IF YOU SEE SOMETHING SAY SOMETHING:
Ethical Obligations to Report an Attorney’s Misconduct

Shannon L. McCarthy
Chihuly Studio
Seattle, Washington

and

Kevin M. Kennedy
Wiggin and Dana
New Haven, Connecticut

and

Brian S. Faughnan
Lewis Thomason
Memphis, Tennessee

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I. INTRODUCTION

For all the animosity that can exist among members of our profession when dealing with each other, and as hard as it can be for lawyers to consistently separate the ire that may exist between principals from the way the agents treat each other, lawyers are typically reluctant to pursue bar complaints against other lawyers. On the other hand, there are some lawyers who are more willing to do so and, unfortunately, even some lawyers who almost seem eager to attempt to leverage the potential for pursuing professional discipline into an opportunity to obtain a potential advantage for their client.1 Many lawyers are also unfamiliar, at any given point when confronted with what appears to be unethical conduct on the part of another lawyer, with how to determine whether they have an ethical obligation to report that lawyer’s conduct. Some lawyers may incorrectly believe that they have to report any ethical violation to disciplinary authorities no matter whether it is a serious one or not. Others may think that perhaps the jurisdiction in which they practice does not impose any such requirement at all. For the most part, both viewpoints are fundamentally incorrect.

Whether to report the ethical misconduct of another lawyer can be one of the most difficult situations an attorney faces. This was difficult terrain even before the rise of the #MeToo movement. Whether a lawyer is in private practice or an organizational setting, there is a fair chance he or she will witness or experience conduct that raises the prospect of a reporting obligation under applicable state ethics rules. Harassment is only one of many difficult scenarios that may trigger a potential duty to report lawyer’s violations of applicable ethics rules. Other situations include lawyers suffering from impairments, dishonest lawyers, and lawyers who learn of an opposing counsel’s misconduct in the course of a representation.

These situations raise an assortment of thorny issues: What obligation does an attorney have to report unethical behavior or other improper conduct (e.g. a lawyer engaging in sexual harassment) by another attorney? How does a lawyer determine whether a line has been crossed from “zealous advocacy” into something impermissible? Is there an ethical obligation to report a colleague or adversary who appears to be impaired by drugs, alcohol or mental illness? And, even if there is not, what ethical obligations does a lawyer have to advise a client about what is going on because of its potential impact on the representation?

In most jurisdictions, a lawyer’s failure to report certain unethical conduct on the part of another lawyer is itself a violation of the state’s ethics rules under analogs of Model Rule 8.3. This paper will address reporting obligations under these and other scenarios, the limitations on such obligations, and the potential consequences of failing to do so. It will also provide some practical advice on what law firms and other organizations can do to minimize the risks of improper behavior and ensure that the organization properly identifies and remedies any such behavior.

1 See, e.g., Geoffrey C. Hazard Jr., “Squeal Rule,” Considered for Change, Nat’l L.J., March 26, 1990, at 13-14 (1990) (noting trend of “filing a disciplinary charge whenever a dispute between lawyers gets heated. The result has been a surge of petty disciplinary matters … motivated by anger or vengefulness.”).
II. APPLICABLE ETHICS RULES

A. ABA Model Rule 8.3

ABA Model Rule 8.3 addresses the obligation of one lawyer to report the misconduct of another. There are two important aspects of it: (a) what kind of misconduct qualifies, and (b) how is the obligation to report reconciled with the lawyer’s obligation to maintain the confidentiality of client information. Model Rule 8.3(a) addresses the type of misconduct that triggers the obligation:

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.2

Model Rule 8.3(c) directly addresses how to balance client confidentiality with the duty to report: “This Rule does not require disclosure of information otherwise protected by Rule 1.6 ....”3

B. Adoption of Model Rule 8.3

While there can be many ways that any particular jurisdiction’s version of the rules may differ from the ABA Model Rules, it is worth noting that the variations in play concerning the obligation to report another’s lawyer’s misconduct are primarily differences at the margins. Even though California will finally have in place ethics rules patterned after the architecture of the Model Rules as of November 1, 2018, it has not adopted Model Rule 8.3 and, thus, will continue to be the only U.S. jurisdiction that does not require any reporting by one lawyer of another lawyer’s ethical misconduct. On the other extreme, there are three U.S. jurisdictions (Alabama,4 Iowa,5 and Kansas,6) that require that any violation, no matter how technical or benign it might be, be reported. Every other U.S. jurisdiction, however, except for Mississippi,7 includes some sort of exception in the rule that makes the source of the knowledge of the violation relevant to whether a report must be made. The differences that arise among jurisdictions on that aspect involve whether the broader cloak of client confidentiality under Rule 1.6 is sufficient to trigger the exception or merely information that is “privileged” in nature.

2 MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2017).

3 Id. R. 8.3(c).

4 ALA. RULE OF PROF'L CONDUCT R. 8.3(a) (requiring as follows: “A lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.”).

5 IOWA RULE OF PROF'L CONDUCT R. 8.3(a) (omitting limiting language so that it reads: “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct shall inform the appropriate professional authority”).

6 KAN. RULE OF PROF'L CONDUCT R. 8.3(a) (requiring that “A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.”).

7 MISS. RULE OF PROF'L CONDUCT R. 8.3(a) does not contain any provision similar to Model Rule 8.3(c) or that otherwise limits the duty to disclose based on the source of the information.
There are also a handful of jurisdictions that expressly or impliedly make the reporting rule essentially aspirational by providing that no disciplinary punishment can be imposed against a lawyer who fails to comply with their own reporting obligations.\textsuperscript{8} Beyond those two areas, the variations among states as to their particular versions of Model Rule 8.3 revolve around whether they deviate from the requirement that the lawyer must “know” of another lawyer’s violation and how robust and detailed are exceptions created for information learned in the course of participation in a Lawyer Assistance Program (LAP) or some similar program.

Thus, in large measure, lawyers confronted with knowledge of ethical misconduct involving the issues discussed in this paper will be operating under the same ethical constraints as to what is \textit{required} of them by way of reporting misconduct. Of course, what is \textit{required} of a lawyer is only one half of the equation. Lawyers also have discretion to report misconduct under applicable ethical rules to bar counsel even if not required to do so as long as they can do so without violating some other ethical obligation. Yet, questions about whether reporting is required, merely permissible, or not appropriate at all can be quite difficult, particularly where the misconduct in question involves something done by another lawyer at the lawyer’s same firm or when it involves conduct that the lawyer certainly finds inappropriate, but which may or may not violate one or more ethics rules.

A lawyer’s duty to report another’s misconduct has taken on particular significance with respect to sexual harassment and related misbehaviors in light of the #MeToo movement and the ABA’s recent adoption of Model Rule 8.4(g) discussed \textit{infra}. Consider each of the following hypothetical scenarios:

- Shawna is a law firm associate, and a client’s GC she meets with on occasion attempts to engage in sexual conversation with her. Shawna reported this behavior to the supervising partner on the matter, but the partner told Shawna to put up with the behavior since the client is an important one, and that the client has repeatedly stated he wants her on his matters. Shawna comes to a partner on the firm’s management committee to report her concerns.

- Bill likes to tell off-color jokes, some of which are sexual in nature. He also sometimes refers to female lawyers as “Honey,” “Sweetie,” or “Babe.”

- A number of female lawyers have commented that John often looks suggestively at them and makes frequent comments about their appearance, and is very “handsy,” often touching them in unwanted ways. He is also known as a “hugger” particularly after he has had a few drinks at firm social events. Several female associates have complained about his behavior, but he is a rain-maker, and firm management insists he means no harm and does not want to “rock-the-boat.”

- Serena attends a bar event and gets into a heated debate with her colleagues about religious, social, and political matters. In the course of the discussion, she shares that she opposes same-sex marriage, offers her opinion on the cultural

\textsuperscript{8} See GA. RULE OF PROF’L CONDUCT R. 8.3(a) stating, “There is no disciplinary penalty for a violation of this Rule.”; See also Ky. RULE OF PROF’L CONDUCT R. 8.3(d) (providing a safe-harbor for good faith decision-making, declaring, “A lawyer acting in good faith in the discharge of the lawyer’s professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f),”). Washington State does not use the verb “shall” in its Rule 8.4(a) opting instead for “should,” and, thus, making the obligation to report something less than mandatory. WASH RULE OF PROF’L CONDUCT R. 8.4(a).
causes of poverty, and her views on religion that others view as insensitive and offensive.

C. ABA Model Rule 8.4

If the ABA Model Rules were, in fact, binding upon lawyers, then some of the scenarios involving inappropriate conduct of attorneys in these hypotheticals would be easier to resolve because in August 2014 the ABA adopted a new provision prohibiting certain harassing and discriminatory conduct by lawyers in any conduct related to the practice of law. ABA Model Rule 8.4(g) provides that it is professional misconduct for a lawyer to:

1. Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.9

Comment [3] to Model Rule 8.4 provides that the “discrimination” proscribed by Rule 8.4(g) includes “harmful verbal or physical conduct that manifests bias or prejudice towards others” and that “harassment” encompasses “sexual harassment[,] … derogatory or demeaning verbal or physical conduct.”10 Sexual harassment, in turn, “includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.”11 Comment [4] explains that “conduct related to the practice of law” encompasses “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.”12

The ABA’s adoption of Model Rule 8.4(g) has proved to be controversial, and at the moment, there is perhaps no Model Rule further away from the concept of universal adoption. The Rule has been criticized on these grounds: (1) its prohibition on “harmful verbal … conduct that manifests bias or prejudice” or “derogatory or demeaning verbal or physical conduct” amounts to an ill-defined speech code that arguably violates attorneys’ First Amendment rights; (2) the Rule’s expansive definition of “conduct related to the practice of law,” which includes running a law firm and participating in bar association events and other social activities, goes beyond the traditional purpose of the rules, which is to bar conduct that prejudices the administration of justice or renders a lawyer unfit to discharge his or her obligations to clients; and (3) the Rule could undermine a lawyer’s due process rights, by permitting the prosecution of sexual harassment grievances through the disciplinary process, which lacks the procedural safeguards of traditional litigation or administrative proceedings, even where there has been no

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10 Id. at Comment 3.

11 Id.

12 Id. at Comment 4.
finding by a court or administrative agency of improper conduct. As of this writing, the only U.S. jurisdiction that has adopted Model Rule 8.4(g) is Vermont.

Of course, it is important to note that Model Rule 8.4(g) was adopted by the ABA before the news of Harvey Weinstein’s decades-long history of abuses was reported and the resulting resurgence of #MeToo. In response to the criticisms of the Model Rule 8.4(g) proponents argue, among other things: (1) Model Rule 8.4(g) “is not a dramatic expansion of the law” but a garden-variety means to further the ABA’s stated purpose of preventing discrimination within the profession; (2) although the Rule, on its face, reaches speech, its primary focus is on discriminatory and harassing conduct; (3) the “hypothetical horribles that critics have paraded are remote and implausible”; and (4) relying on state and federal employment civil and administrative remedies “is an ill-advised approach to regulation of the legal profession.” About the only thing that is clear concerning Rule 8.4(g) is that its importance in the post-Weinstein world is yet to be fully determined.

Even though most states have not adopted Model Rule 8.4(g), more than twenty U.S. jurisdictions already have some sort of prohibition built into their rules on conduct involving harassment or discrimination. Almost all of those rules, however, are limited in application to conduct that arises while representing a client. A few of those rules are further limited by requiring the need for an adjudication of liability under federal or state laws regarding discrimination to be a condition precedent to the imposition of discipline for similar conduct.

In other jurisdictions, the only reference to bias or prejudice (or discrimination or harassment) that arises in their ethics rules appears in a Comment expanding somewhat the prohibition on conduct prejudicial to the administration of justice under Model Rule 8.4(d). The language in Comment [3] to Model Rule 8.4(d) expands the prohibition on conduct prejudicial to the administration of justice by a lawyer, who through either their words or their conduct, “knowingly manifests... bias or prejudice based upon race, sex, religion, national origin,


17 Id.
disability, age, sexual orientation, or socioeconomic status,” but only if such words or conduct are undertaken in connection with representing a client. So, while the language in the Comment seeks to expand what can be a violation of Model Rule 8.4(d) it only does so while simultaneously narrowing the scope of that rule in terms of requiring representation of a client.

D. Other Model Rules

There are at least two other ethics rules worthy of discussion as grounds for potentially addressing the kind of inappropriate conduct of lawyers that are made the focus of much of this paper. Only one of those two rules – Model Rule 4.4(a) – is a route to potential discipline. That rule, again limited to only when a lawyer is representing a client, prohibits “us[ing] means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . .”18 There are a number of lawyers-behaving-badly scenarios involving acts of harassment based on race or gender that can readily be viewed as using ‘means’ that objectively have no purpose beyond, at minimum, embarrassing the target of scorn. This rule is arguably a natural building block for a further direct address of discriminatory conduct tied directly to the practice of law. In fact, at least one U.S jurisdiction, Idaho, has done exactly that by adding the following language to its version of RPC 4.4(a):

In representing a client, a lawyer shall not:

(1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias against a person on account of that person’s gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants.19

The other rule worthy of discussion because of the guidance it offers to lawyers and its wide adoption is Model Rule 2.1, which addresses the role of lawyer as “advisor.” That rule explains what, relatively speaking, should be a common sense concept for lawyers: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client’s situation.”20 It is in the spirit of that rule and its exhortation that we turn toward a more expansive, but still hopefully practical discussion of these topics infused with advice tempered by social and moral considerations.

II. ILLUSTRATIVE SCENARIOS IMPLICATING A LAWYER’S DUTY TO REPORT

Set forth below is a further discussion of the issues raised by sexual harassment and discrimination in the profession, as well as other types of conduct that frequently raise issues concerning a lawyer’s reporting obligations.

A. Sexual Harassment

1. The Scope of the Problem

If the fallout of the Harvey Weinstein story demonstrates anything, it is that sexual harassment is nothing new and no industry is immune. After news about Weinstein broke in early October 2017, numerous stories of sexual harassment and assault emerged about celebrities, journalists, chefs, politicians, physicians, authors, and lawyers. Sexual harassment, like other forms of sexual violence, is not about sex, it's about power, and the abuse of power or expressions of dominance are widespread. A recent survey reports that 38% of women and 13% of men have experienced sexual harassment in the workplace.\(^{21}\) Despite these staggering numbers, the U.S. Equal Employment Opportunity Commission (“EEOC”) receives fewer than 8,000 charges of sexual harassment each year.\(^{22}\)

It is not surprising that sexual harassment is vastly underreported. Victims of sexual harassment now coming forward repeatedly state the same reasons for why they did not come forward before; namely an overwhelming culture of “that’s just how it is.” Sexual harassment is so pervasive in our society that victims of it often change their own behavior rather than confront their abusers or report them. Another reason for underreporting is that the law is not always a useful tool for fighting back, because the process of reporting and pursuing complaints often punishes those raising concerns as much as wrongdoers. Other reasons victims refrain from reporting misconduct include feelings of embarrassment, just wanting the issue to go away, and that coming forward often results in more trauma for the victim by forcing them to relive the experience.

Sexual harassment happens on a scale of varying degrees of severity, and because of applicable legal standards, can leave many subject to abuse without legal recourse. In non-work settings, sexual harassment does not rise to the level of a criminal act unless the victim is physically assaulted. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of sex, race, color, national origin, and religion.\(^ {23}\) Sexual harassment is a form of discrimination prohibited by Title VII, but federal law only recognizes severe or pervasive harassment as unlawful. A unanimous United States Supreme Court held that same-sex sexual harassment claims were cognizable under Title VII of the Civil Rights Act of 1964, but added that Title VII does not create a “general civility code for the American workplace” and that offhand comments or isolated incidents do not violate Title VII.\(^ {24}\) The Court added, that “[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.”\(^ {25}\)

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\(^ {23}\)The Civil Rights Act of 1964 § 701, 42 U.S.C. §2000e-2(a) (1964) (barring employment discrimination based on race or sex, including sexual harassment).


\(^ {25}\)Id. at 82.
As discussed above, the ABA tried to go beyond the Supreme Court’s decision in *Oncale* to address harassment and discrimination within the rules of ethics through its adoption of Model Rule 8.4(g). Before the adoption of Rule 8.4(g), most applicable ethics rules did not expressly identify harassment or discrimination as professional misconduct, the types of conduct proscribed were narrower than those set forth in 8.4(g), and the rules that did exist required a direct nexus to the representation of a client. Moreover, while some states’ ethics rules prohibit discriminatory conduct in the practice of law, as noted above, some only allow ethics complaints to move forward if a lawyer has previously been adjudged in violation of a statute or ordinance that prohibits discrimination.

2. **What Should a Lawyer Do If He Or She Observes Harassment Within His Or Her Organization?**

As discussed below, it is possible that among the correct answers to this question is that the lawyer may be required to report the misconduct to bar disciplinary authorities, but there may be other, additional, and perhaps even more important options.

For starters, every organization and law firm should have a sexual harassment policy and regularly conduct sexual harassment prevention training. If a lawyer observes harassment or discriminatory conduct, he or she should intervene, if possible, and report it in accordance with the reporting procedure in the sexual harassment policy. Some policies require managers or partners to report misconduct they witness to the human resources department or

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27 CAL. RULES OF PROF’L CONDUCT R. 2-400; COLO. RULES OF PROF’L CONDUCT R. 8.4(g); FLA. RULES OF PROF’L CONDUCT R. 4-8.4(d); ILL. RULES OF PROF’L CONDUCT R. 8.4(j); IND. RULES OF PROF’L CONDUCT R. 8.4(g); IOWA RULES OF PROF’L CONDUCT R. 8.4(g); MD. ATT’Y RULES OF PROF’L CONDUCT R. 8.4(e); MASS. RULES OF PROF’L CONDUCT R. 3.4(i); MINN. RULES OF PROF’L CONDUCT R. 8.4(h); MO. RULES OF PROF’L CONDUCT R. 4-8.4(g); NEB. RULES OF PROF’L CONDUCT R. 8.4(d); N.J. RULES OF PROF’L CONDUCT R. 8.4(g); N.M. RULES OF PROF’L CONDUCT R. 16-300; N.Y. RULES OF PROF’L CONDUCT R. 8.4(g); N.D. RULES OF PROF’L CONDUCT R. 8.4(f); OHIO RULE OF PROF’L CONDUCT R. 8.4(g); OR. RULES OF PROF’L CONDUCT R. 8.4(a)(7); R.I. RULE OF PROF’L CONDUCT R. 8.4(d); WASH. RULES OF PROF’L CONDUCT R. 8.4(g); WIS. RULES OF PROF’L CONDUCT R. 8.4(i). See also, CAL. RULES OF PROF’L CONDUCT R. 2-400; ILL. RULES OF PROF’L CONDUCT R. 8.4(g); and N.Y. RULES OF PROF’L CONDUCT R. 8.4(g) (state rules that require prior adjudication of unlawful conduct before ethics violations can be considered). Chart referencing state rules analogous to MODEL RULES OF PROF’L CONDUCT R. 8.4(g) [https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.authcheckdam.pdf).

28 In defending a sexual harassment claim, employers may use the affirmative defense known as the *Faragher-Ellerth* Defense. The defense is available if “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998). California, Connecticut, and New York have laws requiring all employers to provide sexual harassment training to employees. Robert G. Brody & Katherine M. Bogard, *Mandatory Sexual Harassment Training Now Required by New York State*, N.Y.L.J., JUNE 1, 2018, [https://www.law.com/newyorklawjournal/2018/06/01/mandatory-sexual-harassment-training-now-required-in-new-york-state](https://www.law.com/newyorklawjournal/2018/06/01/mandatory-sexual-harassment-training-now-required-in-new-york-state).

29 In *Ferris v. Delta Airlines*, 277 F.3d 128, 136 (2nd Cir. 2001), the Court held Delta liable for the rape of an employee by a non-supervisory employee because it was negligent in not taking reasonable steps to prevent the harm. Supervisors at Delta had knowledge of the perpetrator’s prior rapes but rather than protecting employees from unreasonable risk of rape, the supervisor took affirmative steps to prevent a formal complaint or informal warnings to flight attendants. *Ferris* 277 F.3d at 137.
It is not uncommon to hear rumors of sexually harassing behavior after the fact. These situations usually come from stories after work parties or other social gatherings, often when alcohol is a factor. Not witnessing the harassment first-hand should not deter reporting it if there are other reasons to believe the rumors are credible. Giving the organization the information helps protect the organization by allowing it to investigate, and helps protect the employees by preventing future instances of harassment if the information is credible.31

Sexual harassment, regardless of whether it rises to the level of a Title VII or state law violation should not be tolerated by the organization. Harassment and discrimination create other organizational problems including employee turnover, low morale, and loss of productivity. A law firm or other employer has several strategies available to it to address claims of sexual harassment against an employee including retraining on anti-sexual harassment, verbal warning, written warning, transfer, or termination.

How to address the issue depends on the severity of the claim but should not depend on the position the alleged abuser has within the organization. Regardless of the size of a partner's book of business or the officer position held within the organization, every company should have a zero-tolerance policy for sexual harassment.

3. **What Should a Lawyer Do If He or She Observes Harassment By Lawyers Outside His or Her Organization or Bar Association Gatherings, Etc.?**

Responding to harassment in social gatherings or outside of the workplace can be difficult. In social situations, be a good bystander.32 If conversation becomes sexual or derogatory in nature and you notice others becoming uncomfortable, try to steer the conversation back to more acceptable topics.

It can be difficult to speak up in these situations because one wants to assume the best in others and avoid giving offense. But this attitude protects the abuser from embarrassment and allows others to continue to be victimized by the behavior. Gently suggesting that a line of conversation or joke is inappropriate can sometimes be enough to stop the unwanted conduct. If an abuser is physically touching someone who clearly does not want to be touched, visual cues include shrinking away, side stepping, or trying to create distance between her and him, offer to

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31 The EEOC will hold an employer responsible for the sexual harassment by one employee against another if the employer knew or should have known of the conduct and doesn’t take immediate, appropriate action to stop it. 29 C.F.R. § 1604.11(d). See also Faragher, 524 U.S. at 807 (holding employer vicariously liable for hostile work environment caused by employee’s immediate superior).

walk the victim to the bar or to introduce her to another guest or attendee. You can politely let the offender know that in social gatherings he should probably keep his hands to himself.

These situations make everyone uncomfortable. But preventing sexual harassment by stepping in is worth a moment’s discomfort.

4. **What Should Firms or Supervising Lawyers Do About Harassment By Clients Directed at Firm Lawyers or Staff?**

The EEOC takes the position that employers can be held liable for the actions of non-employees under a negligence theory if the employer knows about the harassment, the harassment interferes with the employee’s employment, and the employer did not take steps to remedy the problem.\(^{33}\)

This problem is especially tricky for law firms where a client that may represent a significant amount of revenue for a partner’s book or the overall firm harasses attorneys, paralegals, or other staff. The firm should state in its sexual harassment policy that harassment by independent contractors, service providers, and clients is not tolerated. The complaint procedure should be the same as for non-employee behavior as it is for employees of the firm.

Lawyers and staff should not be subject to sexual harassment from a client and should feel supported by the firm in reporting harassing behavior. Removing the complaining lawyer or staff member off the client matter is problematic for two reasons: first, it could be seen as retaliation if the client is high-profile or such removal would result in the lawyer or staff-member having a significant reduction in billable hours, and second, it won’t solve the problem of the harassing behavior by the client.

If a firm receives a complaint about a client, it should advise the client of the firm’s anti-harassment policy and tell him that sexual harassment is not tolerated. If speaking to the client does not resolve the problem, the firm may have to consider firing the client.

5. **How Not to be a Sexual Harasser**

With the unprecedented number of accusations coming to light against perpetrators of sexual harassment and assault in the workplace, it is perhaps not surprising to hear concerns of men questioning whether they can interact with female colleagues one-on-one for fear of being accused and expressing confusion over what conduct is, or is not, permitted.\(^{34}\) This type of thinking is unfortunate and perpetuates the myth that sexual harassment claims are easy to make and therefore there are numerous false complaints. False complaints do happen, but the

\(^{33}\) 29 C.F.R. §1604.11(e).

larger issue is the lack of reporting because of fear of disbelief or retaliation. In fact, research shows that most victims of sexual harassment do not report their harasser. In June 2016, the EEOC released its Report of Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace. The Study reports the following:

*The least common response of either men or women to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint.* [ . . . ] (emphasis in the original).

The incidence of reporting appears to be related to the type of harassing behavior. One study found that gender-harassing conduct was almost never reported; unwanted physical touching was formally reported only 8% of the time; and sexually coercive behavior was reported by only 30% of the women who experienced it.

In terms of filing a formal complaint, the percentages tend to be quite low. Studies have found that 6% to 13% of individuals who experience harassment file a formal complaint. That means that, on average, anywhere from 87% to 94% of individuals did not file a formal complaint.

As the Supreme Court observed in *Oncale*, “[c]ommon sense, and an appropriate sensitivity to social context* is the touchstone of establishing appropriate boundaries. Steps one can take to avoid being accused of sexual harassment are quite easy and generally follow the rules of proper etiquette:

a. **Keep Your Hands to Yourself**

Except for a business-like handshake in greeting, there is no need to touch other people in a professional setting. This rule applies to the workplace as well as outside firm or company gatherings including bar events or CLEs. If you consider yourself a “hugger,” make sure you have affirmative, verbal consent from the person you wish to hug. A simple, “can I give you a hug?” is sufficient to obtain consent. However, one must be cognizant of any power dynamic between the “hugger” and his or her recipient. A person of junior seniority may not feel comfortable saying no in this circumstance, in which case it is best to stick with a handshake.

b. **Joke Carefully**

In the immortal words of Carrie Fisher, “Everybody thinks they have good taste and a sense of humor." While there is nothing wrong with maintaining a sense of humor in workplace situations, jokes among colleagues should be kept clean. In social situations, everyone wants to have a good time, and nothing ruins it faster than an off-color joke told in mixed company.

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36 Id.

37 Id. at 16.

38 *Oncale*, 523 U.S. at 82.

39 WHEN HARRY MET SALLY (Castle Rock Entertainment 1989).
of the stereotypical responses to someone taking offense to a sexual innuendo is, “c’mon, it’s just a joke!” However, even if the person who tells the joke and a few others may find it funny does not mean all others will feel the same way. Sexual innuendo or sexually charged jokes should not be told in the workplace, and for those who have crossed a line should be quick to apologize if they learn that they have made someone else uncomfortable. This may seem like buzz-kill advice, but with work colleagues it’s better to err on the side of caution than provoke a complaint.

c. **Don’t Fish Off the Company Pier**

Employees all spend so much time at work with colleagues that workplace romances are bound to happen. However, those who get romantically involved with co-workers should proceed with extreme caution. This can be particularly problematic in situations involving a supervisor and a subordinate. Law firms and organizations often have policies regarding workplace romances; employees should understand those policies and follow any procedures those policies require, including an undoubtedly awkward conversation with human resources. Most importantly, for those who decide to take the jump, respect the “No” if it’s given and move on. Pursuing a romantic interest with a co-worker who has declined advances is sexual harassment.

6. **Romantic Relationships with Clients**

Another situation where a lawyer’s pursuit of a romantic relationship raises the specter of potentially exploitative, coercive conduct is when a lawyer enters into a sexual relationship with a client during the representation. Is the relationship permissible under applicable ethics rules? In many jurisdictions the answer is unqualifiedly “no,” whereas in others such a relationship would be, at a minimum, highly ethically suspect. Model Rule 1.8(j) explicitly prohibits a lawyer from having a sexual relationship with a client, unless the relationship pre-dates the representation, and nearly 20 states have adopted this approach. (The purpose of the exception is to cover pre-existing relationships, such as spouses or significant others).

Other states have not adopted a *per se* bar to sexual relationships between lawyers and clients, but many disciplinary authorities have concluded that such relationships likely violate other sections of applicable rules. Many ethics opinions, including ABA Formal Opinion 92-364, have concluded that a romantic relationship that forms during the course of a representation created a conflict of interest, materially impaired the lawyer’s ability to effectively represent the client, was prejudicial to the administration of justice or negatively reflected on an attorney’s fitness to practice law. Disciplinary authorities, courts and commentators have also noted the following dynamics inherent in such a relationship: “Often the lawyer-client relationship is characterized by the dependence of the client on the lawyer’s professional judgment, and a sexual relationship may well result from the lawyer’s exploitation of the lawyer’s dominant position.”

40 See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-364, n. 1 (1992) (observing that a lawyer’s relationship with a client “is often inherently unequal” and that “[i]n many cases the client’s ability to give meaningful consent is vitiates by the lawyer’s potential undue influence or the emotional vulnerability of the client); Kan. Bar Ass’n Formal Op. 9413 (1995) (stating “the lawyer who pursues a sexual relationship with a client, even a consenting one, leaves most clients in a situation that is not truly consensual”).

41 *In re Leibowitz*, 109 N.J. 175, 179, 516 A.2d 246, 248 (N.J. 1985) (“sexual episodes with client jeopardize the attorney client relationship and have strong potential to involve the attorney in a breach of one or more Disciplinary Rules”), accord, ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-364, n.1; *Disciplinary Counsel v.*
This paper is not an exhaustive review of the differences in applicable ethics rules or opinions addressing lawyers’ relationships with clients.\textsuperscript{42} Suffice to say that any lawyer entering into a sexual relationship with a client during the course of a representation would be violating explicit prohibitions set forth in ethics rules many jurisdictions, and would be running a serious risk of an ethics violation even in jurisdictions where such relationships are not \textit{per se} barred.\textsuperscript{43} Moreover, particularly with the advent of the #MeToo movement, the trend is clearly for more states to explicitly prohibit such conduct going forward. Accordingly, if a lawyer is tempted to embark on a romantic relationship with a client or prospective client, the lawyer should resist the impulse or, in the alternative, refer that client to another attorney before attempting to initiate such a relationship.

7. Client Veto Power over Reporting Obligations

What if a lawyer learns that another attorney has engaged in sexual harassment or even worse misconduct, but the client does not permit disclosure to disciplinary authorities? Is there a duty to report under those circumstances? As discussed above, the answer under Model Rule 8.3(c) would be “no” because of the inability to make the report without disclosing client confidential information. A sampling of state ethics opinions that have wrestled with scenarios on this topic demonstrate the rationale for giving clients this kind of veto authority.

The Arizona State Bar faced this question in \textit{State Bar of Ariz. Comm. on Prof’l Conduct}, Op. 90-13.\textsuperscript{44} There, an attorney learned from a client that prior counsel had raped and impregnated the client. The client refused to authorize the second lawyer to disclose that information to disciplinary authorities based on the advice of her psychiatrist that the experience would be damaging to her. The Committee concluded that the lawyer’s obligation to preserve client confidence barred the lawyer from making such disclosure, even in matters involving the most serious misconduct, reasoning:

\begin{quote}
[We] are informed that the information is not only confidential but privileged, and that the client has instructed the attorney emphatically not to disclose it… [Because] the information was gained in the course of the representation, is about the client, and therefore relates to the representation for purposes of [Rule 1.6(a)]… [if] the client insists upon confidentiality, the inquiring attorney must respect the client’s wishes, and there can be no duty to report.\textsuperscript{45}
\end{quote}

\textit{Booher}, 75 Ohio St. 3d 509, 664 N.E.2d 522 (1996) (“[t]he client’s reliance on the ability of her counsel in a crisis situation has the effect of putting the lawyer in a position of dominance and the client in a position of dependence and vulnerability”); Alaska Ethics Opinion No. 92-6 (1992) (sexual relationship with clients in “emotionally traumatic” matters such as divorce or criminal matters is inherently unequal).

\textsuperscript{42} See ABA COMM. ON ETHICS AND PROF’L RESPONSIBILITY, \textit{Variations of the ABA Model Rules of Professional Conduct Rule} 1.8(j), Sep. 29, 2017 available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8j.authcheckdam.pdf (revising which states have adopted some version of Rule 1.8(j)).

\textsuperscript{43} \textit{Id.}


\textsuperscript{45} \textit{Id.} at 17.
The Kansas Bar reached a similar conclusion in an ethics opinion issued in 1995.\textsuperscript{46} There, the panel was faced with an inquiry from two law partners who learned that one of their partners had a sexual relationship with a client while she was in the midst of a divorce. To further complicate matters, the firm previously jointly represented the client and her estranged husband in bankruptcy proceedings, and the firm also represented her husband in an unrelated criminal matter. The client ultimately terminated the attorney-client relationship and hired another firm to represent her in the divorce. She also requested that the affair not be reported to disciplinary authorities, based on her fear that doing so would undermine her legal position in pending divorce proceedings.

On these facts, the panel concluded that a rules violation occurred that would in the normal course need to be reported. However, it also held that the duty to report was trumped by the lawyer's duty to stay silent if the client continued to refuse to authorize disclosure. In an analysis that was somewhat difficult to follow (the opinion states among other things that the duty of confidentiality “does not apply in this fact situation” but then applies one), the Kansas bar ultimately concluded the lawyer’s misconduct could not be disclosed unless the former client authorized it, and further suggested the authorization should be in writing.\textsuperscript{47}

\textbf{B. Impaired Lawyers}

Lawyer impairment covers a multitude of conditions that can undermine a lawyer’s ability to effectively represent clients. These include alcohol or drug addictions, mental health issues, other forms of addiction (e.g. compulsive gambling), and age-related conditions, such as dementia or other illnesses. In addition to the direct impact an impairment can have on a lawyer’s ability to provide competent representation, the existence of an impairment – particularly an addiction – is often a contributing factor in other forms of misconduct discussed in this paper, such as inappropriate office behavior or a lack of candor with others.

Because lawyering can be such a demanding, stressful profession, studies suggest that the incidence of impairments among lawyers is significantly higher than the population at large. According to a study published in 2016 co-sponsored by the Hazelden Betty Ford Foundation and American Bar Association, 20.6% of lawyers surveyed undertook “hazardous, harmful, and potentially alcohol-dependent drinking,” which was “a higher rate than other professional populations.”\textsuperscript{48} The incidence of problem drinking was even higher among younger lawyers.\textsuperscript{49} The study also concluded that “[l]evels of depression, anxiety, and stress among attorneys were significant, with 28%, 19% and 23% experiencing symptoms of depression, anxiety, and stress, respectively.”\textsuperscript{50}


\textsuperscript{47} Id.


\textsuperscript{49} Id.

\textsuperscript{50} Id.
1. Supervising/Reporting Obligations

Impaired lawyers raise a number of challenges for the law firms or companies that employ them, including both risk management and labor and employment questions51, as well as the degree to which a lawyer’s impairment must be addressed internally and reported to disciplinary authorities. At bottom, the duty to report an impairment is dependent on the firm’s actual level of knowledge of the impairment, and whether the impairment has caused, or threatens to cause, the lawyer to violate his or her professional obligations to clients.

In ABA Formal Opinion 03-429,52 the ABA’s Standing Committee on Ethics and Professionalism addressed a law firm’s supervisory and reporting obligations in three respects:

a. The obligations of partners and other supervising attorneys “to take steps to prevent lawyers in the firm who may be impaired, from violating the Rules of Professional Conduct”;

b. The reporting obligations that attach when one lawyer becomes aware that another firm lawyer’s mental impairment has resulted in the impaired lawyer failing to represent a client in a manner required by the Model Rules; and

c. A law firm’s obligations when an impaired lawyer leaves the firm.

At the outset, the opinion emphasized that “impaired lawyers have the same obligations under the Model Rules as other lawyers,” and that “mental impairment does not lessen a lawyer’s obligation to provide clients with competent representation.”53 Accordingly, a lawyer would be violating Model Rule 1.16, if she undertook a representation in a situation where the lawyer’s condition materially impaired the lawyer’s ability to represent the client.54

The opinion noted that where a lawyer is a member of a firm or corporate legal department, Rule 5.1(a) requires all partners in a firm and lawyers of comparable managerial

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51 These include the degree to which the firm has legal obligations to accommodate an impaired lawyer under the American With Disabilities Act of 1990, 42 U.S.C.§§ 12101 et seq.(1990) (“the ADA”); the Family and Medical Leave Act, 29 U.S.C. §§2601-2654 (2012) or any state law equivalent statutes. If the impaired lawyer is a partner, the firm’s partnership agreement may also be implicated. This paper does not address these issues.


53 Id. Various state bar associations and disciplinary authorities have reached different conclusions concerning the degree to which an impairment is a mitigating factor. See, e.g., In re Disciplinary Action Against Mayne, 783 N.W.2d 153, 158-59 (Minn. 2010) (depression and obsessive compulsive disorder were not mitigating factors when the disabilities did not directly cause the misconduct); In re Freeman, 835 N.E.2d 494, 499 (Ind. 2005) (treatment for depression and anger management did not excuse misconduct; lawyer suspended 12 months); Columbus Bar Ass'n v. Korda, 94 Ohio St. 3d 133, 760 N.E.2d 824 (Ohio 2002); Attorney Grievance Comm'n v. Wallace, 368 Md. 277, 793 A.2d 535 (Md. 2002) (disbarring an attorney for negligence in six separate matters despite lawyer’s defense that he suffered from personal and psychological problems); In re Sheridan, 148 N.H. 595, 813 A.2d 449 (N.H. 2002) (suspension of impaired lawyer who failed to file articles of incorporation for client and then did not communicate that fact to the client); but see, State ex rel. Counsel for Discipline of Neb. Sup. Ct. v. Switzer, 790 N.W.2d 433, 440-41 (Neb. 2010) (lawyer’s depression should have been considered a mitigating factor); In Re McLendon, 120 Wash. 2d 761, 773-74, 45 P.2d 1006, 1012-13 (Wash. 1993) (bipolar disorder and the cessation of misconduct after treatment afforded substantial weight as mitigating factors); People v. Schubert, 799 P.2d 388, 393-94 (Col. 1990) (effort to treat and overcome a substance abuse problem may be a mitigating factor).

authority in professional corporations and legal departments to make reasonable efforts to establish internal policies and procedures to provide reasonable assurance that all lawyers in the firm comply with the Model Rules. 55 (The elements of such policies are discussed further in Section IV(C)). Thus, when there is reason to believe a lawyer is impaired, a law firm or legal department may need to “confront the lawyer with the facts of his impairment,” “forcefully urg[e] the impaired lawyer to accept assistance to prevent future violations” or “limit[] the ability of the impaired lawyer to handle legal matters or deal with clients.” 56 The opinion also recognized that such determinations are inherently case-by-case, and that “some impairments may be accommodated.” 57

With respect to reporting obligations, the opinion concluded that whether there is an obligation to report depends on the circumstances. Specifically, there is no obligation to report where: (1) the impairment that caused a rules violation has ended; or (2) the firm is supervising and monitoring the lawyer’s work so closely that the firm is “able to eliminate the risk of future violations.” 58 In contrast, the ABA concluded that reporting is required in circumstances where the firm is aware that the lawyer is unable to competently represent a client due to an impairment but nonetheless continues to practice.

The opinion also addressed a firm’s obligations when an impaired lawyer departs the firm. On the one hand, the ABA concluded that a firm “has no obligation under the Model Rules to inform former clients who have already shifted their relationship to the departed lawyer that it believes the departed lawyer is impaired and consequently is unable to personally handle their matters competently.” 59 However, where a client has yet to make a decision whether to transfer its work to the departing lawyer, the firm may need to provide disclosure that is reasonably necessary for those clients to make an informed decision, but must ensure there is a “reasonable factual foundation for any such statements.” 60

As a practical matter, a firm dealing with a departing lawyer who is suffering from an impairment must navigate a potential minefield of conflicting considerations, and there is little authority beyond the ABA Formal Opinion addressing these issues. On the one hand, Model Rule 1.16 requires that when a representation ends, a lawyer must “take steps to the extent reasonably practicable to protect the client’s interests.” 61 Given the text of Model Rule 1.16, it is unclear whether the distinction the ABA Formal Opinion attempts to draw – i.e. between clients who have decided to leave (no duty to disclose) and those who are considering it (potential duty to disclose) – would be adopted by a court evaluating a firm’s failure to disclose an impairment in connection with a departing lawyer’s transition to another firm. In addition, disclosing the situation in whole or part to clients raises a host of other considerations. For example, the ADA

55 Id.
56 Id.
57 Id.
58 Id.
60 Id.
61 MODEL RULES OF PROF’L CONDUCT, Rule 1.16 (2017).
and FMLA generally prohibit employers from disclosing confidential medical information on anything beyond a need-to-know basis. Thus, if an impairment does not undermine the lawyer’s ability to competently represent the client, disclosure arguably would be unnecessary under applicable ethics rules and potentially violate federal law. In a similar vein, if a firm disclosed a lawyer’s impairment to a departing client in an effort “to convince the client to remain with the firm rather than follow the impaired lawyer who continues to practice,” the firm may be subjecting itself to claims by the departing lawyer for tortious interference, unfair competition or violating Rule 7.1’s prohibition on making false or misleading claims about the firm’s services.

As far as reporting obligations to disciplinary authorities, ABA Formal Opinion 03-429 provides that there is no obligation to report a departing lawyer’s condition if the impairment did not result in a violation of the Model Rules. It added, however, that subject to the prohibition of disclosing client confidential information protected by Rule 1.6, a firm may voluntarily report “to the appropriate authority its concern that the withdrawing lawyer will not be able to function without the ongoing supervision and support the firm has been providing.”

In a December 2016 Legal Ethics Opinion, the Virginia Supreme Court reached similar conclusions concerning the ethical obligation of a partner or supervisory lawyer who “reasonably believes another lawyer in the firm may be suffering from a significant impairment that poses a risk to clients or the general public.” Relying on ABA Formal Opinion 03-429 (2003), the Virginia Supreme Court emphasized that Rule 5.1(a) “requires that a firm have in place measures or procedures to ensure that all lawyers, not just impaired ones, comply with the Rules of Professional Conduct,” and that “the lawyer’s, impairment is neither a defense to, nor an excuse for ... ethical breaches.” Depending on the nature and severity of the impairment, the “firm may be able to work around or accommodate some ... situations” by “reduc[ing] the impaired lawyer’s workload, requir[ing] supervision or monitoring, or remov[ing] the lawyer from time-sensitive projects.” However, in different circumstances, the law firm “may have a duty to prevent the lawyer from rendering legal services to clients of the firm, until the lawyer has recovered from the impairment.”

In order to meet these obligations, the Court opined that “the firm should have an enforceable policy that would require, and a partner or supervising lawyer should insist, that the impaired lawyer seek appropriate assistance, counseling, therapy, or treatment as a condition of continued employment with the firm.” In addition, the firm should consider consulting with a professional medical or health provider for advice on how the firm should deal with and manage an impaired lawyer.

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62 29 C.F.R. §§ 1630.14(b)(1), (2), and 29 C.F.R. § 825.500(g) (2014).
64 Id.
66 Id. at 4.
67 Id.
68 Id.
69 Id. at 5.
The opinion concluded that if the firm makes reasonable inquiry about the impairment, takes appropriate actions to prevent a lawyer from engaging in future rules violations, and the lawyer is in recovery from the impairment, there is nothing to report to the bar, unless there was prior conduct that involves dishonesty.\(^{71}\) It also concluded that if the firm took reasonable measures or precautions to ensure that the impaired lawyer complied with the Rules of Professional Conduct, “neither the partners or supervisory lawyer in the firm are ethically responsible for the impaired lawyer’s professional misconduct, unless they knew of the conduct at a time where its consequences could have been avoided or mitigated and failed to take reasonable remedial action.”\(^{72}\)

2. Reporting Obligations Concerning Lawyers Outside The Firm

What happens if a lawyer learns or has reason to believe that an attorney outside the firm has an impairment that materially affects the lawyer’s ability to represent clients? Is there any duty to report?

The answer is “yes,” under certain circumstances. ABA Formal Opinion 03-431 provides that a lawyer who believes that another lawyer’s mental condition materially impairs her representation of her clients, and who knows that the lawyer is continuing to represent the clients in an impaired condition, must report that lawyer’s resulting violations of Rule 1.16(a)(2).\(^{73}\) The critical issue is the extent of “knowledge” required to trigger a reporting obligation. The opinion explains the competing considerations lawyers must balance under these circumstances:

[A] lawyer should recognize that, in most cases, lack of fitness will evidence itself through a pattern of conduct that makes clear that the lawyer is not meeting her obligations under the Model Rules, for example, Rule 1.1. (Competence) or Rule 1.3 (Diligence). A lawyer suffering from impairment may, among other things, repeatedly miss court deadlines, fail to make filings required to complete a transaction, fail to perform tasks agreed to be performed, or fail to raise issues that competent counsel would be expected to raise

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Because lawyers are not health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist. Nonetheless a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment (e.g. patterns of memory lapse or inexplicable behavior not typical of the subject lawyer, such as repeated missed deadlines).

Each situation, therefore, must be addressed on the particular facts presented. A lawyer need not act on rumors or conflicting reports about a lawyer. Moreover, knowing that another lawyer is drinking heavily or is evidencing impairment in

\(^{71}\) Id.

\(^{72}\) Id. at 6. Cf., Bd. Of Overseers of the Bar v. Warren, 201 ME 124, 34 A.3d 1103 (Me. 2011) (firm’s executive committee members violated Maine bar rules by failing to have reporting programs and procedures in place).

\(^{73}\) ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 03-431 (August 8, 2003)
social settings is not itself enough to trigger a duty to report under Rule 8.3. A lawyer must know that the condition is materially impairing the affected lawyer's representation of clients.74

State ethics panels have reached similar conclusions. See, e.g., South Carolina Opinion 02-13 (a lawyer who had actual knowledge or a clear belief that another attorney suffered from a mental disability that raised a substantial question about the attorney's "fitness" to practice law, needed to raise that issue with appropriate authorities); Pennsylvania Opinion, 98-124 (Dec. 7, 1998 (mere suspicion of an impairment, without more, does not require reporting).

3. **“Red Flags” Reflecting Potential Impairment**

Given that reporting obligations concerning impairment turn on the state of a lawyer's knowledge, lawyers should be cognizant of these types of behaviors as signs of a potential impairment.

a. Missing deadlines or being unprepared for meetings, conference calls, court appearances, etc.;

b. Unexplained absences from the office, unresponsiveness to clients and other firm personnel or drastic changes in schedule;

c. Physical manifestations of a potential impairment condition (slurred speech, smell of alcohol on breath);

d. Inattention to administrative responsibilities, including failing to enter diary, get bills out, submit expense reports etc.;

e. Cognitive deficiencies (memory lapses, difficulty concentrating, difficulty communicating);

f. Reports of changed behavior from staff members;

g. Drastic increases or decreases in billable hours;

h. Deterioration in appearance or grooming;

i. Keeping odd hours; and

j. Relying on other firm personnel to cover the lawyer’s responsibilities or make excuses for the lawyer’s behavior.

If a law firm or organization learns that a lawyer is suffering from an impairment, it should consider referring that lawyer to an assistance program, as well as consulting with a health care professional for advice on how to handle the situation.75 While the firm should not attempt to dictate the nature of the treatment, it should take steps to insure that the impaired lawyer is, in

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74 Id.

75 See generally Commission on Lawyer Assistance Programs, ABA, available at www.americanbar.org/groups/lawyer_assistance.html (directory of Lawyer Assistance Programs).
C. Dishonest Lawyers

Anecdotal reports suggest that lawyer criminal and quasi criminal misconduct is on the rise. For firm management, the misconduct of a firm lawyer or non-lawyer employee raises issues under Model Rules 1.6 (client confidentiality), 5.1 (duty to supervise); and 8.3 (reporting obligations).

The consequences for failing to meet these obligations can be severe. The District of Columbia Court of Appeals Board of Professional Responsibility’s lengthy decision in In the Matter of Dorrance D. Dickens and Deborah Y. Luxenberg is cautionary tale. There, the Board recommended that a majority partner of a small firm, Deborah Luxenberg, be suspended for six months after her partner stole $1,434,298.50 from three estates, one of which was Luxenberg’s client. (The dishonest lawyer fled the country.) The Board made this recommendation, even though “there [was] no record evidence that Ms. Luxenberg participated in [the other lawyer’s] acts of misconduct or had actual knowledge of the … misappropriation of the estate assets.” The Board concluded that Luxenberg ignored numerous “clear warning signs that the trust and confidence” she placed in her law partner was not justified. These included, the dishonest lawyer’s: (1) long delays in addressing the client’s requests for modifications of operating documents; (2) frequent trips abroad, extended disappearances, and notice he was moving to Italy; (3) failure to appear at client and firm meetings; (4) use of firm credit cards for personal expenses; and (5) failure to follow firm policies on document management, billing and collection. Even worse, Luxenberg witnessed the execution of a document that facilitated the theft of her client’s assets during a visit with the dying client in hospice care. Because she did not take reasonable steps to understand the significance of the documents or read the instructions, she “paved the way” for her colleague to steal her client’s assets. See, In re Fonte (three-year suspension warranted where lawyer ignored evidence that his partner was stealing from client escrow accounts); Bd. Of Overseers of the Bar v. Warren (firm’s executive committee members violated Maine ethics rules by failing to have reporting programs and procedures in place).

The Florida Supreme Court’s decision in The Florida Bar v. Rousso illustrates what can happen when lawyers fail to supervise or report the misconduct of support staff. There, the Court disbarred two attorneys after the firm’s bookkeeper stole nearly $4.4 million from the firm’s trust account and fled to Argentina. The attorneys argued that the criminal acts of the bookkeeper “could not be anticipated or thwarted.” However, the Court adopted the referee’s conclusion that “the massive amount of the $4.38 million deficit proves that the Bookkeeper had


79 2011 Me 124, 34 A.3d 1103 (Me. 2011).

80 117 So.3d 756 (Fla. 2013)
been embezzling for months or even years” and that “[m]isappropriation by office staff does not relieve the lawyer from the requirements of the minimum standards regarding a trust account.”81 The opinion also excoriated the lawyers for taking “an excessive length of time to seriously deal with the issues” and failing to inform clients of the theft in favor of attempting to quietly covering the losses from various sources.

What happens when the duty to report is in conflict with a lawyer’s obligation under Rule 1.6 to preserve the confidentiality of client information? The answer is found in Rule 8.3(c), which provides “This Rule does not require the disclosure of information otherwise protected by Rule 1.6. Rule 1.6, in turn, provides that lawyers have an obligation not to reveal any “information relating to the representation of a client” absent client consent. Thus, if a lawyer discovers the misconduct of another attorney, but the client refuses to allow disclosure of that misconduct, there is an affirmative obligation not to report the offending attorney under such circumstances.

The Supreme Court of Rhode Island’s Advisory Panel Opinion in In re Ethics Advisory Panel Opinion No. 92-1,82 illustrates application of these principles. There, the Court was presented with the following quandary: one lawyer discovered that another has misappropriated escrowed funds. The inquiring lawyer (i.e. the one who discovered the misconduct) advised the client what happened, and sought permission to disclose the misconduct to disciplinary authorities. The client refused, and instead allowed the dishonest lawyer to reimburse the funds. Even more remarkably, the client continued working with the dishonest lawyer on other matters. The lawyer who discovered the misconduct inquired what his obligations were under the circumstances.

On these facts, the Supreme Court of Rhode Island held that under Rule 8.3(c), the inquiring lawyer had a duty not to report the dishonest lawyer to disciplinary authorities, and that the disciplinary authorities could not compel the inquiring lawyer to share what he knew. The Court acknowledged that “absent a confidentiality issue, it is clear that the inquiring attorney would be under an ethical obligation to report the embezzlement and indeed would be subject to discipline if the inquiring attorney failed to report the embezzlement.”83 However, it concluded that because the inquiring lawyer learned of the misconduct through his representation of the client, and the client, in turn, did not authorize the disclosure of information relating to the representation to disciplinary authorities, the duty of confidentiality trumps the reporting obligation. The Court reasoned that “[t]he drafters of the rules anticipated this conflict between Rule 1.6 and Rule 8.3 and concluded that a lawyer’s duty of confidentiality owed his or her client supersedes a lawyer’s obligation to report attorney misconduct.”84 It was nonetheless, exasperated with this result:

In this case [an attorney] has engaged in criminal conduct as well as violated the Rules of Professional Conduct. The failure of the Rules of Professional Conduct to facilitate the investigation and prosecution of [the attorney] is correspondingly a failure of the legal profession to regulate itself effectively. This failure fuels the

81 Id. at 760-61.
83 Id. at 321.
84 Id. at 323.
perception that under a cloak of confidentiality, the legal profession is engaged in a cover-up of attorney misconduct.85

Other jurisdictions have reached similar conclusions. See Philadelphia Bar Ass’n Prof’l Guidance Committee, Opinion No. 93-28 (Jan. 1994) (confidentiality obligations precluded an inquiring lawyer from reporting the conversion of estate funds because a beneficiary refused to authorize the disclosure of such information); Va. Legal Ethics Opinion, No. 1468 (Dec. 1992) (disclosure of trust account violations not permitted where reporting could prejudice the interests of the lawyer’s client in a divorce proceeding); Md. State Bar Ass’n Comm. on Ethics, Op. 89-46 (April 20, 1989) (inquiring lawyer not obligated to bring a grievance against client’s predecessor counsel for breach of fiduciary duty absent client consent).

In contrast, in what is in many respects a seminal decision establishing the general principle on the duty to report rules violations to disciplinary authorities,86 the Illinois Supreme Court in In Re Himmel suspended an attorney for a year for failing to report to disciplinary authorities the misconduct of predecessor counsel in converting settlement proceeds in a personal injury case. Consistent with his client’s instructions, the attorney had sued to recover the money, but did not contact disciplinary authorities. The critical difference between Himmel and the decisions above is the applicable Illinois rules provided a lawyer had a duty to report unless doing so would require the lawyer to disclose “unprivileged” information, rather than the broader duty of confidentiality imposed by Rule 1.6.87

D. Misconduct of an Opposing Lawyer

In addition to the impairment issues discussed in Section IV (B), a lawyer who learns that opposing counsel has engaged in assorted other forms of misconduct may have a duty to report that misconduct.

1. Bullying

Many lawyers have heard accusations of sexual harassment or racial discrimination defended against by assertions that the lawyer in question is merely an equal opportunity offender. “He’s not treating her that way because she is a woman, he’s treats everyone that way. He’s just a bully.” Such topics raise questions that are difficult to answer in a vacuum because they invariably involve an interplay between subjective and objective factors: When does a lawyer’s conduct cross the line from merely zealous advocacy into bullying? When can bullying, unrelated to sexual harassment or racially-motivated animus, be deemed to violate the ethics rules?

Nothing in the Model Rules imposes a general civility standard upon lawyers, nor does any particular Model Rule require attorneys to be nice people or to behave as such. Various aspects of the Model Rules read, to a greater or lesser extent, as acknowledgments of the risk that members of the legal profession can be at risk of having trouble disagreeing without being

85 Id.

86 In re Himmel, 125 Ill. 2d 531, 533 N.E.2d 790 (Ill. 1988).

87 See, e.g., Ariz. Comm. on R. of Prof’l Conduct, Op. 90-13 (1990) (“The most striking difference between Himmel and the situation in Arizona is the issue of confidentiality … [because] [a]bsent [client] consent … he would be bound by the requirement of confidentiality.”).
disagreeable in pursuit of their client’s interests. Exhortations to general “good behavior” appear in the Model Rules as early as the Preamble section: “A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.” 88 Further, in connection with the ethical requirement of diligence, the Model Rules provide guidance in a Comment that is often thought of when addressing requests for continuances or extensions of deadlines, but that extends more broadly to all aspects of lawyering: “A lawyer is not bound, however, to press for every advantage that might be realized for a client... The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” 89 And, of course, the aforementioned Model Rule 4.4(a) also imposes limits on conduct by a lawyer when acting for their client that might otherwise be characterized as “bullying”, explaining: “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.” 90 But, as mentioned earlier in this paper, each of these rules is limited in application to when a lawyer is representing a client and would not apply to a lawyer’s conduct in social settings, or even in other professional settings where the lawyer is not acting in the traditional role of an advocate. Such situations, as with conduct involving sexual harassment or racial discrimination, will trigger a violation of an ethical duty only if they can be characterized as “conduct prejudicial to the administration of justice” in violation of Model Rule 8.4(d).

While deciphering where the line is can be difficult, there are cases that demonstrate tangible risks for lawyers who are willing to bully others that they may face discipline against their license. In what some may view as a mild example, a Virginia lawyer received a public censure in 2014 for his treatment of opposing counsel during the course of a deposition. Crandley characterized his adversary’s client’s case as “crap” both before and after the deposition in question and also made multiple disparaging, albeit G-rated, comments directed at opposing counsel during the deposition. Additional background information about the Virginia lawyer in question casts a clearer light on the reason for the public censure – the attorney had demonstrated a pattern and practice of treating others rudely. Crandley was on disciplinary probation at the time of this public censure – ultimately triggering a 90-day suspension from practice for getting into further trouble while on probation – and had previously even served time in jail on two occasions as a result of his conduct in front of trial court judges involving rude and sarcastic questions of witnesses netting him three days in jail on the first occasion and ten days in jail on the second.91

Another example involves a Florida lawyer whose treatment of opposing counsel was so inexcusable that it contributed significantly to the imposition of a two-year suspension from practice.92 During the course of litigation, in addition to demonstrating an inability to get along with the judge presiding over the case, Jeffrey Norkin was found to have incessantly disparaged


92 Florida Bar v. Norkin, 132 So.3d 77 (Fla. 2014).
and humiliated opposing counsel. The order suspending Norkin for two years explained ten different instances of disparaging communications directed at opposing counsel by Norkin, including calling him “underhanded,” “a scumbag,” “lying and disingenuous,” accusing him of engaging in “ludicrous and downright unintelligent conduct,” and that the motions he filed were “laughable.” Some of these statements were spoken loudly or even yelled in the presence of other attorneys and in court, while others were merely memorialized in email exchanges or letters sent only to opposing counsel. Making matters worse, the opposing counsel on the receiving end of Norkin’s vituperative attacks was seventy-one years of age and suffering from both Parkinson’s Disease and kidney cancer at the time and had passed away more than a year before Norkin was disciplined. In addition to imposing a two-year suspension, the Florida Supreme Court undertook the relatively unusual step of requiring Norkin to travel to Tallahassee to receive a public reprimand from it face-to-face. Norkin was subsequently disbarred in Florida in 2015 based on continuing to practice law while suspended as well as subsequent mistreatment of opposing counsel – this time bar counsel – of a not altogether dissimilar nature.

2. Formal Grievances

The grievance process is another area where the question of “zealous advocacy” vs. “bullying” often arise. Lawyers may not use the threat of a grievance or other form of report solely in an effort to gain an advantage for a client.

ABA Formal Opinion 94-383 addresses this scenario. There the ABA first observed that “in those instances in which an attorney is required to report the professional misconduct of another, the failure to report would itself violate Rule 8.3(a)” In the ABA’s view, “because an agreement not to file a complaint if a satisfactory settlement is made is the logical corollary of a threat to file a complaint in the absence of such a settlement... a threat to file disciplinary charges is unethical in any circumstances where an attorney would be required to file such charges by Rule 8.3(a).” In those instances where reporting a potential rules violation is permissive, rather than mandatory, the opinion posits that the threat still may be improper as criminal extortion “unless it concerns the lawyer’s conduct in the very case in which the threat is made, or conduct which is the subject of the case in which the threat is made (i.e. a malpractice action).” Some states, including for example Tennessee, actually have an explicit

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93 Id. At 85-86.
94 Id.
95 Id. at 87.
96 Id. at 92.
97 Florida Bar v. Norkin, 132 So.3d 77 (Fla. 2014).
99 Id.
100 Id.
prohibition in the ethics rules against threatening a disciplinary complaint for the purposes of gaining an advantage in a civil matter.101

Other ethics committees have taken a similarly negative view of the propriety of using the threat of a grievance to gain a litigation advantage.102 At best, such a threat is unseemly and would strike a judge or a grievance panel as sharp practice; at worst such threats themselves constitute rules violations that will boomerang on those making them. Accordingly, a lawyer who believes an opposing lawyer has engaged in reportable misconduct should view his or her reporting obligation without regard to how it might be used as leverage in the case. If the conduct is bad enough to require a report, make the report at an appropriate time (which might include waiting for the litigation to be concluded). If questionable behavior is not something that the lawyer would otherwise feel compelled to report, then the lawyer should not make idle threats to do so.

III. PRACTICAL ADVICE FOR LAW FIRMS AND OTHER ORGANIZATIONS TO MINIMIZE THE RISKS POSED BY BAD ACTORS AND ENSURE MATTERS ARE TIMELY AND PROPERLY REPORTED

While the predominant focus of this paper has been on the ethical duty to report issues in situations where a lawyer knows or has reason to know of a problem, the adoption of strong internal policies and procedures are perhaps the best way to prevent issues from arising in the first instance, and also ensure that a law firm or legal department complies with its reporting obligations if a rules violation does occur. Strong policies and procedures (and perhaps even more importantly, a strong organizational culture) serve the added purpose of effective risk management. Set forth below are areas where effective organizational practices can make a positive difference.

A. **Effective Vetting of New Hires**

One of the realities that law firms and corporate legal departments face is increased lawyer mobility, and the corresponding competition for legal talent. For example, the financial pressures on law firms to attract lawyers with large, portable books of business and the frequency with which laterals change firms, have increased the potential that the firm recruits one or more “bad apples” to join its ranks for financial reasons, even where red flags emerge in the hiring process. Put simply, the best defense to the difficulties posed by problem lateral lawyers is not allowing them to join the organization in the first place.

Accordingly, all firms and corporate legal departments should have established policies and procedures for vetting lateral candidates thoroughly and not be tempted to lower standards or take procedural shortcuts, even where there is competition from others to attract the candidate or the search is otherwise time-sensitive. That process should include a detailed questionnaire, thorough background checks and other research, speaking with others who have interacted with the lawyer (e.g. clients, opposing counsel, bar association contacts), reference checks and, in the case of a lateral partner candidate, vetting the partner’s clients. Obvious red flags include candidates who have: (1) been disciplined or sanctioned, (2) engaged in criminal

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101 TENN. SUP. CT. R. 8; TENN. RULES OF PROF’L CONDUCT R. 4.4(a)(2).

or civil misconduct (e.g. sexual harassment); (3) changed jobs frequently without satisfactory explanations as to why; and (4) exhibit a lack of candor, or other adverse personality traits, in the hiring process. The consequences of hiring an unworthy lawyer without sufficient due diligence can be dire: if, for example, a firm hires an attorney with a history of sexual harassing others, and that pattern of behavior could have been discovered through competent vetting, a judge, jury or EEOC investigator could very well conclude that the firm “looked the other way” for business reasons, and was not suitably concerned with preventing such behavior.

Historically, a history of suing or being sued by a prior employer has been used as a red flag in hiring due diligence, however firms and legal departments should carefully consider whether to disregard such a candidate in light of the #MeToo movement. More women are coming forward with claims of workplace harassment and filing claims against former employers. Holding such litigation history against potential candidates without thoughtful due diligence could result in continuing workplace discrimination and creating a stigma against women who decide to fight back.

B. Integration and Monitoring

Starting with orientation, effectively integrating new hires into an organization is critically important to avoiding problems down the road and ensuring that the organization is on top of what the new hire is doing. The orientation should cover, among other things, an overview of the organization’s policies, procedures, and culture. Among the messages that leaders should deliver early and often is that the organization takes adherence to its ethical and legal obligations seriously; that any concerning conduct should be reported promptly, no matter who is involved; and that someone who reports improper conduct will not pay a price for doing so. The organization should assign responsibilities to existing lawyers to assist with integrating the new hire into the business. For law firms hiring lateral partners (where the autonomy often afforded partners creates additional risk), the firm should regularly monitor the lawyer’s progress on integrating into the fabric of the firm, not simply based on economic metrics, but also the quality of the partner’s work, whether the partner is working regularly with others in the firm, and the lateral’s adherence to firm policies and procedures. Law firms that tolerate “lone-ranger” partners who function in silo practices that firm management neither monitors nor understands lose the ability to effectively discharge their supervisory obligations and create risks for the business enterprise.

C. Internal Policies and Procedures

In addition to an effective onboarding process, every organization should also have well-established written policies and procedures, setting forth what types of matters need to be reported, and the means for doing so. These policies can include an ombuds policy, anti-harassment and anti-discrimination policies, and policies requiring reporting and consultation to legal ethics counsel concerning adherence to applicable professional ethics rules. Each policy should provide, among other things:

- It is each employee’s responsibility to be familiar with the firm or company’s policies;
- To whom the employee should report problems if concerns arise;
- The types of matters that need to be reported;
• How the report will be handled;

• The organization reserves the right to sanction lawyers and staff for noncompliance with firm policies; and

• There will be no retaliation or other adverse consequences to a report made in good faith.

Depending on the size of the organization and the nature of the issue, there could be different people to whom lawyers and employees are directed to report. For example, employment-related complaints might go to an HR Director, department chair, or manager, whereas matters implicating professional ethics might be reported to a General Counsel. The purpose of having a designated ombudsperson (or office, depending on the size of the organization) is generally to afford employees another outlet to report problems if they are uncomfortable pursuing their concerns through other avenues.

Once a complaint surfaces, the organization should do the following:

• Do not ignore the matter or pressure the employee or reporting lawyer to withdraw the complaint;

• Conduct a complete and timely investigation;

• Counsel employees not to make statements or otherwise discuss the matter amongst themselves (particularly in writing), since such statements are often incomplete, easy to take out of context, or otherwise unreliable. (As distinguished from formal reports prepared by investigators written for the purpose of memorializing the results of the investigation itself);

• Consider whether the organization wants the investigation privileged, and if so, staff the matter appropriately in order to be protected by the attorney-client privilege;

• Depending on the nature and seriousness of the matter, consider retaining outside counsel to conduct the investigation, or to advise how the organization should respond to the results of the investigation;

• To the extent the investigation establishes that a violation occurred and the need for remedial action, undertake corrective steps promptly and effectively.

If an investigation reveals that an attorney engaged in conduct that arguably triggers a reporting obligation, the matter should be referred to qualified ethics counsel for a determination of what else, if anything, needs to be done. In larger law firms or companies, that individual is often the organization’s General Counsel. For smaller organizations that do not have an internal ethics resource, it might be necessary to consult with outside counsel with experience handling legal ethics and related issues.
IV. CONCLUSION

We all believe we would do the right thing when confronted with unethical behavior, but issues of sexual harassment, drug, alcohol, or gambling addiction, or theft by someone we know who is also a member of our profession can leave even the most competent and ethical lawyer struggling for answers that best address the situation. Knowing your state’s obligations for reporting, or not reporting, such behavior is the best first step. Being proactive and involved in the policies your firm or organization has, or can implement, to provide guidance and resources to lawyers on the receiving end of inappropriate conduct is another worthwhile endeavor. Finally, and particularly in the most serious situations, do not feel obligated to rely only on your own professional judgment, but recognize the benefits of obtaining advice from qualified ethics counsel, even if that means retaining outside counsel.
Biographies

Shannon L. McCarthy is Associate General Counsel for Chihuly Studio in Seattle, Washington. Until April 2018, Shannon was a partner at Miller Nash Graham & Dunn LLP where she served as the team leader of the Franchise and Distribution practice. Shannon represented franchisors at all stages of the franchise life-cycle, with particular focus on start-ups and international systems entering the U.S. Market. Shannon is a member of the American Bar Association Forum on Franchising Women’s Caucus Steering Committee. She has co-authored articles for the Franchise Law journal and is a contributing author of the forthcoming Franchise Desk Book (3rd ed. 20__).

Kevin Kennedy is a litigation partner in Wiggin and Dana LLPs New Haven office, and a member of the firm’s franchise practice group. For over two decades, Mr. Kennedy has represented the Subway® franchisor, its affiliates, and other franchise concepts in state and federal court lawsuits, arbitrations, and mediations across the country. He played an integral role in the firm’s successful efforts to enforce the Subway® arbitration clause, which produced numerous leading federal and state appellate decisions on franchise arbitration and resulted in 4 putative class actions and dozens of individual lawsuits being dismissed or enjoined in favor of arbitration. He has tried numerous arbitrations and lawsuits to a conclusion and has argued appeals before the United States Court of Appeals for the Second and Seventh Circuits, the Connecticut Appellate Court and the Connecticut Supreme Court. Mr. Kennedy has been selected for inclusion to The Best Lawyers in America in the Franchise Law category since 2006.

Mr. Kennedy has also served as Wiggin and Dana’s General Counsel since 2007, where he counsels firm lawyers on legal ethics and professional responsibility issues. He is also a long-time member of the Connecticut Bar Association’s Standing Committee on Professional Ethics, which provides ethics opinions to the Connecticut Bar. He writes and speaks frequently about franchising, arbitration, and professional responsibility issues.

Brian S. Faughnan practices with the Tennessee law firm of Lewis Thomason, resident in its Memphis office. In addition to handling business litigation and appellate litigation, his practice focus involves solving problems for lawyers. Over the years, Brian has represented lawyers and law firms in disciplinary matters, litigation and other matters involving professional liability. He has also served as an expert witness in matters in federal and state courts in Tennessee.

Brian is listed in The Best Lawyers in America (Appellate Law, Ethics and Professional Responsibility Law, and Litigation-First Amendment) and was named 2017 Appellate Practice “Lawyer of the Year” in Memphis by that publication. Brian is also listed as a “Super Lawyer” by Mid-South Super Lawyers, and has an AV rating from Martindale Hubbell.

Brian is a frequent author and speaker on ethics and professional responsibility issues. He is a co-author of the book “Professional Responsibility in Litigation,” the Second Edition of which was published by the ABA in April 2016. He shares his thoughts on legal ethics, professional responsibility, and other aspects of the law of lawyering at www.faughnanonethics.com. He currently serves as the Treasurer of the Board of Directors of the Association of Professional Responsibility Lawyers and has been the Chair of the Tennessee Bar Association’s Standing Committee on Ethics and Professional Responsibility since 2009.