Reputation and the Rules: An Argument for a Balancing Approach under Rule 8.3 of the Model Rules of Professional Conduct

Ryan Williams

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Reputation and the Rules: An Argument for a Balancing Approach under Rule 8.3 of the Model Rules of Professional Conduct

I. INTRODUCTION

When you were a child, you tattled on someone: an older sibling, your rowdy cousin, your best friend, whomever. You tattled on someone, and it did not go over well. It strained your relationships. The other kids talked; they called you a tattletale. Maybe you were ostracized for a while. No one wanted to let you in on their plans until they knew for sure where your loyalties lay. You were a liability.

The kids reacted in ways that were understandable enough, but adults often responded absolutely inscrutably. At times, offenders met with swift justice when the authority figure to whom you had reported intervened. Perhaps you were even thanked for helping to enforce the rules. Other times though, you were met with a rebuke. “You shouldn’t tattle on your friends,” your teacher might say, or, when your sister was playing with her toys instead of practicing her penmanship, your mother might respond, annoyed, “I don’t have time for that right now.”

Was there really any way to know when you were supposed to tattle? Wasn’t the enforcement of justice completely contingent on the mood of the authority figure to whom you reported? Maybe these uncertainties were what led you, eventually, to eschew tattling altogether. Or maybe you renounced the practice because the people on whom you most frequently had a chance to tattle were your friends, and at some point, your loyalty to them and your fear of their disapprobation began to greatly outweigh any interest you had in the enforcement of the rules. This much is certain: a long time before you sat for the bar, you internalized the lesson that tattling can get you into trouble.

This lesson, perhaps, is the reason why the American Bar Association has found it necessary to create an affirmative duty to report another lawyer’s misconduct in at least some circumstances.
Under Model Rule 8.3, an attorney is guilty of an ethical violation if he fails to report another attorney’s professional misconduct, when that misconduct raises a “substantial question” as to the other attorney’s fitness to practice law. But old habits die hard. It will come as no surprise that lawyers prefer not to report the misconduct of their peers. This hesitancy may be expressed in terms of “minding one’s own business.” It may be defended as “deference to a fellow member of the professional community.” In its most self-interested (and probably most accurate) formulation, the hesitancy stems from a fear of damage to one’s personal and professional reputation and relationships.

Though such personal concerns admittedly address only half of the issue, the argument I put forth in this Comment is that they are not wholly inappropriate to a discussion of one attorney’s duty to report another’s misconduct. While the legal profession has an unquestioned interest in enforcing its disciplinary rules, it also has competing interests in maintaining the professional reputations of its members and in promoting loyalty and fraternity between fellow practitioners. A rule requiring the reporting of professional misconduct clearly serves the first interest but interferes substantially with the latter two. Striking an appropriate balance among these interests is the purpose of this Comment.

Part II of this Comment provides a brief history of the development of Model Rule 8.3, with special attention to its differences from its predecessor rule, Disciplinary Rule 1–103. It also considers state-by-state variations on Rule 8.3; Louisiana in particular requires reporting misconduct in a greater number of cases than most sister states. Part III considers the wisdom of any

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rule requiring attorneys to report on one another. It briefly treats the question of such a rule’s enforceability and then turns to the crux of the investigation: the sociology of the modern bar and its effect on a lawyer’s inclination to report a fellow lawyer’s misconduct. I argue that fear of damage to his working relationships and reputation often results in a lawyer’s unwillingness to report another lawyer’s misconduct. Since maintaining good relationships between attorneys is a legitimate and acknowledged interest of the professional bar, I conclude that a lawyer, by considering the effect of reporting on his professional reputation before electing to report, is in actuality supporting the interests of the bar. Thus, I advocate a balancing test (as opposed to the prevailing per se rule) to determine whether disciplinary sanctions are appropriate under Rule 8.3. A court should balance the gravity of the offense that went unreported against the damage that would have been done to the attorney’s reputation and working relationships in the event that he had reported it. Finally, Part IV offers a few concluding observations regarding an attorney’s duty to report professional misconduct.

II. BACKGROUND

A. History of the Model Rule

National standards for the ethical conduct of American lawyers have been on the scene since early in the twentieth century.\(^5\) The American Bar Association was founded in 1878, and by 1900, it had emerged as the preeminent bar association in the United States.\(^6\) In 1908, it adopted the Canons of Professional Ethics.\(^7\) Canon 29 was the earliest direct forerunner of modem day Rule 8.3.\(^8\) It provided that “[l]awyers should expose without fear or
favor before the proper tribunals corrupt or dishonest conduct in
the profession . . . .”\textsuperscript{9} That Canon 29 used the word “should”
instead of “shall” indicates that the rule was more a normative
statement than a standard to which adherence could be
compelled.\textsuperscript{10} In fact, the Canons generally were enacted without
enforcement procedures; as a whole, they were goals for legal
professional behavior, but there seems to have been no notion of
disciplining attorneys who failed to comply with them.\textsuperscript{11}

In 1969, the ABA’s adoption of the Code of Professional
Responsibility changed all this.\textsuperscript{12} Under the Code, reporting
professional misconduct became compulsory, and failure to report
was itself made an ethical violation warranting disciplinary
action.\textsuperscript{13} Disciplinary Rule 1-103 requires that “[a] lawyer
possessing unprivileged knowledge of a violation of DR 1-102
shall report such knowledge to a[n] . . . authority empowered to
investigate or act upon such violation.”\textsuperscript{14}

The ABA found that Disciplinary Rule 1-103 was effectively
unenforceable,\textsuperscript{15} and so in 1983, when it replaced the Code with
the Model Rules of Professional Conduct, it significantly modified
the reporting requirement. Rule 8.3 provides, in pertinent part:
“[a] lawyer who knows that another lawyer has committed a
violation of the Rules of Professional Conduct that raises a
substantial question as to that lawyer’s honesty, trustworthiness or
fitness as a lawyer in other respects, shall inform the appropriate
professional authority.”\textsuperscript{16}

By tying the duty to report to the seriousness of the
offense—via the “substantial question” language—Rule 8.3
purportedly makes the reporting requirement more enforceable.

\begin{itemize}
\item \textsuperscript{9} CANONS OF PROF’L ETHICS Canon 29 (1908).
\item \textsuperscript{10} Gendry, \textit{supra} note 5, at 604.
\item \textsuperscript{11} N. Gregory Smith, \textit{Missed Opportunities: Louisiana’s Version of the
at 661.
\item \textsuperscript{12} Olsson, \textit{supra} note 5, at 661.
\item \textsuperscript{13} \textit{Id.}; Gendry, \textit{supra} note 5, at 604–05.
\item \textsuperscript{14} MODEL CODE OF PROF’L RESPONSIBILITY DR 1-103 (1969).
\item \textsuperscript{15} MODEL RULES OF PROF’L CONDUCT R. 8.3 cmt. 3 (2007); Gendry, \textit{supra}
note 5, at 605; Olsson, \textit{supra} note 5, at 662. An in-depth discussion of the
enforceability issue follows \textit{infra} Part III.A.
\item \textsuperscript{16} MODEL RULES OF PROF’L CONDUCT R. 8.3 (2007).
\end{itemize}
B. State-by-State Variations on Model Rule 8.3

The Model Rules do not have any binding effect based solely on their adoption by the ABA. Before a state bar association may enforce the Model Rules, it must adopt them. The bar associations have sometimes adopted the text of the Model Rules verbatim, but in many cases, they have made changes. Such deviations may be merely cosmetic, or may effect substantive changes to the Rule.

The states have adopted versions of Model Rule 8.3 that vary widely. Some have created a rule that is effectively a weak suggestion that professional misconduct should be reported. Others have created an absolute command to report misconduct, untied (or weakly tied) to the seriousness of the underlying offense. In the following subsections, I briefly survey the most extreme variations on Model Rule 8.3.17 In doing so, it is the author’s purpose to demonstrate that although the ABA has been able to settle on a standard governing a lawyer’s duty to report misconduct, its standard has remained a matter of contention among those empowered to give effect to the duty. Additionally, the types of alterations made by the states help to lay a foundation for the suggestions that I offer for revision of Rule 8.3.18

1. The Georgia Rule

Georgia has adopted a variation on Model Rule 8.3 that harkens back to Canon 29 of the ABA’s Canons of Professional Ethics. The Georgia Rule provides:

A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional

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18. See infra Part III.E.
authority. . . There is no disciplinary penalty for a violation of this Rule.\textsuperscript{19}

As in Canon 29, use of the permissive "should" implies that the Georgia Rule is merely hortatory; it encourages reporting misbehavior without requiring it. Georgia Rule 8.3 goes a step further than Canon 29, in fact, by explicitly disclaiming any threat of disciplinary proceedings for failure to comply.

Jurisprudence on the Georgia Rule might reveal the reason for these deviations from the Model Rules. Unfortunately, this author's search for jurisprudence on Georgia's Rule 8.3 was fruitless. This is hardly surprising, since the Rule creates no obligation. Clearly where there is no obligation, there can be no substantial litigation, and such has proved to be the case here. Yet more disappointing, the comments to the Georgia Rule offer no insight into the Georgia drafters' intentions in deviating from the norm set by the ABA; the Georgia drafters merely reproduce the language of comment one to the Model Rule and omit comments two through five; they do not add any explanatory notes of their own.\textsuperscript{20}

2. The Louisiana Rule

Louisiana's version of Rule 8.3 also differs appreciably from the Model Rule. When Louisiana adopted the Model Rules in 1986, it altered Rule 8.3 so as to retain much of the force of prior

\textsuperscript{19} Ga. R. Bar Rule 4-102, RPC Rule 8.3(a) (2007).
\textsuperscript{20} Model Rules of Professional Responsibility Rule 8.3, comment 1 states: Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense. Such a comment is merely an encouragement to comply with the substantive rule, and so is equally appropriate to the Model Rule and the Georgia rule. Comments 2 through 5 of the Model Rules deal primarily with exceptions to the reporting requirement, which, for obvious reasons, need not be detailed in the context of the Georgia rule. \textit{See Model Rules of Prof'l Conduct} R. 8.3 cmts. (2007); Ga. R. Bar Rule 4-102, RPC Rule 8.3 cmt. 1 (2007).
Disciplinary Rule 1-103. At the time of its adoption, Louisiana’s Rule 8.3 provided: “[a] lawyer possessing unprivileged knowledge of a violation of this code shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.”

The Rule lacked the qualifying language of the Model Rule, requiring that a “substantial question” arise before an attorney could be bound to report. Under the original Louisiana rule, all professional misconduct had to be reported, just as when Disciplinary Rule 1-103 was in effect in Louisiana.

Louisiana’s Rule 8.3 was amended by the state supreme court in 2004 and currently provides: “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel.”

The important observation here is that the new Rule continues to omit the ABA’s “substantial question” language. To at least some degree then, Louisiana has apparently ignored the ABA’s contention that a broad-sweeping duty to report is virtually impossible to enforce.

The question remains, however, whether Louisiana’s rule sweeps as broadly as did Disciplinary Rule 1-103. No court to date has interpreted Louisiana’s present version of Rule 8.3, but it was discussed briefly in In re Riehlmann. The Riehlmann case arose under Louisiana’s original version of Rule 8.3, which required reporting of all professional misconduct. Referring to the adoption of the current version of Rule 8.3, the Louisiana Supreme Court wrote, “We made significant changes to Rule 8.3 effective March 1, 2004, long after the formal charges were filed against respondent.” The 2004 amendment implemented the “raises a question” language of the current Louisiana rule; that the court

22. LA. ST. BAR ARTS. OF INCORP. art. XVI, RPC Rule 8.3 (1986).
23. Riehlmann, 891 So. 2d at 1246 n.5.
24. LA. ST. BAR ARTS. OF INCORP. art. XVI, RPC Rule 8.3(a) (2007)

(emphasis added).
25. 891 So. 2d at 1246 n.5.
26. Id.
characterized the amendment as "significant" indicates that the amendment may alter the level of misconduct that will trigger a duty to report.

Thus, at least under the *Riehmann* dicta, not every instance of misconduct necessarily "raises a question" as to an attorney's fitness to practice law, and so not every instance of misconduct triggers a duty to report in Louisiana. Thus, the quantum of misconduct is higher under the Louisiana Rule than under Disciplinary Rule 1-103. At the same time however, since we should give effect to the difference in language between the Model Rule and the Louisiana rule, the quantum of misconduct must be less under Louisiana's Rule 8.3 than under Model Rule 8.3. Accordingly, although the law is unsettled, Louisiana apparently adheres to an intermediate standard between Disciplinary Rule 1-103 and Model Rule 8.3. The contours of that standard have yet to be fleshed out.

### III. Analysis

#### A. Enforceability

The first challenge facing a rule that requires reporting of another's misconduct is the question of its enforceability. The ABA recognized that Disciplinary Rule 1-103 was practically unenforceable as written, and in response, it adopted the "substantial question" language of Model Rule 8.3, anticipating, presumably, that the new language would render the Rule enforceable. Arguably, the new language does little, if anything, to enhance the enforceability of the Rule.

We should say that a rule is enforceable to the extent that the people who violate it may be identified and disciplined. The question, then, is whether we are better able to identify those who fail to report misconduct that "raises a substantial question" than those who fail to report lesser misconduct. Looked at in this way, it should become clear that the very nature of the offense makes

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the rule prohibiting it virtually unenforceable. There are two elements of the offense: (1) knowledge of an ethical violation of sufficient magnitude, and (2) failure to report that violation. But meeting either of these requirements is unlikely to arouse the suspicion of the bar’s disciplinary committee. Knowledge is particularly difficult to impute from the outside. Furthermore, by failing to report, an attorney merely goes about his business as usual. There is nothing that would lead an outside party to investigate an attorney who has violated such a rule. The most important observation here is that this is true no matter how egregious the underlying offense is. There is nothing about the underlying offense that makes an attorney’s knowledge of its occurrence or his failure to report it any more outwardly suspicious.

Probably, it was in recognition of Rule 8.3’s unenforceability that Georgia enacted its reporting requirement without a disciplinary penalty for its violation. Where a rule cannot be enforced, it becomes, de facto, an exhortation to a certain kind of conduct; on this view, the Georgia Rule merely wears its hortatory character on its sleeve instead of masquerading as an enforceable rule of law.

Some commentators have suggested imposing very harsh penalties on those few unlucky attorneys who are found to have violated Rule 8.3. By doing so, they argue, we could ensure that compliance with the Rule is high, since other attorneys would fear similar punishments. There is, indeed, some empirical support for this position. However, the chances of being caught violating

29. But see Model Rules of Prof’l Conduct R. 1.0(f) (2007) (“A person’s knowledge may be inferred from circumstances.”). Nevertheless, it is reasonable to suppose that in the prototypical Rule 8.3 case, the only person with knowledge of the relevant circumstances is the one with knowledge of the violation. This was the case in Riehlmann, 891 So. 2d 1239. The defendant in Riehlmann took the unprecedented step of (unwittingly) recounting the circumstances supporting the inference that he had knowledge of a reportable violation. Id. Such cooperation cannot be expected in a majority of cases.


32. Id.; Donald D. Rotunda, The Lawyer’s Duty to Report Another Lawyer’s Unethical Violations in the Wake of Himmel, 1988 U. Ill. L. Rev. 977, 992 (1988). Rotunda observes that following the decision of the Illinois Supreme
Rule 8.3 are so slim that disciplinary sanctions, in order to be prohibitive, would likely have to be out of all proportion with the gravity of the offense. In this light, prohibitive penalties seem peculiarly unjust as applied to those few who are found to have violated Rule 8.3.

At the same time, Georgia's no-penalty Rule is also dissatisfactory in ways. There are instances where a failure to report another attorney's misconduct clearly rises to a level that would justify some punishment. When such a case arises, we want there to be a rule under which courts can impose punishment. Georgia courts would have their hands tied no matter how egregious was the attorney's failure to report. Ultimately, it is this consideration that leads me to admit that the rule generally is unenforceable. Nevertheless, I must conclude that it is desirable and should be enforced in those rare instances where it can and should be. As a corollary to this, it is not apparent why the ABA is concerned at all about the enforceability of a rule creating a duty to report misconduct since such a rule is a good one to have around regardless of its enforceability.

Upon reflection, it appears that the "substantial question" language of Rule 8.3 actually addresses a concern other than enforceability. In what follows, I argue that the primary effect of

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Court in In re Himmel, 533 N.E.2d 790 (Ill. 1988) (taking the unprecedented action of disciplining an attorney who had violated Rule 8.3, but had not at the same time run afoul of any other Rule), lawyers all over the country began to report professional misconduct in greater numbers.

33. Riehmann is such a case. In Riehmann, an attorney confided in respondent Riehmann that he had intentionally suppressed exculpatory blood evidence in a criminal prosecution. The defendant in that case was sentenced to death. Only about a month before his sentence was to be carried out, defendant's counsel discovered the results of tests on blood evidence that proved conclusively that defendant could not have been the perpetrator. Riehmann, upon learning of the exoneration proceedings, surmised that this was the case about which his friend had confided in him five years earlier, and cooperated with the defense to exonerate the defendant. Riehmann, 891 So. 2d 1239. Punishment seems to be proper in such a case, since, apparently, Riehmann would never have reported the other attorney's misconduct if he had not learned of the exoneration proceeding (he had, after all, already gone five years without reporting), and the result in this case would have been that an innocent man would have been put to death by the state.
the "substantial question" language has been to establish a prior balance between the bar’s interest in prosecuting misconduct and the attorney’s interest in not being labeled a snitch. Such balancing, I argue, is appropriate, but is not easily effected under the current rule. Before turning our attention to that discussion, however, we need to lay some groundwork for what follows by attending to certain sociological attributes of the legal profession.

B. Values Served by Legal Professionalism

Professions have been defined by sociologists as "exclusive occupational groups applying somewhat abstract knowledge to particular cases." 34 Most of the fundamental characteristics of professionalism "have some relation to the establishment or maintenance of market control." 35 One of the ways in which professions maintain market control is through self-regulation. 36 Professionals themselves institute the standards that others must meet in order to be admitted to the profession. 37 They also adopt the standards of behavior to which all members of the profession will be held. 38 In the case of lawyers, the state bar associations adopt minimum proficiency requirements for admission to the bar and rules of professional conduct. Since the ABA’s adoption of the Code of Professional Responsibility in 1969, these rules have typically created substantive obligations with disciplinary penalties. 39

But not all of the interests of professional organizations are related to economic forces; some are related to values such as public service, professional fraternity, and maintaining the profession’s reputation with the public. 40 These kinds of values cannot be effectively provided for by creating substantive obligations, since, under the threat of disciplinary sanctions, actions in accordance with these values would lose their

34. Kritzer, supra note 4, at 717.
35. Croft, supra note 4, at 1266.
36. Id. at 1266–67.
37. Id.; Kritzer, supra note 4, at 717.
38. Croft, supra note 4, at 1266; Kritzer, supra note 4, at 717.
39. Gendry, supra note 5, at 604–05; Olsson, supra note 5, at 661.
40. Croft, supra note 4, at 1268–69; Kritzer, supra note 4, at 717.
philanthropic character. Although the philanthropic values are not protected by substantive rules, they are asserted in other ways, most notably in the Preamble to the Model Rules of Professional Conduct.

The Preamble refers, on several occasions, to the importance of a lawyer's personal moral compass in determining how to behave ethically in any particular situation. Likewise, it indicates that the opinions of other lawyers and the public are a valuable guide to ethical behavior. For example:

Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers.

In the nature of law practice . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical
considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.\textsuperscript{41}

All of this goes to say that the Rules themselves admit that they are not the last word on every legal ethical question. With respect to our discussion of Rule 8.3, it is helpful to observe that the moral status of the informant is notoriously ambiguous.\textsuperscript{42} Informants are absolutely necessary to the enforcement of professional rules, but they are also frequently unpopular and accused of disloyalty.\textsuperscript{43} The Preamble to the Model Rules directs a lawyer to consider his own ethical opinions, those of his professional peers, and those of the public in evaluating his moral duties. Consulting these attitudes, a lawyer is likely to find that the balance weighs against reporting in all but the most egregious circumstances. In the moral estimations of most, the values of loyalty and professional fraternity are likely to win out over the bar’s interest in discovering violations of the Rules.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{41} \textit{Model Rules of Prof’l Conduct} pmbl. \textsuperscript{7}, \textsuperscript{9}, \textsuperscript{16} (2007). Admittedly, Louisiana has not adopted the ABA’s Preamble. Smith, \textit{supra} note \textsuperscript{11}, at \textsuperscript{3}. It would be unreasonable, however, to read the failure to enact the Preamble as a repudiation of the values it espouses. In fact, the task force recommending the adoption of the Model Rules in Louisiana indicated that, although it would not recommend the adoption of the Preamble, it might still be considered as “preciatory,” or persuasive authority. \textit{Id.} at \textsuperscript{11–13}.
\item \textsuperscript{42} Lynch, \textit{supra} note \textsuperscript{3}, at \textsuperscript{491}, \textsuperscript{521–22}.
\item \textsuperscript{43} \textit{Id.} at \textsuperscript{521–22}.
\item \textsuperscript{44} \textit{Id.} But see E. Wayne Thode, \textit{The Duty of Lawyers and Judges to Report Other Lawyer’s Breaches of the Standards of the Legal Profession}, 1976 \textit{Utah L. Rev.} 95, 100 (“If personal relationships and reluctance to cause trouble for another lawyer are the hallmarks of the legal profession, then we should immediately cease claiming that it is a profession and acknowledge that it is a fraternity. Standards of camaraderie that may be appropriate for a fraternal organization are not appropriate for a profession that plays an integral part in the proper function of our system of justice.”).
\end{itemize}
C. The Operation of Rule 8.3 in Modern Legal Culture

Attorneys generally find it distasteful to report on one another. A 1976 study showed that "of . . . 142 complaints filed against members of the [Utah] bar in 1974, only eighteen were filed by lawyers." In 1975, 135 complaints were filed against Utah lawyers, and only sixteen were filed by attorneys. At that time, the Utah Rule requiring reporting of professional misconduct was modeled on Disciplinary Rule 1-103; thus, with the adoption of the more lenient standard of Rule 8.3, it is reasonable to expect that the percentage of complaints emanating from other attorneys has been reduced even further. To be fair, however, the Utah study made no distinction between substantiated complaints and those without a basis in reality. It is probable that complaints filed by laypersons are less likely to allege actual attorney misconduct, since laypersons are typically unfamiliar with the standard of conduct to which attorneys are held. If complaints filed by attorneys were far more likely to be substantiated than those filed by laypeople, it would severely damage the probative worth of the Utah study.

A 1974 study posed this hypothetical to a group of one thousand Boston lawyers:

Question 24: You learn that a colleague in your firm has committed a flagrant violation of a canon, which, if discovered, would result certainly in embarrassment for the firm and quite possibly in criminal liability for your colleague. You strongly approve of the canon which has been violated. Assuming that no confidentiality exists between you and your colleague, what would you do?

45. Gendry, supra note 5, at 606; Lynch, supra note 3, at 538; Olsson, supra note 5, at 665.
46. Thode, supra note 44, at 99.
47. Id.
48. See id. at 97–99.
There were no answer choices for this question; the attorneys’ responses were “open-ended.” The experimenters then sorted the responses into the following categories:\(^{50}\)

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do nothing</td>
<td>13.1</td>
</tr>
<tr>
<td>Deal with the individual</td>
<td>26.9</td>
</tr>
<tr>
<td>Deal with the individual and members of the firm</td>
<td>6.7</td>
</tr>
<tr>
<td>Deal with members of the firm</td>
<td>14.6</td>
</tr>
<tr>
<td>Deal with members of the firm and the bar association</td>
<td>2.2</td>
</tr>
<tr>
<td>Deal with the bar association</td>
<td>4.1</td>
</tr>
<tr>
<td>See that the individual is fired</td>
<td>12.6</td>
</tr>
<tr>
<td>Simply dissociate from the individual</td>
<td>2.6</td>
</tr>
<tr>
<td>Other response</td>
<td>0.7</td>
</tr>
<tr>
<td>Don’t know</td>
<td>2.6</td>
</tr>
<tr>
<td>Blank</td>
<td>12.7</td>
</tr>
</tbody>
</table>

The study shows that a total of only 6.3% of the respondents would report their colleague’s serious misconduct to the bar association. Only 40.2% of respondents would report serious misconduct to anyone at all. And this is all true when the responding attorney “strongly approves” of the Canon that has been violated.

Next, the experimenters posed this question:

*Question 25:* The same situation as in question 24, except that the canon involved is one which you have previously violated and which you strongly disapprove of. What would you do?\(^{51}\)

Again, the attorneys’ responses were open-ended. The results were:\(^{52}\)

<table>
<thead>
<tr>
<th>Response</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do nothing</td>
<td>38.4</td>
</tr>
<tr>
<td>Deal with the individual</td>
<td>11.2</td>
</tr>
<tr>
<td>Deal with the individual and members of the firm</td>
<td>4.1</td>
</tr>
<tr>
<td>Deal with the members of the firm</td>
<td>8.2</td>
</tr>
<tr>
<td>Deal with the members of the firm and the association</td>
<td>0.4</td>
</tr>
</tbody>
</table>

50. *Id.* at 100.
51. *Id.* at 101.
52. *Id.*
Under this hypothetical, only 1.1% of all respondents would report the violation to the bar association. Only 15.2% would report the violation to anyone.

The Boston study, like the Utah study, has some rather serious flaws, at least for our purposes. First, it surveys only the extremes of a continuum of attorney opinion. In the first question, the attorney is asked to imagine that he strongly supports the Canon in question; in the second, he is asked to imagine that he not only strongly opposes the Canon, but has violated it himself. The Boston study would be much more helpful if it posed an intermediate hypothetical where the attorney is asked to imagine that he is ambivalent about the Canon.

Secondly, the Boston study complicates matters by asking the attorney to assume that he would be reporting on a co-worker. An attorney is probably less likely to report a co-worker than to report another attorney for professional misconduct. Rule 8.3 deals with an attorney’s duty to report any other lawyer’s misconduct, and so the Boston study would be more helpful if it did not skew the results by making them dependent upon the co-worker relationship between the attorneys. At the same time, however, it is likely that lawyers are more likely to have knowledge of the misconduct of their co-workers than of other lawyers, and so the Boston study may be more telling than it appears at first glance.

Lastly, self-reporting seems to be a particularly inadequate way of determining what lawyers actually do when faced with an ethical dilemma such as this one. Surely a different set of factors weighs in the lawyer’s mind when he contemplates reporting a flesh and blood human being instead of a lifeless hypothetical. If

53. Gendry, supra note 5, at 606.
the survey is skewed by a self-reporting bias, however, we can likely predict at least in which direction the results are skewed. If anything, the propensity to report professional misconduct was likely over-reported in the Boston study.

Even the reported rates at which lawyers would report other lawyers’ misconduct, however, are startlingly low. Depending on the attorney’s opinion of the disciplinary rule that had been broken, the likelihood of reporting the misconduct to the bar association was somewhere between 1.1% and 6.3%. The likelihood of reporting the misconduct to anyone at all varied between 15.2% and 40.2%. What accounts for attorneys’ reluctance to report the professional misconduct of others?

In the main, the answer is that attorneys fear the damage to their professional reputation that may result from reporting. Anonymity for reporting attorneys has been suggested as a solution to this problem, but such a solution is difficult to implement. In many disciplinary proceedings, the testimony of the person filing the complaint is important to the case against the transgressing attorney. In order to protect the reporting attorney’s anonymity, he would need to be protected from testifying at the disciplinary proceeding. In many cases, this would unravel the disciplinary proceeding entirely, and the purpose of Rule 8.3 would be undermined.

Where the duty to report arises with respect to a co-worker’s misconduct (as is frequently the case), there is a further disincentive to reporting: the very real threat of retaliatory firing. Some states have allowed a lawyer who is fired in retaliation for

55. Gendry, supra note 5, at 611.
56. Id. at 611–12.
57. Id. at 612.
acting appropriately under Rule 8.3 a legal remedy; others have found that the termination of an at-will employment contract for any reason is proper. In the states where no ruling on the subject has been handed down, the fear of a retaliatory firing may be enough to suppress reporting of another attorney's misconduct. And even where no retaliatory firing results, the reporting attorney may be discriminated against in other subtler ways.

Furthermore, considerations like these seem to have become even more important over the thirty years since the Utah and Boston studies were conducted. One sociologist has noted, speaking of the dawn of the twenty-first century, "[t]his has been deemed the age of 'whatever,' implying that no one wants to make a judgment, impose a standard, or call conduct unacceptable." This sociological tendency would appear to make reporting of lawyer misconduct even less likely now than it was thirty years ago. This same span of years has also seen what some commentators have called "the decline of professionalism"; this refers to an across-the-board deterioration of traditional professional values. One of the causes of this decline, it has been hypothesized, is that lawyers are now more highly concentrated in large firms than they ever have been before. As attorneys work together in greater and greater numbers, and in hierarchical employment structures, their everyday experiences becomes more similar to those of ordinary employees than of old-style independent professionals. Lawyers who think of themselves as employees are less likely to report the misconduct of their co-workers than are lawyers who think of themselves as independent professionals.

59. Wieder, 609 N.E.2d at 110.
60. Bohatch, 997 S.W.2d 543.
62. Kritzer, supra note 4, at 715.
63. Id. at 722.
64. Id.
D. Argument for a Balancing Approach

The propensity of lawyers to report the misconduct of their peers has always been low, and there is reason to believe that it is as low now as it has ever been. Attorneys refuse to report misconduct, recognizing rightly that to do so would place their reputations and their jobs in jeopardy. The bar has an interest in regulating the conduct of its members, and Rule 8.3 helps to serve that interest. However, the bar has a competing interest in maintaining good relations between lawyers. Rule 8.3 does a disservice to that interest. Where two legitimate interests compete, a balancing test is appropriate to determine what duty exists in any given case. Particularly when one of the interests is acknowledged, but left unprotected by substantive law, balancing should come into play.

The bar’s interest in maintaining good relationships between lawyers is aligned with an individual attorney’s own self-interest in preserving his reputation and job security. Thus, balancing the bar’s legitimate interest in enforcing the rules with its interest in maintaining good relations between lawyers turns out to be the same as balancing the bar’s interest in enforcing the rules with the attorney’s interest in his reputation. But this is exactly the kind of balancing that lawyers are already doing when deciding whether or not to report the misconduct of their peers. I propose that the test under Rule 8.3 take account of these factors and balance them in individual cases.65

It is a widely known criticism of balancing tests that, when applied by courts, they lead to unpredictable results.66 But in this

65. Of course, job security, reputation, and the bar’s interest in enforcing the disciplinary rules do not exhaust the factors to be considered under a balancing approach. For an example of another factor, see In re Riehlmann, 891 So. 2d 1239 (La. 2005). In that case, the attorney who had committed the underlying misconduct died long before Riehlmann was investigated for failing to report. Thus, the bar’s interest in enforcing discipline for the underlying misconduct was negated. Nevertheless, the Louisiana Supreme Court appropriately found that Riehlmann had failed in his duty to report, since the underlying misconduct had prejudiced an innocent criminal defendant to the extent that he had been sentenced to death.

case, the unpredictability of a balancing approach would almost certainly be preferable to unpredictability arising from the subjective “substantial question” standard. In fact, since the “substantial question” language of Rule 8.3 has failed in its stated objective of making the duty to report more enforceable, the actual primary effect of that language has been to institute a kind of prior balancing of the interests involved. That is, the current Rule is an awkward first attempt to “balance” the competing interests of the bar and the individual attorney: when the conduct in question raises a “substantial question,” the bar’s interest in holding disciplinary proceedings per se outweighs the interest of the attorney in his reputation; when the conduct does not raise a substantial question, the attorney’s interest in his reputation per se outweighs the bar’s interest in discipline.

Such an approach is clearly an oversimplification. It assumes that all the damage caused to the individual attorney by a reporting requirement is equal. This is simply false. Some lawyers, in reporting the misconduct of others, put their jobs on the line; some their professional reputations; and others only their comfort. To treat such a range of burdens identically is the height of injustice. Of course, an attorney contemplating his duty to report misconduct under a balancing approach would also do well to recognize that the bar’s disciplinary committee may not be as impressed with the prospective damage that reporting would cause as the attorney is himself.

Finally, a true balancing approach has the salutary effect of more meticulously holding the attorney who fails to report accountable for his own moral failure. Under the “substantial question” test, the attorney who violates Rule 8.3 is punished because the definition of “substantial” to which he adheres is different from the one offered (almost certainly post hoc) by the state supreme court. This linguistic variance is an appalling basis for punishment. The true balancing approach holds the attorney accountable for putting his own interests ahead of the bar’s interests when the bar’s interests predominate. It is eminently more acceptable to hold the attorney liable for this kind of poor balancing than for misapplying a standard that has long been criticized as vague and subjective.\(^\text{67}\)

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\(^{67}\) Gendry, supra note 5, at 609.
In this respect, Louisiana is already one step ahead of the game, since it has refused to adopt the ABA’s “substantial question” language. Regarding that refusal, the Louisiana Supreme Court observed:

A task force of the Louisiana State Bar Association concluded that it was inappropriate to put a lawyer “in the position of making a subjective judgment” regarding the significance of a violation, and felt it was preferable instead “to put the burden on every lawyer to report all violations, regardless of their nature or kind, whether or not they raised a substantial question as to honesty, trustworthiness, or fitness.”

Though the task force ultimately reached a different conclusion from the one I am offering, its reasoning is essentially compatible: namely, the task force recognized that the Model Rule’s “substantial question” language creates an unmanageable standard that offers the practitioner little guidance as to when reporting is required. Therefore the task force concluded that a different standard should govern the practice of law in Louisiana.

There is, however, no reason why these two versions of the reporting requirement should be the only games in town. In a field so dominated by conflicting moral opinions and legitimate but incompatible social interests, discretion counsels that we suspend judgment until we have considered the equities involved in particular factual scenarios. Prior line-drawing, no matter where such a line is drawn, is inherently arbitrary; it always has the potential for unjust results. In many contexts these injustices are tolerated, and rightly so, since careful balancing takes a heavy toll on judicial economy. In the present context though, the price of careful balancing is moderated by procedural peculiarities of attorney disciplinary proceedings.

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68. Riehmann, 891 So. 2d at 1246 (quoting REPORT AND RECOMMENDATION OF THE TASK FORCE TO EVALUATE THE AMERICAN BAR ASSOCIATION’S MODEL RULES OF PROFESSIONAL CONDUCT 24 (1985)).
69. Id. See also Smith, supra note 11, at 30–31.
70. Riehmann, 891 So. 2d at 1246; Smith, supra note 11, at 30–31.
In Louisiana, attorney disciplinary proceedings are tried through the hearing committees of the Attorney Disciplinary Board. The hearing committees make disciplinary recommendations, which are then subject to review by the Attorney Disciplinary Board itself and the state supreme court. Thus, Louisiana district courts and circuit courts never hear attorney disciplinary matters. As such, the only dockets that could possibly be slowed by a balancing test are those of the Attorney Disciplinary Board and the state supreme court. The vast weight of the state’s legal machinery would remain completely unaffected. Furthermore, prosecutions under Rule 8.3 are sufficiently rare such that a more nuanced test is unlikely to have an appreciable effect on any tribunal’s docket.

E. Redrafting Rule 8.3

I propose the following rule as a replacement for Model Rule 8.3:

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct shall inform the appropriate professional authority.

... 

(d) It shall be an affirmative defense to disciplinary action under this rule that reporting would have created an undue burden on the lawyer with knowledge of the underlying violation. Sources of such an undue burden shall include but shall not be limited to damage to the lawyer’s reputation, working relationships, or employment stability.

71. LA. SUP. CT. R. 19 § 3(D).
72. Id.
73. Id. § 11(F).
74. Id. § 11(G).
75. A Westlaw search reveals that from 1999 to 2005, there was an average of only two reported Louisiana Supreme Court decisions per year that even cited Rule 8.3.
76. Part (b) of the Model Rule creates an obligation to report judicial misconduct in language identical to that of part (a). For reasons similar to those cited in this paper, that language should be redrafted in the same way that I have suggested redrafting part (a) of the Rule. Part (c) of the Model Rule exempts privileged and confidential information from the reporting requirement. MODEL RULES OF PROF’L CONDUCT R. 8.3 (2007). I omit those sections from my
Part (a) is based on the current language of Rule 8.3(a), but the qualifying language of that part has been omitted. Like Disciplinary Rule 1-103, it adopts a clear policy in favor of reporting professional misconduct. The arbitrary and subjective “substantial question” standard is absent. Instead, the new language qualifying the duty to report has been moved to its own section, part (d) of the redrafted rule. The qualifying language now takes the form of an affirmative defense. This is because it seems appropriate to shift the burden to the attorney to prove that his duty to report was outweighed by other legitimate interests.

Finally, I recognize that it might well be argued that the “undue burden” language creates a standard every bit as subjective as the Model Rule’s reference to a “substantial question.” This is probably true. But any standard we might adopt in this area that even attempts to recognize the competing interests involved will necessarily be steeped in subjectivity. If the choice then is between the subjectivity of an awkward per se balancing test, and the subjectivity of a fact-intensive true balancing test, then, to the mind of this author, the choice is clear.

IV. CONCLUSION

“Again, suppose a man’s father were stealing from temples or digging an underground passage to the Treasury—ought his son to report him to the authorities?”
“No, that would be a sin. Indeed, if the father were charged, his son ought to defend him.”
“So patriotism does not, then, come before all other obligations?”
“Yes, it does indeed, but our country will benefit by having sons who are loyal to their parents.”

redrafted version of Rule 8.3 because they have not been discussed in analysis here.

Conflicts of societal duties and personal loyalties are as ancient as civilization itself.\textsuperscript{79} It is thus the epitome of normalcy that we have found ourselves at a loss for how to adequately resolve them in the abstract. What is clear, however, is that such conflicts would not elicit the sense of urgency that they do if our societal duties and our personal loyalties did not both serve compelling interests.\textsuperscript{80} We should be cautious, then, in purporting to draw bright lines as to when one or the other of these interests prevails. Only a thorough factual analysis can hope to reveal, in a given case, which interest predominates.

The bar sets the standards of legal professionalism. But the bar does not speak with a single voice on the issue of reporting misconduct, because the bar is not merely a rule-giver, but also a collection of lawyers. The Preamble to the Model Rules instructs that “a lawyer is . . . guided by personal conscience and the approbation of professional peers.”\textsuperscript{81} Frequently, a lawyer’s “professional peers” share his distaste for “tattling.”

I do not call for a professionalism of tight-lipped secrecy, where professional fraternity excuses every failure to report misconduct. Instead, I call for a substantive acknowledgement of the values that the Rules of Professional Conduct purport to promote. If the opinions of fellow lawyers are an appropriate consideration for an attorney who wishes to behave professionally, then it is likewise appropriate for the law to take account of those opinions in mitigation of an attorney’s failure to report misconduct.

\textit{Ryan Williams}\textsuperscript{*}

\textsuperscript{79} Indeed, Cicero cites an even more ancient thinker, Hecato, as the source of the quoted dialog. \textit{Id.}
\textsuperscript{80} \textit{See} Lynch, \textit{supra} note 3, at 521–22.
\textsuperscript{81} MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 7 (2007).

\textsuperscript{*} I would like to thank Professor Greg Smith for his aid in crafting this Comment. Many thanks and much love as well to my incomparable family and friends for their unwavering encouragement and support throughout my writing process, and always.