is currently the subject of controversy and criticism. Individual attorneys are often described as unethical and incompetent, while the bar is portrayed as politically partisan, captive of economic interests, and unresponsive to

1. Shakespeare, *King Henry the Sixth Part II*, Act IV, Scene II, reprinted in *THE COMPLETE ILLUSTRATED SHAKESPEARE* 376 (H. Staunton ed. 1979).

2. The Special Committee on Evaluation of Disciplinary Enforcement was created by the ABA in February 1967. The Committee's purpose was to assemble and study information relevant to professional discipline, including the effectiveness of present enforcement, and to make recommendations as they deemed necessary and appropriate to achieve and maintain the highest possible standards of professional conduct. ABA Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* Preface xiii (Final draft 1970) [hereinafter cited as *Clark Report*].

3. *Clark Report* 1-2.

4. *Id.* at 1.

the public interest. Public opinion polls document disrespect for attorneys as a group."⁵ All of this seems to indicate a hint of self-protection operating within the legal ranks. In recognizing the problem, it becomes obvious that some remedy is essential to the survival of the profession and, more specifically, to the continuation of the privilege to regulate ourselves.⁶

As noted earlier, the legal profession purports to be exclusively self-regulated. The basis for this system of regulation is found in the various codes of professional responsibility and conduct. These codes have historically been the guidelines for regulating the bar.⁷ The state bar associations, courts, and legislatures have adopted and enacted at least most of the earlier Canons of Professional Ethics and the Code of Professional Responsibility as proffered by the ABA in 1970.⁸ A more recent set of standards, known as the Model Rules of Professional Conduct,⁹ have been promulgated and adopted by the ABA. Nine states have adopted new ethics codes based on the ABA Model Rules.¹⁰ The disciplinary rules which concern self-regulation are DR 1-103 and DR 1-102.¹¹ The corre-

5. Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RESEARCH J. 917, 919-920.

6. See Gentile, *Reporting Misconduct by Other Lawyers*, 192 N.Y.L.J., Oct. 23, 1984, at 2, col. 2.

7. Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation?* 1974 U. ILL. L.F. 193, 197.

8. *Id.* at 197-198.

9. The Model Rules of Professional Conduct were adopted by the ABA in August, 1983.

10. [CURRENT REPORTS] LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) No. 52, at 1126 (Jan. 8, 1986). A comparison of these proposed Model Rules and the present Code of Professional Responsibility is forthcoming later in this article. In such comparison, some interesting proposals affecting the lawyer's duty to report will be seen, but, for the moment, this discussion will focus on the Code currently in effect. The Code contains nine normative canons. Following each canon are ethical considerations along with disciplinary rules which supply the operating force of the Code by defining specific duties of the lawyer. Marks & Cathcart, *supra* note 7, at 198.

11. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103, DR 1-102 (1979). Disclosure of Information to Authorities

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

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence

sponding rules in the Model Rules of Professional Conduct are Rule 8.3 and Rule 8.4.¹²

upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

DR 1-102 Misconduct

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral

DR 1-102 (1979). turpitude.

- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

12. MODEL RULES OF PROFESSIONAL CONDUCT RULES 8.3, 8.4 (1983): Rule 8.3 Reporting Professional Misconduct

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

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

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.4 Misconduct. It is professional misconduct for a lawyer to:

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

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

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

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

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

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

The states have set up systems of disciplinary machinery for the purpose of implementing these rules. Each state usually has a General Counsel or, on the local level, a grievance committee that investigates complaints entered against lawyers. Complaints are either dismissed at this level or some type of sanction is proposed. Sanctions basically include private reprimand, public reprimand, suspension, or disbarment. In some jurisdictions a disciplinary commission is also established to review the proposal of the investigating body and approve, modify, or reverse their decision. When formal charges are sought, they are recommended to a disciplinary board who then actually decides whether the charges should be sustained against the lawyer. If one of the harsher sanctions, starting with public reprimand, is sought, the disciplinary board makes such a recommendation to the state's highest court who makes the final decision imposing the sanction.¹³

To begin to understand the practicing attorney's apparent aversion to his regulatory obligation, *i.e.*, his duty to report in particular, a glance at the meaning and the controversy of DR 1-103 is necessary. On its face, the requirement of DR 1-103 is quite clear.¹⁴ The rule imposed a distinct obligation upon each attorney to report *any* violation of DR 1-102 of which he has unprivileged knowledge. Part (B) of the rule also requires the lawyer to disclose any such knowledge to a tribunal or other disciplinary authority upon request. Disciplinary Rule 1-103(A) and DR 1-102 are to be construed so as to require an attorney to report not only actual misconduct but also another attorney's failure to report a known violation.¹⁵ Whether this is actually done or not will be discussed herein. A strict reading of the rule illustrates its intended rigidity. In the eyes of many in the profession it is this rigidity that has at least caused the initial problems of bar regulation.

This strict requirement to report other attorneys has been the subject of many of the changes made by state bar associations in the Code of Professional Responsibility originally propounded in 1969 by the ABA Committee on Ethics and Professional Responsibility. While most state bar associations have

13. This outline is not in detail and is only intended to give one a general picture of the disciplinary structure.

14. See Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509, 510 (1978).

15. See *id.* at 510-11.

adopted most of the Code verbatim or with minimal change, DR 1-103(A) has undergone some significant reworking. Several states, including Arizona, have changed the phrase "shall report" to read "should report," apparently as an attempt to make the duty to report aspirational rather than mandatory. Going a step further, the District of Columbia Court of Appeals Amended Canon One of the Code in 1972 by deleting DR 1-103(A) altogether.¹⁶

In those jurisdictions that have adopted DR 1-103 as originally promulgated the mandate remains clear, and other reasons, or explanations, for impeding the self-regulatory scheme must be sought.

In the academic setting it is easy to see how the different rules should and should not work, but in actual practice it may not be so easy. This is probably because, for the lawyer, many other factors come into play that have to be weighed against the duty to report in order to reach the most optimal decision in a given situation. It is hard to say what exactly is going through a lawyer's mind when he is making the decision to report or not to report something concerning another lawyer of which he has knowledge; but, at least, some proposed reasons for failure to report can be noted.

First, there is a scarcity of case precedent indicating any enforcement of DR 1-103.¹⁷ Only five cases have been found that include a finding of a violation of the obligation to report.¹⁸ Of these five, only one really appeared to be issuing a sanction solely for failure to report. In the other four cases the respondent attorney also had participated in, and had been charged with, some other misconduct. In the case of *In re Brown*,¹⁹ the Illinois Supreme Court found no evidence that the attorney had participated in any of the illegal acts of which his partner in the firm was engaged.²⁰ "On the other hand, the evidence does show he knew Dryer [his partner in the firm] was issuing the false statements in the firm

16. *Id.* at 511 (footnotes omitted).

17. See Ringler, *Lawyer's Obligation to Report Professional Misconduct*, 192 N.Y.L.J. Sept. 20, 1984, at 3, col. 1.

18. Office of Disciplinary Counsel v. Tumini, 499 Pa. 284, 453 A.2d 310 (1982); Attorney Grievance Comm'n v. Kahn, 290 Md. 654, 431 A.2d 1336 (1981); Carter v. Folcarelli, 402 A.2d 1175 (R.I. 1979); *In re Bonafield*, 75 N.J. 490, 383 A.2d 1143 (1978); *In re Brown*, 389 Ill. 516, 59 N.E.2d 855 (1945).

19. 389 Ill. 516, 59 N.E.2d 855 (1945).

20. See *In re Brown*, 389 Ill. 516, —, 59 N.E.2d 855, 856.

name."²¹ The attorney was suspended for six months. The implications from this apparent lack of enforcement of the reporting rule are two-fold. With no threat of enforcement there is nothing to prevent attorneys from ignoring their obligation under DR 1-103.²² Beyond this, the absence of reported decisions finding a violation of the duty to report may say something about the zeal, or lack thereof, of this profession's disciplinary agencies. "The absence of reported cases or ethics opinions imposing discipline upon attorneys for failure to report misconduct suggests that the practicing bar's indifference toward DR 1-103(A) is fostered by courts and state bar disciplinary bodies, those with the initial responsibility for discipline in the legal profession."²³

A second reason, the one probably thought by the general public to explain the current situation, is the idea of professional protectionism, a sort of "we against they" attitude. The Clark Committee in quoting a past president of a state bar noted: "Lawyers are extremely reluctant to complain about their brethren. We have a false sense of fraternity that keeps us from complaining about other men when they do something wrong."²⁴ In reality, there may be some sense of self-protection operating when a lawyer is making the decision of whether or not to report another attorney. This concern for self preservation, however, probably exists not so much on the professional level as it does on the individual level. In other words, when making this decision, lawyers are probably more concerned about themselves than they are about the profession in general.²⁵

This concern for the possibility of ramifications against a reporting attorney then is a third possible reason for balking at the duty of self-regulation. "For the young associate or struggling practitioner, fear of economic and social reprisals undoubtedly still deters compliance with DR 1-103(A)."²⁶ Can this particular problem ever be resolved? This factor, in conjunction with the next potential reason for violation of the obligation to report, probably comes closest to explaining what considerations go through a lawyer's mind when confronted with a situation of unprivileged knowledge

21. *Id.* at —, 59 N.E.2d at 858.

22. See Ringler, *supra* note 17, at 3, col. 1.

23. Note, *supra* note 14, at 512 (footnotes omitted).

24. *Clark Report*, *supra* note 2, at 167.

25. See Ringler, *supra* note 17, at 3, col. 1.

26. Ringler, *supra* note 17, at 3, col. 1; see also Note, *supra* note 14, at 526.

of a violation of the disciplinary rules. Lawyers are ignorant of or, on the other hand, very concerned about the harshness of the possible sanctions that could result against the accused attorney from their complaint, especially when the reporting is for relatively lesser violations.²⁷ "An unfounded belief that reporting an attorney results in his instantaneous ruin would naturally deter reports of minor transgressions to the disciplinary authorities."²⁸

A final possible explanation for the continuous violation of DR 1-103 may be based on human instinct. From childhood, we have been instilled with the notion that "finking" on another person is bad. As a result, reporting another attorney is contrary to one's personal morals or individual code of ethics.²⁹ Reporting someone else may make one feel like one is better than the person, a feeling most people do not like, or an image most do not like to portray. "At first blush, DR 1-103(A) seems to require behavior that runs counter both to instinct and all basic moral training."³⁰

All, or some, of these factors are likely taken into consideration when a lawyer is making the decision of whether or not to file a complaint against another attorney with the disciplinary authorities. Most lawyers today probably realize that they have a prescribed duty to report, or actively try a case against, another attorney who has been negligent or involved in some other misconduct, but after balancing the advantages of reporting against the possibility of what could happen to his *own* career if he did report the scale tips in favor of not reporting. This is coupled with a feeling that the existing disciplinary agencies should be able to police the profession and that individual attorneys should be relieved of this responsibility.³¹ "In view of these resources and those of ordinary law enforcement agencies, some lawyers maintain that the damage to personal relationships and the personal discomfiture stemming from the duty to report a fellow lawyer are not offset by a compelling need for mandatory attorney activism."³²

The likely result of this balancing process is that most of the complaints which are made against attorneys will be made by their

27. See Ringler, *supra* note 17, at 3, col. 2; see also Clark Report, *supra* note 2, at 167; Marks & Cathcart, *supra* note 7, at 202-203.

28. Ringler, *supra* note 17, at 3, col. 2.

29. *Id.* at 2, col. 5.

30. Gentile, *supra* note 6, at 2, col. 1.

31. See Ringler, *supra* note 17, at 2, col. 5.

32. *Id.*

clients. "The bulk of disciplinary agency caseload involves complaints made by clients against their attorneys."³³ When lawyers do report, the case usually involves a violation of some specific norm of conduct, or, in other words, some clearly identifiable misconduct such as solicitation or misappropriating client funds.³⁴ Such identifiable deviants can be treated, and are often recognized, as "outsiders" by those in the profession and therefore the concern for negative consequences to the reporting attorney are not as likely.³⁵

Problematic attorney conduct can be singled out and the perpetrator dealt with as an outsider, a deviant being unlike other members of the profession. The deviant can be sanctioned without injury to the basic professional image. This orientation reinforces the notion that problems of attorney behavior involve a limited number of deviant lawyers.³⁶

While this rule is good, it is the lesser violations such as negligence, incompetence, and neglect with which the public is most concerned.³⁷ Most of the client complaints received by disciplinary agencies involve allegations of some type of inadequate performance, as opposed to one of the major violations.³⁸ It is in this area that self-regulation needs improvement.

The fact that most of the complaints received by disciplinary agencies are client complaints leads to another particularly troublesome situation. For the most part, those making up the disciplinary bodies are also lawyers and often the same type of problem exists, but at this point it is only exacerbated. The attorneys who make up the disciplinary agencies often empathize with the respondent lawyers who are reported for negligence, or some other type of inadequate performance, probably for many of the same reasons discussed earlier.³⁹ "Client complaints received by bar grievance committees are sifted through the profession's moral screen. Consequently, the questions regarding lawyer competency

33. Steele & Nimmer, *supra* note 5, at 973.

34. *See id.* at 974.

35. *See id.* at 928.

36. *Id.* at 928.

37. *See id.* at 974.

38. *See id.*

39. *See* Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?* 69 GEO. L.J. 705, 712 (1981); Lobe, *Confessions of a Nonlawyer on a Disciplinary Board*, 51 FLA. B.J. 76, 77 (1977).

that concern most clients are given virtually no attention."⁴⁰

Realizing the effects of this balancing that the attorney engages in when he is faced with knowledge of a violation and his duty of compliance with the DR 1-103 obligation, something is needed to tip the scales in the direction of reporting. The Model Rules of Professional Conduct, adopted by the ABA in 1983, are an attempt to remedy the problem of nonreporting by requiring lawyers to report only "substantial" misconduct, or in other words, misconduct "substantially" reflecting on the violating lawyer's ability, or fitness, to practice law. The Comment to Model Rule 8.3 "limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule."⁴¹ It was noted earlier that several jurisdictions have taken similar measures by replacing the word "shall" with "should" or by deleting DR 1-103 altogether. But such efforts will not do anything to change the reluctance to report that now exists. These measures merely accommodate the present situation and provide a "legal" way for lawyers to avoid their regulatory duty. This will not, by any means, restore the integrity and public image of the profession.

What is needed is something to encourage lawyers to report the lesser violations with which the public is most concerned. To accomplish this, the possible reasons for not reporting must be affected in such a way as to shift the attorney's balance in favor of disclosure. Of the reasons noted, probably the two having the greater impact on the lawyer's decision are his ignorance, or concern, about the possibility of harsh sanctions being imposed for the relatively minor violations and, stemming from this, the fear of potential social and professional ramifications in the form of subtle retaliation. Some assurance is needed that any sanctions imposed will conform to the violations committed. In other words, any element of discretion at the agency level should be removed. This assurance could be accomplished by a system of categorizing particular kinds of misconduct under prescribed sanctions. The Court, as they have the final say in issuing the stronger sanctions, would review the findings of the disciplinary boards to insure that the pre-

40. Martyn, *supra* note 39, at 713; see also Marks & Cathcart, *supra* note 7, at 217.

41. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 Comment.

scribed categories and sanctions have been followed. For the lesser sanctions the disciplinary boards would have this duty. This proposal is rather inflexible, but in this instance flexibility needs to be sacrificed in favor of greater participation. This type of system, along with heightened education in law schools concerning the need and consequences of reporting, should greatly contribute to accomplishing the needed shift. Removing the fear of discriminatory use of the disciplinary process in this manner is essential if lawyers are to be encouraged to discharge their duty to report a fellow lawyer's misconduct.⁴²

With lesser sanctions prescribed for the relatively minor violations, the question then becomes will such sanctions deter the misconduct being reported? One thing is for sure, greater lawyer participation will at least satisfy the general public that the legal profession is concerned and actively working at its duty of self-regulation. If this is not accomplished, the future of our current regulatory scheme will be bleak at best. The threat of outside regulation is imminent.⁴³ Laymen now serve on disciplinary boards in at least eight states.⁴⁴ Outside regulation is not appealing. Having an "outsider" looking over our shoulder does not help much in maintaining the "mystique" of the legal profession. "We lawyers have a lot to lose by having outsiders look over our shoulders. Appearing to make law more of a technique and less of an art lowers our status."⁴⁵ The Clark Committee, back in 1970, wrote:

The profession does not have much time remaining to reform its own disciplinary structure. Public dissatisfaction is increasing. Proposals for public participation in the disciplinary process already have been made and, in at least one instance, have been implemented. Unless the profession as a whole is itself prepared to initiate radical reforms promptly, fundamental changes in the disciplinary structure, imposed by those outside the profession, can be expected.⁴⁶

42. See Martyn, *supra* note 39, at 742.

43. See Clark Report, *supra* note 2, at 2; Note, *supra* note 14, at 535-536; Swan, *The Ethical Obligation to Disclose Attorney Negligence*, 13 COLO. LAW. 232 239 (1984).

44. Steele & Nimmer, *supra* note 5, at 924 n.7 (Colorado, Georgia, Maine, Michigan, Minnesota, New Hampshire, Washington, and Wisconsin).

45. Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC'Y 257, 283 (1976).

46. Clark Report, *supra* note 2, at 8-9.

Another innovative answer to lawyer apathy was suggested in the case of *Williams v. The Council of the North Carolina State Bar*.⁴⁷ The issue in that case was whether or not the plaintiff had a claim for relief in a civil action against a third attorney who knew of misconduct by the plaintiff's attorney but failed to report it.⁴⁸ The Court of Appeals in North Carolina dismissed the complaint.

The message to be conveyed here is that something must be done quickly, and "that something" has to be increased lawyer participation within the disciplinary structure. "Clearly, the disciplinary agencies, underfunded and understaffed, cannot manage the task of investigating and prosecuting professional misconduct without the active participation and assistance of both the Bar and the Bench."⁴⁹ Lawyers must comply with their obligation under DR 1-103 for our system of self-regulation to work.

Douglas B. Baker

47. 46 N.C. App. 824, 266 S.E.2d 391 (N.C. Ct. App. 1980).

48. *Id.* at —, 266 S.E.2d at 392.

49. Gentile, *supra* note 6, at 2, col. 2.