



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 8.3(a), 8.4(b) and (c). See also *Skolnick v. Alzheimer and 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. 90-28
March 9, 1991

Topic: Mandatory Report of Attorney Misconduct

Digest: A report is not mandatory under Rule 8.3 unless a lawyer has actual knowledge of a violation of Rule 8.4(a)(3) or (a)(4). If such information is received as hearsay, the lawyer is not required to attempt to confirm or disprove the allegation. If a lawyer obtains actual knowledge of misconduct falling within Rule 8.3, however, a report is required even though the action agency already has learned of the matter through a different source.

Ref.: 1990 Illinois Rules of Professional Conduct, Rules 8.3, 8.4(a)(3), and 8.4(a)(4)
In re Himmel, 125 Ill. 2d 531 (1988)

FACTS

Lawyer A represents a client in civil litigation. His client informed him that the opposing litigant "threatened to expose various activities to the Internal Revenue Service of the United States if a favorable settlement of the civil case was not accomplished." Lawyer A made contact with Lawyer B, who represents the opposing litigant, "and received similar statements, although couched in different terms." Lawyer A then reported those events to a State prosecutor, "insinuat[ing]" that the prosecutor had a duty to report the allegation to the Illinois Attorney

Registration and Disciplinary Commission (ARDC).

Subsequently, Lawyer A provided the same information to Lawyer C, who is not involved in the litigation. Lawyer C then informed the prosecutor of his conversation with Lawyer A.

The prosecutor now inquires whether he is under an obligation to report the alleged misconduct of Lawyer B to the ARDC. If so, he asks whether his report is excused because Lawyer A already informed the commission of the event. Finally, he inquires whether he has a duty to investigate "in order to determine whether or not there is any independent information to support the veracity of the complaint."

QUESTIONS

1. On the facts given, is a report to ARDC required?
2. Is such a report excused if the report already has been made by the person with first hand knowledge of the facts?
3. Does a lawyer who receives hearsay information of professional misconduct have a duty to make an investigation before reporting that misconduct?

OPINION

1. Rule 8.3(a) of the Illinois Rules of Professional Conduct requires a report if a lawyer has "knowledge" of a violation of Rule 8.4(a)(3) or (a)(4). Knowledge is defined in the "Terminology" section of the Rules as "actual knowledge of the fact in question." On the facts given, the prosecutor has only hearsay knowledge, and therefore is under no duty to report the matter.

It also is questionable whether a mandatorily reportable event has occurred. The reach of Illinois Rule 8.3(a) is far more limited than that of its counterpart in the A.B.A. Model Rules. The latter requires disclosure of all Rule violations that raise "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." Illinois Rule 8.3(a), however, comes into play only if a lawyer's conduct violates Rule 8.4(a)(3) or (a)(4).

Rule 8.4(a)(4) refers to "conduct involving dishonesty, fraud, deceit or misrepresentation." That language does not seem applicable to this situation. Threats of the type here alleged are serious improprieties. See Rule 1.2(e). Such conduct, however, does not amount to "dishonesty, fraud, deceit or misrepresentation."

Rule 8.4(a)(3) is applicable only if Lawyer B's comment violates a criminal statute. Rule 8.4(a)(3) requires disclosure of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." (emphasis added) From the face of the inquiry, it is unclear whether Lawyer B's statement was a mere confirmation of the fact of the client's threat, or whether it was a reinforcement of that threat.

If the former, it was not improper. If the latter, it may well have been a criminal act whose disclosure is mandated by Rule 8.3.

The possibility that Rule 1.16(a)(1), (a)(2), (b)(1)(B) or (C), or some other Rule may require action on the part of Lawyer B is not within the scope of the inquiry. The question whether the alleged

threat by Lawyer B's client may amount to a criminal offense is not within the scope of this inquiry.

The prosecutor may properly, at his option, report the events to the ARDC. If he were to do so, he should make it clear that he has only hearsay knowledge of the event, and that his report does not imply an official prosecutorial imprimatur.

2. If disclosure were mandated by Rule 8.3, we do not believe that the Lawyer A's report would excuse the prosecutor from performing that obligation.

The respondent in In re Himmel, 125 Ill.2d 519 (1988), was accused of violating former Rule 1-103 by failing to disclose a criminally dishonest 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." (125 Ill.2d at 538)

In a proper case, a confirmatory report to the ARDC may serve an important function. It may alert that agency to the existence of evidence corroborating the initial complaint. It also may minimize the possibility that a complaint may be misinterpreted, lost or overlooked.

3. The prosecutor's status as a lawyer, standing alone, neither obligates nor authorizes him to attempt to confirm Lawyer A's information. Rule 8.3 does not cast the members of the legal profession in the role of investigators. That responsibility rests with the appropriate public agencies.

We do not possess sufficient facts to offer an opinion as to whether the prosecutor's official position imposes an independent duty to investigate the matter. See A.B.A. Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-3.1(a).

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