



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion

on

Professional Conduct

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Opinion No. 11-01
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Topic: Arbitration and Mediation; Reporting Lawyer Misconduct

Digest: When a lawyer-mediator learns that a lawyer representing a party in a mediation has violated Rule 8.4(c), the lawyer-mediator has an obligation to report that lawyer's misconduct. Provisions in the Uniform Mediation Act or the Not-For-Profit Mediation Center Act generally do not prevent such disclosure.

References: Illinois Rules of Professional Conduct 1.6, 3.6, 4.1, 4.2, 8.3, 8.4

Illinois State Bar Opinions 85-3 and 93-1

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

Skolnick v. Alheimer & Gray, 191 Ill.2d 214, 730 N.E. 2d 4 (2000)

Uniform Mediation Act, 710 ILCS 35

Not-For-Profit Dispute Resolution Center Act, 710 ILSC 20

Virginia Legal Ethics Opinion 1658

Virginia Legal Ethics Opinion 1185

FACTS

Mediator is a lawyer licensed in Illinois. During a mediation conducted under the provisions of the Uniform Mediation Act, 710 ILCS 35, or the Not-For-Profit Dispute Resolution Center Act, 710 ILCS 20, lawyer-mediator becomes aware that a lawyer for one party participating in the mediation has committed an act that violates Illinois Rule of Professional Conduct 8.4 (c).

QUESTIONS

1. Does a lawyer-mediator have an obligation to report another lawyer's violation of Illinois Rule of Professional Conduct 8.4 (c) when the lawyer-mediator learns of the violation during a mediation?
2. Do confidentiality provisions in the Uniform Mediation Act or Not-For-Profit Dispute Resolution Center Act override a lawyer-mediator's obligation to report another lawyer's violation of Illinois Rule of Professional Conduct 8.4 (c) during a mediation?

OPINION

- A. A lawyer has an obligation to report violations of Rule 8.4 (c), including when the lawyer is serving as a mediator.

Illinois Rule of Professional Conduct 8.3 (a) states that “(a) lawyer who knows that another lawyer has committed a violation of Rule 8.4 (b) or Rule 8.4 (c) shall inform the appropriate professional authority.” Rule 8.4 (b) prohibits a lawyer from committing a “criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; Rule 8.4 (c) prohibits a lawyer from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.” Rule 8.3 (c) provides, “This Rule does not require disclosure of information otherwise protected by the attorney-client privilege or by law or information gained by a lawyer or judge while participating in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred.”

The facts state that the lawyer-mediator has learned that a lawyer for a party participating in the mediation has violated Rule 8.4 (c). The committee understands the inquiry to suggest that the lawyer-mediator has knowledge, which “denotes actual knowledge of the fact in question.” See, Rule 1.0 (Terminology). The lawyer-mediator therefore knows that another lawyer has committed a violation of Rule 8.4 (c) and must report the lawyer. “The duty to report misconduct (under Rule 8.3) is absolute.” *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 226, 730 N.E. 2d 4, 13 (2000); *see also In re Himmel*, 125 Ill. 2d 531, 533 N.E. 2d 790 (1988).

Rule 8.3 (a) requires such reporting even though the lawyer-mediator was serving as a mediator and not representing a client at the time the lawyer-mediator learned that the other lawyer had violated Rule 8.4 (c). Nothing in Rule 8.3(a) restricts its application to particular circumstances such as to when a lawyer is representing a client. *Compare, e.g.,*

Rule 3.6 (a) (restricting application of the rule to a lawyer “who is participating or has participated in the investigation or litigation of a matter”); Rule 4.1 (restricting application to “in the course of representing a client”); Rule 4.2 (restricting application to “in representing a client”).

Further, numerous authorities make clear that Rules of Professional Conduct which do not contain limitations on when they apply govern a lawyer’s conduct in all circumstances. *See, e.g.*, ISBA Opinions 85-3 and 93-1 (discussing ethical obligations of lawyer who also sells insurance); Va. Legal Ethics Opinion 1658 (citing Va. Legal Ethics Opinion 1185 (“a lawyer must comply at all times with applicable rules of the Code of Professional Responsibility, whether or not the attorney is acting in a professional capacity as a lawyer.”)).

- B. That a lawyer-mediator learns of another lawyer’s wrongful conduct during a confidential mediation may not extinguish the duty to report.

The inquiry also asks whether the confidentiality provisions in the Uniform Mediation Act and the Not-For-Profit Mediation Center Act are “law” within the meaning of Rule 8.3 (c).

As noted above, Rule 8.3 (a) states that “a lawyer who knows that another lawyer has committed a violation of Rule 8.4 (b) or Rule 8.4 (c) shall inform the appropriate professional authority.” Both the Uniform Mediation Act and the Not-For-Profit Mediation Center Act have provisions that provide for confidentiality of certain communications made during mediation. However, as detailed below, the Committee believes that neither of these provisions would prevent the lawyer-mediator from disclosing that a lawyer who represented a party in the mediation violated Rule 8.4 (c).

Section 4 of the Uniform Mediation Act states that certain mediation communications are privileged. Section 6 (a)(6) of the Uniform Mediation Act provides that there is “no privilege under section 4 for a mediation communication that is (6) except as otherwise provided in subsection (c) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.”

Section 6 (c) of the Uniform Mediation Act states that a mediator “may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).” 710 ILCS 35/6 (c). The Committee understands this provision to bar a party to the mediation or other party from subpoenaing a mediator and forcing the mediator to testify about the mediation proceeding in a disciplinary proceeding. However, the mediator remains capable under this section of disclosing a lawyer’s misconduct to disciplinary authorities. Nor does the Committee believe that Rule 8.3(c), which does not require disclosure of information otherwise protected by law, would apply in this situation.

Further, the mediator does not have a client in the mediation, and thus the information regarding the other lawyer's misconduct that was learned during the mediation would not constitute information "otherwise protected by the attorney-client privilege" under Rule 8.3 (c). Nor would the information about the other lawyer's misconduct be considered confidential information pursuant to Rule 1.6, as the mediator would not be revealing information relating to the representation of a client.

Likewise, the Not-For-Profit Dispute Resolution Center Act has a provision that prevents disclosure of certain information shared during a mediation. Section 6 of the Not-For-Profit Dispute Resolution Center Act states:

All memoranda, work products, or case files of a qualified dispute resolution center and its mediators shall be confidential and shall not be subject to discovery or other disclosure in any judicial or administrative proceeding. Any communication made during the resolution process by any participant, mediator, or any other person present at the mediation shall be a confidential communication.

710 ILCS 20/6. The Committee believes this section does not bar the lawyer-mediator from reporting that another lawyer involved in a mediation violated Rule 8.4 (c). To find otherwise would be to find that lawyers may be immune from repercussions for false statements made before a mediator where as if the same statements were made before a judge, the lawyer would face possible sanctions.

The Committee decided to reach these issues out of a sense of necessity, so that lawyers will have guidance on such issues. The Committee further believes that disclosure is appropriate based upon (1) the importance the Illinois Supreme Court has placed on the obligation of lawyers to report serious misconduct by other lawyers, (2) the fact that the mediator has no fiduciary relationship with any person in the mediation whose rights might be compromised by effecting the duty to report, and (3) recognition that a lawyer should not be able to subvert the mediation process by engaging in misconduct, and then avoid discipline for such misconduct because of the confidentiality provisions contained in the Acts.

CONCLUSION

Under Illinois Rule of Professional Conduct 8.3 (a), a mediator who is also a lawyer licensed in Illinois must report another lawyer when the lawyer-mediator knows the other lawyer has engaged in conduct that violates 8.4 (c). This duty to report exists even though the lawyer-mediator is not acting as a lawyer representing a client during the mediation. Further, the Committee believes the confidentiality provisions of the Uniform Mediation Act and the Not-For-Profit Dispute Resolution Center Act do not abrogate the lawyer-mediator's obligation to report the other lawyer's misconduct.

