The Attorney's Ethical Responsibility to Report Misconduct:

A Fundamental Duty/Obstacles to Compliance

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In his 2012 article in the Ohio State Law Journal, Professor Arthur F. Greenbaum of the Moritz College of Law begins with the premise:

> *An effective lawyer disciplinary system is essential to the protection of clients, third parties, and the profession as a whole. The present system, however—which relies primarily on complaints filed by lawyers, judges and clients—often fails to capture misconduct, which, either standing alone or as part of a larger pattern of misconduct, warrants disciplinary attention by sanction or through remedial training.*

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Professor Greenbaum is, of course, quite right and his article explores the potential advantages and disadvantages of what he describes as 'automatic reporting mechanisms'. But the question should be asked, "Does the topic of 'automatic reporting mechanisms' suggest that there are shortcomings in the current ethical obligation imposed on lawyers to report violations of the Rules of Professional Conduct?" It may be helpful to examine the basic premise for the ethical rules mandating the reporting of ethical misconduct by lawyers, its observance in practice, and practical obstacles to compliance.

The ABA Model Rule which sets out the obligation imposed upon members of the bar to report misconduct by other attorneys is Rule 8.3(a):

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

The comments to Rule 8.3(a) makes clear that in order to lay claim to the notion that we are a 'self-regulating profession', attorneys must honor their duty to report misconduct. While virtually all disciplinary agencies report that the vast majority of complaints regarding lawyer misconduct come from clients, it is clear that fellow attorneys (including judges) are often in the best position to recognize, assess and report ethical lapses of colleagues. This foundation principle which undergirds the self regulation premise is vital to an effective system of lawyer regulation and yet perhaps one of the most resisted obligations contained within the Rules.

I. The Cornerstone of a Self-Regulating Profession

Virtually every business, occupation and profession is subject to some form of regulation, typically at the hands of some governmental entity. Indeed much political rhetoric focuses on the proper level of oversight and regulation—too much or too little. But few professions have laid claim to the lofty notion of 'self regulation' as does the legal profession.

The unique role of lawyers in our society, which literally supports the American system of justice, easily translates into a moral duty to honor our obligation to protect the public, the profession and the justice system from those who either cannot or will not abide by the ethical rules which we self impose. The judicial branch in most states holds the inherent, plenary, (and in some jurisdictions such as Louisiana) the exclusive constitutional authority to regulate the practice of law. This structure is the source of the claim of 'self-regulation' espoused by the legal profession—a notion that is both impugned and hailed by those who either choose to highlight the regulatory failures, or its successes.

The duty to report lawyer misconduct embraces the principle that, as officers of the court, our collective vigilance supports our system of justice and the public we serve. In the disciplinary matter of *In Re: Riehl-*

mann, 2004-0680 (La. 1/19/2005), 891 So.2d 1239, the Louisiana Supreme Court spoke to the basic notion of an attorney's reporting obligation:

> Reporting another lawyer's misconduct to disciplinary authorities is an important duty of every lawyer. Lawyers are in the best position to observe professional misconduct and to assist the profession in sanctioning it. While a Louisiana lawyer is subject to discipline for not reporting misconduct, it is our hope that lawyers will comply with their reporting obligation primarily because they are ethical people who want to serve their clients and the public well. Moreover, the lawyer's duty to report professional misconduct is the foundation for the claim that we can be trusted to regulate ourselves as a profession. If we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public.

This last line in the Court's opinion captures well the essence of the attorney's duty to report misconduct as reflected in Rule 8.3(a).

But most recognize that the mandatory reporting of attorney misconduct by lawyers is not nearly as robust as the rule would demand. This troubling fact has a number of causes, a few of which we'll explore here.

II. Obstacles to Reporting Lawyer Misconduct

While the percentages differ amongst jurisdictions, all lawyer regulatory agencies report that the vast majority of misconduct complaints are lodged by clients. This is neither surprising nor unexpected. Nonetheless, it is often true that other attorneys were in the best position to detect misconduct by a fellow member of the bar but failed to report the behavior to the disciplinary authorities.

One impediment is the simple notion that no one likes to be viewed as one who 'tattles' on another. Since early childhood we've all learned from parents and teachers that 'no one likes a tattletale'. Indeed, some lawyers have derided the ethical obligation reflected in Rule 8.3(a) as requiring that they help 'big brother' snoop on their colleagues, referring to 8.3(a) as the 'snitch rule'. That view is a very real but harmful perspective and one that is not easily overcome. One matter decided by the Louisiana Supreme Court reflects the indifference demonstrated by this mindset.

In the matter of *In Re: Brigandi, 2002-2873 (La. 04/09/2003), 843 So.2d 1083* the respondent was a contract attorney in a tiny law office where the owner of the firm was engaged in a high volume personal injury practice supported by an illegal, unethical runner based solicitation scheme. The lawyer who owned the firm paid cash to 'runners' who recruited accident victims for the law office. The daily activity in the firm was characterized by a seemingly never ending stream of runners hauling in new accident victims and being paid in cash for their catch. In an investigative sworn statement the respondent testified that he has never seen cash being exchanged, had no firsthand knowledge of the scheme and therefore had no duty to report. In an off record comment, the respondent suggested that he had nothing to say to ODC as 'you'll never get him', referring to the owner of the firm. As it turned out, he was wrong. The firm's owner was prosecuted criminally and in connection with subsequent disciplinary proceedings, consented to permanent disbarment. When asked if his employee Mr. Brigandi was, aware of the runner based operations, the owner said that he would have had to have been 'deaf, dumb and blind' not to have known what was happening around him. Brigandi was charged with violating 8.3(a) as well as a lack of candor to the ODC. In imposing discipline, the Supreme Court stated:

> In Count II, respondent's actions may have caused no palpable harm to any clients, but violated the general duty imposed upon attorneys "to uphold the integrity of the bar." *Louisiana State Bar Ass'n v. Weysham*, 307 So. 2d 336 (La. 1975). Attorneys are often in the best position to witness

the systemic harm to the legal profession from organized schemes of misconduct, such as solicitation, which might not be readily apparent to the general public. As a result, our professional rules impose an obligation on all members of the bar to report any misconduct they become aware of in the course of their practice. An attorney's failure to do so must be viewed as a serious offense.

A second obstacle to compliance with Rule 8.3(a) is found within the rule itself. Nothing within the rule defines the term 'knowledge.' Nor does the rule set out a time or deadline by which a report of misconduct must occur. The Louisiana Supreme Court in the *Riehlmann* matter specifically spoke to those issues:

> We now turn to a more in-depth examination of the reporting requirement in Louisiana. At the time the formal charges were filed in this case, Louisiana Rule 8.3(a) provided:
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> > A lawyer possessing unprivileged knowledge of a violation of this code shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
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> Thus, the rule has three distinct requirements: (1) the lawyer must possess unprivileged knowledge of a violation of the Rules of Professional Conduct; (2) the lawyer must report that knowledge; and (3) the report must be made to a tribunal or other authority empowered to investigate or act on the violation. We will discuss each requirement in turn.
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> ***Knowledge***
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> In its recommendation in this case, the disciplinary board did excellent work in collecting and analyzing the cases and legal commentary interpreting the knowledge requirement of Rule 8.3(a). We need not repeat that analysis here. Considering those authorities, it is clear that absolute certainty of ethical misconduct is not required before the reporting requirement is triggered. The lawyer is not required to conduct an investigation and make a definitive decision that a violation has occurred before reporting; that responsibility belongs to the disciplinary system and this court. On the other hand, knowledge requires more than a mere suspicion of ethical misconduct. We hold that a lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred. As such, knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question.
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> ***When to Report***
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> Once the lawyer decides that a reportable offense has likely occurred, reporting should be made promptly. Arthur F. Greenbaum, The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform, 16 GEO. J. LEGAL ETHICS 259, 298 (Winter 2003). The need for prompt reporting flows from the need to safeguard the public and the profession against future wrongdoing by the offending lawyer. Id. This purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented.
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> ***Appropriate Authority***
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> Louisiana Rule 8.3(a) requires that the report be made to "a tribunal or other authority empowered to investigate or act upon such violation." The term "tribunal or other authority" is not specifically defined. However, as the comments to Model Rule 8.3(a) explain, the report generally should be made to the bar disciplinary authority. Therefore, a report of misconduct by a lawyer admitted to practice in Louisiana must be made to the Office of Disciplinary Counsel.

Hence, at least since the Court's decision in *Riehlmann,* lawyers have had better guidance and direction regarding their reporting obligations. To be sure, the number and frequency of 8.3(a) reports of misconduct by lawyers has substantially increased in Louisiana. Nevertheless, still other obstacles to consistent compliance remain.

Another area of concern to the practitioner is the fear (real or imagined) of retribution by the respondent lawyer; or a fear that the legal community will develop the perception that the reporting attorney is a 'snitch'—someone not to be trusted. While such a concern does not justify a violation of 8.3(a), ignoring the reality of the role those concerns play in 8.3(a) compliance does little good for the bar or the protection of the public. This problem is never more evident than in the criminal justice system where 'prosecutorial misconduct' is rarely reported by criminal defense attorneys. When quizzed about such failures, the more candid response from defense attorneys is that they have literally dozens of other clients being prosecuted by the errant district attorney, and a report of 'prosecutorial misconduct' might adversely affect their chances of fair or favorable treatment—particularly in plea discussions. While the proffered excuse is understandable, prompt reporting in every instance allows for the regulatory authorities to address the issue as may be appropriate by either seeking remedial education coupled with probation, or removal of the prosecutor's license in the case of repeated misconduct or in particularly egregious circumstances.

A final related area is the concern by practitioners that the reporting of misconduct by a fellow attorney during the course of litigation may be viewed as a means to secure leverage and a more favorable outcome. Indeed, some attorneys do use the filing of disciplinary complaints as a means of intimidating opponents, or to exact retribution on opposing counsel. Most if not all disciplinary authorities are extremely sensitive to that issue, and are vigilant to safeguard against the practice wherever possible.

The litigator who uses the threat of filing a disciplinary complaint to secure an advantage in pending civil litigation runs afoul of Louisiana's Rule 8.4(f) which provides:

> It is professional misconduct for a lawyer to threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

While the 'threat' of filing an ethics complaint may give rise to discipline where the sole reason for doing so is to secure an advantage in a civil matter, the *actual* filing of the complaint does not. The duty to promptly report misconduct certainly trumps the concern over possible adverse perceptions, and the rules governing disciplinary enforcement procedures allows for the ODC to 'stay' or delay disciplinary investigations where there is pending civil or criminal litigation regarding the same subject matter. While such assurances are routinely provided to lawyers by disciplinary authorities, in practice this factor features prominently in either a failure or substantial delay in the reporting of misconduct.

III. Conclusion

The duty of lawyers to assist in the regulation of the practice of law is the foundation of our opportunity which we enjoy to engage in 'self regulation'. The trust and confidence placed in our profession by our citizens rests upon the notion that we will police our ranks, report those whose conduct falls below the ethical standards, and imposed fair but firm discipline so as to protect the public. The dilemma is that there are many obstacles which provide impediments to compliance with the 8.3(a) reporting obligation. Open and active discussion of these issues serves to educate members of the bar, improves chances of increased compliance with reporting obligations, and reinforces the confidence and trust of the public in the legal profession.

> If we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public.