

TO REPORT OR NOT TO REPORT

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Reprinted from *Bench & Bar of Minnesota* (December 1988)

What should attorney Himmel have done when he learned that attorney Casey had taken client Forsberg's funds? Forsberg came to Himmel for legal help when she could not get answers from Casey about what became of her settlement funds. Himmel discovered, and reported to Forsberg, that Casey took the funds. Despite Himmel's request, Forsberg instructed Himmel not to inform the Lawyers Board. Himmel kept quiet, and also drafted an agreement for Casey and Forsberg, that included a nonreporting provision. What were Himmel's obligations? Did he have any discretion?

The Illinois Supreme Court, in a disciplinary opinion, and the Office of Lawyers Professional Responsibility, in an informal advisory opinion, have given quite different answers to these questions. The Illinois opinion, *In re Himmel*,^{Ftn 1} decided under the Code of Professional Responsibility, imposed a one-year suspension on Himmel for failure to report. This office, interpreting Rules 8.3 and 1.6, Rules of Professional Conduct, advised an attorney in a situation like Himmel's that he could not report the apparent theft.

The difference between the Illinois result and that in Minnesota is partly a product of the difference between DR 1-103(A) of the Code (effective in Minnesota until September 1985) and the newer Rules. DR 1-103 required reporting of "unprivileged knowledge" of *any* rule violation. Rule 8.3 requires reporting of serious violations, except that disclosure of "confidences" (privileged matters) and "secrets" (other information acquired during the representation) is not required, or (with a few exceptions) permitted. When the Illinois Court determined that Himmel's knowledge of Casey's theft was unprivileged,^{Ftn 2} it also decided that he must report. Under Rule 8.3, in Minnesota, information need not be privileged to be protected, if it is a "secret," that is information from the professional relationship that the client does not wish disclosed or which could harm the client. The expansion of the exception to the reporting rule may be more significant than is generally realized.

Suppose that opposition counsel is obviously incompetent in neglecting a plaintiff's case. Suppose further that an attorney observing this also comes to believe that the neglectful attorney is chemically dependent and harming clients and the court system. If this information is gained in the course of client relationship(s), it appears that under Rules 8.3 and 1.6 the decision whether to report the misconduct in situation is the client(s)' to veto or allow. Until 1985, the client would have had such control only over reporting privileged information. It does not appear that the drafters of the Model Rules or the Minnesota rules considered the consequences of this change in rule language.

In Illinois, meanwhile, the opinion on *Himmel* was preceded and followed by controversy. About 50 Illinois attorneys were disbarred or suspended in connection with the "Greyford" investigations into bribery schemes in the Illinois courts. Himmel had nothing to do with Greyford, except that it seemed

intolerable that many Chicago attorneys had been aware of corruption without reporting it. Himmel may have suffered for the sins of others.[Ftn 3](#)

The issue of reporting other attorneys' misconduct (and one's own) has been discussed for many years. At least since the 1970 ABA Clark report, it has been lamented that lawyers seldom complain against other lawyers. The Code's response to this problem – requiring lawyers to report all violations, by themselves or other lawyers – was unsatisfactory. Not only was the rule unenforceable and unenforced, it seems morally repugnant to require reporting of any violation, however trivial, by another attorney or oneself. Under the Code, an attorney who cheated at golf arguably was obliged to turn himself in for dishonest conduct in violation of DR 1-102(A)(4).

Adoption of Rule 8.3 in this respect marked progress: Only violations by “another lawyer” that raise “a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer” must be reported. Lawyers still may report venial infractions, but they do not engage in unprofessional conduct for declining to do so. Nor is there a separate obligation to report one's own misconduct.[Ftn 4](#)

A lawyer “having knowledge” of another's substantial misconduct must report. “Knowledge” is obviously more than suspicion, but it is not necessary to become metaphysical about the meaning of the term. One commentator suggests that the criminal standard of being aware of a “high probability” of misconduct is enough to trigger the reporting requirement. Complainants are immune from civil liability for ethics complaints, although a complaint that included knowingly or recklessly false statements could be subject to discipline.[Ftn 5](#) Reports must be made to “the appropriate professional authority,” normally the Office of Lawyers Professional Responsibility. Under the old DR 1-103, reports had to be made “to a tribunal or other authority empowered to investigate or act.” Of course, attorneys *may* still report to the courts as well as to the office.

As a society, and as attorneys we rightly feel ambivalent about requirements to inform on others.[Ftn 6](#) When the criminal law requires certain individuals to report certain kinds of things (*e.g.*, physicians and gunshot wounds, school personnel and child abuse), the report is normally of serious information that might come only to the reporter's attention. Citizens and professionals have not generally been *required* to report misdeeds of which they are the mere observers. On the other hand, when professionals routinely turn their backs on grave misconduct, the public, clients, and the profession itself will be harmed. Too broad a reporting requirement can suggest a totalitarian mindset, but remain unenforced – except by the overzealous. Too narrow a reporting requirement, in contrast, may scant the attorney's duty as a professional and officer of the court to help protect against corruption and unprofessional conduct. Sometimes the choices are agonizing – for example, the Board of Medical Examiners disciplined a doctor-father for not reporting his son-doctor's continuing drug use.

In Minnesota about 7 to 8 percent of complaints annually come from lawyers and judges. Sometimes a situation will come to light more or less by chance that shows many attorneys do not take the reporting obligation seriously. For example, several years ago an attorney who shared office space with others was chemically dependent and abandoned his practice. Mail piled up, phone calls went unanswered, court appearances were missed, deeds were not recorded, but no attorney or judge reported the situation. It wasn't Greylord, but it should not have been ignored.

Back to Himmel – what should have been done? He should not have drafted the agreement providing that the misconduct would not be reported. Under Minnesota Rules, he should have kept silent,

as he did. It is most unusual for an attorney to be disciplined severely for his resolution of a close and arguable question of law – namely whether his knowledge was “privileged” under Illinois law.

Comparing the Illinois Code and the Minnesota Rules, what should an attorney’s reporting obligation be? It should be, as it is, to report only serious misconduct. Privileged communications from the client should be expected from reporting. What about nonprivileged information the attorney gains in the course of the representation? That question deserves consideration and debate. I would argue that the attorney should not be required to disclose such information if disclosure would harm the client, but that disclosure should be required where there will be no client harm.

NOTES

¹ In re Himmel, May 15, 1988, File 65946 (Ill). Himmel’s suspension has been stayed pending resolution of a petition for rehearing.

² Himmel determined that the privilege did not apply for two reasons: 1) Himmel had, as part of his investigation, disclosed Casey’s theft to third parties; and 2) Forsberg disclosed the theft to Himmel “while her mother and fiancée were present.” Himmel qualified the latter rationale as only “probably” applying.

³ The Illinois Court’s suspension order was much harsher than the recommendations of discipline counsel (censure recommended) or the two bar groups involved (one recommended private reprimand, the other dismissal). Himmel received no fee in the matter and obtained over \$15,000 for his client. In 13 years of practice, he had no discipline record.

⁴ The deletion of such a requirement apparently was related to recognition of an attorney’s Fifth Amendment privileges. However, case law indicates that voluntary disclosure of misconduct will result in substantial mitigation of discipline. In re Simonson, 365 N.W.2d 259 (Minn. 1985).

⁵ Rule 21(a), Rules on Lawyers Professional Responsibility.

⁶ See Lynch. The Lawyer as Informer. 1986 Duke L.J. 491 (1986).