ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.6, 8.3, and 8.4. See also *Skolnick v. Altheimer & Gray*, 191 Ill.2d 217, 246 Ill.Dec. 324, 730 N.E.2d 4 (2000). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 90-8
January 29, 1991

Topic: Duty to report professional misconduct

Digest:

1. There is no duty to report knowledge of professional misconduct protected as a confidence by the lawyer-client privilege.
2. The duty to report knowledge of professional misconduct of another lawyer should not apply to a lawyer retained to represent the lawyer whose professional conduct is in question.
3. There is a duty to report professional misconduct which is otherwise subject to mandatory reporting even if the ARDC has learned of the same misconduct from another source.

Ref.: Rules 1.6, 8.3 and 8.4
ABA Model Rule 8.3 (Comment)
In re Himmel, 125 Ill.2d 531, 533 N.E. 2d 790 (1988)

FACTS

The inquiring lawyer represents another lawyer in a legal malpractice action and learns from the client lawyer facts which may constitute a violation of the Rules of Professional Conduct by the client lawyer. The lawyer also learns from other sources, both in preparation for trial and during the

trial, facts suggesting such a violation. It also appears that either the trial judge or opposing counsel in the malpractice action have reported the alleged misconduct to the Attorney Registration and Disciplinary Commission.

QUESTIONS

1. Where a lawyer has been retained to represent another lawyer whose professional conduct is in question, is the lawyer under a duty to report knowledge of professional misconduct where the facts were communicated to the lawyer by the client lawyer?
2. Is the duty to report any different where the lawyer obtains knowledge of the client lawyer's possible misconduct from sources other than the client lawyer in the course of preparation and trial of the malpractice action?
3. If a duty to report exists in either case, is the inquiring lawyer relieved of that duty by the fact that others have reported the misconduct in question?

OPINION

An Illinois lawyer's duty to report the professional misconduct of another lawyer is governed by Rule 8.3(a) of the Rules of Professional Conduct. Under that rule, a "lawyer possessing knowledge not otherwise protected as a confidence by these Rules or by law that another lawyer has committed a violation of Rule 8.4(a)(3) or (a)(4) shall report such knowledge" to an appropriate authority.

It is important to note that only professional misconduct which violates Rule 8.4(a)(3) or Rule 8.4(a)(4) must be reported. Rule 8.4(a)(3) 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(a)(4) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." The facts presented in this inquiry are insufficient to determine whether the client lawyer's conduct violated Rule 8.4(a)(3) or Rule 8.4(a)(4). For purposes of this opinion, it will be assumed that the conduct in question was subject to mandatory reporting.

Another necessary element of a duty to report under Rule 8.3(a) is "knowledge" of the other lawyer's misconduct. The Rules define the words "knowingly", "knowing", or "knows", to denote "actual knowledge of the fact in question." The Rules also state that a "person's knowledge may be inferred from circumstances." For purposes of this opinion, it will be assumed that the inquiring lawyer had "actual knowledge" of the misconduct in question gained from confidential communications with the client lawyer as well as sources other than the client lawyer.

With the foregoing background and assumptions, the Committee answers the inquiring lawyer's questions as follows:

1. A lawyer retained to represent another lawyer whose professional conduct is in question has no duty to report knowledge of professional misconduct communicated in confidence by the client lawyer. Indeed, the lawyer would be prohibited from reporting such knowledge by the Rules. As noted above, Rule 8.3(a) requires lawyers to report knowledge of misconduct only when the lawyer's knowledge is "not otherwise protected s a confidence by these Rules or by law." A "confidence" is defined by the Rule as "information protected by the lawyer-client privilege under applicable law." Rule 1.6, which governs confidentiality of information, provides:

> Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.

Thus, knowledge otherwise subject to mandatory reporting under Rule 8.3(a) which is protected as a confidence by Rule 1.6(a) need not, and should not, be reported by the inquiring lawyer. This result is consistent with the holding of In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1088), a case decided under the 1980 Code of Professional Responsibility.

2. The Committee believes that the result should be the same even where the lawyer gains knowledge of the misconduct in question from sources other than the client lawyer. As stated above, Rule 1.6(a) generally prohibits disclosure of both "confidences" and "secrets" of clients. (The Rules define a "secret" as information gained in the professional relationship that the client has requested be held inviolate or the revelation of which would be embarrassing or detrimental to the client.) In contrast, Rule 8.3(a) requires the reporting of knowledge not otherwise protected as a client "confidence" under the Rules.

Because a "confidence" under the Rules refers only to information protected by the lawyer-client privilege, Rule 8.3(a) requires that a client's "secret" involving another lawyer to be reported even though disclosure would be otherwise prohibited by Rule 1.6. (In this respect, Rule 8.3(a) is consistent with the result in Himmel, in which the Illinois Supreme Court held that a lawyer had a duty to disclose knowledge of another lawyer's criminal act, contrary to the wishes of the respondent's client, where the knowledge was not protected under the lawyer-client privilege.) Therefore, literal application of Rule 8.3(a) could require a lawyer representing another lawyer to report knowledge of professional misconduct obtained in the course of the representation not protected by the lawyer-client privilege as a "confidence" under the Rules.

The Committee does not believe that a literal interpretation of Rule 8.3(a) in situations where a lawyer represents another lawyer is either necessary or appropriate for several reasons.

First, it is not required by Himmel. The misconduct in question in Himmel was not the misconduct of Himmel's own client and therefore the issue of the duty to report the professional misconduct of a lawyer's own client was not considered by the Supreme Court.

Second, a lawyer potentially threatened with discipline for failure to divulge unprivileged knowledge concerning the lawyer's client learned in the course of the representation would not be motivated to pursue discovery that might reveal information subject to mandatory reporting.

Third, a literal interpretation of Rule 8.3(a) would also place lawyers representing other lawyers in an inherent conflict where the client's interests would inevitably conflict with the lawyer's interest in avoiding discipline as a result of knowledge gained in the representation. Obviously, requiring a lawyer to report on the lawyer's own client would inevitably destroy the trust and confidence implicit in the lawyer-client relationship.

Finally, the Committee's opinion is consistent with the views of the drafters of the 1983 American

Bar Association Model Rules of Professional Conduct. The official comments to ABA Model Rule 8.3, which is similar to Illinois Rule 8.3, make clear that the duty to report does not extend to the conduct of a lawyer's own client:

> The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

The Committee believes that the Supreme Court would follow the view expressed in the ABA Comments.

3. With respect to the inquiring lawyer's third question, if disclosure is required by Rule 8.3, the Committee does not believe that a report by another would excuse the lawyer from that obligation. The respondent in Himmel was accused of violating former Rule 1-103 by failing to disclose a criminal act by another lawyer. Himmel sought to excuse his nondisclosure by showing that his client had reported the matter before he learned of it. The Supreme Court held that he had not stated a defense:

> Respondent offers no authority for such a defense and our research has disclosed none. Common sense would dictate that if a lawyer has a duty under the Code, the actions of a client would not relieve the attorney of his own duty. 9125 Ill.2d at 538)

In any event, a confirmatory report may serve an important function. It may alert the Attorney Registration and Disciplinary Commission to the existence of evidence corroborating the initial complaint. It may also minimize the possibility that a complaint may be misinterpreted.

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