

A NEW APPROACH TO ATTORNEY REGULATION

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Abstract: For more than half a century, jurisdictions have relied on threats of disciplinary sanctions—sticks—to try to coerce attorneys to act in an ethical manner. In doing so, they have focused their efforts on establishing minimum standards of practice and sanctioning only those attorneys who fall well short of them. By crafting general rules that apply to all attorneys, however, jurisdictions have ignored the considerable differences that attorneys face as a result of their practice settings, years of experience, or individual identities. Furthermore, jurisdictions have struggled to establish clear standards to guide attorneys regarding their obligations—precisely because the settings in which their obligations arise are so complex. Perhaps no rule better epitomizes the deficiencies in this one-size-fits-all approach than the mandatory reporting rule, which has simultaneously created anxiety among attorneys about their reporting obligations and, with its strictures, engendered widespread noncompliance.

But there are other ways to conceive of professional lawyer regulation than merely policing and sanctioning the worst offenders. Other legal and nonlegal systems have increasingly turned to carrots to motivate people to act in ways that will benefit the greater good. Thus far, however, lawyer regulators have continued to unthinkingly cling to—and often double down on—the use of sticks out of a belief that such sanctions are needed to convince the public that the legal profession can continue to regulate itself.

This Article makes three primary contributions to the discourse on reforming professional lawyer regulation through the lens of the mandatory reporting rule. First, it demonstrates the deficiencies and limitations created by a stick-based system almost exclusively focused on sanctions. Second, it proffers an alternative model—one leveraging the use of carrots—and draws upon the rational choice literature to identify criteria for determining which type of incentive to implement. Third, it provides a template for how professional lawyer regulation can be revitalized by incorporating carrots that encourage attorneys to strive for ethical

* Associate Professor of Law, University of Oklahoma College of Law. I wish to thank Dmitry Bam, Garry W. Jenkins, Steve Leben, Jeffrey A. Maine, Samuel Merchant, Anthony Moffa, Robyn Powell, Leigh Saufley, and Deirdre M. Smith, along with the participants at the 2024 Central States Law Schools Association Annual Scholarship Conference and the University of Maine School of Law Faculty Workshop Series, for their invaluable ideas and support. I have been inspired to share my own story because of others who have shown the courage to do so, including the panelists for the 2024 AALS program on incorporating one's lived experiences into scholarship. I am grateful to Maysa Alqaisi and Kate Tallmadge for their stellar research assistance, as well as to the editors and staff of the *Boston College Law Review* for their excellent work.

heights, rather than relying on sticks that induce attorneys to do just enough to avoid disciplinary action.

INTRODUCTION

When I was a newly licensed attorney, I may have violated the rules of professional conduct. Or perhaps not—I am not entirely sure. What I do know is that I was harassed and sexually assaulted by a prominent lawyer in the community.¹ I strongly suspect that I was not the first person to have been terrorized by him, and I fear that I was not the last. But I did not do anything about it at the time—or at any time while he was licensed to practice—because I was still grappling with the realization of what had happened and feared repercussions if my story were to come to light. Even writing about it now gives me trepidation, despite that it happened over a decade ago and there being no possibility that my writing now will lead to civil or criminal proceedings against him.

How could an attorney who is a sexual assault survivor—or a victim of any crime, for that matter—be subject to professional discipline for doing nothing? The answer lies in Rule 8.3 of the American Bar Association Model Rules of Professional Conduct (Model Rules),² which is sometimes referred to as the “mandatory reporting rule”³ or, more pejoratively, the “snitch rule.”⁴ Rule 8.3 requires an attorney to report the misconduct of another lawyer if such misconduct violates a rule and “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”⁵ Forty-eight states have adopted a version of the mandatory reporting rule, the violation of which may lead to professional discipline.⁶

Regrettably, it is not clear that what the lawyer did to me violated the ethical rules in effect at that time. Rule 8.4(g), which explicitly proscribes discrimination or harassment on the basis of sex and other protected classifications, was not adopted by the American Bar Association (ABA) until 2016—and a number of states have been reticent to adopt it or a similar anti-bias pro-

¹ Although the lawyer has since passed away, his name will not be used.

² MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS’N 2023).

³ See, e.g., Arthur F. Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 265 (2003) (employing the term “mandatory reporting rule”).

⁴ See, e.g., R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 NOTRE DAME L. REV. 635, 682 (2006) (describing the inadequacy of the “snitch rule” to protect clients from incompetent trial counsel).

⁵ MODEL RULES OF PRO. CONDUCT r. 8.3(a).

⁶ See *id.* r. 8.5(a) (stating that an attorney’s admission to practice law in a jurisdiction gives the jurisdiction disciplinary authority over the attorney); *infra* note 90 and accompanying text (identifying Georgia and Washington as states without a mandatory reporting rule).

vision.⁷ Although other catchall provisions arguably applied, such as those proscribing some types of criminal conduct and actions that are “prejudicial to the administration of justice,”⁸ the extent to which those provisions cover harassment and sexual assault is debatable.⁹ Regardless of whether the lawyer’s misconduct fell squarely within an ethical prohibition, however, I firmly believed that he should not be in a position of trust and confidence. Yet, even in the face of possible disciplinary action against me if I did not report, I remained silent.

By its terms, the mandatory reporting rule extends far beyond my circumstances. It can apply any time an attorney knows of another lawyer’s misconduct, including when the attorney and lawyer are members of the same firm or on opposite sides of litigation; the rule can apply even if the attorney and lawyer have no professional relationship with each other.¹⁰ In the wake of the 2020 election, for example, individual attorneys and legal advocacy organizations around the country urged disciplinary agencies to investigate and sanction lawyers who were involved in the baseless efforts to overturn the results of the election.¹¹ In one instance, more than three thousand attorneys signed on to an ethics complaint against Rudy Giuliani filed with the New York Attorney

⁷ MODEL RULES OF PRO. CONDUCT r. 8.4(g); Jon J. Lee, *Catching Unfitness*, 34 GEO. J. LEGAL ETHICS 355, 372 (2021) (explaining that Model Rule 8.4(g) has been met with resistance since its adoption); see also Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 823–24 (2019) (describing the state-by-state landscape at the time of the rule’s adoption).

⁸ MODEL RULES OF PRO. CONDUCT r. 8.4(b), (d) (setting out the crime and administration-of-justice provisions).

⁹ See Martinez, *supra* note 7, at 821–22 (explaining why Model Rule 8.4(g) was necessary despite the existence of Comment 3 to Rule 8.4(d), the administration-of-justice provision).

¹⁰ See MODEL RULES OF PRO. CONDUCT r. 8.3(a) (not qualifying the term “knows”); Parker D. Eastin, Note, *Should Kentucky Impose an Enforceable Duty on Lawyers to Report Other Lawyers’ Professional Misconduct?*, 87 KY. L.J. 1271, 1290–91 (1998–99) (recognizing that the reporting obligation extends to opposing counsel, which arguably makes it ripe for abuse as a litigation tactic); Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 527–28 (noting that the reporting obligation applies to those who share an “affinity” with one another, including friendship or familial relationship); Peter K. Rofes, *Another Misunderstood Relation: Confidentiality and the Duty to Report*, 14 GEO. J. LEGAL ETHICS 621, 645–51 (2001) (describing the reporting obligations by members of one’s own firm and identifying the possible confidentiality concerns associated with providing details to disciplinary authorities).

¹¹ See, e.g., Alison Durkee, *Ethics Complaint Against Rudy Giuliani Seeks to Disbar Him in New York*, FORBES (Jan. 21, 2021), <https://www.forbes.com/sites/alisondurkee/2021/01/21/ethics-complaint-against-rudy-giuliani-seeks-to-disbar-him-in-new-york/?sh=46c649fd3317> [<https://perma.cc/7BSM-2YRH>] (discussing the complaint that Lawyers Defending American Democracy filed against Rudy Giuliani). Since 2022, the 65 Project has filed dozens of ethics complaints against those who took part in the efforts to overturn the 2020 election results. See *Ethics Complaints*, 65 PROJECT, <https://the65project.com/ethics-complaints/> [<https://perma.cc/92NB-S9ZE>] (containing links to each complaint).

Grievance Committee; the complaint characterized itself as “informed by the obligations [of] Rule 8.3(a).”¹²

Nevertheless, the burdens of the mandatory reporting rule are not shouldered equally by all attorneys—context matters.¹³ The burdens are certainly greater when an attorney shares a professional or personal bond with the subject lawyer, because reporting puts those relationships at risk.¹⁴ And the burden of the rule can be enormous when the attorney is an associate in a law firm and knows that a partner in the firm has committed misconduct. Reporting the partner may put the associate at risk of informal and formal retaliation, including termination, merely for fulfilling their ethical obligations.¹⁵ Although some courts have permitted attorneys to recover damages when they have been terminated under these circumstances, in many states the law is unclear or undeveloped.¹⁶ Nor do the Model Rules provide any explicit protection to attorneys who report misconduct, beyond the comfort that they have complied with an ethical obligation that is almost never enforced.¹⁷

Faced with a tangible risk of professional ruin on the one hand and an amorphous threat of disciplinary action on the other, it is not surprising that

¹² Complaint from Lawyers Defending American Democracy, Inc. to Attorney Grievance Committee, Supreme Court of the State of New York, Appellate Division, First Judicial Department on the Professional Responsibility Investigation of Rudolph W. Giuliani, Registration No. 1080498 (Jan. 20, 2021), <https://ldad.org/wp-content/uploads/2021/05/LDAD-Attorney-Grievance-Committee-Complaint.pdf> [<https://perma.cc/A2T3-CDDC>]; see Press Release, Lawyers Defending American Democracy, 7,200 Signers Join LDAD’s Ethics Complaint Against Rudy Giuliani (2021) (on file with author) (stating that “more than 3,100 lawyers licensed in 48 of the 50 states have signed the 18-page complaint”).

¹³ See *infra* notes 348–410 and accompanying text (discussing the varied scenarios in which the reporting duty may fall on an attorney).

¹⁴ See Lynch, *supra* note 10, at 527–29 (analyzing the moral intuitions regarding informing on a person with whom one has a relationship); Greenbaum, *supra* note 3, at 319–20 (noting that attorneys are unlikely to report family members, as doing so would damage those relationships).

¹⁵ See Douglas R. Richmond, *Associates as Snitches and Rats*, 43 WAYNE L. REV. 1819, 1838–40 (1997) (noting that whereas “[a]n associate who reports a fellow associate’s misconduct may be excommunicated by his peers,” “[a]n associate who reports a partner’s misconduct may face reduced professional opportunities, or even the termination of his employment,” and giving an example of a partner who unjustly critiqued the work of an associate because of the threat of a report); see also Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 794–95 (2009) (noting that the lack of ethical infrastructures in law firms makes it particularly risky to report misconduct involving senior attorneys).

¹⁶ See generally Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043, 1076–84 (2008) (describing various approaches and their limitations).

¹⁷ See Nikki A. Ott & Heather F. Newton, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747, 757–58 (2003) (noting that some jurisdictions fail to enforce Model Rule 8.3 and linking the lack of enforcement to underreporting); MODEL RULES OF PRO. CONDUCT r. 8.3 (including no such anti-retaliation provision).

attorneys routinely disregard their reporting obligations.¹⁸ Indeed, Charles Wolfram has declared that “[p]robably no other professional requirement is as widely ignored by lawyers subject to it.”¹⁹

Yet there is broad agreement that the profession needs attorneys to report serious misconduct committed by other lawyers.²⁰ Not only are attorneys often in a better position than clients or members of the general public to witness such misconduct when it occurs, they also have the legal and ethical training to recognize it and act accordingly.²¹ As such, the question is how to properly and effectively achieve that end.

The current system of professional lawyer regulation resembles the criminal justice system in that it largely uses sticks—the threats of sanctions—to promote compliance.²² Attorneys must adhere to the ethics codes in the jurisdictions where they are permitted to practice, and state codes are largely patterned after the Model Rules.²³ The Model Rules proscribe certain actions, and an attorney who violates their strictures is subject to professional discipline.²⁴ Rule 8.3 follows this pattern, requiring that attorneys report some instances of misconduct or else face a possible disciplinary action.²⁵

Nevertheless, legal systems are not limited to the use of sticks to bring about certain behaviors. There has been a remarkable increase in the employment of carrots—positive incentives to promote compliance—across a wide

¹⁸ See Ott & Newton, *supra* note 17, at 750 (noting that it is rare for attorneys to report other lawyers).

¹⁹ CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.10.1 (1986); see also Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. PA. L. REV. 751, 774 (2011) (“Lawyers rarely report each others’ misconduct.”).

²⁰ See, e.g., 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 (stating that client representation would improve if attorneys informed on lawyers who were not meeting ethical standards); see also Lynch, *supra* note 10, at 538–46 (proposing a narrower formulation for when reporting obligations should arise).

²¹ Greenbaum, *supra* note 3, at 265; AM. BAR ASS’N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENF’T, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 167 (1970), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/reports_migrated/Clark_Report.pdf [<https://perma.cc/V52F-7HBB>] [hereinafter CLARK REPORT].

²² See Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 682–85 (2003) (comparing and contrasting the criminal justice system with the system of professional lawyer discipline, specifically the penological theories underlying each); MODEL RULES OF PRO. CONDUCT pmbl. 16 (stating that adherence to the Model Rules depends, in the final instance, “upon enforcement through disciplinary proceedings”).

²³ MODEL RULES OF PRO. CONDUCT r. 8.5(a) (subjecting attorneys licensed in a jurisdiction to that jurisdiction’s disciplinary authority); Lee, *supra* note 7, at 359 (discussing the widespread adoption of the Model Rules).

²⁴ MODEL RULES OF PRO. CONDUCT pmbl. 16.

²⁵ *Id.*; *id.* r. 8.3(a).

variety of fields,²⁶ from tort law²⁷ to environmental law²⁸ to constitutional law.²⁹ Scholars have even begun to explore and advocate for the expanded use of carrots to curb quasi-criminal and criminal conduct.³⁰ Meanwhile, those charged with regulating lawyers continue to rely on the threat of disciplinary sanctions as their predominant method of attempting to ensure compliance.³¹

This Article draws upon the rational choice literature on carrots and sticks to ascertain whether offering carrots might be a more appropriate and effective way to increase the reporting of serious misconduct and to incentivize other desirable ethical behavior.³² Given the complexity of determining when lawyer misconduct should be reported, the different burdens on those who have information to report, and the costs associated with detecting and prosecuting violations, carrots are more appropriate tools than sticks in this circumstance.³³ Furthermore, this Article will show how disciplinary authorities can select and structure carrots to lessen the distributional distortions among reporters and provide support for those who have the most to lose.³⁴

This Article proceeds in four Parts. Part I traces the history of attorney disciplinary codes in the United States and shows how the reporting rule has

²⁶ See Gerrit De Geest & Guiseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 343, 373–74 (2013) (noting the increasing tendency toward the use of carrots, exemplified in intellectual property law). *But see generally* Ian Ayres & Amy Kapczynski, *Innovation Sticks: The Limited Case for Penalizing Failures to Innovate*, 82 U. CHI. L. REV. 1781 (2015) (identifying circumstances when penalties for failing to innovate might be preferable).

²⁷ See, e.g., Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 882–94, 939–41 (1986) (debating the merits of carrots and sticks regarding rescue, and acknowledging “the possibility that the law will offer ‘carrots only’” in certain situations, such as when there are multiple non-rescuers, because of difficulties in imposing sticks).

²⁸ See, e.g., Jonathan M. Gilligan, *Carrots and Sticks in Private Climate Governance*, 6 TEX. A&M L. REV. 179, 181–82 (2018) (advocating for offering carrots to combat climate change).

²⁹ See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1898 (2015) (advocating for using safe harbors to incentivize police procedures that respect constitutional rights).

³⁰ See, e.g., Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as Well as Punishment in Regulatory and Tort Law*, 51 HARV. J. ON LEGIS. 315, 317 (2014) (suggesting incentives to encourage reporting of corporate misconduct); Brian Galle, *The Economic Case for Rewards Over Imprisonment*, 96 IND. L.J. 471, 476–77 (2021) (making the economic case for preferring financial incentives over incarceration for crime prevention).

³¹ See MODEL RULES OF PRO. CONDUCT pmbl. 16 (AM. BAR ASS’N 2023) (providing that the Model Rules will be enforced by disciplinary action).

³² See *infra* notes 244–488 and accompanying text (discussing the carrot-and-stick framework and applying the framework to attorney discipline).

³³ See *infra* notes 348–410 and accompanying text (discussing the shortcomings of the current reporting rule).

³⁴ See *infra* notes 411–488 and accompanying text (proposing a new formulation of the reporting rule).

been transformed to fit the current stick-based code.³⁵ Part II describes the failures of the current reporting rule in relation to its lack of enforcement by disciplinary authorities, low compliance rate by attorneys, and adverse consequences for those who report.³⁶ Part III discusses the literature on carrots and sticks, identifying the circumstances in which one or the other might be preferable and the concept's application in other fields.³⁷ Part IV applies these principles to the issue of reporting lawyer misconduct, showing that the circumstances militate in favor of using carrots.³⁸ Part IV also identifies and describes six measures that could be adopted to incentivize reporting in light of this analysis.³⁹ The Article concludes with thoughts on how this framework and approach can be used to reform other aspects of attorney regulation.

I. THE EVOLUTION OF THE MANDATORY REPORTING RULE

The standard conception of the mandatory reporting rule is that it is the cornerstone of our system of self-regulation—"nothing less than essential to the survival of the profession."⁴⁰ The form that the reporting obligation has taken, however, has changed dramatically over the last century.⁴¹ Even now, its precise contours are unclear and differ across jurisdictions.⁴²

This Part describes the history of the reporting rule, from its roots as a principled statement of our profession's norms to the mandatory obligations embodied in Model Rule 8.3. It shows how these changes mirror the broader shifts in lawyer ethical codes, which have replaced the canons to which lawyers should aspire with minimum thresholds below which lawyers will be subject to sanctions.

Section A of this Part discusses the advent of the reporting duty in the 1908 Canons of Professional Ethics (Canons).⁴³ Next, Section B describes the development of the mandatory reporting obligation in the 1969 ABA Model Code of Professional Responsibility (Model Code).⁴⁴ Section C then lays out

³⁵ See *infra* notes 40–133 and accompanying text.

³⁶ See *infra* notes 134–243 and accompanying text.

³⁷ See *infra* notes 244–342 and accompanying text.

³⁸ See *infra* notes 348–410 and accompanying text.

³⁹ See *infra* notes 411–488 and accompanying text.

⁴⁰ Greenbaum, *supra* note 3, at 265 (quoting *Wieder v. Skala*, 609 N.E.2d 105, 109 (N.Y. 1992)); see CLARK REPORT, *supra* note 21, at 170 (calling sanctions for nonreporting "necessary" for self-regulation). But cf. Lynch, *supra* note 10, at 537–38 (acknowledging the self-regulation view but arguing that it is "more of a public relations gimmick than anything else").

⁴¹ Compare CANONS OF PRO. ETHICS Canon 29 (AM. BAR ASS'N 1908) (providing for a horatory reporting rule), with MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2023) (setting forth a mandatory reporting rule).

⁴² See *infra* notes 92–133 and accompanying text (discussing the modern rule).

⁴³ See *infra* notes 47–60 and accompanying text.

⁴⁴ See *infra* notes 61–76 and accompanying text.

the current framework for the narrower reporting obligation under the Model Rules.⁴⁵ With that framework in place, Section D explores several interpretive questions regarding the scope of the obligation as it is now formulated.⁴⁶

A. Canons: Reporting as Unenforceable Norm

Although a few state bar associations enacted rudimentary ethics codes prior to the twentieth century, the ABA, in adopting the Canons, undertook the first nationwide attempt at a universal code of lawyer ethics.⁴⁷ The thirty-two canons contained “aspirational principles t[o] guide and inspire well-intentioned lawyers” rather than a comprehensive set of concrete rules.⁴⁸ Indeed, the verb “should” appeared more than fifty times in the Canons,⁴⁹ reflecting the fact that they represented “fraternal norms” instead of binding obligations.⁵⁰

Two canons referenced a responsibility to report the misconduct of other attorneys or judges, one general and the other more specific. Canon 29, “Upholding the Honor of the Profession,” provided that “[l]awyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged [their] client.”⁵¹ These actions were necessary “to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.”⁵² Canon 28, which proscribed “Stirring Up Litigation,” also placed a duty “upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be

⁴⁵ See *infra* notes 77–91 and accompanying text.

⁴⁶ See *infra* notes 92–133 and accompanying text.

⁴⁷ Lee, *supra* note 7, at 362; see also Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 978 (describing the informal nature of ethics codes and discipline prior to the twentieth century). See generally James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395 (2003) (providing extensive history and analysis of the Canons).

⁴⁸ Fred C. Zacharias, *Foreword: The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787, 790 (1998); see Rotunda, *supra* note 47, at 979 (noting that “its preamble emphasized that it was not really a code of law but only ‘a general guide,’ not at all intended to be definitive”). See generally CANONS OF PRO. ETHICS (AM. BAR ASS'N 1908) (containing 32 canons).

⁴⁹ See CANONS OF PRO. ETHICS.

⁵⁰ See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249 (1991) (explaining the transition from the Canons to the current Model Rules).

⁵¹ CANONS OF PRO. ETHICS Canon 29; see also David C. Olsson, *Reporting Peer Misconduct: Lip Service to Ethical Standards Is Not Enough*, 31 ARIZ. L. REV. 657, 660–61 (1989) (discussing Canon 29).

⁵² CANONS OF PRO. ETHICS Canon 29 (identifying the reasons necessitating reporting).

disbarred.”⁵³ As with the rest of the Canons, these two reporting obligations were not designed to be binding on attorneys or subject them to discipline.⁵⁴

Although information about how frequently attorneys reported the misconduct of other lawyers in accordance with the Canons is scarce, by all available accounts reporting was practically nonexistent.⁵⁵ Perhaps the best evidence of the lack of reporting comes from the work of the Clark Committee, which was created by the ABA in 1967 to evaluate state systems of discipline and suggest improvements.⁵⁶ Among the thirty-six problems that the Clark Report identified was the “[r]eluctance on the part of lawyers and judges to report instances of professional misconduct.”⁵⁷ According to the Clark Report, the lack of reporting was “cited as a major problem by nearly every disciplinary agency in the United States surveyed by this Committee.”⁵⁸ To combat this “almost universal reluctance to inform,” which was attributed to shared bonds and professional loyalty, the Clark Report made two recommendations: (1) provide additional education to law students and attorneys on their self-policing responsibilities, and (2) sanction those in the profession who do not inform disciplinary agencies of misconduct “in appropriate circumstances.”⁵⁹ Although the threat of sanctions largely rang hollow in jurisdictions that still

⁵³ *Id.* Canon 28; see Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 741 (linking Canons 28 and 29 to the lawyer’s “[d]uty to [s]peak”).

⁵⁴ See Rotunda, *supra* note 47, at 979–80 (discussing Canon 29, and contrasting the Canons with provisions requiring discipline); Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 177 (1999) (stating that under the Canons, lawyers “could keep silent about their peers’ misconduct without fear of related punishment”); Eastin, *supra* note 10, at 1273–74 (noting that the reporting obligations were “all bark and no bite”).

⁵⁵ See, e.g., CLARK REPORT, *supra* note 21, at 77, 167–69 (“Many states report that they do not maintain permanent records of complaints received and their processing.”); David O. Burbank & Robert S. Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK U. L. REV. 66, 67, 100–01 (1974) (reporting results of a contemporary survey finding that only 6.3% of lawyer-respondents would report knowledge of a colleague’s “flagrant violation of a canon”).

⁵⁶ See Steven K. Berenson, *Is It Time for Lawyer Profiles?*, 70 FORDHAM L. REV. 645, 676–77 (2001) (describing the creation of the Clark Committee and its role in identifying shortcomings).

⁵⁷ CLARK REPORT, *supra* note 21, at 167.

⁵⁸ *Id.*; see also Vincent R. Johnson, *Justice Tom C. Clark’s Legacy in the Field of Legal Ethics*, 29 J. LEGAL PRO. 33, 58 (2005) (recounting Justice Clark’s astonishment “that lawyers who are supposed to uphold and defend the law shrink away from performing their duties in this area”). One disciplinary agency estimated that 1% of all ethics complaints in the jurisdiction had been made by attorneys. CLARK REPORT, *supra* note 21, at 167.

⁵⁹ CLARK REPORT, *supra* note 21, at 167–68.

adhered to the Canons, it was much more salient in jurisdictions that had adopted the new Model Code.⁶⁰

B. Model Code: Introducing Extensive Mandatory Reporting

Although the Canons were successful in regard to their adoption and influence,⁶¹ their structure and coverage ultimately proved to be unworkable.⁶² After several attempts to modify the Canons, in 1969 they were replaced by the Model Code.⁶³ The Model Code had a three-part structure: (1) canons, setting out “axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers”; (2) ethical considerations, containing aspirational statements of the “objectives toward which every member of the profession should strive”; and (3) disciplinary rules, specifying “the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”⁶⁴ This new structure permitted the ABA to differentiate clearly between the parts of the code that would subject a lawyer to discipline (the disciplinary rules) and the parts that were intended to be aspirational or guiding (the canons and ethical considerations).⁶⁵ The Model Code was also far more detailed and comprehensive in the conduct it addressed than its predecessor.⁶⁶

⁶⁰ See Richmond, *supra* note 54, at 177 (stating that Canon 29 imposed an obligation to report that was discretionary, not mandatory); *infra* note 67 and accompanying text (noting that reporting was mandatory under the Model Code).

⁶¹ Altman, *supra* note 47, at 2396 (stating that “by 1924, the Canons had been adopted, with minor modifications, by ‘almost all of the state and local bar associations of the country’” (quoting REPORT OF THE STANDING COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, 47 ANN. REP. A.B.A. 466, 467 (1924))).

⁶² See John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 61 (2013) (describing attempts to shore up the Canons before ultimately developing the Model Code); see also Rotunda, *supra* note 47, at 979–80 (describing how the Canons, which were not meant to be exclusive as to duties and were not written like statutes, nevertheless served as evidence of attorneys’ ethical duties).

⁶³ See Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. & BAR ASS’N J. 1, 1, 3–4 (1970) (describing the adoption of the Model Code and the weaknesses of the Canons).

⁶⁴ MODEL CODE OF PRO. RESP. Preliminary Statement (AM. BAR ASS’N 1980).

⁶⁵ See *id.* (describing the three-part structure); see also Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1444 (2004) (describing the “novel format” of the Model Code); Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 436 (2005) (suggesting that “the [Model] Code is the ABA’s first explicit division between ‘professionalism’ and minimum [r]ules”).

⁶⁶ See Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381, 426 (2012) (stating that, compared to the Canons, the Model Code added length and complexity).

Included in the Model Code was the first mandatory reporting rule, which was sweeping in scope.⁶⁷ Under Disciplinary Rule (DR) 1-103, “[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.”⁶⁸ DR 1-102 itself was a catchall provision that proscribed, among other actions, “[v]iolat[ing] a Disciplinary Rule”; “illegal conduct involving moral turpitude”; “conduct involving dishonesty, fraud, deceit, or misrepresentation”; “conduct that is prejudicial to the administration of justice”; and “any other conduct that adversely reflects on [the attorney’s] fitness to practice law.”⁶⁹ Taken together, these provisions obligated attorneys to report information about all known Model Code violations, even those the would-be reporter considered “minor and technical.”⁷⁰

The Model Code’s threat of disciplinary sanctions for failing to report misconduct had little practical effect.⁷¹ Available disciplinary statistics from that time indicate that attorneys were making relatively few such reports.⁷² The primary reason proffered for these statistics was the Model Code’s failure to account for the severity of the misconduct involved.⁷³ For example, a survey of Vermont lawyers revealed that nearly eighty percent would decline to report “a lawyer routinely overbilling clients for ‘a few more hours’ than actually spent on a case,” but over ninety percent would take action “for clear ethical violations, such as ‘billing a corporate client for non-existent legal services and then kicking back the fees for a political slush fund.’”⁷⁴ Nor were disciplinary agen-

⁶⁷ MODEL CODE OF PRO. RESP. DR 1-103; see RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS—THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.3-1(a) (2021) (describing the extensive scope of the mandatory reporting rule in the Model Code).

⁶⁸ MODEL CODE OF PRO. RESP. DR 1-103.

⁶⁹ *Id.* DR 1-102.

⁷⁰ ROTUNDA & DZIENKOWSKI, *supra* note 67, § 8.3-1(a) (“On its face, the reporting obligation of the Model Code applied to *all* disciplinable violations, whether they were, in the reporting lawyer’s view, flagrant and substantial, or minor and technical.”); see Greenbaum, *supra* note 3, at 279–80 (setting out the framework for the Model Code’s mandatory reporting rule and noting its ineffectiveness).

⁷¹ Olsson, *supra* note 51, at 661.

⁷² See, e.g., Thode, *supra* note 20, at 99 (“Of the 142 complaints filed against members of the [Utah] bar in 1974, only eighteen were filed by lawyers; of the 135 complaints filed against members of the [Utah] bar in 1975, only sixteen were filed by lawyers.”).

⁷³ See Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 TEMP. L. REV. 1211, 1223 (1988) (contrasting the Model Code’s mandatory reporting obligation with that contained in the Model Rules, noting that a rule requiring reporting of all misconduct would be widely ignored) (quoting GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 556 (1985)); see also Greenbaum, *supra* note 3, at 279–80 (highlighting that the rule mandated reporting minor misconduct).

⁷⁴ A. Jeffrey Taylor, *Reporting Professional Misconduct—A Legal Fiction?*, 12 VT. BAR. J. & L. DIG. 5, 7 (1986). Even though the survey was conducted in 1986, after the adoption of the Model

cies sanctioning lawyers solely for violating their Model Code reporting obligations.⁷⁵ It became apparent that “a general reporting rule would be subject to massive civil disobedience that would in turn make it difficult to prosecute even clearcut and egregious cases.”⁷⁶

C. Model Rules: Scaling Back Mandatory Reporting

Even though the Model Code was quickly adopted in almost every jurisdiction, its existence was short-lived.⁷⁷ In 1983, less than two decades after its adoption, the Model Code was superseded by the Model Rules.⁷⁸ The Model Rules discarded the norm-based canons and ethical considerations in favor of organizing professional responsibilities around rules that are binding obligations.⁷⁹ Although the rules include comments that can inform the interpretation of a provision,⁸⁰ the comments are not requirements “going above and beyond, or standing beside, the Rules”⁸¹

The Model Rules retained a mandatory reporting obligation, but it was pared back significantly because, according to the drafters, “the Model Code provision had proved unenforceable in practice.”⁸² Under Model Rule 8.3, the current reporting rule, “[a] lawyer who knows that another lawyer has committed a violation of the Rules . . . 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.”⁸³ There is also an analogous pro-

Rules, Vermont lawyers were still subject to the Model Code at that time. *See id.* at 5, 9 (describing a suggestion to adopt the Model Rule in this area, instead of “the present Disciplinary Rule”).

⁷⁵ *Cf. infra* notes 139–141 and accompanying text (noting that there are only two reported cases in which an attorney was sanctioned solely for a reporting violation, neither of which applied the Model Code standard verbatim). *But cf. infra* notes 142–153 and accompanying text (discussing the suspension of James Himmel by the Illinois Supreme Court, which applied a narrower version of the reporting rule). For a discussion of the differences between the ABA and Illinois versions, see generally Rotunda, *supra* note 47, at 981–92.

⁷⁶ HAZARD & HODES, *supra* note 73, at 556; *see* Spaeth, *supra* note 73, at 1223 (noting the differences between the Model Code and the Model Rules in this respect).

⁷⁷ *See* Andrews, *supra* note 65, at 1445–46, 1445 n.454 (discussing adoption by 1972, and subsequent criticism, of the Model Code).

⁷⁸ *See* Hazard, *supra* note 50, at 1251 (describing the relatively fast transition from the Model Code to Model Rules).

⁷⁹ *See id.* at 1249, 1251 (describing the retention of enforceable regulations and elimination of co-existent norms in the Model Rules).

⁸⁰ MODEL RULES OF PRO. CONDUCT Scope para. 21 (AM. BAR ASS’N 2023).

⁸¹ Hazard, *supra* note 50, at 1251.

⁸² AM. BAR ASS’N, *Rule 8.3 Reporting Professional Misconduct*, in A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–1998, at 326, 328 (1999).

⁸³ MODEL RULES OF PRO. CONDUCT r. 8.3(a).

vision requiring attorneys to report judges who violate the code of judicial conduct.⁸⁴

The Model Rules limit an attorney's reporting obligations in three ways. First, and most significantly, attorneys are required to report only serious violations that meet the "substantial question" threshold; any other reporting is voluntary.⁸⁵ Second, an attorney's obligation to report is subject to their obligations under Rule 1.6, the confidentiality rule.⁸⁶ This limitation is greater than the Model Code version, which exempted only privileged information.⁸⁷ Third, attorneys are no longer required to report their own misconduct, as they were ostensibly required to do before.⁸⁸

Although not all states have adopted Rule 8.3 verbatim, forty-eight states currently have a mandatory reporting rule.⁸⁹ Two states, Georgia and Washington, encourage rather than require reporting.⁹⁰ California is the most recent state to adopt a version of the mandatory reporting rule in 2023, which was spurred on by the massive misappropriation of client funds by Thomas Girardi,

⁸⁴ *Id.* r. 8.3(b) ("A lawyer who knows 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."). Even though this Article will focus on the reporting of other lawyers, most arguments apply with equal, if not greater, force to judges. *See generally* David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline*, 76 TENN. L. REV. 909 (2009) (highlighting the issue of unreported judicial misconduct).

⁸⁵ Spaeth, *supra* note 73, at 1223; Lynch, *supra* note 10, at 513.

⁸⁶ MODEL RULES OF PRO. CONDUCT r. 1.6, 8.3(c). In the current version of the Model Rules, the reporting obligation also does not extend to information learned in a lawyer's assistance program. *See id.* r. 8.3(c).

⁸⁷ *See* MODEL CODE OF PRO. RESP. DR 1-103 (AM. BAR ASS'N 1980) (exempting only "unprivileged knowledge"); Rofes, *supra* note 10, at 627–28 & nn.17–18 (discussing the shift in the transition from Model Code to Model Rules as to the confidentiality duty as it relates to reporting).

⁸⁸ *See* Richmond, *supra* note 54, at 201–02 (stating that Rule 8.3(a) only mandates informing on another's misconduct); Rotunda, *supra* note 47, at 990 (noting that, in a discussion of Illinois Rule 1-103(a), that an attorney could be additionally punished for not self-reporting); *see, e.g.,* Susan Humiston, *Your Duty to Report*, 74 BENCH & BAR MINN. 10, 10–11 (2017) (instructing Minnesota lawyers that they need not self-report under Rule 8.3).

⁸⁹ *See generally* AM. BAR ASS'N, CPR POL'Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT (2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-3.pdf [<https://perma.cc/Q4AC-2GGC>] (providing state variations of Model Rule 8.3(a)).

⁹⁰ *See* GA. RULES OF PRO. CONDUCT r. 8.3 (using the word "should" and stating that "[t]here is no disciplinary penalty for a violation of this Rule"); WASH. RULES OF PRO. CONDUCT r. 8.3 cmt. 1 (2015) ("Self-regulation of the legal profession . . . creates an aspiration that members of the profession report misconduct to the appropriate disciplinary authority when they know of a serious violation . . ."); *see also* Katherine Yon Ebright, *Taking #MeToo Seriously in the Legal Profession*, 32 GEO. J. LEGAL ETHICS 57, 74 (2019) (noting that almost all states have a mandatory reporting rule, in conjunction with the inequity in requiring victims of harassment to report such lawyer misconduct to disciplinary authorities).

a prominent Los Angeles lawyer, spanning a number of years, that had gone unreported by many attorneys.⁹¹

D. Unpacking the Current Rule

The precise contours of Model Rule 8.3 remain uncertain because disciplinary agencies rarely have sanctioned attorneys who have violated their jurisdictions' versions of the rule.⁹² This Section briefly outlines three issues that have arisen regarding Rule 8.3's interpretation: (1) what constitutes knowledge giving rise to a duty to report;⁹³ (2) what misconduct is serious enough to meet the "substantial question" threshold;⁹⁴ and (3) how much Rule 1.6 alleviates or restricts an attorney's obligation to report.⁹⁵ The resolution of each of these issues is critical to the rule's effectiveness and to attorney compliance.

1. Knowledge Standard

Neither Rule 8.3 nor its associated comments provide further insight on what it means for an attorney to "know" that another lawyer has committed unethical conduct.⁹⁶ The Model Rules includes a terminology section, however, explaining that "knows" "denotes actual knowledge of the fact in question."⁹⁷ This language appears to impose a subjective standard, and there is evidence that the ABA intended that interpretation as well.⁹⁸ Although the def-

⁹¹ CAL. RULES OF PRO. CONDUCT r. 8.3 (2023) (limiting mandatory reporting to "criminal act[s]," "conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property"); see Harriet Ryan & Matt Hamilton, *In Major Reform, California Attorneys Must Report Misconduct by Their Peers*, L.A. TIMES (June 22, 2023), <https://www.latimes.com/california/story/2023-06-22/california-attorneys-must-now-report-misconduct-by-their-peers> [<https://perma.cc/96BH-68AY>] (discussing the new rule, which came into effect in August 2023, and the role of the scandal involving Tom Girardi in bringing about the change).

⁹² See Richmond, *supra* note 54, at 176, 184–201 (noting that "so much seems unclear" and discussing outstanding issues in its interpretation); Rotunda, *supra* note 47, at 982 (noting that enforcement of Rule 8.3 is unusual).

⁹³ See *infra* notes 96–106 and accompanying text (discussing the knowledge standard).

⁹⁴ See *infra* notes 107–120 and accompanying text (discussing the substantial question threshold).

⁹⁵ See *infra* notes 121–133 and accompanying text (exploring the relationship between Rule 1.6 and Rule 8.3). There is a fourth issue—the timing of the report—and although it does contribute to the rule's uncertainty, it is beyond the scope of this Article. See Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 252 (2007) (discussing the timing issue); Laurel Fedder, *Obstacles to Maintaining the Integrity of the Profession: Rule 8.3's Ambiguity and Disciplinary Board Complacency*, 23 GEO. J. LEGAL ETHICS 571, 575–76 (2010) (noting that the silence regarding timing "enables the imposition of undeserved negative consequences").

⁹⁶ See MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N 2023).

⁹⁷ *Id.* r. 1.0(f); Kentra, *supra* note 53, at 742 (glossing knowledge as "actual knowledge").

⁹⁸ Cf. Kristy D'Angelo-Corker, *Don't Call Me Sweetheart! Why the ABA's New Rule Addressing Harassment and Discrimination Is So Important for Women Working in the Legal Profession Today*,

inition further provides that “knowledge may be inferred from circumstances,”⁹⁹ the use of circumstantial evidence to infer knowledge is common in the area of criminal law and does not necessarily transform the inquiry into a purely objective one.¹⁰⁰

Despite this definition, disciplinary agencies and tribunals have failed to reach a consensus on how to operationalize the knowledge standard in the context of Rule 8.3.¹⁰¹ It appears that most actually employ an objective standard rather than a subjective one.¹⁰² Although there is widespread agreement that the standard is higher than one of “[m]ere suspicion,” the precise language differs across jurisdictions.¹⁰³ In Mississippi, for example, “[t]he supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred”¹⁰⁴ This “firm opinion” test seems considerably higher than that adopted in New Mexico, which requires only that “a lawyer possess[] . . . a substantial basis for believing that a serious ethical violation has occurred.”¹⁰⁵ On the other end of the spectrum, some jurisdictions require that

23 LEWIS & CLARK L. REV. 263, 285, 295 (2019) (discussing “knowledge” in the context of Rule 8.4(g) and noting that the ABA has “indicated that [‘knows’] is a subjective standard”).

⁹⁹ MODEL RULES OF PRO. CONDUCT r. 1.0(f).

¹⁰⁰ See Courtney K. Cross, *Sex, Crime, and Serostatus*, 78 WASH. & LEE L. REV. 71, 149 (2021) (“Intent in criminal cases is often inferred from circumstantial evidence in addition to more direct evidence.”); cf. R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1457 (2011) (stating that, in the context of the interpretation of Model Rule 3.8(d), the sentence “slightly objectifies what otherwise appears to be an explicitly subjective standard”).

¹⁰¹ Greenbaum, *supra* note 3, at 291–92 (discussing ambiguity in the knowledge requirement, and the different standards established by jurisdictions).

¹⁰² See Ott & Newton, *supra* note 17, at 751 (supporting the objective test); Richmond, *supra* note 95, at 249 (summarizing various formulations of the knowledge standard, then stating that “[n]o matter which test is applied, the key point is that a lawyer’s knowledge may be inferred from the circumstances”); see, e.g., Att’y U. v. Miss. Bar, 678 So. 2d 963, 972 (Miss. 1996) (“That [knowledge] standard must be an objective one, however, not tied to the subjective beliefs of the lawyer in question.”).

¹⁰³ Richmond, *supra* note 95, at 249; see also Michael J. Burwick, *You Dirty Rat!! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct*, 8 GEO. J. LEGAL ETHICS 137, 142 (1994) (stating that jurisdictions have interpreted Rule 8.3 to require “more than a mere suspicion,” yet in some “even uncertain suspicions should be reported”); see, e.g., Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 14 (Ill. 2000) (citing ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 555 (3d ed. 1996)) (surveying the landscape of the knowledge standard).

¹⁰⁴ Att’y U., 678 So. 2d at 972; see, e.g., *In re Riehlmann*, 891 So. 2d 1239, 1247 (La. 2005) (adopting the standard).

¹⁰⁵ Ethics Advisory Comm. of the State Bar of N.M., Advisory Op. 1988-8, <https://www.sbnm.org/Portals/NMBAR/AboutUs/committees/Ethics/1988/1988-8.pdf?ver=YacW-IHGVJub8ULH8BUYOw%3d%3d> [https://perma.cc/KJ9G-XZLV]; see Greenbaum, *supra* note 3, at 291–92 (calling the Bar of New Mexico’s interpretation “a more liberal standard”).

the attorney have “no substantial doubt” or “a high degree of certainty” before reporting is mandated.¹⁰⁶

2. Substantial Question Threshold

The key difference between the current reporting rule and its Model Code predecessor is that the former only requires reporting misconduct “that raises a *substantial question* as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”¹⁰⁷ Although some professional responsibility scholars have advocated for a defined list of misconduct that would qualify,¹⁰⁸ the ABA has retained a standard-based approach.¹⁰⁹ In describing the types of misconduct that are serious enough to trigger the reporting duty, the comments to the rule reflexively state that they are “those offenses that a self-regulating profession must vigorously endeavor to prevent.”¹¹⁰

Beyond this circular language, guidance is scant. There is a suggestion that misconduct that would otherwise go undetected is more likely to trigger a reporting obligation.¹¹¹ But in the end, this determination is effectively left to the individual attorney, with the comments providing that “[a] measure of judgment is, therefore, required in complying with the . . . Rule.”¹¹² Fairly read, the “substantial question” threshold appears to be tied to the subjective judgment of each individual attorney.¹¹³

¹⁰⁶ Greenbaum, *supra* note 3, at 292 & n.182 (describing Colorado and Pennsylvania’s approaches, respectively).

¹⁰⁷ MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS’N 2023) (emphasis added); see MODEL CODE OF PRO. RESP. DR 1-103 (AM. BAR ASS’N 1980) (providing no limitation).

¹⁰⁸ See, e.g., Lynch, *supra* note 10, at 538–45 (recommending that the ABA identify three categories of misconduct that should be reported).

¹⁰⁹ See Lonnie T. Brown, Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1602 (2001) (calling the ABA’s standard “deceptively broad” and stating that “it cannot seriously be disputed that reasonable attorneys could disagree as to what types of violations fall within the rule’s definition”).

¹¹⁰ MODEL RULES OF PRO. CONDUCT r. 8.3 cmt. 3.

¹¹¹ See *id.* r. 8.3 cmt. 1 (noting that reporting “is especially important where the victim is unlikely to discover the offense”).

¹¹² *Id.* r. 8.3 cmt. 3.

¹¹³ See Greenbaum, *supra* note 3, at 285 (stating that the “*Model Rules* [limit reporting] in a highly ambiguous and subjective way”); see also Ariz. Ethics Advisory Comm., Op. 90-13: Reporting Professional Misconduct (1990), <https://tools.azbar.org/RulesofProfessionalConduct/ViewEthicsOpinion.aspx?id=608> [<https://perma.cc/T7XV-TCX4>] (“This situation falls into what we believe to be a large gray area . . . in which the duty to report depends upon a very fact-sensitive determination, and the exercise of appropriate professional judgment and discretion”); see, e.g., Bd. of Overseers of the Bar v. Warren, 34 A.3d 1103, 1111 (Me. 2011) (determining that, given “the wholly subjective nature of the test,” six attorneys did not violate the reporting rule because they did not “subjectively believe” that another lawyer’s “mishandling of funds” met the threshold).

As will be discussed in the next Part, the paucity of disciplinary actions involving a possible Rule 8.3 violation make it impossible to surmise what misconduct typically qualifies.¹¹⁴ One rule of thumb is that misconduct that would lead to disbarment of the subject lawyer must be reported—but that would require the would-be reporter to forecast the likely sanction that would be imposed were the disciplinary agency to learn about it.¹¹⁵ Although intentional theft of substantial client monies almost undoubtedly would qualify, some believe that overbilling would qualify as well.¹¹⁶ Likewise, whether and when a lawyer's incompetence necessitates reporting has been debated.¹¹⁷

The broadest category of serious conduct potentially requiring reporting is that which raises a substantial question about the person's "fitness as a lawyer in other respects."¹¹⁸ This language is similar to another catchall rule, the fitness-to-practice provision, which was eliminated in the adoption of the Model Rules due to concerns over its broadness and redundancy.¹¹⁹ Professional responsibility scholars have mused that the "misuse of television advertising might raise substantial questions about fitness" to some people, whereas others would merely find it "annoying."¹²⁰

3. Confidentiality Constraint

An attorney's obligation to disclose information about another lawyer's misconduct is limited by that attorney's ethical obligation not to reveal confidential information under Rule 1.6.¹²¹ What is considered "confidential" is exceedingly broad; it includes "all information relating to the representation [of a

¹¹⁴ See *infra* notes 138–174 and accompanying text (describing the infrequency of Rule 8.3 discipline).

¹¹⁵ See Richmond, *supra* note 54, at 189–90 (proposing disbarment as an "inclusionary standard," or baseline, for reporting).

¹¹⁶ See *id.* at 191–92 (describing conduct that violates Rule 8.4(c) and raises a substantial question as to fitness); see also Lynch, *supra* note 10, at 542–43 (positing that "crimes involving financial dishonesty" should trigger reporting, but apparently not extending it to overbilling).

¹¹⁷ See Lynch, *supra* note 10, at 554–55 ("The need to ensure professional competence provides the clearest justification for a mandatory informing requirement."); Spaeth, *supra* note 73, at 1223–24 (suggesting that some types of incompetence should trigger reporting, although acknowledging that reporting would not be an effective way to remedy the problem on its own).

¹¹⁸ See Greenbaum, *supra* note 3, at 286–87 (stating that the standard "leaves the [reporting] [r]ule open ended").

¹¹⁹ See generally Lee, *supra* note 7 (describing the elimination of the fitness-to-practice provision in the change to the Model Rules from the Model Code and advocating for its reintroduction).

¹²⁰ See Greenbaum, *supra* note 3, at 287 & n.150 (discussing the debate over reporting improper advertising).

¹²¹ MODEL RULES OF PRO. CONDUCT r. 1.6, 8.3 (AM. BAR ASS'N 2023); see Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 360 (2014) (suggesting that "Rule 8.3 . . . explicitly states that Rule 1.6 trumps the duties of this integrity rule").

client], whatever its source.”¹²² This arguably could include information that a client’s previous lawyer had committed misconduct¹²³ or even that a law firm colleague had committed misconduct involving a firm client¹²⁴—two circumstances in which disciplinary agencies certainly would benefit from attorney reporting.¹²⁵

By and large, disciplinary agencies and tribunals have not grappled with the relationship between Model Rules 8.3 and 1.6.¹²⁶ Nevertheless, there are indications that at least some have interpreted the concept of confidentiality more narrowly, which would expand the information subject to reporting.¹²⁷ For instance, a jurisdiction might exclude information from Rule 1.6 if it has become generally known.¹²⁸ Similarly, if an attorney knows of billing misconduct committed by a firm colleague and can reveal it without disclosing the specifics of any particular client matters, such a disclosure might not violate Rule 1.6.¹²⁹ The stakes of this uncertainty are heightened by the fact that if an attorney reveals information about another lawyer’s misconduct to an authority and it turns out that the disclosure was not permitted by Rule 1.6, the reporting attorney could be subject to discipline for their interpretative mistake.¹³⁰

¹²² MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3; see Rofes, *supra* note 10, at 627 (discussing its breadth).

¹²³ See Rofes, *supra* note 10, at 632–33 (using such a scenario as an example of “the clash between confidentiality and the reporting duty”).

¹²⁴ See *id.* at 646–47 (describing how such a case raises confidentiality issues).

¹²⁵ See, e.g., Richmond, *supra* note 95, at 248–51 (discussing the confidentiality limits in relation to a hypothetical involving client billing).

¹²⁶ See Rofes, *supra* note 10, at 628 (“Indeed, the legal landscape devoted to [the relationship between Rule 8.3 and Rule 1.6] is suffused with law, decisional and advisory both, that reflects a persistent inability to integrate the principle of confidentiality into the duty to report.”).

¹²⁷ See, e.g., *id.* at 632–51 (outlining the variety of approaches taken on the issue by jurisdictions, some of which evidently have conceived of confidentiality more narrowly); see also Greenbaum, *supra* note 3, at 305–06 (positing that Rule 1.6 may be “subject to narrowing constructions”).

¹²⁸ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (AM. L. INST. 2000) (empting “generally known” information from the definition of “[c]onfidential [c]lient [i]nformation”).

¹²⁹ Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS L. REV. 2153, 2183–84 (1998) (“The alleged misconduct is by lawyers, not clients, and could be disclosed without revealing client confidences. If anything, [the attorney] might have an additional obligation to report the billing fraud to his clients as well as to the disciplinary authorities.”); see, e.g., Conn. Bar Ass’n, Comm. on Pro. Ethics, Informal Op. 89-21: Reporting of Attorney-Partner Misconduct (1989) (stating that an attorney had a duty to report the attorney’s prior partner for lying to a client, without addressing the confidentiality issue); see also Rofes, *supra* note 10, at 646–47 (criticizing the Connecticut ethics opinion).

¹³⁰ See Am. Bar Ass’n, Standing Comm. on Ethics & Pro. Resp., Formal Op. 04-433: Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law (2004) (discussing the relationship between Rules 1.6 and 8.3 and emphasizing that the disclosure of confidential information, even to report misconduct in good faith, violates the Model Rules); see, e.g., *In re Ethics Advisory Panel Op. No. 92-1*, 627 A.2d 317, 323 (R.I. 1993) (lamenting the fact that, in some cases, “[t]he failure of the Rules . . . to facilitate the investigation and prosecution of [an] attorney . . . is correspondingly a failure of the legal profession to regulate itself effectively”); *In re Paul*, 292 A.3d 779, 781 (D.C. 2023) (suspending reporting attorney for thirty days for violating Rule 1.6).

In light of these three interpretative quandaries and other concerns, just about the only thing scholars agree on is that Rule 8.3 has interjected more uncertainty than it has resolved.¹³¹ Perhaps the more interesting question is whether the rule is merely “poorly drafted”¹³² or whether it accurately reflects disciplinary agencies’—and the entire legal profession’s—“consistent ambivalence toward reporting.”¹³³ It is to the issue of ambivalence about mandatory reporting that this Article turns.

II. DOCUMENTING THE FAILURES OF THE MANDATORY REPORTING RULE

Although Rule 8.3 has been quite successful when measured by the extent of its adoption, it has been a failure in terms of its impact on disciplinary agencies, attorneys, and the public at large.¹³⁴ Section A of this Part documents how jurisdictions rarely have used the mandatory reporting rule to discipline attorneys.¹³⁵ Next, Section B marshals the data on attorney grievances and other indicators to show the infrequency with which attorneys are reporting their peers.¹³⁶ Finally, Section C explains how reporting puts attorneys at risk of reputational backlash and adverse employment actions, all without guaranteed recourse.¹³⁷

A. Scarce Use by Jurisdictions

Disciplinary agencies virtually never impose sanctions for a violation of their versions of the mandatory reporting rule.¹³⁸ In fact, in only two publicized disciplinary opinions have jurisdictions sanctioned an attorney solely for violat-

¹³¹ See, e.g., Rofes, *supra* note 10, at 621–63 (using words like “bewilder” and “frustrate” to describe the reporting obligation); Lynch, *supra* note 10, at 539 (“The Model Rules thus retain all of the ambiguities present in the Code and add an additional layer of ambiguity by not specifically defining the ‘seriousness’ criterion.”).

¹³² See Greenbaum, *supra* note 3, at 263 (describing the current rule as such).

¹³³ See Lynch, *supra* note 10, at 516 (finding such an ambivalence in the Model Code).

¹³⁴ See AM. BAR ASS’N, CPR POL’Y IMPLEMENTATION COMM., *supra* note 89 (showing adoption of variations of Rule 8.3 in forty-eight states); Spaeth, *supra* note 73, at 1224 (describing Rule 8.3 as irrelevant).

¹³⁵ See *infra* notes 138–174 and accompanying text.

¹³⁶ See *infra* notes 175–194 and accompanying text.

¹³⁷ See *infra* notes 195–243 and accompanying text.

¹³⁸ See Brown, *supra* note 109, at 1599–1600 (noting the lack of enforcement of both the Model Code and Model Rules reporting provisions); Lindsay M. Oldham & Christine M. Whitledge, *The Catch-22 of Model Rule 8.3*, 15 GEO. J. LEGAL ETHICS 881, 893 (2002) (noting that Rule 8.3 prosecutions are “so few in number”); see also Ott & Newton, *supra* note 17, at 758–62 (describing the few cases in which sanctions have been imposed).

ing their reporting obligations—*In re Himmel*¹³⁹ and *In re Condit*¹⁴⁰—and both have unique features that may explain why those cases were prosecuted.¹⁴¹

Almost every professional responsibility class discusses James Himmel, the Illinois attorney whose name has been inextricably tied to mandatory reporting.¹⁴² Himmel had been retained to recover monies that the client's former lawyer had converted.¹⁴³ Importantly, Himmel verified his client's allegations but did not alert the disciplinary agency about the other lawyer's misdeeds.¹⁴⁴ To the contrary, Himmel negotiated a settlement agreement under which the client "agreed not to initiate any criminal, civil, or attorney disciplinary action against [the lawyer]."¹⁴⁵ Then, when the lawyer failed to abide by that agreement, Himmel successfully sued the lawyer on the client's behalf.¹⁴⁶

In what was a shock to the legal profession at the time, the Illinois Supreme Court suspended Himmel in 1988 for a year for failing to report—despite the fact that the hearing board had suggested a private reprimand and the appellate review board had recommended a dismissal.¹⁴⁷ In its opinion, the court made it clear that this sanction would put "the profession . . . on notice that a violation of [the mandatory reporting obligation] will not be tolerated."¹⁴⁸ Indeed, lawyers in Illinois and elsewhere across the country took notice of the opinion, spurring an initial "flurry of . . . activity" and questions regarding their duties.¹⁴⁹

¹³⁹ 533 N.E.2d 790 (Ill. 1988).

¹⁴⁰ No. SB-94-0021-D, 1995 Ariz. Unpub. LEXIS (Ariz. Mar. 14, 1995).

¹⁴¹ See *infra* notes 142–156 and accompanying text (detailing the *Himmel* and *Condit* decisions); Richmond, *supra* note 54, at 183 (describing *Condit* as the only case similar to *Himmel*).

¹⁴² See Laura Gatland, *The Himmel Effect: 'Snitch Rule' Remains Controversial but Effective, Especially in Illinois*, A.B.A. J., Apr. 1997, at 24, 24 (1997) (stating that "most law students now learn [about *Himmel*] in ethics classes"); see, e.g., *Attorney Discipline: Reporting Misconduct by Fellow Attorneys*, ILL. CTS. (Dec. 17, 2019), <https://www.illinoiscourts.gov/News/441/Attorney-Discipline-Reporting-Misconduct-by-Fellow-Attorneys/news-detail/#:~:text=The%20duty%20to%20report%20in%20Illinois%20is%20imposed,after%20what%20he%20did%20in%20the%20last%20hearing.%22%29> [<https://perma.cc/RFB9-43BW>] (noting that, among attorneys, "*Himmel* is used as an adjective ('Do I have a *Himmel* duty?') or a verb ('I had to *Himmel* that guy after what he did in the last hearing.')).

¹⁴³ *Himmel*, 533 N.E.2d at 791; see Rotunda, *supra* note 47, at 982–83 (describing the case).

¹⁴⁴ *Himmel*, 533 N.E.2d at 791.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*; see also Brown, *supra* note 109, at 1598–99 (discussing the case).

¹⁴⁷ *Himmel*, 533 N.E.2d at 790–91, 796; see Rotunda, *supra* note 47, at 982, 984 (noting that "[a]ttorneys have greeted *Himmel* with surprise" and discussing the case).

¹⁴⁸ *Himmel*, 533 N.E.2d at 795 (setting out the argument of the Administrator, which was accepted by the *Himmel* court).

¹⁴⁹ See Mary T. Robinson, *A Lawyer's Duty to Report Another Lawyer's Misconduct. The Illinois Experience*, 2007 PRO. LAW. 47, 49 (describing attorneys' heightened attention to the reporting rule in Illinois following the *Himmel* ruling); see, e.g., Vivian E. Berg, *The Snitch Rule: Does It Work?*, 67 N.D. L. REV. 381, 381 (1991) (describing how *Himmel* immediately resulted in an increase in attorneys' calls to the North Dakota disciplinary counsel to discuss whether they must report).

Yet, for several reasons, the *Himmel* decision is not as far reaching as it seems. First, the Illinois rule was more narrowly drawn as to reportable conduct than either the Model Code or Model Rules, making it easier for attorneys in that state to know whether misconduct had to be reported.¹⁵⁰ Second, the Illinois rule made reporting subject not to Rule 1.6 but rather to the more limited attorney-client privilege; had reporting been subject to Rule 1.6, Himmel likely would have been prohibited from reporting.¹⁵¹ Third, and most importantly, Himmel's conduct went beyond merely failing to report misconduct. He leveraged his knowledge of the lawyer's misconduct to his client's—and arguably his own—advantage by including the promise not to report the misconduct in the settlement agreement.¹⁵² Himmel's actions could have easily merited a second code violation, and it appears that the court weighed it heavily in determining his sanction.¹⁵³

Only one other public disciplinary sanction involves solely a violation of the mandatory reporting rule: in 1995, in *Condit*, the Arizona Supreme Court approved the public censure of Lawrence Condit.¹⁵⁴ The relevant facts are nearly identical to those of *Himmel*: an attorney took on a client who had been defrauded by their predecessor lawyer, the attorney entered into a settlement agreement on behalf of the client that included a nondisclosure provision, and the attorney sued the other lawyer on behalf of the client when the other lawyer breached the agreement.¹⁵⁵ Yet *Condit* was less influential than *Himmel*, both because Condit consented to a public censure for violating Rule 8.3 and because the Arizona Supreme Court approved that agreement by an unpublished opinion—apparently out of its concern regarding the interplay between the reporting rule and Rule 1.6, together with the case's procedural idiosyncrasies.¹⁵⁶

¹⁵⁰ Rotunda, *supra* note 47, at 981–82 (noting narrower cross-references to proscribed conduct).

¹⁵¹ Rofes, *supra* note 10, at 632 n.32 (collecting sources opining that *Himmel* would come out differently in a jurisdiction that had adopted Model Rule 8.3); Richmond, *supra* note 15, at 1835–36 (discussing differences between the Model Rules and the reporting rule at issue in *Himmel*).

¹⁵² See *Himmel*, 533 N.E.2d at 791 (describing the settlement agreement that Himmel drafted, which included a promise not to pursue a disciplinary action and that would allow Himmel to benefit financially). As the Illinois Supreme Court noted in its opinion, this conduct actually violates the Illinois Criminal Code. *Id.* at 796.

¹⁵³ See *id.* (“We are particularly disturbed by the fact that respondent chose to draft a settlement agreement with Casey rather than report his misconduct.”); see, e.g., MODEL RULES OF PROFESSIONAL CONDUCT r. 8.4(d) (AM. BAR ASS’N 2023) (forbidding “conduct that is prejudicial to the administration of justice”).

¹⁵⁴ No. SB-94-0021-D, 1995 Ariz. Unpub. LEXIS, at *1, *5 (Ariz. Mar. 14, 1995); Richmond, *supra* note 54, at 183 (discussing the opinion).

¹⁵⁵ Patricia A. Sallen, *Combating Himmel Angst*, 2007 PRO. LAW. 55, 60–61 (calling *Condit* “*Himmel*’s Arizona and Rules of Professional Conduct doppelgänger”).

¹⁵⁶ See *Condit*, 1995 Ariz. Unpub. LEXIS, at *2, *4 (declining to resolve the reporting-confidentiality tension, but stating that “[n]evertheless, we are concerned about the breadth of ER

Remarkably, there have been no widely publicized sanctions of attorneys *solely* for violating a mandatory reporting rule since Condit's public censure in 1995.¹⁵⁷ That is not to say that jurisdictions never sanction attorneys for violating the rule; on rare occasions, a jurisdiction will find that an attorney has violated Rule 8.3 as one of several rule violations leading to a sanction.¹⁵⁸ These cases typically arise in one of two ways. The first is when an attorney becomes involved in serious law firm misconduct that a colleague began. For instance, a South Carolina attorney was disbarred in part for "actively participat[ing]" in the misuse of client monies for six years after his partner revealed a shortage in their trust account and, instead of reporting it, the attorney joined his partner in misappropriating funds.¹⁵⁹ The attorney ultimately consented to disbarment based on his misconduct in thirteen matters, admitting that he violated eleven other ethics provisions in addition to the reporting rule.¹⁶⁰ Even if the attorney's misconduct was less egregious than that committed by his partner, it does not seem as though the additional failure-to-report violation materially influenced the ultimate sanction imposed.¹⁶¹

The second is where an attorney fails to report their own misconduct.¹⁶² To be sure, Rule 8.3 itself does not require self-reporting.¹⁶³ Nevertheless, several jurisdictions have adopted variations of the reporting rule that require self-reporting in certain circumstances.¹⁶⁴ Even so, a fair reading of the disciplinary

1.6"); see Sallen, *supra* note 155, at 60 (referring to Condit as a "[m]issed . . . [o]pportunity" for the Arizona Supreme Court to clarify the scope of Rule 1.6).

¹⁵⁷ See Richmond, *supra* note 54, at 183 (describing Condit as the only case similar to *Himmel*).

¹⁵⁸ Ott & Newton, *supra* note 17, at 757 (describing the "[l]imited court enforcement of the duty to report," and linking it to attorneys choosing not to comply with it); see also Olsson, *supra* note 51, at 667–68 (detailing the few cases at the time, and noting that in a majority, "the failure to report charge served to complete the list").

¹⁵⁹ *In re Rivers*, 761 S.E.2d 234, 235 (S.C. 2014) (per curiam). When this misconduct came to light, the attorney's clients claimed they were owed nearly \$1.3 million, and the partner's clients claimed they were owed more than \$3.8 million. *Id.* at 236–37.

¹⁶⁰ See *id.* at 237–41 (describing the thirteen matters, the matters involving his law partner, and the ethics violations to which the respondent admitted).

¹⁶¹ See *id.* at 240–41 (containing only a cursory mention of the Rule 8.3 violation in the opinion).

¹⁶² See, e.g., *In re MacLean*, 861 S.E.2d 589, 590 (S.C. 2021) (per curiam) (noting respondent's failure to self-report criminal charges for "four counts of possession of a controlled substance"); *In re Dickens*, 435 P.3d 21, 37–38 (Kan. 2019) (per curiam) (noting respondent's failure to self-report informal admonishment from Missouri disciplinary authorities for violating Rules 1.1 and 1.3).

¹⁶³ See *supra* note 88 and accompanying text (noting that the Model Rules do not require attorneys to self-report).

¹⁶⁴ See, e.g., KAN. RULES OF PRO. CONDUCT r. 8.3(a) (1999); S.C. RULES OF PRO. CONDUCT r. 8.3(a) (2019). Kansas is an example of an implicit rule. See KAN. RULES OF PRO. CONDUCT r. 8.3(a) (using the phrase "an attorney" instead of "another attorney"); J. Nick Badgerow, *The Beam and the Mote: A Review of the Lawyer's Duty to Report*, 82 J. KAN. BAR ASS'N 20, 24 (2013) (discussing cases where the Kansas Supreme Court disciplined attorneys who did not self-report). Some states include explicit rules for self-reporting related to criminal conduct, either alone or in addition to an implicit rule. See, e.g., S.C. RULES OF PRO. CONDUCT r. 8.3(a) (requiring self-reporting no later than

opinions reveals that the violation of the self-reporting obligation was ancillary to the other misconduct that the attorney had committed—including the underlying misconduct triggering the duty to self-report.¹⁶⁵ Here again, the attorney's violation of the reporting rule does not appear to have had an appreciable impact on the disposition of their case.

Unfortunately, it is impossible to get a complete picture of the frequency with which Rule 8.3 is used as a basis for public sanctions because disciplinary agencies still fail to adequately publicize individual sanctions or to provide compiled information for analysis.¹⁶⁶ Nevertheless, by all accounts—even by disciplinary agencies themselves—the frequency is miniscule.¹⁶⁷ For example, in advising attorneys about their mandatory reporting obligations, a Minnesota authority noted that Minnesota has never publicly sanctioned an attorney for violating Rule 8.3.¹⁶⁸ Yet the authority reminded attorneys that “this fact should not lessen the seriousness with which you approach your ethical obligation.”¹⁶⁹ This regulatory inaction is mirrored by the experience of another state's bar counsel, who could not “remember having even *investigated* an allegation that a lawyer violated [the mandatory reporting rule]”¹⁷⁰

One might posit that the reason for so few public disciplinary sanctions is that violations of the reporting rule result in private sanctions instead.¹⁷¹ If that were true, it would mean that disciplinary agencies are in fact deploying sanctions to promote compliance with the rule—albeit in a manner obscuring their

fifteen days by “[a] lawyer who is arrested for or has been charged by way of indictment, information or complaint with a serious crime”).

¹⁶⁵ See, e.g., *In re MacLean*, 861 S.E.2d at 590 (committing misconduct in several bankruptcy matters, leading to violations of the competency, diligence, communication, withdrawal, and other rules); *In re Dickens*, 435 P.3d at 35 (stipulating violations of the competence, diligence, and communication rules, among others).

¹⁶⁶ See generally Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007) [hereinafter Levin, *The Case for Less Secrecy*] (providing comprehensive treatment of the matter of secrecy in attorney discipline); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1 (1998) (exploring a litany of problems with the current disciplinary agencies, including their lack of transparency).

¹⁶⁷ See Brown, *supra* note 109, at 1599 (noting that under the Model Code, the norm was a lack of enforcement).

¹⁶⁸ Humiston, *supra* note 88, at 10.

¹⁶⁹ *Id.*

¹⁷⁰ Sallen, *supra* note 155, at 55; see Fedder, *supra* note 95, at 581 (discussing that fact and its significance); see, e.g., Berg, *supra* note 149, at 381 (“Yet, I cannot recall any time, no matter how egregious the misconduct, when there has been the least bit of attention given to whether or not a file should be opened to inquire into whether a lawyer had the requisite knowledge under Rule 8.3”); see also Robinson, *supra* note 149, at 51 (noting that in Illinois, *Himmel* investigations were “about one-tenth of one percent of the investigative caseload”).

¹⁷¹ See Levin, *The Case for Less Secrecy*, *supra* note 166, at 1 (noting that “many discipline sanctions are private”).

use. Even less is known about private sanctions than about their public counterparts, but the limited data does not support that hypothesis either.¹⁷² In a prior article, I conducted a comprehensive study of over fifteen hundred private sanctions imposed in five jurisdictions over a twenty-year period; only one of those sanctions included a violation of Rule 8.3—but even that sanction included additional misconduct beyond the attorney’s failure to report.¹⁷³ These findings support the belief that Rule 8.3 “embodies one of the most underenforced, and possibly unenforceable, mandates in legal ethics.”¹⁷⁴

B. Low Compliance Rate Among Attorneys

Of course, the lack of disciplinary sanctions for violations of the reporting rule does not necessarily mean that the rule is not working. In fact, one might claim that the absence of cases is a sign of its success; most attorneys must be complying with their ethical obligation to report, so the argument goes, obviating the need for disciplinary agencies to intervene.¹⁷⁵ As described in the Introduction, such compliance played out quite publicly in the aftermath of the 2020 election, with swaths of attorneys lodging complaints against those who attempted to invalidate the results.¹⁷⁶

Another possible indicator of compliance could be the frequency with which attorneys contact disciplinary agencies regarding their obligations.¹⁷⁷ Even though most of the evidence is anecdotal, such evidence suggests that state disciplinary agencies regularly receive inquiries from attorneys seeking

¹⁷² See generally Jon J. Lee, *Private Sanctions, Public Harm?*, 48 BYU L. REV. 1255 (2023) (exploring the limited publication of private sanctions); *supra* note 166 and accompanying text (discussing public sanctions).

¹⁷³ Data on file with author; see Lee, *supra* note 172, at 1261, 1288–93, 1302 (describing the study, including the fact that the analysis examined both private and public sanctions); *Disciplinary History*, ALA. STATE BAR (Jan. 7, 2013), <https://www.alabar.org/office-of-generalcounsel/disciplinary-history/> [<https://perma.cc/ZY6Z-UBMV>] (capturing a private reprimand in response to attorney’s violation of Rules 1.9 and 8.3 for representing a new client in an action against persons who discussed the matter with the attorney previously).

¹⁷⁴ See Ott & Newton, *supra* note 17, at 747 (describing lack of enforcement of reporting rule); see also A. Rebecca Williams, *An Inside Job: Using In-Court Sting Operations to Uncover Corruption in an Inadequate Self-Regulating System*, 28 GEO. J. LEGAL ETHICS 969, 980 (2015) (“The lack of case law dealing with Rule 8.3 violations demonstrates either the legal community’s unwillingness or inability to enforce compliance.”).

¹⁷⁵ See Greenbaum, *supra* note 3, at 272–74 (discussing the “evidence that lawyers take their reporting responsibilities seriously” and positing that the lack of disciplinary actions should not be dispositive).

¹⁷⁶ See *supra* notes 11–12 and accompanying text (describing reporting of attorneys attempting election fraud).

¹⁷⁷ See, e.g., *supra* note 149 and accompanying text (noting the increase in questions regarding mandatory reporting following *Himmel*).

clarification and advice.¹⁷⁸ Arizona went a step further and tracked calls to its ethics hotline; there were more than one hundred and twenty calls inquiring about reporting obligations in a single year.¹⁷⁹

Nevertheless, even assuming there are a large number of *inquiries* from attorneys about their reporting obligations, that does not mean they are routinely *complying* with those obligations. Only a few jurisdictions track and share the source of disciplinary complaints; that data suggests that attorney-initiated grievances are few and constitute a small portion of the total.¹⁸⁰ Immediately following the *Himmel* decision, Illinois was held up by proponents of mandatory reporting as an example of how “strict enforcement” could induce compliance.¹⁸¹ In the year following *Himmel*, Illinois attorneys filed 922 reports out of approximately six thousand total grievances—representing over fifteen percent of the total grievances filed in Illinois that year.¹⁸² Since that time, however, the “initial hysteria [has] died down.”¹⁸³ Between 2008 and 2022, the annual number of attorney-initiated grievances averaged 513 (forty-four percent lower), representing just under ten percent of the total.¹⁸⁴ Arizona, the only other state to have publicized a sole Rule 8.3 violation, has a similar percentage of attorney-initiated grievances.¹⁸⁵ Moreover, there is a belief that the per-

¹⁷⁸ See, e.g., Berg, *supra* note 149, at 381 (“At least one question a week is referred by the Office of Disciplinary Counsel to the State Bar Association of North Dakota Ethics Committee for help with that decision.”); Humiston, *supra* note 88, at 10 (noting that there are “numerous advisory opinion requests received by the Office involving whether a particular factual scenario requires reporting”).

¹⁷⁹ See Sallen, *supra* note 155, at 55 (“Of more than 2,100 calls to our hotline in 2006, more than 120 concerned the reporting requirement.”).

¹⁸⁰ See Levin, *The Case for Less Secrecy*, *supra* note 166, at 19, 21 (noting that only four states make complaints public as a rule, and although many disciplinary authorities release annual reports, only some reports mention the source of each complaint); see, e.g., J. Anthony McLain, *Reporting Misconduct—It’s a Good Thing*, 62 ALA. LAW. 240, 240 (2001) (“Based on information from disciplinary files of the Disciplinary Commission of the Alabama State Bar, it appears that fewer than six complaints a year are filed by lawyers reporting misconduct of another lawyer.”); Spaeth, *supra* note 73, at 1223 (“Experience has shown, however, that only a small percentage—ten to fifteen percent—of complaints to disciplinary authorities are filed by lawyers.”).

¹⁸¹ See, e.g., Olsson, *supra* note 51, at 670 (discussing, in 1989, “positive changes brought about by [the *Himmel*] decision”).

¹⁸² See Richmond, *supra* note 54, at 182 & n.74 (containing information on grievances filed by Illinois attorneys in 1989); Robinson, *supra* note 149, at 49 (providing the total number of grievances made in Illinois in 1989).

¹⁸³ See Robinson, *supra* note 149, at 49 (describing years post-1989).

¹⁸⁴ ATT’Y REGISTRATION & DISCIPLINARY COMM’N OF ILL., 2022 ANNUAL REPORT OF THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS 69 (2022), <https://www.iardc.org/Files/AnnualReports/AnnualReport2022.pdf> [<https://perma.cc/7JGD-YW4L>].

¹⁸⁵ See Sallen, *supra* note 155, at 56–57 (discussing Arizona’s focus on the reporting rule and noting that, in 2005, attorneys made 9.5% of complaints); *supra* notes 154–156 and accompanying text (discussing *Condit*, the publicized violation).

centages of attorney-initiated grievances in Illinois exceed those in jurisdictions where Rule 8.3 has never figured prominently.¹⁸⁶

That there are low percentages of attorney-initiated grievances does not itself prove that attorneys are failing to comply with Rule 8.3. But such percentages must be evaluated in light of the fact that attorneys are more often in a position to observe and recognize serious misconduct than are clients, opposing parties, or others.¹⁸⁷ Indeed, Rule 8.3 recognizes this fact: its drafters stress, in a comment, the need for reporting when “the victim is unlikely to discover the offense.”¹⁸⁸ Though it is impossible to know the “optimal” number or percentage of attorney-initiated grievances if attorneys routinely complied with their reporting obligations, the consensus is that it would be significantly higher.¹⁸⁹

Two other sources of information on compliance rates are surveys and anecdotes from those who have interacted with attorneys considering whether to re-

¹⁸⁶ See Richmond, *supra* note 54, at 182 (calling reporting in Illinois “unmatched”); Sallen, *supra* note 155, at 57 (noting the number of complaints); Gatland, *supra* note 142, at 24 (discussing the disciplinary statistics as to complaints filed by attorneys in the two states); *supra* notes 139–141 and accompanying text (describing the only published opinions for sole Rule 8.3 violations); see also ANN SOUTHWORTH & CATHERINE L. FISK, *THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE* 983 (2014) (noting the “small fraction” of complaints made by other attorneys).

¹⁸⁷ See Richmond, *supra* note 95, at 256 (citing Matzkin v. Delaney, Zemetis, Donahue, Durham & Noonan, PC., No. CV044000288S, 2005 WL 2009277, at *4 (Conn. Super. Ct. July 29, 2005)) (explaining that attorneys have an obligation to report because, in part, they are trained in the law and can identify ethics rules violations); see, e.g., McLain, *supra* note 180, at 240 (citing national statistics that “in at least 75–80 percent of matters involving lawyer misconduct, a judge or another lawyer observed, was subjected to, or was personally aware of the misconduct”); see also Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession*, 96 MINN. L. REV. 1482, 1520 (2012) (attributing the low number of grievances to clients’ lack of awareness of violations, combined with the fact that “lawyers internally lack motivation and perspective to come forward”).

¹⁸⁸ MODEL RULES OF PRO. CONDUCT r. 8.3 cmt. 1 (AM. BAR ASS’N 2023); see Lynch, *supra* note 10, at 540 (discussing the need for attorneys to report another lawyer’s dishonesty toward their client because “the client will not always be aware of the misconduct” and the attorney “is better able to judge whether a violation has occurred and knows how to lodge an appropriate complaint”).

¹⁸⁹ See, e.g., Spaeth, *supra* note 73, at 1223–24 (concluding that attorneys are not a large percentage of complainants); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 278 (1999) (“Rule 8.3 is perhaps the most widely violated and the most underenforced of the disciplinary rules.”); Ott & Newton, *supra* note 17, at 755–57 (characterizing the current systems as producing a “low rate of attorney compliance”). Interestingly, disciplinary authorities often claim that lawyers “generally comply,” without proffering evidence to support that assertion. See, e.g., Harriet Ryan & Matt Hamilton, *When It Comes to Crooked Colleagues, California Lawyers Can Remain Silent*, L.A. TIMES (Oct. 28, 2022), <https://www.latimes.com/california/story/2022-10-28/should-lawyers-have-to-report-corrupt-peers-only-california-says-no> [<https://perma.cc/8MSF-47TR>] (quoting chief Kentucky bar counsel for the proposition that although Kentucky has not disciplined anyone for a Rule 8.3 violation, “attorneys ‘generally comply’”).

port.¹⁹⁰ One survey found that seventy percent of respondents indicated they would report the misconduct of another lawyer who was not a member of their firm, but only fifty-nine percent would inform on the misconduct of a colleague.¹⁹¹ Perhaps not surprisingly, women attorneys and attorneys in larger firms are less apt to raise ethical concerns to their superiors.¹⁹²

The anecdotal information supports these assertions in an even starker fashion. For example, Lisa Lerman has recounted that she has “on many occasions” consulted with law students and lawyers on their reporting duties; though they “often agreed” with her assessment that they had a duty to report, none, to her knowledge, have done so.¹⁹³ She also conducted an informal poll of about one hundred practicing attorneys in which nearly all admitted to witnessing misconduct requiring reporting yet failing to do so—with many admitting to observing “numerous” such instances.¹⁹⁴ As a teacher and mentor to hundreds of law students and practitioners, I can confirm that my experiences are similar to those of Professor Lerman. I have had many discussions with attorneys about their reporting obligations, but I do not know of any who actually reported. Although surely there are times when attorneys do comply, my perception—admittedly from my limited experience—is that the compliance rate is quite low.

C. Negative Consequences of Fulfilling the Reporting Obligation

Complying with one’s reporting obligation has two primary benefits to the reporting attorney. The first is internal: the feeling that one has fulfilled one’s moral obligation and taken an action that could benefit the other lawyer’s clients, people with whom the other lawyer interacts, and the profession.¹⁹⁵ The second is external: the knowledge that one has fulfilled one’s obligation under the ethics code and therefore one will not be subject to disciplinary action.¹⁹⁶ Although these two benefits are not negligible, they are less salient

¹⁹⁰ See Greenbaum, *supra* note 3, at 274–75 (describing the limitations in the types of empirical data available to measure compliance).

¹⁹¹ Lauren Rubenstein Reskin, *Lawyers Are Serious About Professional Responsibility*, A.B.A. J., Dec. 1985, at 41, 41 (describing the survey results of a “random sample of 600 lawyers”).

¹⁹² See *id.* (“More women and lawyers in larger firms have never rejected work because of ethical considerations . . .”). In fact, survey data indicates that ethical concerns may lead attorneys to leave private practice entirely. See Susan Saab Fortney, *An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 64 TEX. BAR J. 1060, 1064 (2001) (showing that 46% of associates agreed to some degree that “[b]illing pressure causes ethical and competent attorneys to leave private law practice”).

¹⁹³ Lerman, *supra* note 129, at 2183.

¹⁹⁴ Lerman, *supra* note 189, at 278 n.261.

¹⁹⁵ See Lynch, *supra* note 10, at 538–39 (positing that “[t]he more serious the violation, the more likely it is that people will universally agree that there is a moral duty to report it”).

¹⁹⁶ Cf. Stephen G. Bené, Note, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907, 925 (1991) (positing that lawyers are more risk averse

than the two primary perceived negative consequences of faithful compliance: (1) poor treatment by those who learn of the report,¹⁹⁷ and (2) the possibility of an adverse employment action.¹⁹⁸

1. Poor Treatment by Those Who Learn of the Report

One commonly cited reason for the low compliance rate is the would-be reporting attorney's belief that they will be ostracized by their colleagues in the profession.¹⁹⁹ This concern is reinforced by the fact that the mandatory reporting rule is often referred to as the "snitch rule," even among those charged with enforcing it.²⁰⁰ The societal disdain for a tattletale is arguably amplified among those in a profession that lionizes confidentiality.²⁰¹ Even if the reporting attorney is not informing disciplinary authorities about the misdeeds of a firm colleague, they still might be branded as a person who does not conform with the norms of the profession, which could lead to adverse personal and professional consequences (such as not being considered for an employment opportunity).²⁰²

This concern about adverse consequences is supercharged when the attorney is considering reporting the misconduct of a firm colleague. Much has been written on the institutional culture in law firms, particularly when it comes to

than the average person, which increases "the deterrent effect of sanctions"). There may be other benefits, such as the possibility that prompt reporting will limit the exposure of the reporter or the reporter's firm to civil liability, but that type of benefit is more attenuated. *See, e.g., Estate of Spencer v. Gavin*, 946 A.2d 1051, 1069 (N.J. Super. Ct. App. Div. 2008) (noting that a lawyer's failure to report could "expose[] him to civil liability to those who were harmed by his silence").

¹⁹⁷ *See infra* notes 199–213 and accompanying text (discussing the concern that an attorney will experience poor treatment by others if they report).

¹⁹⁸ *See infra* notes 214–243 and accompanying text (describing the concern that an attorney will risk their employment if they report).

¹⁹⁹ *See, e.g., Ott & Newton, supra* note 17, at 752 (suggesting that "[l]awyers may fear being considered a tattletale by their peers within the legal community"); Brown, *supra* note 109, at 1603 (noting lawyers' "concern about being perceived as 'tattletales'"); Long, *supra* note 15, at 826–27 ("Attorneys in law firms may be particularly susceptible to fears that their . . . reports . . . are either inherently disloyal or will be viewed as such.").

²⁰⁰ *See Long, supra* note 15, at 827 ("Some in the legal profession view those who make external reports of wrongdoing with particular disdain, as evidenced by the long list of derisive names for Rule 8.3(a), such as the 'squeal rule,' the 'snitch rule,' and the duty 'to "rat" on one's colleagues.'"); *see, e.g., Kate A. Toomey, Practice Pointer: The Snitch Rule*, UTAH BAR J., Mar. 2004, at 24, 24 (employing the phrase, in an article by deputy bar counsel).

²⁰¹ *See Lynch, supra* note 10, at 491 (noting society's ambivalence toward informers, and lawyers' valorization of confidentiality).

²⁰² *See Ott & Newton, supra* note 17, at 752 (noting that those practicing may judge or criticize a reporting lawyer); *cf. Richmond, supra* note 15, at 1840 (giving example of an attorney who told a mentor that he was clinically depressed, after which the firm fired the attorney).

the pressure on early-career attorneys to conform.²⁰³ With regard to reporting the misconduct of other lawyers in particular, a law firm's ethical infrastructure—or, in most cases, the lack thereof—may serve as “a strong signal that such reports—particularly where they concern more senior attorneys—are unwelcome.”²⁰⁴ Even before an attorney reaches the point where they believe that serious misconduct should be reported, they likely have received dozens of signals, both subtle and overt, downplaying the significance of unethical conduct.²⁰⁵ Billing is at the top of this list, with early-career attorneys being acculturated into the norm of meeting billable hour requirements at all costs.²⁰⁶ At times, early-career attorneys will witness other attorneys employ—and even justify—practices such as double billing, billing at an attorney rate for a non-attorney's time, and flat-out inflating hours.²⁰⁷

An associate who risks going against these institutional norms by reporting a colleague may be viewed by others as committing the ultimate act of disloyalty.²⁰⁸ When Peter Kelly, a Hunton & Williams associate, told a partner about suspected billing fraud committed by the firm's rainmaker, he was put under the microscope by the other partners in the firm.²⁰⁹ In contrast with his first-year evaluation, where he was called “a valuable asset to our team,” partners began criticizing him after his revelation for “his constant tardiness and

²⁰³ See, e.g., Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 460–71 (2007) (describing how subordinate attorneys are more likely to comply with a partner's instructions, employing social psychology principles); Mortazavi, *supra* note 187, at 1488–97 (describing the key features of the firm's institutional structure); Long, *supra* note 15, at 792–94 (examining the impact of firms' ethical infrastructures, or lack thereof); Richmond, *supra* note 15, at 1838 (explaining why “[a]ssociates are particularly vulnerable to infra-firm pressures”).

²⁰⁴ Long, *supra* note 15, at 792, 795; see also Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10 (1991) (describing a law firm's ethical infrastructure and its importance).

²⁰⁵ See Nancy B. Rapoport, “Nudging” Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 42, 64–67 (2014) (using hypothetical scenarios to explain the social pressure to commit misconduct); Long, *supra* note 15, at 793 (noting that the culture of a law firm will influence the behavior of its associates).

²⁰⁶ See Mortazavi, *supra* note 187, at 1492–95 (discussing the institutional pressures of billable hour requirements, which have led attorneys at all levels to commit unethical—and often illegal—conduct).

²⁰⁷ See Lerman, *supra* note 129, at 2158–66 (recounting the billing practices at one firm, which included these actions); see also Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 253–54 (2000) (discussing results of a survey of law firm associates and indicating that billing structures and lack of guidance led to unethical conduct).

²⁰⁸ See Richmond, *supra* note 15, at 1838 (noting that the bonds of loyalty between colleagues decrease reporting); Williams, *supra* note 174, at 978 (describing the reasons why reporting of colleagues is rare).

²⁰⁹ Kelly v. Hunton & Williams, No. 97-CV-5631, 1999 WL 408416, at *1–2 (E.D.N.Y. June 17, 1999).

other inattentions to the administrative aspects of practicing law”²¹⁰ For Howard Wieder, a New York attorney who informed senior partners about a peer associate’s neglect of his own case and failed cover-up, the change in demeanor among firm leadership was more personal.²¹¹ Even though they acknowledged that the other associate “was a pathological liar and that [the other associate] had previously lied . . . regarding the status of other pending legal matters,” they resisted Wieder’s request to inform disciplinary authorities.²¹² When they finally made the report, they “continuously berated [Wieder] for having caused them to report [it].”²¹³

2. Possibility of Adverse Employment Action

The mistreatment of Kelly and Wieder went even further, however, eventually resulting in dismissal from their respective firms.²¹⁴ Despite a smattering of cases with similar facts,²¹⁵ getting a sense of how frequently such mistreatment occurs from the case law is difficult; discharged attorneys may avoid litigation for fear it will brand them as even more of an outsider.²¹⁶ Nevertheless, both Kelly and Wieder sued their former firms for claims related to their discharges, which meant that courts had to grapple with the tension between at-will employment and lawyer ethics codes.²¹⁷

Although attorneys are generally considered at-will employees, jurisdictions have begun to recognize limitations on an employer’s ability to terminate

²¹⁰ *Id.*; see Jason A. Anon, *Still “Snowing” in the Sunshine State: An Analysis of and Potential Solutions to the Lack of Protection from Employer Retaliation for Florida Lawyers Who Adhere to the State’s Mandatory Reporting of Professional Misconduct Rule*, 13 FIU L. REV. 1175, 1194–95 (2019) (discussing the *Kelly v. Hunton & Williams* case).

²¹¹ *Wieder v. Skala*, 609 N.E.2d 105, 106 (N.Y. 1992).

²¹² *Id.*

²¹³ *Id.*; see Sandra J. Mullings, *Wieder v. Skala: A Chink in the Armor of the At-Will Doctrine or a Lance for Law Firm Associates?*, 45 SYRACUSE L. REV. 963, 980–82 (1995) (describing facts of case).

²¹⁴ *Wieder*, 609 N.E.2d at 106 (indicating that the plaintiff was fired immediately after filing paperwork related to an important case); *Kelly*, 1999 WL 408416, at *4 (indicating that the plaintiff was given a “choice” between being fired without a favorable reference or resigning and receiving a favorable reference).

²¹⁵ See, e.g., RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS—THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 5.2-2 (2023) (collecting attorney wrongful-discharge cases from jurisdictions); see also Long, *supra* note 16, at 1048–62 (categorizing common fact patterns in which attorneys were terminated for fulfilling their ethical obligations).

²¹⁶ See Richmond, *supra* note 15, at 1845 (noting the “stigma” that attaches to lawyers who file lawsuits seeking redress).

²¹⁷ See *Kelly*, 1999 WL 408416, at *1 (discussing suit sounding in contract because of termination); *Wieder*, 609 N.E.2d at 106 (discussing wrongful discharge claim); Anon, *supra* note 210, at 1193–96 (discussing *Wieder* and *Kelly*); see also Long, *supra* note 16, at 1076–84 (describing the trade-off between interests of employers and the public, and summarizing different approaches that courts have used in such cases).

an attorney for actions they have taken in furtherance of their ethical responsibilities.²¹⁸ Courts may recognize two primary claims. The first, a contractual one, is that an employer breaches an “implied-in-law obligation” when it takes any action (such as discharge) that interferes with an employee’s compliance with their ethical obligations.²¹⁹ In fact, this theory has been adopted by New York courts, which ruled in favor of both Kelly and Wieder in their lawsuits.²²⁰ There are concerns, however, that this theory might not provide a satisfactory recovery—or any recovery at all, for that matter—in all circumstances when an attorney is fired for practicing ethically.²²¹

The second theory, based in tort, permits an employee attorney to bring a cause of action for retaliatory discharge.²²² Although this theory has significant potential, it can only apply if the jurisdiction recognizes the lawyer ethics code as providing a source of public policy that can underlie such a claim.²²³ Legislative enactments, such as criminal statutes, commonly provide such a source; for example, if an employer terminates an employee because of the employee’s unwillingness to engage in their employer’s illegal activities or for reporting their employer’s illegal conduct, the employee may have a cause of action.²²⁴ Although some jurisdictions, such as California, have extended the principle of deriving public policy from statutes to compliance with a lawyer’s ethical obligations, others have declined to do so.²²⁵

²¹⁸ See Margaret Kline Kirkpatrick, Comment, *Partners Dumping Partners: Business Before Ethics* in *Bohatch v. Butler & Binion*, 83 MINN. L. REV. 1767, 1774–79 (1999) (discussing at-will employment and possible exceptions for lawyers); Long, *supra* note 16, at 1076–77 (identifying the “split” in approaches to the issue).

²¹⁹ See *Wieder*, 609 N.E.2d at 110 (finding there to be a valid contractual claim); Cynthia L. Gendry, Comment, *Ethics—An Attorney’s Duty to Report the Professional Misconduct of Co-Workers*, 18 S. ILL. U. L.J. 603, 608 (1994) (discussing the court’s key holding in *Wieder*).

²²⁰ See Richard W. Painter, *Professional Responsibility Rules as Implied Contract Terms*, 34 GA. L. REV. 953, 956 (2000) (discussing the *Wieder* decision for plaintiff on breach of contract claim); Anon, *supra* note 210, at 1196 (discussing the *Kelly* decision).

²²¹ See Long, *supra* note 16, at 1079–80 (describing the limitations of the doctrine).

²²² *Id.* at 1080. See generally Kenneth J. Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility*, 92 DICK. L. REV. 777 (1988) (proposing the action for retaliatory discharge).

²²³ See Wilbur, *supra* note 222, at 786–87 (describing the standards for public policy in discharge contra to public policy suits); Long, *supra* note 16, at 1081 (noting requirement to locate a source setting out the policy that the termination contravenes); Oldham & Whitley, *supra* note 138, at 883–84 (stating the requirement that a retaliatory discharge be against public policy).

²²⁴ See Long, *supra* note 16, at 1082–83 (discussing common categories of retaliatory discharge cases); see also Terri Martin Kirik, *Retaliatory Discharge for Attorney-Employees in Private Practice: To Do, or Not to Do, the “Right Thing,”* 33 J. MARSHALL L. REV. 383, 391 (2000) (noting that “[p]ublic policy may be codified in a statute”). Some states have enacted whistleblower statutes that specify categories of protected conduct and identify the ways in which reporting must occur. See Kirik, *supra*, at 390–91 (discussing state wrongful discharge statutes).

²²⁵ See Genna H. Rosten, Annotation, *Wrongful Discharge Based on Public Policy Derived from Professional Ethics Codes*, 52 A.L.R.5th 405, §§ 3[a], 4[a] (1997) (collecting cases from jurisdictions

A notorious case espousing the latter view is *Jacobson v. Knepper & Moga, P.C.*, an Illinois case featuring an associate who was terminated after he alerted a partner about the firm's ongoing practices of making false statements as to venue in court filings.²²⁶ In reaching its decision, the majority, astonishingly, used the associate's mandatory reporting obligations not as a source of public policy under which he warranted protection but rather as the very reason to deny protection.²²⁷ The opinion reasoned that because the attorney was already under an ethical obligation to report misconduct, there were "sufficient safeguards" in place to ensure that the firm's misconduct would be reported.²²⁸ The dissent flatly called out the practical effect of this decision on associates having knowledge of misconduct within their firms: "in certain circumstances, it is economically more advantageous to keep quiet than to follow the dictates of the Rules of Professional Conduct."²²⁹

Thus far, the majority of jurisdictions that have been asked to recognize a contract- or tort-based cause of action for discharged attorneys have done so.²³⁰ Yet the parameters of these court-fashioned doctrines are not well-defined, and the recognition of claims is quite fact-specific.²³¹ Furthermore, even jurisdictions that recognize a cause of action for discharged associates might not extend it to partners given the differences in the nature of the relationship and obligations owed.²³² All of this means that attorneys who are contemplating

on both sides of the issue). *Compare* Gen. Dynamics Corp. v. Superior Ct., 876 P.2d 487, 501 (Cal. 1994) (recognizing doctrine), *with* Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 896 So. 2d 787, 789, 791 (Fla. Dist. Ct. App. 2005) (declining to recognize doctrine under whistleblower statute and public policy claim).

²²⁶ 706 N.E.2d 491, 492–93 (Ill. 1998); *see* Richmond, *supra* note 95, at 257 (describing *Jacobson*); Greenbaum, *supra* note 3, at 279 n.106 (noting the criticism of *Jacobson*).

²²⁷ *See Jacobson*, 706 N.E.2d at 493 (holding that public policy was fairly protected by the disciplinary rules alone).

²²⁸ *Id.* at 493–94; *see also* Richmond, *supra* note 95, at 257 (calling *Jacobson* "a wretched decision").

²²⁹ *Jacobson*, 706 N.E.2d at 494 (Freeman, C.J., dissenting); *see* Ott & Newton, *supra* note 17, at 763 (describing the contrast between the majority and dissent).

²³⁰ *See* ROTUNDA & DZIENKOWSKI, *supra* note 215, § 5.2-2 (collecting cases and noting that the trend is toward protection).

²³¹ *See* Long, *supra* note 16, at 1077–84 (describing the wide range of approaches for retaliatory discharge and noting that attorneys have to fit their claim into "one of several of these cubbyholes" to be successful); Greenbaum, *supra* note 3, at 279 (noting that the protection offered by the doctrine may depend on a determination of the nature of the duty to inform).

²³² *See, e.g.,* Bohatch v. Butler & Binion, 977 S.W.2d 543, 546–47 (Tex. 1998) (declining to recognize a cause of action for breach of fiduciary duty when a partner was expelled for making a good faith internal report about suspected overbilling by another partner). *See generally* Kirkpatrick, *supra* note 218 (arguing that *Bohatch* was wrongly decided). *But see* David A. Grenardo, *Long Live Bohatch: Why a Law Firm Partner Can Be Expelled for Following the Rules of Professional Conduct*, 34 MISS. COLL. L. REV. 15, 18 (2015) (suggesting that *Bohatch* was correctly decided by relying on partnership principles).

whether to report have little assurance that they will be protected—either by their firm or by the courts—if they go forward.

Nor do the Model Rules or associated disciplinary procedures expressly protect those who make reports from retaliation.²³³ The Model Rules, for their part, do not explicitly prohibit a lawyer from taking an adverse action against an attorney who shares concerns about unethical conduct with someone in the firm or makes a report.²³⁴ Although a disciplinary agency could credibly argue that such retaliation is prejudicial to the administration of justice, it does not appear that jurisdictions have been sanctioning lawyers on that basis.²³⁵ Such a provision would not eliminate retaliation outright, but its existence might act as a deterrent or at least provide a stronger basis for a court to recognize a retaliatory discharge cause of action.²³⁶

Under the disciplinary procedures in most states, attorney complainants must identify themselves and might be required to participate in an ongoing manner in the investigation and proceedings.²³⁷ Although the attorney's identity initially may be confidential vis-à-vis members of the general public,²³⁸ it will not be shielded from the subject lawyer.²³⁹ Disciplinary agencies generally do not allow for anonymous reports, which means that the reporter can be certain that their identity will be shared with the subject lawyer—and anyone else with whom the subject lawyer shares that information.²⁴⁰

²³³ See MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N 2023) (providing no specific anti-retaliation provision).

²³⁴ See Long, *supra* note 15, at 822–23 (lamenting the lack of a specific anti-retaliation rule within the Model Rules and describing the benefits of having such a rule); Greenbaum, *supra* note 3, at 325 (advocating for such a rule).

²³⁵ See Long, *supra* note 15, at 820–22 (noting that disciplinary agencies could acknowledge that the Model Rules impliedly impose an obligation not to retaliate); Richmond, *supra* note 15, at 1846 (noting that Rule 8.4(d) likely includes retaliation as proscribed conduct); see also Greenbaum, *supra* note 3, at 325 (noting that the possibility that retaliation is already proscribed by the Rules “has gone largely unnoticed”).

²³⁶ Long, *supra* note 15, at 822–24 (suggesting that “the inclusion of such a rule might amount to the clear expression of public policy courts require in deciding whether to recognize a common law tort claim of retaliatory discharge”).

²³⁷ Richmond, *supra* note 15, at 1848; Brown, *supra* note 109, at 1603 (“Put simply, informing can be somewhat of an involved undertaking.”).

²³⁸ See MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 16 (AM. BAR ASS'N 2020) (explaining that, subject to limited exceptions, “[p]rior to the filing and service of formal charges in a discipline matter, the proceeding is confidential within the agency”).

²³⁹ See Humiston, *supra* note 88, at 10 (providing that the subject attorney will know who reported). But cf. Richmond, *supra* note 15, at 1848 (suggesting that the subject attorney “does not need to know” the reporter’s identity).

²⁴⁰ See, e.g., Humiston, *supra* note 88, at 10 (“The subject of the report is going to know who made the report because our [Minnesota] Office does not accept anonymous reports, except in a few circumstances.”); cf. Anthony D’Amato, *Self-Regulation of Judicial Misconduct Could Be Misregulation*, 89 MICH. L. REV. 609, 611–12 & 612 n.13 (1990) (discussing the fact that the model rules

All told, attorneys face a real possibility of repercussions, both informal and formal, if they choose to report another lawyer's misconduct.²⁴¹ They are given virtually no support by the state bar at the very time it is most critical.²⁴² In light of the hollow threat of disciplinary sanctions for violating one's mandatory reporting obligations, it is no surprise that most choose to remain silent.²⁴³

III. CARROTS AND STICKS AS INCENTIVES: A BASIC FRAMEWORK

As described in Part I, the mandatory reporting rule, including the threatened penalties for noncompliance, matches the structure of the contemporary stick-based approach to professional lawyer regulation.²⁴⁴ The Model Rules delineate the bare minimum for attorney conduct; a violation exposes an attorney to the risk of disciplinary action.²⁴⁵ Disciplinary agencies enforce the rules by sanctioning attorneys; that is, they sometimes impose the threatened stick.²⁴⁶ Although a few comments describe actions attorneys "should" take, that quasi-aspirational language is not coupled with anything tangible that an attorney receives upon compliance; that is, the rules and related disciplinary processes typically do not induce ethical actions through carrots.²⁴⁷ Nevertheless, since the Model Rules's adoption in 1983, using carrots to incentivize desired behaviors has exploded, both in legal systems and in other aspects of society.²⁴⁸ This naturally leads to the question of how one should decide whether to induce an action through a stick or a carrot.

governing federal judicial conduct "require that the complainant sign the complaint," which could deter people "who are afraid of revealing their identity for fear of reprisals").

²⁴¹ See *supra* notes 199–240 and accompanying text (discussing potential negative consequences of reporting).

²⁴² See *supra* notes 214–240 and accompanying text (discussing the lack of employment protection for reporting attorneys).

²⁴³ See *supra* notes 138–194 and accompanying text (indicating that jurisdictions rarely discipline attorneys for violations of the reporting rule and suggesting that there is a low compliance rate).

²⁴⁴ See *supra* note 79 and accompanying text (noting that the Model Rules primarily use binding obligations); MODEL RULES OF PRO. CONDUCT pmbl. 19 (AM. BAR ASS'N 2023) (stating that attorneys can be disciplined for Rule violations).

²⁴⁵ MODEL RULES OF PRO. CONDUCT pmbl. 19; see Barton, *supra* note 65, at 438 (noting that the Model Rules constitute minimum standards).

²⁴⁶ See MODEL RULES OF PRO. CONDUCT pmbl. 16 (noting that enforcing the Model Rules requires discipline in the final instance).

²⁴⁷ See *id.* pmbl. 14 (stating that the comments only offer guidance); Barton, *supra* note 65, at 421–22 (noting that disciplinary agencies focus on baseline standards, which have become "a quasi-criminal set of rules").

²⁴⁸ See De Geest & Dari-Mattiacci, *supra* note 26, at 343 (noting the increase of carrots in modern law); Ezra Goldschlager, *Praise and the Law*, 49 CREIGHTON L. REV. 353, 356 (2016) (summarizing areas in which carrots have become more common); *About the Model Rules*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [<https://perma.cc/6C56-D823>] (noting adoption of the Model Rules in 1983); see also Brian Galle, *The Tragedy of the Carrots: Economics and Politics in the Choice of Price Instruments*, 64

This Part lays out a preliminary framework to answer that question.²⁴⁹ Section A begins with an explanation of key terms and concepts to provide a common reference point for the discussion.²⁵⁰ Then, drawing upon the extensive study of the phenomenon by law and economics scholars, Section B sets out the conditions that favor the use of one or the other incentive.²⁵¹ Finally, Section C draws illustrative examples from criminal law and tort law to demonstrate how carrots and sticks have been used in those settings.²⁵²

A. Defining Key Terms and Concepts

There is no consensus on the definitions of “carrot” and “stick”; whereas some use the two terms in the narrower monetary sense, this Article takes a broader view.²⁵³ According to Brian Galle, a carrot is “a welcome change against a given, usually pre-existing, policy baseline; a stick is simply an unwelcome change in the opposite direction.”²⁵⁴ The definition is an apt one because it highlights the fact that whether a tool is considered a “stick” or “carrot” depends on one’s frame of reference.²⁵⁵

This Article likewise adopts a broad view of what incentives may operate as a stick or carrot. Two of the most common sticks, which are frequently employed in criminal and disciplinary systems, are sanctions and fines—though interestingly, lawyer disciplinary agencies generally have prohibited the latter.²⁵⁶ Carrots are traditionally conceived of as direct monetary incentives, such as a tax incentive to an individual who undertakes a certain activity.²⁵⁷ In the intellectual property realm, the primary carrot given to inventors and authors is

STAN. L. REV. 797, 802–03 (2012) (positing that the increase in carrots may be for political reasons, yet disagreeing with that as a justification).

²⁴⁹ See *infra* notes 253–342 and accompanying text.

²⁵⁰ See *infra* notes 253–269 and accompanying text.

²⁵¹ See *infra* notes 270–309 and accompanying text.

²⁵² See *infra* notes 310–342 and accompanying text.

²⁵³ See, e.g., De Geest & Dari-Mattiacci, *supra* note 26, at 354 (noting confusion as to the definitions, but stating that “[c]arrots and sticks are both transfers of wealth that induce the citizen to comply with a rule”).

²⁵⁴ Galle, *supra* note 248, at 803–04.

²⁵⁵ See *id.* at 804 (defining “stick” or “carrot” as variation from normative baseline).

²⁵⁶ See De Geest & Dari-Mattiacci, *supra* note 26, at 343 (using fines and negative sanctions as examples of sticks, and stating that criminal law is a stick-based field and that administrative agencies use fines as sticks); Bené, *supra* note 196, at 907–09 (stating that most jurisdictions and the ABA prohibit the use of fines in lawyer discipline, yet arguing that fining lawyers might be more appropriate than imposing disciplinary sanctions).

²⁵⁷ See De Geest & Dari-Mattiacci, *supra* note 26, at 354 (describing carrots as payments to individuals); see, e.g., Giuseppe Dari-Mattiacci & Alex Raskolnikov, *Unexpected Effects of Expected Sanctions*, 50 J. LEGAL STUD. 35, 61 (2021) (discussing the operation of such a tax incentive).

the limited right to exclude others from using the invention or work—an indirect monetary incentive.²⁵⁸

But carrots can extend beyond financial rewards. In the criminal or quasi-criminal context, informants or whistleblowers might receive a reduction in charges or leniency in sentencing, either of which would be considered a carrot in relation to what the whistleblowers might have received otherwise.²⁵⁹ The creation of a safe harbor provision likewise can serve as a carrot to an actor who otherwise might be at risk of criminal or civil liability.²⁶⁰ Even praise can serve as an effective carrot in some circumstances.²⁶¹

The “payment” of a stick or carrot occurs when an individual has been observed and found in violation or compliance, respectively.²⁶² Two sets of costs are associated with implementing any incentive-based system. Monitoring costs are those expenses incurred before determining whether someone is in compliance.²⁶³ Processing costs are those expenses incurred afterward, both those to determine whether a stick or carrot in fact should be imposed (such as costs of prosecution) and those associated with its imposition (such as costs of incarceration or paying a financial reward).²⁶⁴

Sticks and carrots have distributional effects that work in opposite directions. Whereas a stick extracts resources from a violator and transfers them to the government, a carrot transfers resources from the government to a complier.²⁶⁵ Two concerns with distributional effects may arise. The first is the extent to which an incentive system causes too much or too little redistribution of

²⁵⁸ See Ayres & Kapczynski, *supra* note 26, at 1785, 1790 (describing this exclusion right as a “traditional” carrot).

²⁵⁹ See, e.g., Sandra Marco Colino, *The Perks of Being a Whistleblower: Designing Efficient Leniency Programs in New Antitrust Jurisdictions*, 50 VAND. J. TRANSNAT’L L. 535, 549–51, 561 (2017) (discussing the types of carrots that may be offered to corporate whistleblowers, but noting that overgenerous rewards might carry “a risk of strategic exploitation”).

²⁶⁰ See, e.g., Friedman & Ponomarenko, *supra* note 29, at 1898 (advocating for the use of safe harbors to incentivize democratic police procedures); Jonathan Rohr & Aaron Wright, *Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets*, 70 HASTINGS L.J. 463, 519–20 (2019) (proposing that SEC regulators be allowed to offer a safe harbor from civil liability as a carrot so that entities associated with blockchain adopt measures to protect against fraud).

²⁶¹ See, e.g., Goldschlager, *supra* note 248, at 366–68 (stating that “significantly better outcomes are ‘achieved by [drug courts] that offered higher and more consistent levels of praise and positive incentives from the judge’” (quoting Nat’l Ass’n of Drug Court Pros., 1 ADULT DRUG COURT BEST PRACTICE STANDARDS 31 (2013))).

²⁶² De Geest & Dari-Mattiacci, *supra* note 26, at 354–55.

²⁶³ See *id.* at 359 (describing ex ante monitoring costs).

²⁶⁴ See *id.* (distinguishing between monitoring costs (ex ante) and processing costs (ex post)).

²⁶⁵ Galle, *supra* note 248, at 805; Brian Galle, *Tax, Command . . . or Nudge?: Evaluating the New Regulation*, 92 TEX. L. REV. 837, 851 (2014).

resources.²⁶⁶ The former may be the case, for example, where a particularly attractive carrot is easy to obtain and leads to the unnecessary depletion of government resources.²⁶⁷ The second is that an incentive system may create distributional distortions, which can arise when a particular subset of the monitored population is likely to disproportionately benefit or be penalized by a carrot or stick system, respectively.²⁶⁸ For instance, if the effects of a particular tax program are more likely to fall on people from poorer households, that distortion might militate in favor of a different approach—one that either redesigns the stick or replaces it with a carrot.²⁶⁹

B. Criteria for Determining Which Type of Incentive to Implement

Starting from this baseline understanding of sticks and carrots, the question is how a decision maker should determine which type of incentive to implement. As an initial matter, this Article will draw upon the law and economics literature and adopt a rational choice framework.²⁷⁰ Other dimensions certainly could factor into this decision, however, including the psychological effects of the incentive on behavior²⁷¹ and the political realities that might favor one type of incentive over the other.²⁷² It is also important to acknowledge that the choice between the use of carrots and sticks by a particular regulator is not necessarily a mutually exclusive one, which is why there may be a mixture of both within a broader legal system.²⁷³

²⁶⁶ See Galle, *supra* note 248, at 814–16 (identifying situations in which either carrots or sticks would be costlier).

²⁶⁷ See Galle, *supra* note 265, at 851–52 (noting that producers “might altruistically produce the good without subsidy,” thereby wasting government resources by overpaying).

²⁶⁸ De Geest & Dari-Mattiacci, *supra* note 26, at 359–61 (discussing reasons why distributional distortions “are socially costly”); see Galle, *supra* note 265, at 875 (noting the advantages of carrots when a system would impact poorer families).

²⁶⁹ See Galle, *supra* note 248, at 817–19 (identifying that vice taxes implicate these concerns); see also Ayres & Kapczynski, *supra* note 26, at 1785, 1787 (discussing the advantages and disadvantages of using sticks and nontraditional carrots in intellectual property law).

²⁷⁰ See De Geest & Dari-Mattiacci, *supra* note 26, at 346 (describing the rational choice framework as standard).

²⁷¹ See Emily A. Satterthwaite, *Rewarding Honest Taxpayers: An Experimental Assessment*, 22 FLA. TAX REV. 200, 207 (2018) (noting psychological research touting the “efficacy of carrots in inducing desired behavioral outcomes”); Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AM. J. INT’L L. 195, 197 (2021) (discussing the psychological effects of rewards in international law).

²⁷² See, e.g., Galle, *supra* note 248, at 802–03 (lamenting the “political tragedies that lead us to choose carrots over sticks,” and believing that the political desire for carrots should not be dispositive); Jason Scott Johnston, *Regulatory Carrots and Sticks in Climate Policy: Some Political Economic Observations*, 6 TEX. A&M L. REV. 107, 108 (2018) (describing the relative durability of legislative carrots that incentivize environmental harms).

²⁷³ See, e.g., Ayres & Kapczynski, *supra* note 26, at 1783 (positing that, in the context of intellectual property law, there are “circumstances in which sticks may be a good policy choice, either alone

Gerrit De Geest and Giuseppe Dari-Mattiacci, two prominent scholars in this area, distilled this inquiry into the degree of complexity involved in the setting.²⁷⁴ In a “simple” setting, the use of sticks will be more efficient in promoting compliance, but as the setting becomes more “complex,” sticks will lead to higher costs and distributional distortions, militating in favor of carrots.²⁷⁵

What makes a setting a “simple” one? They set out two criteria. The first is that regulated individuals must have relatively equal compliance costs; that is, they must spend the same amount of money (or undertake relatively the same amount of effort) to avoid a violation.²⁷⁶ The second is that the regulator must be “fully informed” about those compliance costs.²⁷⁷ Armed with this knowledge, the regulator will know how high to calibrate the stick to ensure compliance.²⁷⁸

At this point, using a stick should be exceedingly more efficient because, at least in theory, everyone would comply to avoid the stick.²⁷⁹ Compliance would be attained and processing costs minimized, and no distributional distortions would occur because everyone would incur similar compliance costs and not receive a stick.²⁸⁰ Were a carrot-based system imposed in this circumstance, everyone, again, would comply—this time in hopes of being given a carrot.²⁸¹ The problem, however, is that this system would increase processing costs because, presumably, many people would receive a payout.²⁸²

A setting becomes more complex when one or both of these criteria do not hold.²⁸³ Compliance costs often differ dramatically from person to person.²⁸⁴ Using a stick in this circumstance could lead to distributional distortions: those having higher compliance costs would either have to expend more resources to comply or risk having a stick imposed on them, leaving them

or—likely more often—in conjunction with traditional or nontraditional carrots”); Schwartz & Goldberg, *supra* note 30, at 362–63 (touting the use of carrots and sticks in tandem to promote corporate compliance).

²⁷⁴ See De Geest & Dari-Mattiacci, *supra* note 26, at 345 (propounding general rule to compare sticks and carrots).

²⁷⁵ *Id.* at 345–46; see also Zachary E. Shapiro et al., *Designing an Americans with Abilities Act: Consciousness, Capabilities, and Civil Rights*, 63 B.C. L. REV. 1729, 1786 (2022) (applying this framework to disability regulation).

²⁷⁶ See De Geest & Dari-Mattiacci, *supra* note 26, at 366 (requiring equal effort costs for simple systems).

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 366–67.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 367.

²⁸² *Id.* at 366.

²⁸³ *Id.* at 345.

²⁸⁴ See *id.* at 367 (describing the situation where compliance costs differ).

worse off than others.²⁸⁵ This danger is referred to as “singling-out,” which can happen when a generally framed regulation disproportionately affects a smaller subset of the population.²⁸⁶ Carrots are more appropriate because they can be tailored to compensate people in accordance with the efforts they have to expend, thereby reducing distributional distortions.²⁸⁷

Carrots are also preferable when a regulator has incomplete information about individuals’ compliance costs: that is, the regulator cannot tell who can comply at a cost reasonable to them and who cannot.²⁸⁸ This is known as a type of specification problem.²⁸⁹ For instance, if the government wanted to induce the creation of valuable songs, it would make no sense for it to implement a stick-based regime requiring all citizens to comply under threat of criminal sanctions or fines.²⁹⁰ Although Taylor Swift would have no trouble meeting this demand, most of us would be unable to comply.²⁹¹ This would have three negative effects: (1) it would increase the regulator’s processing costs because it would need to impose a stick on a large percentage of the monitored population; (2) it would create distributional distortions because those unable to comply (or who could comply but at a high cost) would be disproportionately impacted; and (3) those who could not comply would abide in constant fear of the stick.²⁹² A carrot-based system would incentivize Taylor Swift and others who are able to comply at reasonable costs, yet not drive up processing costs or create distributional distortions to the same extent.²⁹³ In fact, these principles serve to explain why intellectual property law has developed as predominantly a carrot-based system.²⁹⁴

²⁸⁵ *Id.* at 367–69; *see* Galle, *supra* note 248, at 818–19 (discussing the concept of sticks in relation to negative tax incentives, such as vice taxes).

²⁸⁶ *See* De Geest & Dari-Mattiacci, *supra* note 26, at 373 (describing impact of individualized rules); Ayres & Kapczynski, *supra* note 26, at 1804 (describing how singling-out has the effect of artificially making a subset of individuals poorer than they otherwise should be).

²⁸⁷ De Geest & Dari-Mattiacci, *supra* note 26, at 367–69.

²⁸⁸ *Id.* at 370.

²⁸⁹ *Id.* at 372–73; *see* Ayres & Kapczynski, *supra* note 26, at 1803–04 (describing the problem of the lack of legislator knowledge about citizen behavior).

²⁹⁰ *See* De Geest & Dari-Mattiacci, *supra* note 26, at 370 (posing hypothetical).

²⁹¹ *See id.* at 370–73 (discussing the use of carrots to induce the creation of songs and other intellectual property).

²⁹² *See id.* at 371–73 (discussing the downsides to sticks in instances where compliance to a norm is low).

²⁹³ *See id.* at 370 (noting that the more people who cannot comply, the more the usage of sticks drives up costs).

²⁹⁴ *See id.* at 373–74 (describing the use of carrots in intellectual property law to resolve the specification problem); Ayres & Kapczynski, *supra* note 26, at 1799–800 (identifying the traditional use of carrots to incentivize the creation of intellectual property yet positing that there may be instances in which the circumstances weigh in favor of employing innovation sticks).

Beyond the simple/complex distinction proffered by Professors De Geest and Dari-Mattiacci, Professor Galle and others have paid significant attention to whether the underlying activity produces negative or positive externalities.²⁹⁵ Where the underlying activity produces negative externalities, the general rule of thumb is that it is more appropriately regulated using sticks.²⁹⁶ This is because the stick can be set high enough to ensure compliance (meaning that individuals create less of the negative externality) while keeping processing costs low—a win-win.²⁹⁷ Carrots are not a natural fit for activities producing a negative externality because the regulator would have to reward people for *not* engaging in the activity.²⁹⁸ Although an attractive carrot might induce people to comply, it would be at the expense of higher processing costs and the potential for people to engage in increasingly bad behavior in hopes of being offered a larger carrot.²⁹⁹

On the flip side, activities that produce positive externalities may be better induced through a carrot-based system.³⁰⁰ Although the regulator must make a payment to monitored individuals who undertake the activity, those payments are tied to the generation of positive externalities.³⁰¹ But there is a caveat: a carrot-based system will be efficient only in circumstances “where we would expect social underproduction” of the activity in question.³⁰² If the activity is already profitable or one that people would undertake out of altruism, a carrot is not needed.³⁰³ The inefficiency of carrots likewise would increase processing costs, which would call into question whether the benefit from the positive externality is worth the expense.³⁰⁴

²⁹⁵ See, e.g., Brian Galle, *Charities in Politics: A Reappraisal*, 54 WM. & MARY L. REV. 1561, 1600–01 (2013) (discussing positive or negative externalities in the context of charitable donations); Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT’L REV. L. & ECON. 309, 310 (1997) (positing that the use of sticks might be preferable to respond to international negative externalities).

²⁹⁶ Galle, *supra* note 248, at 813–14; see Donald Wittman, *Liability for Harm or Restitution for Benefit?*, 13 J. LEGAL STUD. 57, 71–72 (1984) (discussing general principles of externalities).

²⁹⁷ See Galle, *supra* note 248, at 809–13, 815 (providing a comprehensive explanation of the advantages of sticks for curbing negative externalities).

²⁹⁸ See *id.* at 817 (describing theory that morals mandate the disapproval of harmful activity).

²⁹⁹ See Brian Galle, *Carrots, Sticks, and Salience*, 67 TAX L. REV. 53, 60–61 (2013) (discussing why sticks are more effective for preventing negative externalities).

³⁰⁰ See, e.g., Wendy J. Gordon, *Of Harms and Benefits: Torts, Restitution, and Intellectual Property*, 34 MCGEORGE L. REV. 541, 546–47 & 547 n. 25 (2003) (identifying advantages of using subsidies and rewards in the context of tort law, where the activities provide benefits).

³⁰¹ See Galle, *supra* note 265, at 852 (noting the benefits of granting producers of positive externalities more resources); Amy L. Stein, *Renewable Energy Through Agency Action*, 84 U. COLO. L. REV. 651, 670 (2013) (discussing in relation to environmental law).

³⁰² See Galle, *supra* note 265, at 852 (describing defensible circumstances for carrots).

³⁰³ See Galle, *supra* note 299, at 61 (noting that positive externalities may still be produced from altruism).

³⁰⁴ See *id.* at 60–61 (describing how carrots may be costly when implemented).

In terms of ease of design, a carrot-based system is preferable when the regulator does not know the upper limit of how much activity it wishes to induce—another type of specification problem.³⁰⁵ Once again, intellectual property law is a field in which the government does not know how many inventions or works of authorship it wishes to have created and how to assess the value of such creations, making a carrot-based system easier to create and administer.³⁰⁶

A final consideration in choosing between a carrot-based system and a stick-based system is the expected regulatory costs associated with violations or compliance.³⁰⁷ Whereas the processing costs on an individual basis will be highly fact-specific, the total cost will be heavily influenced by compliance rates.³⁰⁸ If compliance rates are high, then a stick-based system likely will cost less than a carrot-based system; however, the opposite will be true if compliance rates are low.³⁰⁹

C. Case Studies from Criminal Law and Tort Law

With these criteria in mind, this Section briefly explores how sticks and carrots have been implemented in criminal law and tort law. I selected these two fields because they share some commonalities with professional lawyer regulation, particularly in relation to one's obligations vis-à-vis third persons.³¹⁰

1. Criminal Law

Criminal law is a field overwhelmingly dominated by sticks.³¹¹ Lawmakers enact statutes proscribing certain behavior, and those who engage in that behavior are subject to criminal sanctions. On its face, the criminal justice system appears to fit all the criteria for favoring a stick-based approach: the set-

³⁰⁵ See Edward P. Lazear, *Labor Economics and the Psychology of Organizations*, 5 J. ECON. PERSPS. 89, 104 (1991) (discussing preference for bonuses in situations where the value increases above some point, in relation to employment contracts); Giuseppe Dari-Mattiacci & Gerrit De Geest, *Carrots, Sticks, and the Multiplication Effect*, 26 J.L. ECON. & ORG. 365, 368 (2010) (summarizing Lazear's arguments).

³⁰⁶ See De Geest & Dari-Mattiacci, *supra* note 26, at 373–74 (stating why the utilization of carrots in intellectual property law is justified).

³⁰⁷ Galle, *supra* note 248, at 811. See generally Wittman, *supra* note 296 (exploring administrative costs in fashioning rules to promote efficiency).

³⁰⁸ See De Geest & Dari-Mattiacci, *supra* note 26, at 359 (discussing the relationship between processing costs and compliance rates); Wittman, *supra* note 296, at 63 (providing an example where compliance is widespread, so using carrots is costly).

³⁰⁹ See Wittman, *supra* note 296, at 62–63 (illustrating these principles through a hypothetical involving the cost of fires started from sparks off of a railroad); Dari-Mattiacci & De Geest, *supra* note 305, at 368 (summarizing Wittman's research).

³¹⁰ See, e.g., *infra* notes 313–323 (discussing criminal informants who inform on third parties).

³¹¹ Dari-Mattiacci & De Geest, *supra* note 305, at 367; cf. Galle, *supra* note 30, at 472–73 (positing that the traditional stick-based view has led to a broken criminal justice system).

ting is a “simple” one, the individual’s behavior generally creates negative externalities, and lawmakers theoretically should be able to set the punishment high enough to deter people from committing the offense.³¹²

Upon closer inspection, however, the government has chosen to employ carrots in a number of circumstances, either in addition to or in lieu of sticks. The most well-known and contentious use of carrots is related to the use of informants.³¹³ Informants share information with law enforcement personnel about criminal activity in order to receive “a covertly arranged tangible benefit.”³¹⁴ Most informants are themselves currently incarcerated, charged with an offense, and/or are involved with ongoing criminal activity.³¹⁵ These informants may be enticed by a number of carrots, including a “more lenient outcome in their criminal case, forbearance from arrest or prosecution, a financial payoff, [or] benefits directed to a third party such as a relative.”³¹⁶ Furthermore, some informants are afforded the cloak of confidentiality, shielding their identities from disclosure to defendants unless needed to ensure due process.³¹⁷

Why offer these carrots to people whom law enforcement knows or suspects have committed crimes? There are several reasons. First, specification problems exist.³¹⁸ Law enforcement does not necessarily know who has critical information of interest, and it would be inequitable to sanction anyone who had no information to share.³¹⁹ Second, individuals are differently situated with

³¹² See De Geest & Dari-Mattiacci, *supra* note 26, at 372 (using criminal law as an example of a simple setting); cf. Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 237–39 (2005) (discussing research that found “a significant effect of sanctions on criminal activity”). But see generally Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003) (disagreeing with the idea that changes in criminal law doctrine can optimize deterrence).

³¹³ See, e.g., Kristen Underhill, *Money That Costs Too Much: Regulating Financial Incentives*, 94 IND. L.J. 1109, 1116 (2018) (discussing the use of informants); Peter A. Joy & Rodney J. Uphoff, *Sentencing Reform: Fixing Root Problems*, 87 UMKC L. REV. 97, 105 (2018) (suggesting that the use of carrots for informants is unfair).

³¹⁴ PRINCIPLES OF THE L., POLICING § 12.01 cmts. a, b (AM. L. INST., Tentative Draft No. 4, 2022); see Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 651–52 (2004) (elaborating on key terms as to informants).

³¹⁵ See Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 747–48 (2016) (taxonomizing informants).

³¹⁶ PRINCIPLES OF THE L., POLICING § 12.01 cmt. b.; see also Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1379–80 (2014) (discussing benefits that may be provided to “[j]ailhouse snitches”).

³¹⁷ See Thomas A. Mauet, *Informant Disclosure and Production: A Second Look at Paid Informants*, 37 ARIZ. L. REV. 563, 569–70 (1995) (describing the general rule and the circumstances in which disclosure of an informant’s identity might be required under due process); *United States v. Raddatz*, 447 U.S. 667, 679 (1980) (tying the limited disclosure right to the Due Process Clause).

³¹⁸ See *supra* notes 288–289 (defining specification problems).

³¹⁹ See De Geest & Dari-Mattiacci, *supra* note 26, at 370 (describing a hypothetical where a government imposes a fine for not informing).

regard to the costs of sharing information. For those not currently under investigation, their revelation could open them up to charges because they too were involved in criminal activity.³²⁰ For others, sharing the information could put them at risk of physical or financial retaliation.³²¹ Law enforcement can tailor the carrot to align with the informant's effort and costs in a way that would not be practicable in a stick-based system.³²² That is not to say there are no criticisms of this system—in particular, critics cite the risk of creating incentives to provide false information³²³—but it arguably yields more beneficial information than would a stick-based system.

2. Tort Law

Similarly, tort law historically has been designed as a stick-based system.³²⁴ Someone who has been harmed by another person can recover damages from that person provided they can prove the person committed an intentional tort, acted negligently, or was engaging in the type of activity that made them strictly liable.³²⁵ Although this setting is arguably more “complex” than criminal law at times, given the difficulties in pinning down the amount of care required from each person, we expect that due care will be the norm rather than the exception.³²⁶ Accordingly, a stick-based system should minimize the transfer of resources and processing costs.³²⁷

³²⁰ Cf. Mary Nicol Bowman, *Truth or Consequences: Self-Incriminating Statements and Informant Veracity*, 40 N.M. L. REV. 225, 251 (2010) (explaining how the fact that an informant's statement also implicates the informant may make the statement more trustworthy than otherwise).

³²¹ See Stephen Whetstone, *Changing Ohio's Snitch Code: Require a Conviction in the Leniency for Informant Work Exchange*, 39 CAP. U. L. REV. 85, 111 (2011) (advocating for confidentiality for informants “because potential informants would likely fear both being labeled as a snitch and suffering reprisals from the targets of their informing”); Colino, *supra* note 259, at 550 (describing concerns that whistleblowers would have about financial retribution).

³²² See De Geest & Dari-Mattiacci, *supra* note 26, at 367–69 (noting that carrots can be individualized to account for high compliance costs).

³²³ See, e.g., Covey, *supra* note 316, at 1376 (calling jailhouse informant testimony “[f]undamentally and [p]ervasively [u]nreliable”); *Informing Injustice: The Disturbing Use of Jailhouse Informants*, INNOCENCE PROJECT (Mar. 6, 2019), <https://innocenceproject.org/news/informing-injustice-the-disturbing-use-of-jailhouse-informants/> [<https://perma.cc/NQ9H-9VCP>] (describing cases in which jailhouse informants provided false information to law enforcement authorities).

³²⁴ Dari-Mattiacci & De Geest, *supra* note 305, at 367; see Wittman, *supra* note 296, at 57 (noting the traditional view that the government creates stick-based remedies).

³²⁵ See 74 AM. JUR. 2D *Torts* §§ 1, 7–9, 14, 17, 18 (2023) (describing the elements of a tort).

³²⁶ See *id.* §§ 10–11 (stating that a tort plaintiff must show that a duty was owed to them, but that there is also a general duty to avoid harming others); Wittman, *supra* note 296, at 63 (calling the efficient holding in the negligence setting “the typical case”).

³²⁷ See De Geest & Dari-Mattiacci, *supra* note 26, at 345 (stating that in settings where the costs of compliance are equal among citizens, and the legislator can value these costs, sticks would be a better option than carrots).

Nevertheless, jurisdictions at times decline to impose a stick—and may even offer a carrot.³²⁸ Most states impose no general duty on an individual to rescue another who is in peril.³²⁹ This is true even when the assistance required would be easy to provide and would not put the would-be rescuer in any danger of harm.³³⁰ To be sure, some courts and legislatures have adopted exceptions to the general lack of a duty, such as when there is a special relationship between the parties, but those ordinarily are limited in scope by their context.³³¹

Instead, states have attempted to incentivize rescue by offering a carrot. All fifty states have passed some form of a “Good Samaritan” statute, which immunizes from tort liability those who voluntarily provide emergency medical care to others, subject to limited exclusions.³³² There is considerable variation in how these statutes operate; although some states limit protection under the statute to emergency or medical professionals, others extend it to anyone providing assistance.³³³ Although there has been some discussion about whether rescue should be further incentivized by systematically offering financial carrots *ex ante* (such as by establishing a fund to compensate rescuers),³³⁴ at the moment, other carrots may be sporadically bestowed upon rescuers *ex post* (such as prizes and praise).³³⁵

Given the dominance of sticks in tort law, one may wonder why jurisdictions have deviated from that approach in this circumstance. When analyzed

³²⁸ Private actors, such as insurance carriers, are increasingly offering financial carrots in the form of insurance discounts as well. See Paul Stenquist, *Letting Your Insurer Ride Shotgun, for a Discounted Rate*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/16/business/car-insurance-app-discounts.html> [<https://perma.cc/SP9K-399H>] (describing tracking programs used by insurers).

³²⁹ See Gordon, *supra* note 300, at 544 (noting a general rule against such a duty); Victor D. López & Eugene T. Maccarrone, *Should Emergency Good Deeds Go Unpunished? An Analysis of the Good Samaritan Statutes of the United States*, 45 RUTGERS L. REC. 105, 135–36 (2018), https://lawrecord.com/files/45_Rutgers_L_Rec_105.pdf [<https://perma.cc/J5FL-VEKV>] (providing information on the five states that impose an obligation to assist under some circumstances).

³³⁰ See Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1460 (2008) (describing a hypothetical where failing to shout a warning would not cause liability).

³³¹ See Levmore, *supra* note 27, at 899–900, 936 (identifying some special relationships and noting that special relationships arise only when there is only one best-situated rescuer); Amelia H. Ashton, *Rescuing the Hero: The Ramifications of Expanding the Duty to Rescue on Society and the Law*, 59 DUKE L.J. 69, 72–73 (2009) (noting the expansion of categories yet pushing back against it).

³³² Danny R. Veilleux, Annotation, *Construction and Application of “Good Samaritan” Statutes*, 68 A.L.R.4TH 294, 295 §§ 1[a], 2[a] (1989); see Dov Waisman, *Negligence, Responsibility, and the Clumsy Samaritan: Is There a Fairness Rationale for the Good Samaritan Immunity?*, 29 GA. ST. U. L. REV. 609, 627 (2013) (discussing the history of the Good Samaritan statutes, starting in 1959).

³³³ Veilleux, *supra* note 332, at 295 § 2[a]; see Waisman, *supra* note 332, at 631 (summarizing the various approaches in different jurisdictions).

³³⁴ See, e.g., Levmore, *supra* note 27, at 882 (positing that the law might give rewards to rescuers).

³³⁵ See De Geest & Dari-Mattiacci, *supra* note 26, at 376 (describing the present use of carrots to reward rescuers).

using the criteria outlined above, however, the distinction has support. Beyond the fact that the activity (attempted rescue) generally results in positive externalities, which militates in favor of carrots, imposing a duty on everyone to rescue others in peril could result in vastly different compliance costs.³³⁶ Whereas one person might only have to make an emergency phone call to fulfill their duty, another might have to put their life in danger.³³⁷ These different costs could lead to distributional distortions, which inevitably leave some worse off than others.³³⁸

Considerable specification problems also exist. When multiple people have the ability to rescue, how to determine who among them should be required to make an attempt is unclear.³³⁹ Indeed, this specification problem may be a reason Good Samaritan laws in some states are limited to particular classes of professionals: the carrot is dangled in front of people we believe will have the proper training and experience to successfully provide emergency assistance to another.³⁴⁰ In fact, the history of these statutes reveals that they came about because of the belief that some physicians were reticent to provide assistance out of fear of liability.³⁴¹ In light of concerns about the “social underproduction” of this beneficial activity, it is perhaps no surprise that jurisdictions swiftly adopted an immunity carrot.³⁴²

IV. CONSTRUCTING A REPORTING SYSTEM WITH APPROPRIATE INCENTIVES

Although multiple legal and nonlegal systems have begun to recognize the advantages of offering carrots in more complex settings to induce individuals to take actions that produce positive externalities, those charged with regulating

³³⁶ See *id.* at 367–68 (using a hypothetical regarding a sinking boat to illustrate how rescue is easier for some than others); Galle, *supra* note 299, at 61 (noting that carrots function better to incentivize positive externalities rather than to disincentivize negative externalities).

³³⁷ See De Geest & Dari-Mattiacci, *supra* note 26, at 374 (noting that jurisdictions have carved out exceptions to the trend against sticks for non-rescue only “when the effort costs (including safety risks for the rescuer) are relatively small and homogeneous across the population, so that there is *no singling-out problem* (that is, there are no significant distributional distortions)”).

³³⁸ See *supra* notes 285–287 and accompanying text (discussing distributional distortions).

³³⁹ See Levmore, *supra* note 27, at 933–35 (noting that it may be difficult to show causation with multiple non-rescuers).

³⁴⁰ See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 312 (2d ed. 2023) (discussing the variation among states, with some limiting protection to medical professionals and others extending to a larger group but not to the general public in all circumstances).

³⁴¹ Waisman, *supra* note 332, at 628–29.

³⁴² See Galle, *supra* note 265, at 852 (discussing the efficiency of a carrot-based system in such circumstances); *supra* note 302 and accompanying text (same); Vincent C. Thomas, *Good Samaritan Law: Impact on Physician Rescuers*, 17 WYO. L. REV. 149, 151 (2017) (suggesting that the variation among jurisdictions as to their Good Samaritan laws still “significantly influences the confidence” of a physician in undertaking such an activity); Waisman, *supra* note 332, at 627 (noting that the other states quickly followed California in passing a Good Samaritan law).

attorneys continue to rely on the traditional, stick-based approach first adopted in the Model Code and refined by the Model Rules.³⁴³ Although the Model Rules are replete with sticks that have not served to adequately promote desirable ethical behaviors,³⁴⁴ the mandatory reporting rule is the most glaring failure.³⁴⁵

This Part employs the foregoing criteria to demonstrate why an attorney's reporting of lawyer misconduct should be incentivized with carrots rather than with sticks. Section A begins by identifying scenarios where an attorney might learn information that arguably should be reported (and where reporting would be desirable), and it highlights the obstacles and inequities that are created by the current system.³⁴⁶ Section B then wipes the slate clean and reimagines what an effective reporting system would look like using a carrot-based approach, drawing upon guidance from other areas on how to construct incentives to enhance compliance.³⁴⁷

A. Exposing the Flaws in the Current System

As described in Part I, the current reporting rule has three basic components: (1) the trigger, which is knowledge of another lawyer's serious violation of the Model Rules; (2) the action, which is reporting the misconduct to the appropriate authority; and (3) the incentive, which is the threat of discipline if the attorney fails to take required action.³⁴⁸ Accordingly, it is designed as a rudimentary stick-based system—and, in fact, resembles the design of a criminal statute or tort cause of action that threatens criminal or civil liability.³⁴⁹ The varied circumstances in which attorneys may glean knowledge of another lawyer's misconduct, however, are anything but simple. This Section will outline three of these scenarios and show how the threat of a sanction fails to properly incentivize the attorneys we most need to speak up.

³⁴³ See MODEL CODE Preliminary Statement (explaining that the disciplinary rules would be enforced by disciplinary action); MODEL RULES OF PRO. CONDUCT pmb. 19 (AM. BAR ASS'N 2023) (stating that violating the Rules is sanctionable).

³⁴⁴ See, e.g., Spaeth, *supra* note 73, at 1220 (doubting that Model Rule 1.1, the competence standard, can be adequately enforced).

³⁴⁵ See *supra* note 174 and accompanying text (discussing the underenforcement of Rule 8.3).

³⁴⁶ See *infra* notes 348–410 and accompanying text.

³⁴⁷ See *infra* notes 411–488 and accompanying text.

³⁴⁸ See MODEL RULES OF PRO. CONDUCT r. 3.8(a) (setting out knowledge standard and required action).

³⁴⁹ See De Geest & Dari-Mattiacci, *supra* note 26, at 343 (noting that criminal and tort law are paradigmatic stick-based systems).

1. Scenario #1: Attorney Learns of Law Firm Colleague's Misdeeds

The stories of Peter Kelly and Joe Wieder are apt ones for examining how the current rule has a differential impact on attorneys working in law firms.³⁵⁰ Neither associate had been complicit in the underlying misconduct; in fact, Wieder had received substandard representation from the lawyer that resulted in financial loss to him.³⁵¹ Both first took their concerns to senior management, who discouraged them from reporting to the disciplinary agency and admonished them to keep silent.³⁵² Their courage in raising concerns led not only to mistreatment at the firm but also to their termination.³⁵³

When thinking about times when disciplinary agencies should want to incentivize reporting, this kind of situation rises to the top. Early-career attorneys likely have more familiarity with the current ethics codes than those with more practice experience, which can make the former better positioned to identify unethical conduct.³⁵⁴ They also may not be fully acculturated to their law firm's norms, giving them a more objective lens through which they can assess the propriety of a colleague's conduct.³⁵⁵ Furthermore, in many instances the misconduct at issue may be toward clients, who are unaware of it.³⁵⁶ Indeed, Scott Wolas, the rainmaker who was the subject of Kelly's concerns, had been running a Ponzi scheme involving one hundred defrauded investors, and he fled the jurisdiction prior to being charged.³⁵⁷

³⁵⁰ See *supra* notes 209–217 and accompanying text (describing treatment of both associates).

³⁵¹ See *Kelly v. Hunton & Williams*, No. 97-CV-5631, 1999 WL 408416, at *2 (E.D.N.Y. June 17, 1999) (describing Kelly's suspicions of another attorney's fraud); *Wieder v. Skala*, 609 N.E.2d 105, 106 (N.Y. 1992) (describing how the other lawyer mishandled Wieder's matter).

³⁵² *Kelly*, 1999 WL 408416, at *3–5; *Wieder*, 609 N.E.2d at 106.

³⁵³ See *supra* notes 209–217 and accompanying text (describing retaliation against Kelly and Wieder).

³⁵⁴ See Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 925–26 (1997) (arguing that the ethics rules chill ethical discussion by enabling early-career attorneys to defer to supervisors' resolutions of such issues).

³⁵⁵ See Catherine Gage O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective*, 15 NEV. L.J. 671, 689–95 (2015) (identifying reasons why early-career attorneys might be better positioned than experienced attorneys to identify ethical issues). But see Long, *supra* note 15, at 793 (noting that associates may “look ‘up and around’ in order to learn what is expected of them” (quoting Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 643 (2005))).

³⁵⁶ See MODEL RULES OF PRO. CONDUCT r. 8.3 cmt. 1 (AM. BAR ASS'N 2023) (highlighting the importance of reporting in that circumstance); cf. Rice, *supra* note 354, at 925 (noting that associates may be most intimately familiar with cases, enabling them to spot ethical issues).

³⁵⁷ *Kelly*, 1999 WL 408416, at *2 (noting that investors claimed they lost more than \$30 million in the alleged ponzi scheme); see Debra Cassens Weiss, *Former Hunton Partner Who Disappeared 20 Years Ago Pleads Guilty to Fraud Using Assumed Identity*, A.B.A. J. (July 2, 2018), https://www.abajournal.com/news/article/former_hunton_partner_who_disappeared_20_years_ago_pleads_guilty_to_fraud_u [<https://perma.cc/QL8B-CD2X>] (describing Wolas's disappearance and subsequent

Yet the current stick-based approach is not the optimal way to incentivize reporting for a number of reasons. First, the compliance costs are astronomically higher for associates like Kelly and Wieder than they are for, say, the attorneys who file grievances against lawyers who tried to invalidate the 2020 election results.³⁵⁸ The *action* of reporting is the same in both circumstances, but the probable adverse reputational consequences and nontrivial chance of adverse employment consequences are much higher in the former than the latter.³⁵⁹ Although it is true that the likelihood of adverse consequences materializing likely depends on the law firm's culture, even firms that appear to be supportive of reporting in theory might not in fact be supportive when concerns are raised.³⁶⁰ Regardless of whether these consequences would in fact occur, this risk is one that associates inevitably will account for when deciding whether to report.³⁶¹

Second, the distributional distortions created by this obligation will be most pronounced for those within a firm who have the least power and leverage to withstand the intrafirm pressures.³⁶² It is perhaps no surprise that Kelly was a newly minted associate at his law firm, which made his position in the firm even more precarious than if he was a partner.³⁶³ Furthermore, attorneys of color, women attorneys, LGBTQ+ attorneys, and attorneys with disabilities may face additional obstacles to reporting due to bias they experience in the workplace and their underrepresentation among the senior management ranks.³⁶⁴ More research remains to be done in this area, but preliminary data

crimes, which ultimately resulted in a guilty plea for “seven counts of wire fraud and one count each of aggravated identity theft, misuse of a Social Security number and tax evasion”).

³⁵⁸ See *supra* notes 11–12 and accompanying text (describing ethics complaints about lawyers attempting to subvert the election).

³⁵⁹ See *supra* notes 199–243 and accompanying text (describing the typical risks facing a lawyer who reports).

³⁶⁰ See Richmond, *supra* note 15, at 1838–41 (describing two incidents in which law firms seemed to have “ostensibly supportive firm management” but had partners who took sides against associates); see also Ryan Williams, Comment, *Reputation and the Rules: An Argument for a Balancing Approach Under Rule 8.3 of the Model Rules of Professional Conduct*, 68 LA. L. REV. 931, 950 (2008) (“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.”).

³⁶¹ See Long, *supra* note 15, at 798 (“In short, bringing misconduct to light carries with it the potential for retaliation. In contrast, the choice to remain silent . . . carries relatively few risks for an attorney.”).

³⁶² See *supra* notes 268–269 and accompanying text (defining distributional distortions).

³⁶³ See *supra* notes 209–210 and accompanying text (describing facts of Kelly's termination); Richmond, *supra* note 95, at 258 (discussing the precarious position associates are in if they report).

³⁶⁴ See generally Robert L. Nelson, Ioana Sendroiu, Ronit Dinovitzer & Meghan Dawe, *Perceiving Discrimination: Race, Gender, and Sexual Orientation in the Legal Workplace*, 44 LAW & SOC. INQUIRY 1051 (2019) (presenting the results of a study analyzing reports of workplace discrimination); Peter Blank et al., *Diversity and Inclusion in the American Legal Profession: First Phase Find-*

suggests that these factors may lead these groups of attorneys not to raise ethical concerns in the first instance.³⁶⁵

Third, disciplinary agencies have no way of determining, *ex ante*, precisely who among attorneys in law firms will be able to comply with this mandate at a reasonable cost.³⁶⁶ Although undoubtedly there are some law firm partners who would be receptive toward—and even encourage—associates to raise ethical concerns,³⁶⁷ others would react similarly to those who dismissed Wieder and Kelly. These disparities are reinforced by the fact that the Model Rules do not, by their text, forbid retaliatory actions against people who raise ethical concerns or file a report.³⁶⁸ Though Kelly and Wieder ultimately succeeded in maintaining their wrongful discharge suits, in many jurisdictions the causes of action have not been established or the doctrine is not well defined.³⁶⁹ Furthermore, by the time an attorney files a wrongful discharge action against their former employer, the damage to their career likely cannot be fully repaired.

Fourth, the construction of the current reporting rule is itself in tension with enforcement via a stick. An attorney deciding whether to report must determine whether they “know[]” that another lawyer has committed a rules violation and whether the violation raises a “substantial question” about the lawyer’s fitness to practice.³⁷⁰ As described in Part I.D, there is no consensus on how these standards should be judged or precisely what qualifies.³⁷¹ In comparison with the Model Code’s mandatory reporting rule, which clearly identified the misconduct that an attorney was required to report, the Model Rules are much more ambiguous, arguably reflecting indecision regarding how much reporting

ings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+, 23 U. D.C. L. REV. 23, 46 (2020) (presenting the results of a national study of lawyers with disabilities and lawyers who identify as LGBTQ+, indicating that a substantial percentage stated that they have confronted bias).

³⁶⁵ See Reskin, *supra* note 191, at 41 (finding that women and those in law firms are less likely to raise ethics issues than their counterparts).

³⁶⁶ See *supra* notes 288–294 and accompanying text (describing why carrots are preferred in situations where lawmakers do not have complete information about the costs that will befall individuals).

³⁶⁷ Cf. Fortney, *supra* note 207, at 254–56 (presenting results of a study indicating the nature of systems or policies regarding ethics that had been implemented by the firms of those surveyed, with results broken down by firm size).

³⁶⁸ See *supra* note 234 and accompanying text (discussing the lack of an anti-retaliation rule).

³⁶⁹ See *supra* notes 225–232 and accompanying text (noting that some jurisdictions will not allow an attorney to bring a retaliatory discharge claim, and that the limits of claims are not clear in others).

³⁷⁰ See MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS’N 2023) (setting out the standards for knowledge and substantial question).

³⁷¹ See *supra* notes 97–113 and accompanying text (noting indeterminacy of knowledge and substantial question standards).

the rule is intended to produce.³⁷² In settings where there are specification problems and uncertainty about the upper bounds of activity a regulator desires to induce, a system employing carrots would be more appropriate.³⁷³

2. Scenario #2: Attorney Tangentially Involved in Pervasive Misconduct

In some instances, by the time an attorney fully appreciates that other lawyers are committing serious misconduct, it is too late—they have become involved as well. A prototypical example is an attorney engaging in unethical billing practices that are commonplace in their firm.³⁷⁴ Recent law graduates often have had no experience billing clients and look to senior attorneys for guidance.³⁷⁵ When they cannot fathom how to meet billable hour requirements, they learn the tricks of the trade from those in their firm who have “cracked the code”: bill for nonessential work, double bill, and pad hours.³⁷⁶ They then start doing it themselves, only to fully realize later the impropriety of these practices. Some vow to stop and might even leave their firm, but almost none report the misconduct to disciplinary agencies.³⁷⁷

Although the Model Rules do not require attorneys in this position to report their own ethics violations, they are obligated to report others despite the fact that doing so might also implicate themselves.³⁷⁸ Indeed, this type of firmwide misconduct is precisely when reporting would be extremely beneficial. At the extreme, when Thomas Girardi was at the helm of the law office Girardi Keese, he allegedly stole from his clients more than eighteen million

³⁷² Compare MODEL CODE DR 1-102, 1-103 (requiring reporting of the violations identified in a list), with MODEL RULES OF PRO. CONDUCT r. 8.3(a) (requiring reporting only as to serious violations).

³⁷³ See *supra* notes 288–291, 305–306 and accompanying text (discussing circumstances in which carrots are preferable).

³⁷⁴ See Mortazavi, *supra* note 187, at 1492–96 (describing, among lawyers in firms, “the incentive to be inefficient, inflate hours, and cut participation in professional activities”); *supra* notes 206–207 and accompanying text (discussing improper billing practices).

³⁷⁵ See Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 681 (1990) (describing how billing is a “slippery slope problem” and many lawyers “appear to have slipped down the slope”).

³⁷⁶ See, e.g., *id.* at 705–14 (discussing practices based on interviews of attorneys engaged in such conduct); Lerman, *supra* note 129, at 2158–66 (describing the experience of an attorney who was instructed by other firm associates on how to meet billable hour requirements); Long, *supra* note 15, at 793 (noting the impressionability of new associates).

³⁷⁷ See, e.g., Lerman, *supra* note 129, at 2164, 2175 (recounting one lawyer’s experience that the honest attorneys left the firm, and that essentially nobody reported misconduct).

³⁷⁸ Humiston, *supra* note 88, at 11 (noting that there is no duty to report oneself in Minnesota, which has adopted Rule 8.3, yet reminding attorneys that “your duty to report another’s conduct may implicate your own misconduct”).

dollars over a ten-year period.³⁷⁹ The misconduct was known throughout the firm, and it included lawyers who knew of the misconduct yet failed to protect the firm's clients.³⁸⁰ Although the other attorneys may not have been culpable to the same extent as Girardi, their conduct also violated the ethics rules.³⁸¹ Nor did they do anything about the misconduct while it was ongoing, thereby permitting Girardi to continue defrauding clients.³⁸²

For several reasons, the current rule does not appropriately incentivize reporting in this circumstance. The most compelling reason is that an attorney's report could subject them to disciplinary action, greatly increasing the cost of compliance for them relative to other attorneys.³⁸³ In light of how infrequently disciplinary agencies investigate lawyers *sua sponte*,³⁸⁴ rational attorneys might assume they would be better off saying nothing rather than reporting misconduct that could put themselves under the microscope.³⁸⁵ Nor do disciplinary agencies explicitly offer any carrots to firm whistleblowers akin to those law enforcement offers to informants.³⁸⁶ Although the ABA Standards for Imposing Lawyer Sanctions (Standards) permit disciplinary authorities to consider one's "full and free disclosure to [the] disciplinary board" as a mitigating circumstance in deciding whether to reduce the sanction imposed, it is not clear that this would extend to or fully capture the fulfillment of one's reporting obligation.³⁸⁷

In addition to the higher compliance costs for these attorneys, there are specification problems that militate in favor of eschewing a stick-based system

³⁷⁹ Jenny Gross, *Former High-Profile Lawyer Is Charged with Embezzling More Than \$18 Million*, N.Y. TIMES (Feb. 2, 2023), <https://www.nytimes.com/2023/02/02/us/tom-girardi-indicted.html> [<https://perma.cc/GAB6-HGKX>].

³⁸⁰ See, e.g., David Thomas, *Judge Won't Sanction Ex-Girardi Lawyers Over Missing \$2 Mln*, REUTERS (Nov. 2, 2022), <https://www.reuters.com/legal/legalindustry/judge-wont-sanction-ex-girardi-lawyers-over-missing-2-mln-2022-11-02/> [<https://perma.cc/6NJA-5JHB>] (noting that two lawyers in the firm knew of Girardi's misconduct from the beginning).

³⁸¹ See *id.* (describing judge's chastisement of the lawyers in the firm for failing to report). But see Thomas, *supra* note 380 (declining to sanction lawyers because the defrauded clients had been made whole).

³⁸² See Ryan & Hamilton, *supra* note 91 (describing how the Girardi scandal led to the recent adoption of the mandatory reporting rule in California).

³⁸³ See *supra* notes 157–161 and accompanying text (discussing the situation where an attorney has a duty to report misconduct in which they are involved).

³⁸⁴ See, e.g., Susan Humiston, *Mythbusters: Lawyer Discipline Edition*, BENCH & BAR MINN., <https://www.mnbar.org/resources/publications/bench-bar/columns/2021/05/26/mythbusters-lawyer-discipline-edition> [<https://perma.cc/QP2A-F3H7>] (noting the infrequency of Director-initiated investigations and the checks on their initiation).

³⁸⁵ Cf. Ott & Newton, *supra* note 17, at 756–59 (arguing that the lack of enforcement contributes to the low compliance rate).

³⁸⁶ See *supra* notes 313–314 (describing benefits offered to informants by law enforcement).

³⁸⁷ See STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 9.32(e) (AM. BAR ASS'N 1992) (listing cooperation as a mitigating factor).

for a carrot-based alternative. Beyond the definitional issues within the reporting rule itself, tension is created by the interaction between the reporting rule and the confidentiality limitations imposed by Rule 1.6.³⁸⁸ Much of the time, when a Scenario #2 issue arises, the reporting attorney will be relying on confidential information learned through the representation of their own or a firm's client. Yet, as discussed in Part I.D, jurisdictions have yet to sufficiently explain how attorneys can uphold their duty of confidentiality to their clients while simultaneously providing disciplinary authorities with the information they need to investigate cases.³⁸⁹ Even more perversely, attorneys who err on the side of reporting might later find out that they violated Rule 1.6—thereby subjecting themselves to sanctions for obediently reporting misconduct.³⁹⁰

3. Scenario #3: Attorney as Target of Another Lawyer's Misconduct

My own story is one example of how an attorney may become the target of another lawyer's misconduct; in my case, harassment and sexual assault. Unfortunately, I am not the only one.³⁹¹ According to the longitudinal study "After the J.D.," which surveyed nearly twenty-seven hundred lawyer-respondents, "[m]ore than one in five white women (21.9 percent) and one in four minority women (25.3 percent) report experiencing harassing behavior at work."³⁹² The pervasiveness of harassment and discrimination in the profession extends further. That same study found that just over 11% of minority men (which included gay men) said they had been harassed at work, with 12.7% saying they had encountered other types of discrimination.³⁹³ By all accounts, these egregious actions go underreported and are almost never sanctioned.³⁹⁴

³⁸⁸ See *supra* notes 121–130 and accompanying text (exploring the relationship and tensions between Rules 8.3 and 1.6).

³⁸⁹ *Supra* notes 121–130.

³⁹⁰ See *supra* note 130 and accompanying text (noting that reporting in contravention of Rule 1.6 is sanctionable).

³⁹¹ See KIERAN PENDER, INT'L BAR ASS'N, US TOO? BULLYING AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION 11 (2019), <https://www.ibanet.org/MediaHandler?id=B29F6FEA-889F-49CF-8217-F8F7D78C2479> [<https://perma.cc/2SQV-CWEN>] (presenting survey results finding that one out of three women in the legal profession had experienced sexual harassment). See generally Ebright, *supra* note 90 (examining gender violence and harassment among those in the profession).

³⁹² Heather Antecol, Deborah A. Cobb-Clark & Eric Helland, *Bias in the Legal Profession: Self-Assessed Versus Statistical Measures of Discrimination*, 43 J. LEGAL STUD. 323, 326–27, 330–31, 333 (2014); see also Susan Saab Fortney, *Keeping Lawyers' Houses Clean: Global Innovations to Advance Public Protection and the Integrity of the Legal Profession*, 33 GEO. J. LEGAL ETHICS 891, 918 (2020) (discussing the prevalence of sexual harassment in the legal profession, both in the United States and around the world).

³⁹³ Antecol et al., *supra* note 392, at 331, 333.

³⁹⁴ See Fortney, *supra* note 392, at 917 (noting that "very few disciplinary actions involving sexual harassment by colleagues have been litigated" and positing that the litigated cases only "scratch[] the surface" (quoting Paul Hodgkinson, *U.K. Lawyers Are Facing Heavy Scrutiny for Misconduct. Will*

In 2016, the ABA finally adopted Model Rule 8.4(g), which specifically proscribes discrimination or harassment on the basis of race, ethnicity, sex, gender identity, sexual orientation, disability, and a number of other categories.³⁹⁵ At the time of its adoption, dozens of proponents spoke about their personal experiences of being the targets of harassment or discrimination perpetrated by other lawyers.³⁹⁶ Yet little seems to have changed on the ground since this rule's adoption. Some jurisdictions have resisted adopting its broad language, but even those that have adopted it (or that have a similar anti-bias provision) almost never use it to sanction lawyers.³⁹⁷

Ostensibly, the ABA has signaled through its adoption of Rule 8.4(g) that rooting out this egregious misconduct is a priority and has recognized that it goes underreported.³⁹⁸ But at the same time, an attorney such as myself who has experienced this misconduct firsthand is given only one implicit message by disciplinary authorities: you must report; otherwise, you may be in violation of the rules yourself.

It goes without saying that the compliance costs of reporting by a survivor of sexual assault or by a target of invidious discrimination or harassment are markedly different than those incurred by other attorneys. In my own case, I felt ashamed of what had happened and questioned whether there was something I could have done to stop it.³⁹⁹ I had been trusting of him, precisely because of his stature in the community, until it was too late. Given these feelings of guilt and regret, I was not ready to talk about it. Even though the other lawyer did not directly work with me, I was fearful of being shunned—or worse—

the Same Happen Here?, AM. LAW. (Nov. 8, 2019), <https://www.law.com/americanlawyer/2019/11/08/u-k-lawyers-are-facing-heavy-scrutiny-for-misconduct-will-the-same-happen-here/?srlreturn=20240308113753> [<https://perma.cc/WYW8-NMSN>]]; see also Lee, *supra* note 7, at 403–06 (presenting results of study showing how the fitness-to-practice provision is used to sanction attorneys, yet noting the low numbers of sanctions for certain types of harassment).

³⁹⁵ See Martinez, *supra* note 7, at 811 (describing the rule and its passage). See generally Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017) (discussing history of the adoption of Rule 8.4(g)).

³⁹⁶ See Lee, *supra* note 7, at 372 (detailing adoption of Rule 8.4(g)).

³⁹⁷ See *id.* (noting that the number of jurisdictions that adopted the rule is low); Martinez, *supra* note 7, at 827–30 (describing the lack of success of state counterparts, with the low number of sanctions being touted as a reason for jurisdictions not to be concerned about adopting Rule 8.4(g)).

³⁹⁸ See, e.g., Martinez, *supra* note 7, at 827, 830 (outlining the ABA's objectives for the new rule, but noting that prior similar rules were rarely enforced).

³⁹⁹ See Nora K. Kline et al., *Self-Blame and PTSD Following Sexual Assault: A Longitudinal Analysis*, 36 J. INTERPERSONAL VIOLENCE NP3153, NP3154 (2021), https://journals.sagepub.com/doi/abs/10.1177/0886260518770652?casa_token=NFUCZmes_cIAAAAA%3A4uKxDibD8Uzos0U0pw2KZmYQoRXF9cjlFs2HWUz40q8QUuQ4p5jVATPcRmjuaPiDQ3jWeLPCN95Tg&journalCode=jiva [<https://perma.cc/6CTC-XWEE>] (discussing the relationship between self-blame and post-traumatic stress disorder following sexual assault).

for making allegations against a prominent lawyer. People who experience harassment or discrimination by a colleague also have to deal with the intrafirm repercussions, including the possibility of workplace retaliation.⁴⁰⁰ These distributional distortions would be so extreme that these individuals certainly would be “singled out.”⁴⁰¹ Indeed, in analogous discussions about whether states should adopt statutes obligating the reporting of sexual crimes (a controversial doctrine), it is ordinarily a given that survivors should be exempt.⁴⁰²

Another compliance cost that may be especially high in this circumstance is how the reporting obligation must be satisfied. Not only does the attorney have to alert disciplinary authorities, they also cannot make an anonymous report.⁴⁰³ The details of the grievance will not be publicly available at first, but they will be provided to the subject attorney.⁴⁰⁴ As discussed earlier, the risk exists that once this information is shared, the subject of the complaint will divulge it more broadly, fueling concerns about retaliation not only by the subject but also by others in the legal community.⁴⁰⁵ In my experience, that would have meant that my assailant, an attorney who was respected in the community, would know I had made a report to the disciplinary agency about what he had done. That prospect alone deterred me from speaking up at the time.

An additional layer of complexity comes from the nature of this misconduct. Although discrimination and harassment have plagued this profession, historically they have been virtually ignored by disciplinary authorities.⁴⁰⁶ In states without Rule 8.4(g) or another anti-bias provision, it may be difficult for an attorney to know, due to the lack of precedent, whether the conduct they experienced violated another general catchall rule, such as the provision re-

⁴⁰⁰ See Eisha Jain, *Realizing the Potential of the Joint Harassment/Retaliation Claim*, 117 YALE L.J. 120, 123 (2007) (describing the phenomenon of joint retaliation and harassment claims and positing that the two commonly occur together).

⁴⁰¹ See *supra* note 286 and accompanying text (defining the “singling-out” phenomenon).

⁴⁰² See, e.g., Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders Amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1324–29 (2019) (exempting certain classes of bystanders, including survivors); see also Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 1042–43 (calling the punishment of bystanders “problematic” in part because bystanders may themselves be in a vulnerable situation).

⁴⁰³ See *supra* notes 237–240 and accompanying text (discussing the fact that anonymous reporting is generally not an option).

⁴⁰⁴ See *supra* notes 238–239 and accompanying text (discussing the fact that the subject attorney will be notified of the reporting attorney’s identity).

⁴⁰⁵ See *supra* note 240 and accompanying text (discussing the possibility that the reporting attorney’s identity will be shared by the subject attorney).

⁴⁰⁶ See Fortney, *supra* note 392, at 917 (noting the contrast between the number of women lawyers who have been harassed and the small number of disciplinary actions for harassment). See generally Martinez, *supra* note 7 (discussing the background of discrimination within the profession and the attempt to ameliorate it through adopting Rule 8.4(g)).

garding the administration of justice.⁴⁰⁷ But even if Rule 8.4(g) is in effect, it does not adequately flesh out what qualifies as “harassment” or “discrimination.”⁴⁰⁸ This ambiguity and lack of specificity compound the compliance problems associated with the mandatory reporting obligation, thereby reinforcing the would-be reporter’s silence.

Taken together, these three scenarios illustrate the problems that arise when jurisdictions attempt to incentivize reporting merely by threatening disciplinary sanctions. Because of the variety of settings in which attorneys may learn of reportable information and the ways in which attorneys may be putting themselves at risk by making a report, a stick-based approach is too harsh and too blunt a tool. Further, the reporting rule’s lack of specificity and ambiguity often make it difficult for an attorney to know whether they must report, may report, or cannot report due to their other ethical obligations.⁴⁰⁹ Likewise, this uncertainty arguably renders disciplinary agencies powerless to enforce the reporting rule in all but the most obvious cases.⁴¹⁰ Here, the teachings of rational choice literature and the experience gleaned from the prior half-century perfectly align: attorney reporting cannot be properly incentivized through the threatened stick of sanctions, but the offering of effective carrots may hold promise.

B. Reimagining an Effective and Equitable Attorney Reporting System

One might suggest that the most efficient way to revamp the reporting system would be simply to strike out the mandatory reporting rule or to change the language from “shall” to “should,” similar to the rules in Georgia and Washington.⁴¹¹ Although such a change certainly would remove the threat of a disciplinary stick, it would do nothing tangible to positively incentivize reporting. In fact, some of the de facto barriers to reporting, such as the risk of work-

⁴⁰⁷ See Martinez, *supra* note 7, at 821–22, 828 (noting deficiencies in the administration-of-justice provision); Lee, *supra* note 7, at 369–70 (explaining the limitations of the applicability of Comment 3 to Rule 8.4(d)).

⁴⁰⁸ See Bruce A. Green & Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, 50 HOFSTRA L. REV. 543, 564 (2022) (noting the potential expansiveness of the phrase “harassment”); George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 135, 141–42 (2018) (identifying ambiguities and concerns about how the two terms may be interpreted).

⁴⁰⁹ See *supra* notes 92–133 and accompanying text (outlining the interpretative issues).

⁴¹⁰ See *supra* notes 92–133 and accompanying text (noting the rule’s vagueness); *supra* notes 138–174 and accompanying text (describing the low number of sanctions for Rule 8.3 violations and positing that the addition of the reporting violation had a negligible effect on the discipline imposed).

⁴¹¹ See *supra* note 90 and accompanying text (noting that Georgia and Washington have permissive, not mandatory, reporting rules); see, e.g., Thomas R. DeBray, Jr., Student Commentary, *No One Likes a Tattletale: Why Alabama Should No Longer Force Attorneys to Report the Professional Misconduct of Other Attorneys*, 34 J. LEGAL PRO. 181, 194 (2009) (advocating for Alabama to get rid of its mandatory reporting rule).

place retaliation, might even loom larger because the change could be interpreted as a signal that there is not a strong public policy supporting the reporting of lawyer misconduct.⁴¹² Although little information is available from these two states on the effectiveness of their permissive reporting systems, we do have sixty years of experience with the Canons. As described in Part I.A, the ABA eschewed the Canons' toothless exhortations to report in favor of a broad mandatory reporting rule precisely because the former proved to be useless in overcoming lawyers' "almost universal reluctance to inform."⁴¹³

Instead of suggesting modest tweaks to the current reporting rule, this Article takes a more ambitious approach. It proposes a series of measures that, taken together, aim to provide effective positive incentives to encourage reporting. It accomplishes this by accounting and compensating for the differential compliance costs and de facto barriers to reporting identified earlier in this Part.⁴¹⁴ Furthermore, the proposed modifications extend beyond the narrow confines of the Model Rules to disciplinary procedures, the sanctioning process, and even broader changes to the legal protections given to lawyer-employees.

Despite the ambitious nature of this thought experiment, there are limiting principles. Any incentive-based system comes with a risk of "motivational crowding-out"—the displacement of an individual's intrinsic motivation to act by the application of an extrinsic incentive.⁴¹⁵ At the extreme, crowding-out can lead to a reduction in desired activities—even in comparison to the level before the activity was incentivized.⁴¹⁶ Although motivational crowding-out may occur when an individual is offered a carrot or a stick, it tends to be more commonly associated with carrots.⁴¹⁷ Concerns about crowding-out are also higher when the activity is one for which there may be intrinsic motivation (for example, donating blood) to perform than when there is not.⁴¹⁸

⁴¹² See *supra* note 223 and accompanying text (noting that a retaliatory discharge claim requires a violation of public policy).

⁴¹³ See CLARK REPORT, *supra* note 21, at 167–68 (identifying the problem, and recommending the introduction of some manner of sanctionable mandatory reporting rule).

⁴¹⁴ See *supra* notes 348–410 and accompanying text (discussing situations in which it is difficult for lawyers to report).

⁴¹⁵ Underhill, *supra* note 313, at 1114–15.

⁴¹⁶ See I. Glenn Cohen, *Regulating the Organ Market: Normative Foundations for Market Regulation*, 77 LAW & CONTEMP. PROBS. 71, 74 (2014) (noting the possibility of motivational crowding-out in the context of organ donation, potentially resulting in fewer altruistic donations).

⁴¹⁷ Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 YALE J. ON REGUL. 213, 228 (2016).

⁴¹⁸ *Id.* at 226–27; see also Cohen, *supra* note 416, at 74 (discussing the issue of crowding-out in the context of organ donations).

Yet as Kristen Underhill has described, incentives can be designed and tailored to minimize the potential for crowding-out effects.⁴¹⁹ Two aspects of incentives relevant to this Article are the incentive type and incentive size.⁴²⁰ With regard to incentive type, there is evidence that selecting an incentive “‘congruent’ with the incentivized behavior” can lessen the risk of crowding-out.⁴²¹ The use of financial incentives in particular can be problematic when the activity at issue is one for which there are societal norms against monetizing.⁴²² Although the incentive size matters—both in inducing the activity and in contributing to crowding-out—a relevant consideration is “the extent to which the incentive is proportional to the effort or task burden.”⁴²³ Additionally, an incentive should not be so high as to induce people to take inappropriate steps to falsely claim a reward.⁴²⁴

Furthermore, the framing of an incentive may affect the extent to which it contributes to motivational crowding-out.⁴²⁵ If an incentive is perceived as controlling, it is more likely to contribute to crowding-out than if it is perceived as supportive.⁴²⁶ In fact, there is evidence to suggest that an appropriately designed supportive incentive can result in “crowding-in”: an increase in intrinsic motivation to complete the desired task.⁴²⁷

With these principles in mind, this Article proposes the adoption of the following six measures to incentivize attorney reporting of serious misconduct. Although there are additional details that jurisdictions should flesh out prior to implementation, this proposal provides a blueprint for jurisdictions that wish to disrupt the lawyer code of silence.

⁴¹⁹ See generally Underhill, *supra* note 417 (providing comprehensive treatment of the design of incentives with regard to crowding-out).

⁴²⁰ See *id.* at 259 (noting that an incentive’s design influences the effects of crowding-out).

⁴²¹ *Id.* at 260–61.

⁴²² See Goldschlager, *supra* note 248, at 369–70 (positing that the incongruous nature of some financial incentives militates in favor of praise and other non-monetary incentives).

⁴²³ Underhill, *supra* note 417, at 261–62.

⁴²⁴ See Galle, *supra* note 248, at 815 (noting that the use of carrots may lead to false positives); Dari-Mattiacci & Raskolnikov, *supra* note 257, at 60–61 (discussing the problem of individuals falsely claiming carrots and offering potential solutions to minimize it, including the use of sticks).

⁴²⁵ See Underhill, *supra* note 417, at 254–59 (discussing incentive architecture and framing decisions).

⁴²⁶ Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURVS. 589, 594–95 (2001); Goldschlager, *supra* note 248, at 373–74.

⁴²⁷ See Underhill, *supra* note 417, at 239–40 (pointing to a study of the behavior of Swiss voters, which found that a fine may have caused citizens to believe in the importance of voting); Aaken & Simsek, *supra* note 271, at 238 (discussing the phenomenon in relation to international law).

1. Modify the Existing Rule to Encourage More Reporting

At the outset, this Article strongly recommends that jurisdictions transform the existing reporting rule into a recommendation rather than a mandate. Under the reimaged Rule 8.3, attorneys would be encouraged—but not required—to report the same type of serious misconduct—that which “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”⁴²⁸ At the same time, it would lower the mental state from “knowledge” to “reason to believe,” thereby broadening the circumstances in which an attorney would be encouraged to report.⁴²⁹

These changes to the reporting rule serve two purposes. First, the elimination of the stick immediately reduces some of the worst and most perverse distributional distortions caused by the current system. Attorneys like me, who have been targets of egregious misconduct, are not required to decide between the certain risk of traumatization and the amorphous risk of professional discipline.⁴³⁰ Second, the change in the mental state incentivizes more reporting and avoids the uncertainty of the current “knowledge” standard that appears to fuel underreporting.⁴³¹

When other scholars have considered overhauling the current rule, they generally have retained the mandate but either (1) tried to further define the misconduct requiring reporting,⁴³² or (2) exempted lawyers in certain circumstances from reporting.⁴³³ Although both of these suggestions would reduce some of the distributional distortions and alleviate some of the specification problems, they merely put a Band-Aid on the problem. Even if mandatory reporting was limited to violations of particular rules, for instance, those violations can manifest in numerous ways that differ dramatically in their seriousness.⁴³⁴ Furthermore, delineating specific exemptions from reporting would

⁴²⁸ MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS’N 2023).

⁴²⁹ See Lynch, *supra* note 10, at 546 (arguing for shift in the knowledge standard to “reason to believe” because it would “eliminate the potential for confusion or evasion”).

⁴³⁰ See *supra* notes 138–174 and accompanying text (noting the lack of enforcement of the reporting mandate); *supra* note 399 and accompanying text (discussing trauma after a sexual assault).

⁴³¹ See *supra* notes 96–106 and accompanying text (discussing knowledge standard); Lynch, *supra* note 10, at 546 (stating that a “reason to believe” standard would remove judgment from would-be informants); see also Greenbaum, *supra* note 3, at 293 (advocating that “knowledge” should be judged by a reasonable person standard).

⁴³² See, e.g., Lynch, *supra* note 10, at 539–45 (identifying three categories of misconduct that should be mandatorily reported); Burwick, *supra* note 103, at 153–54 (suggesting limiting the mandatory duty to “specific, enumerated offenses” but not identifying the offenses).

⁴³³ See, e.g., Greenbaum, *supra* note 3, at 319–20 (setting out possible exemptions that have been proffered by other scholars, such as those with familial ties or who work in the same firm).

⁴³⁴ Cf. Gendry, *supra* note 219, at 609–10 (“However, changing the rule to include a list of violations seems impractical, if not impossible. The very nature of ethics is somewhat nebulous.”).

benefit some, but not all, would-be reporters.⁴³⁵ As the scenarios in the previous section demonstrate, attorneys may be at risk when they report lawyers within their firm or outside it.⁴³⁶ A sharper and thinner stick may be more effective than a larger and blunter one, but both can do harm.

2. Provide Robust Protections from Retaliation

Under the current system, attorneys who comply with their reporting obligations are afforded no clear protection against retaliation. The Model Rules contain no specific rule proscribing such conduct, and the prospect of a court recognizing a breach of contract or wrongful discharge action is murky and incomplete at best.⁴³⁷ This proposal aims to curb retaliation through two measures: one within the Model Rules and the other outside them. The first is an anti-retaliation provision included in the modified reporting rule, prohibiting lawyers from attempting any action intended to interfere with or retaliate against an attorney who, in good faith, seeks to report misconduct that falls within the rule. The second would require states to enact or modify whistleblower laws to ensure that attorneys who, in good faith, report other lawyers' illegal or unethical conduct fall within the ambit of such laws.

These two measures are by no means novel; a number of scholars have identified the prospect of retaliation as one of the primary reasons attorneys avoid their reporting obligations and have proposed variations of these measures as possible solutions.⁴³⁸ The advantage of these measures is that, when adopted in tandem, they go as far as possible to prevent third-party interference and retaliation from occurring while simultaneously providing a cause of action if an employer chooses not to heed the warning of a disciplinary action. They do this by threatening two sticks to curb actions that produce negative externali-

⁴³⁵ Alternatively, one could imagine crafting a more flexible standard for an exemption. *See, e.g.*, Williams, *supra* note 360, at 952 (advocating for an affirmative defense where "reporting would have created an undue burden on the [reporter]"). Although that type of standard might provide an avenue for more attorneys to argue that they should not be sanctioned for not reporting, they would not know whether a disciplinary agency would agree with their self-assessment of the burden placed on them. *See id.* at 953 (noting the subjectivity of a more flexible standard for exemptions from reporting).

⁴³⁶ *See supra* notes 350–373 and accompanying text (discussing the risks of intra-firm reporting); *supra* notes 391–408 and accompanying text (discussing the costs of reporting a lawyer who has committed harassment).

⁴³⁷ *See supra* notes 214–243 and accompanying text (describing the possibility of retaliation against attorneys who report).

⁴³⁸ *See, e.g.*, Long, *supra* note 15, at 798–99, 821–24 (proposing an anti-retaliation ethical rule as a "partial" solution, but suggesting that the attorney's actions must be in "good faith"); Greenbaum, *supra* note 3, at 325 (proposing an anti-retaliation ethical rule and the recognition of retaliatory discharge claim); Anon, *supra* note 210, at 1203 (calling on the Florida legislature to include ethical rules within the scope of the state's whistleblower statute); Fortney, *supra* note 392, at 924 (calling on state courts to recognize a tort for retaliatory discharge).

ties. Although some have focused on the adoption of an anti-retaliation ethics provision because it is within the state bar's control, such a provision has relatively little force if lawyers can disobey it without suffering any financial consequences.⁴³⁹

One might argue that this measure goes too far, in that it could provide an incentive for an underperforming lawyer-employee to drum up an ethics complaint against a colleague to avoid a legitimate adverse employment action. Although that is a theoretical possibility, it is unlikely to occur for several reasons. First, the complementary provisions include two safety valves: (1) the reporting attorney must be acting in good faith, and (2) the interference or retaliation by the other lawyer must be done with intent.⁴⁴⁰ If the report is made in bad faith or if the employer is taking a legitimate adverse action, the lawyer taking such an adverse action would not suffer consequences. Second, concerns about misuse of anti-retaliation provisions are not unique to this context, and nothing indicates they would be subject to more abuse here than elsewhere.⁴⁴¹ In fact, in light of the perception among lawyers that breaking the code of silence will lead to significant reputational consequences, it is unlikely that an attorney would make a report merely to shield themselves from their current employer.⁴⁴²

3. Permit Anonymous and Truly Confidential Reports

As things stand, disciplinary agencies generally require attorneys (indeed, all complainants) to identify themselves when they file a grievance.⁴⁴³ Although the inclusion of this information certainly makes it easier for disciplinary authorities to look into certain grievances, it is by no means essential to the success of all disciplinary matters.⁴⁴⁴ For instance, when an attorney has been the target of harassment or discrimination at the hands of their supervisor,

⁴³⁹ Cf. Long, *supra* note 15, at 822 (proposing that a professional rule against retaliation would show that the profession encourages reporting). But see *id.* at 823–24 (arguing that an ethics rule forbidding retaliation has value, irrespective of whether the jurisdiction enacts a whistleblower statute or recognizes it as a source of public policy giving rise to a retaliatory discharge claim).

⁴⁴⁰ See Kirkpatrick, *supra* note 218, at 1801 (advocating for using a “good faith” standard for reporting).

⁴⁴¹ See, e.g., Timothy M. Holly, *The Causation Standard for Retaliation Claims Under Employment Discrimination Statutes: Ambiguity of “Central Importance,”* 15 DEL. L. REV. 71, 71–73 (2014) (suggesting that “it is common enough for employees to make an unfounded charge of racial, sexual or religious discrimination to forestall a sometimes lawful action”).

⁴⁴² See *supra* notes 199–213 and accompanying text (describing the poor treatment lawyers give to “snitches”).

⁴⁴³ See *supra* notes 237–240 and accompanying text (identifying the general prohibition against making anonymous reports to disciplinary agencies).

⁴⁴⁴ See Pimentel, *supra* note 84, at 946, 949 (noting some of the positive attributes of non-anonymous complaints, but discussing an anonymous complaint against a judge that was successful).

they may know or strongly suspect that they are not the only person who has been treated unfairly.⁴⁴⁵ Were that attorney to make an anonymous report about the supervisor's conduct, disciplinary agencies could inquire further or, at the very least, keep that information and have it in case they receive similar reports about the supervisor. In my own case, I cannot honestly say for sure whether I would have made an anonymous report about my attacker. What I can say for sure, however, is that the prospect of having my identity associated with the report—which would invariably be shared with him—was untenable at the time.⁴⁴⁶

This Article envisions offering two options to reporters who wish to shield their identity. The first, which would provide a partial shield, is to permit reporters to identify themselves in the grievance but not have their identities shared with the subject attorney. The second would permit complete anonymity. Furthermore, to facilitate reporting, disciplinary agencies could set up websites permitting robust confidential or anonymous reporting that are similar to those that have become prevalent on college campuses to report bias incidents.⁴⁴⁷ Currently, disciplinary agencies often do not have a clear and streamlined process for receiving grievances, which also may thwart would-be reporters from coming forward.⁴⁴⁸

This part of the proposal in particular is where pushback is expected. Although some scholars have suggested expanding the confidentiality of a complainant's identity during the initial stage of the investigation, few have gone so far as to recommend ensuring confidentiality throughout the process—much less permitting anonymous reporting.⁴⁴⁹ Anonymous reporting has come under

⁴⁴⁵ Cf. *id.* at 951 (noting that in some instances the identity of an “anonymous” complainant will be clear from the context).

⁴⁴⁶ See *supra* notes 238–239 and accompanying text (noting that a reporting lawyer's identity will be shared with the subject of the report).

⁴⁴⁷ See, e.g., *Bias Incident Reporting Form*, PENN DIVERSITY & INCLUSION, <https://diversity.upenn.edu/diversity-at-penn/bias-motivated-incident-report> [<https://perma.cc/YW6Y-GPLC>] (allowing respondents to choose whether to make an anonymous report or a confidential, yet not anonymous, report).

⁴⁴⁸ See Brown, *supra* note 109, at 1603 (noting how the hassle of the grievance process may deter reporting); see, e.g., *How to File an Attorney Grievance*, STATE OF NEB. JUD. BRANCH, <https://supremecourt.nebraska.gov/administration/professional-ethics/attorney-discipline-ethics/how-file-attorney-grievance> [<https://perma.cc/4F8N-CN4W>] (providing little detail on the substantive nature of filing a grievance and not including a form within the website to do so); *Filing a Complaint Against an Attorney*, OKLA. BAR ASS'N, <https://www.okbar.org/gc/complaint/> [<https://perma.cc/B8AT-9SLG>] (requiring all complaints to be signed and in writing).

⁴⁴⁹ See, e.g., Greenbaum, *supra* note 3, at 322–23 (advocating for confidentiality “in the early stages of the disciplinary process”); Richmond, *supra* note 15, at 1848 (arguing in favor of protecting confidentiality yet deeming complete anonymity “unreasonable”); Gendry, *supra* note 219, at 611–12 (advocating for permitting anonymous complaints, but noting that they may be unpopular with disciplinary agencies).

fire more generally by those who claim it violates the First Amendment rights of persons who may be targeted for their viewpoints, the Fourteenth Amendment rights of persons to due process, or the Sixth Amendment rights of persons to confront their accusers.⁴⁵⁰ Others worry that disciplinary authorities would be deluged with specious grievances or that the lack of detail in them would greatly diminish their value.⁴⁵¹ Still others worry that no complaint would be completely “anonymous” because the subject attorney might have a good idea (based on the facts or their own intuition) of who made the report.⁴⁵²

Although I recognize these concerns, I do not believe they are necessarily fatal. Regarding the First Amendment, it must be remembered that the subjects of these grievances are attorneys and the conduct at issue is that which arguably violates the Model Rules. Even assuming that bias response reporting systems at schools might be constitutionally suspect, lawyers may be subject to some regulations that limit their speech beyond that which would be permissible for the public at large.⁴⁵³ Nor does an anonymous reporting system inherently violate the subject attorney’s rights to due process or to confront witnesses.⁴⁵⁴ Were an anonymous grievance substantiated, it is envisioned that the grievance itself would not be introduced in the associated disciplinary proceeding.⁴⁵⁵ Rather, the disciplinary counsel would need to elicit separate witness testimony during the hearing, thereby preserving the subject lawyer’s constitutional rights.⁴⁵⁶ One might argue that if the disciplinary agency knows the re-

⁴⁵⁰ See, e.g., Rachel Weiner & Karina Elwood, *Loudoun Schools’ Bias-Reporting System Might Violate Free Speech, Court Says*, WASH. POST (Apr. 14, 2023), <https://www.washingtonpost.com/education/2023/04/14/loudoun-school-bias-appeal/> [<https://perma.cc/E4GJ-64GR>] (discussing a Fourth Circuit decision allowing a lawsuit that challenged a school’s bias reporting system to proceed); Teresa Greider, *Eliminating Peer-on-Peer Sexual Harassment: Why State Statutes Are Not the Answer*, 29 S. CAL. INTERDISC. L.J. 345, 366 (2020) (discussing the due process concerns of anonymous reporting of sexual assault on college campuses); Salvador Rizzo, *Rand Paul’s Claim That Trump Has a Constitutional Right to Confront Whistleblowers*, WASH. POST (Nov. 8, 2019), <https://www.washingtonpost.com/politics/2019/11/08/rand-pauls-claim-that-trump-has-constitutional-right-confront-whistleblowers/> [<https://perma.cc/Z69B-CFUE>] (noting Senator Rand Paul’s erroneous claim that the Sixth Amendment applied to an impeachment proceeding).

⁴⁵¹ See Gendry, *supra* note 219, at 612 (discussing the concern that anonymous reporting would allow the process to be abused and that “it will be much more difficult to pursue a claim against an allegedly unethical attorney”); Pimentel, *supra* note 84, at 953 (discussing the argument that anonymous reporting would lead to a flood of “frivolous and vexatious accusations”).

⁴⁵² Cf. Pimentel, *supra* note 84, at 951 (discussing anonymous complaints, where the complainant may be discoverable, in the context of judicial grievances).

⁴⁵³ Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J.L. & POL’Y 37, 51 (2022); see Gillers, *supra* note 395, at 234–35 (identifying a number of ethics rules that restrict lawyer speech).

⁴⁵⁴ Cf. Pimentel, *supra* note 84, at 952 (discussing the rights of judges vis-à-vis reporting).

⁴⁵⁵ Cf. *id.* (discussing in the context of judicial misconduct).

⁴⁵⁶ See *id.* (referring to judicial misconduct proceedings); Michael J. Zydney Mannheimer, *Covered Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 89 (2002) (noting that

porter's identity, there might be limited circumstances when it must be revealed to the subject attorney as a matter of due process;⁴⁵⁷ however, it is not clear the extent to which such a disclosure would be required as a constitutional matter in a disciplinary proceeding.

To be fair, it is not clear how the introduction of an anonymous reporting option would impact the work of disciplinary authorities. More grievances undoubtedly would be filed, including some frivolous ones, but other scholars have posited that frivolous ones often could be quickly investigated and dismissed.⁴⁵⁸ It is not clear that there would be an influx of anonymous grievances from clients, because they generally contact the bar precisely because they want intervention in an ongoing matter.⁴⁵⁹ The instructions for filing the grievance could explain, to channel most clients into filing non-anonymous grievances, that information about the complainant's identity makes it easier for disciplinary agencies to intervene in specific matters. Furthermore, the fact that a grievance is anonymous surely will be considered by investigators when they are determining whether a particular grievance is credible, but that circumstance does not necessarily make it worthless.⁴⁶⁰ When the person filing the anonymous grievance is an attorney, that reporter should be more knowledgeable than most about what non-identifying facts would assist in an investigation.⁴⁶¹ Although it is true that the subject lawyer might deduce who filed the grievance in some circumstances, that does not negate the value of broadly offering the option to file anonymously.⁴⁶²

the Confrontation Clause is not implicated unless an anonymous tip is put forth as evidence at the adjudication); *see also* Gendry, *supra* note 219, at 612 (suggesting that requiring disciplinary agencies to work without complainant testimony might "promote proper investigation by the disciplinary commission and provide needed protection for the accused from unfounded claims").

⁴⁵⁷ Cf. *supra* note 317 and accompanying text (discussing the limited circumstances in which disclosure of an informant's identity is required in relation to a criminal prosecution).

⁴⁵⁸ *See, e.g.*, Pimentel, *supra* note 84, at 953–54 (responding to the concern of a deluge of frivolous claims).

⁴⁵⁹ *See* Levin, *The Case for Less Secrecy*, *supra* note 166, at 30 (discussing how client complainants often want to publicize their complaint).

⁴⁶⁰ *See, e.g.*, Humiston, *supra* note 384 (noting that Minnesota typically does not investigate anonymous complaints but may do so depending on the severity of the misconduct and the amount of detail in the complaint).

⁴⁶¹ *See* Greenbaum, *supra* note 3, at 265 (noting that attorneys are better suited to observe other lawyers' conduct).

⁴⁶² *See* Pimentel, *supra* note 84, at 951 ("The complainant runs a certain risk of having his or her identity discovered when filing anonymously, but if the complainant files in a regular fashion, which would require the complainant's name and address, that risk is one hundred percent.").

4. Use Reporting as a Mitigating Circumstance in Discipline

As Scenario #2 illustrated, attorneys at times become tangentially involved in pervasive misconduct.⁴⁶³ Although attorneys currently are not obligated to self-report, they may be dissuaded from reporting serious misconduct committed by others out of concern that they will implicate themselves.⁴⁶⁴ This proposal seeks to mitigate their concern—but not eliminate it—by adding “actions undertaken to comply with Rule 8.3” in the Standards as a mitigating circumstance that disciplinary agencies may consider when imposing sanctions.

This type of carrot—reducing the size of a stick—is less common in lawyer disciplinary proceedings yet frequently provided to informants and whistleblowers in criminal and quasi-criminal contexts.⁴⁶⁵ In those settings, it is believed that such carrots are needed to incentivize individuals to provide information that may put themselves at risk not only with the regulator but also with the persons about whom they are speaking.⁴⁶⁶ At the same time, this proposal does not go so far as to offer any sort of blanket immunity or safe harbor for reporting, out of recognition that such an incentive arguably would go too far and be incongruous in light of the expectations placed on those in the profession.⁴⁶⁷ Nor is it envisioned that the mitigating circumstance would apply when an attorney chose to make an anonymous report.

Perhaps because the current reporting rule is mandatory, whether to include reporting among the mitigating circumstances has not been widely discussed. Presumably, the primary argument against its inclusion would be that it impermissibly benefits wrongdoers by giving them leniency in exchange for information—the same sorts of arguments raised when discussing the leniency offered to criminal informants.⁴⁶⁸ Nevertheless, the Standards already provide leniency for wrongdoers through two analogous mitigating circumstances: (1) “timely good faith effort to make restitution or to rectify consequences of misconduct” and (2) “full and free disclosure to [the] disciplinary board or cooperative attitude toward proceedings.”⁴⁶⁹ Both of these recognize that an attor-

⁴⁶³ See *supra* notes 374–390 and accompanying text (describing Scenario #2: an attorney tangentially involved in pervasive misconduct).

⁴⁶⁴ See *supra* note 88 and accompanying text (noting that there is no requirement to self-report under Model Rule 8.3).

⁴⁶⁵ See *supra* notes 313–317 and accompanying text (describing the benefits available to informants).

⁴⁶⁶ See *supra* notes 320–321 and accompanying text (describing the costs informants would face).

⁴⁶⁷ See *supra* notes 421–422 and accompanying text (discussing the importance of congruence between the setting and the incentive).

⁴⁶⁸ See, e.g., Natapoff, *supra* note 314, at 647–49 (questioning the propriety of the system and its unpredictability); Roth, *supra* note 315, at 745 & 745–46 nn.49–50 (identifying relevant scholarship).

⁴⁶⁹ STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 9.32(d), (e) (AM. BAR ASS’N 1992).

ney's actions following their misconduct can have a bearing on the sanction imposed. Surely providing disciplinary authorities with information about another lawyer's serious misconduct should also fall within that category, given the potential for that information to prevent future harm to that other lawyer's clients and third parties with whom that other lawyer interacts.

5. Permit Disclosure of Non-Harmful Confidential Information

In light of the unresolved tension between the current reporting rule and the duty of confidentiality, it is no surprise that attorneys may be uncertain about whether they are allowed to report another lawyer's misconduct when it involves a client matter.⁴⁷⁰ Yet those are precisely the times when jurisdictions should seek to encourage reporting, given the client's vulnerability and potential inability to learn about the misconduct themselves.⁴⁷¹ Even though it may not be feasible to offer attorneys an additional positive carrot, the Model Rules could at least neutralize the threat of a Rule 1.6 sanction.

This change could be accomplished through modifying Rule 8.3(c), which currently contains the confidentiality limitation.⁴⁷² Under this proposal, Rule 8.3(c) would permit attorneys to disclose information otherwise protected by Rule 1.6 "if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client."⁴⁷³ This language tracks the standard used for disclosing information for conflict-of-interest checks when lawyers change firms—presumably a standard with which many attorneys are familiar.⁴⁷⁴

Although there is broad agreement among scholars that the current reporting rule is unsatisfactory in its treatment of confidentiality, scholars do not agree on how to fix it. Some have suggested adopting specific confidentiality exceptions (for example, for generally known information),⁴⁷⁵ whereas others have suggested that Rule 8.3 should trump Rule 1.6 and mandate disclosure.⁴⁷⁶

⁴⁷⁰ See *supra* notes 121–130 and accompanying text (detailing ambiguity regarding the interaction between the reporting and confidentiality rules).

⁴⁷¹ See *supra* note 188 and accompanying text (describing the Comment to Rule 8.3 that suggests that reporting is more critical when the victim cannot uncover the misconduct).

⁴⁷² MODEL RULES OF PRO. CONDUCT r. 8.3(c) (AM. BAR ASS'N 2023).

⁴⁷³ Cf. *id.* r. 1.6(b)(7) (containing the confidentiality exception to account for conflict-of-interest detection when a lawyer is changing firms).

⁴⁷⁴ See *id.* (setting out permissive conflict check exception to confidentiality duty); see, e.g., Amy DeVan, *Between a Rock and a Hard Place: Law Firm Conflicts and Lateral Hires*, COLO. LAW., Apr. 2018, at 40, 42, <https://wtotrial.com/webfiles/Ethics.pdf> [<https://perma.cc/2WCA-TFKV>] (providing guidance to Colorado attorneys on how to comply with obligations when joining a new workplace).

⁴⁷⁵ See, e.g., Greenbaum, *supra* note 3, at 309–11 (identifying professional responsibility scholars who argue that "generally known" knowledge and information "contained in a public record" should be exempted from the definition of confidential information).

⁴⁷⁶ See, e.g., Joanne Pelton Pitulla, *Should Clients Be Able to Veto the Duty to Report?*, PRO. LAW., Aug. 1996, at 2, 12 (positing that the disclosure of otherwise confidential information should at

The proposal in this Article aims to strike a practical middle ground by fashioning an incentive in light of the norms of the profession. The profession's strong view of the obligation toward confidentiality—and the rare times it yields to other priorities—militates in favor of permitting, but not requiring, disclosure.⁴⁷⁷ At the same time, the exception provides attorneys with the discretion to make a report “where no real harm will befall the client from reporting.”⁴⁷⁸ To be sure, attorneys would be well advised to consult with affected clients before sharing information and to obtain informed consent to disclose—as is the case with the other permissive confidentiality exceptions—but under this proposed measure they would not be obliged to keep information secret merely because of a recalcitrant client.⁴⁷⁹

6. Consider Using Intangible Carrots to Cement the Value of Reporting

Throughout much of its history, the mandatory reporting rule has been viewed by most attorneys—and even some disciplinary agencies—as being of dubious value.⁴⁸⁰ Nevertheless, many agree that the legal profession desperately needs attorneys to report serious misconduct to protect the public and to maintain the plausibility of its claim that it should continue to be able to regulate itself.⁴⁸¹ To overcome attorneys' general moral compunction with reporting and long-standing negative feelings about the reporting rule, disciplinary agencies certainly will need to highlight the positive changes made to the system.⁴⁸² Additionally, other intangible carrots could be used to demonstrate the value of reporting. For example, one can imagine a jurisdiction recognizing attorneys who reported misconduct despite the difficulties involved, and thereby pre-

least be allowed to facilitate reporting of “serious misconduct”); *see also* Stevenson, *supra* note 121, at 360, 399–401 (advocating for widespread repeal of confidentiality obligations, such as the exception within the reporting rule).

⁴⁷⁷ *See* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 270–74 (2006) (exploring the prevalence of permissive ethics rules, including the confidentiality exceptions, and the norms that they represent); Rofes, *supra* note 10, at 627 (noting the wide breadth of the rule mandating confidentiality).

⁴⁷⁸ *See* Greenbaum, *supra* note 3, at 311 (proposing a standard mandating disclosure “where the information is neither protected by the attorney-client privilege, nor harmful to the client if released”).

⁴⁷⁹ *See* Pitulla, *supra* note 476, at 12 (asking rhetorically why a client may veto reporting); Green & Zacharias, *supra* note 477, at 298 (noting that an attorney should balance the rights of the client against public policy concerns when deciding whether to disclose); *cf.* MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 16 (“Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure.”).

⁴⁸⁰ *See supra* notes 134–243 and accompanying text (discussing how attorneys and disciplinary agencies have neglected the rule).

⁴⁸¹ *See supra* notes 20–21, 47 and accompanying text (exploring why attorneys are often better situated to report, and the importance of the reporting duty to the profession).

⁴⁸² *See supra* notes 200–201 and accompanying text (noting that the rule is also known as the “snitch rule”).

vented serious harm to the public. Many state bar associations already bestow annual awards on attorneys in a variety of categories; this meritorious conduct could be celebrated in its own category or included within a broader category, such as a “professionalism” or “selfless service” award.⁴⁸³

To be sure, an award does not act as a direct incentive in the same way as a financial incentive would. But offering a blanket financial incentive for reporting might be viewed as inappropriate by those within and outside of the profession.⁴⁸⁴ Praise is more socially acceptable, and perhaps even more so when given in this manner because it would not be guaranteed to all who reported.⁴⁸⁵ The award setting would also provide an opportunity to communicate, in real terms, the tremendous value of making reports to disciplinary authorities. It could have an expressive function as well, signifying that those within the profession not only tolerate but also encourage reporting.⁴⁸⁶ This could, in turn, increase the intrinsic motivation of other individuals to report—motivational crowding-in—which ultimately could lead to even greater reporting of serious misconduct.⁴⁸⁷

This Article envisions that all six of the foregoing measures would be adopted simultaneously by a jurisdiction to maximize an attorney’s incentive to report. Indeed, the measures have been designed so that they reinforce each other and thereby amplify the overall effect. Furthermore, none of these measures requires any significant expenditures on the part of disciplinary agencies outside of those associated with investigating additional reports—which presumably are welcome. Indeed, the monitoring and processing costs of implementing these measures are negligible and certainly less than those associated with the present stick-based system, assuming that disciplinary authorities currently take seriously their responsibility to investigate and prosecute those who violate their reporting obligations.

At the same time, a jurisdiction would not need to adopt all six measures to see a benefit. Several of the measures might be quite contentious, as they run counter to the traditional mantra that attorneys have an obligation to report

⁴⁸³ See, e.g., *Awards & Competitions: Awards for Nomination*, N.Y. STATE BAR ASS’N, <https://nysba.org/awards-competitions/> [<https://perma.cc/FD8Y-CU7A>] (displaying forty-five awards given by the New York State Bar Association).

⁴⁸⁴ See *supra* note 422 and accompanying text (noting that financial incentives are not ideal in situations where monetization is not socially acceptable).

⁴⁸⁵ See Underhill, *supra* note 417, at 262–63 (describing how incentive uncertainty can decrease the likelihood of motivational crowding-out).

⁴⁸⁶ See Goldschlager, *supra* note 248, at 369–70 (noting how praise may impact behavior through its expressive function).

⁴⁸⁷ See *id.* at 374–75 (describing how supportive incentives may cause crowding-in).

misconduct irrespective of the costs to their personal and professional lives.⁴⁸⁸ But my hope is that this proposal will spur a much-needed conversation about the realistic costs of reporting and the ways that our profession can support those who come forward.

CONCLUSION

When the ABA adopted the Canons in 1908, they were replete with aspirational language to guide “right-thinking lawyers” in the ethical practice of law, but they provided no incentive to encourage compliance.⁴⁸⁹ After that first experiment proved to be a disaster, the ABA turned to a criminal law model in the Model Code and later strengthened in the Model Rules: establishing minimum standards of conduct for attorneys below which they are subject to sanctions. Although a stick-based system might work well in simple settings, it cannot fully account for the considerable differences attorneys may face because of their practice settings, years of experience, or individual identities. Nowhere is that incongruence more evident than in the mandatory reporting rule, which threatens to sanction attorneys if they do not reveal misconduct even when that revelation could lead to adverse reputational consequences, informal or formal retaliation, or worse—while simultaneously providing no support to those who are most at risk.

This Article highlights the failures of the status quo and offers a different approach. Other legal and nonlegal systems have turned to carrots to motivate people to act in ways that will benefit the greater good. Carrots are particularly effective in complex settings where individuals have dramatically different compliance costs that are difficult to ascertain *ex ante*. Although the reporting of another lawyer’s misconduct is clearly such a setting, this Article aims to create a framework that can be applied more broadly by decision-makers to other aspects of professional lawyer regulation where the stick-based approach is inappropriate and ineffective in inducing the ethical conduct we strive for in our profession. To be clear, this Article does not call for a wholesale replacement of the current sanction-based system with one dominated by carrots; rather, it posits that some types of ethical or otherwise desirable attorney conduct may be more effectively and equitably promoted by offering positive incentives.

Through the implementation of the specific six-pronged proposal in this Article, jurisdictions can begin to turn around the reporting system that has

⁴⁸⁸ Grenardo, *supra* note 232, at 46–47 (“And just because it is practically difficult to report another attorney, that does not mean the legal profession or the legislature should provide an incentive to do so. Being an attorney is hard.”).

⁴⁸⁹ See Hazard, *supra* note 50, at 1250 (noting that the Canons were supposed to function as representative of ethical norms rather than as enforceable obligations).

long been an abject failure. But it will take an exhaustive examination of the entire system of professional regulation—and an openness to alternative models—to develop a comprehensive approach that will produce the collective ethical conduct that merits the privilege of self-regulation.