ATTORNEY ETHICS ADVISORY COMMITTEE

Thursday January 30, 2020

No. 3 Former State Bar Ethics Opinions Assignments

o Op. 90-13

Staff will present information at the meeting.

State Bar of Arizona Ethics Opinions

90-13: Reporting Professional Misconduct 10/1990

Thorough analysis of the scope of an attorney's ethical duty to report another attorney's misconduct.

FACTS

On September 22, 1988, the Supreme Court of Illinois issued its opinion in an attorney disciplinary proceeding, In re Himmel, 125 Ill.2d 531, 127 Ill. Dec. 708, 533 N.E.2d 790 (1988), suspending attorney Himmel for one year for failure to report another attorney's misconduct to appropriate state bar authorities. This controversial opinion focused renewed nationwide attention on the duty members of the bar have to report their colleagues' misconduct, colloquially if impolitely referred to as the "squeal rule." As elsewhere, Himmel has provoked considerable discussion and uncertainty in Arizona as to its application and effect.[1] This committee has been receiving an increasing number of requests from attorneys as to the parameters of their duty to report another lawyer's apparent misconduct. In order to provide some uniform general guidance to our members, supplementing that in our recent Opinion No. 89-06 (July 16, 1989), the committee is issuing this formal opinion on three specific requests as to the reporting obligation in Arizona.

First Request

The first request presents the case of a plaintiff's attorney who believes that his opposing counsel in a pending litigation has submitted inconsistent affidavits regarding his failure to file a timely answer to the complaint. In the first affidavit filed with the Superior Court, defendants' counsel stated that he "signed a final draft" of the answer on October 24 but did not file it because he was awaiting information from the Arizona Corporation commission to verify defendants' status, which plaintiff had alleged to be defunct. Since that information was received too late on October 25 to file the answer, it was filed on October 26. In a subsequent affidavit attached to a petition for special action to the Court of Appeals about six weeks later, however, this attorney wrote that he "finalized and signed" the answer on October 24 and gave it to the secretary having responsibility "to insure that completed and signed pleadings are timely filed." This secretary had the duty "to make the proper arrangements for filing of the pleading." This second affidavit apparently does not refer to the need on October 24 to await further information. The inquiring attorney states that he has been unable to "reconcile the apparent inconsistencies" in the two affidavits, and suggests that the second one was filed "apparently in an attempt to demonstrate excusable neglect."

Second Request

In the second request, the inquiring attorney represents lawyer X who, in turn, represents a client in a legal proceeding of undetermined nature, although the inquiring attorney discloses that lawyer X has an active administrative law practice. The client has informed lawyer X, in a communication subject to the attorney-client privilege that she was raped by her former lawyer and is pregnant as a result of the rape. Her psychiatrist has advised her that it would be harmful to reveal the name of the man who raped her. The client has specifically and categorically instructed lawyer X that he is not to report the matter to the State Bar or to any law enforcement agency. Lawyer X has no knowledge or information regarding the former lawyer, and has no reason to believe that the former lawyer may similarly harm other clients.

Third Request

The third request comes from five attorneys. Since 1987, attorneys A and B have been the sole shareholders in a professional corporation which employs the other three attorneys as associates under their agreement, A and B were to take equal draws from the firm and split profits and losses equally. The firm also employs B's wife as the office manager with responsibility for overseeing the firm's bookkeeper and maintaining its financial records.

It has been discovered that, from about May to October, 1989, attorney B was taking from the firm fees which were paid in cash without crediting the cash in the firm's accounts. Either attorney B or his wife would destroy the firm's receipt book to cover up the cash transactions. When confronted, attorney B and his wife admitted this conduct in a meeting attended by all five attorneys and estimated the amount of cash involved as between $5,000 and $10,000. They justified their actions by saying that, for various reasons, attorney B was contributing more to the firm than attorney A. Attorney B stated that there was no improper handling or diversion of clients' trust monies, and the firm's outside accountant "tentatively" has confirmed this.

All five attorneys ask whether there is an obligation to report attorney B's conduct. They also ask whether this obligation is affected by attorney A's decision on the question of whether or not to file criminal charges against attorney B; or by B's commitment to report the income as a distribution of profit and to pay the appropriate income taxes thereon; or by A's and B's ability or inability to work out a pending proposal for B's purchase of A's interest in the firm, the terms of which may take into consideration the money taken by B.

QUESTION

In each of the described circumstances, does any attorney[2] have a duty to report the possible misconduct by another member of the bar to the office of Chief Bar Counsel for the State Bar?[3]

We wish to make clear at the outset, however, that this Opinion deals only with an attorney's obligation under the Arizona Rules of Professional Conduct to report another lawyer's misconduct in the sense that one is subject to discipline for failure to report. There well may be other situations in which a lawyer, not constrained by confidentiality or other requirements as discussed below, can -- and in a normative but non-obligatory sense should -- report another lawyer's misconduct.

ETHICAL RULES CITED

ER's 1.1, 1.3, 1.6, 1.9, 3.3, 3.4, 8.3, 8.4.

RELEVANT PRIOR ARIZONA OPINIONS

Opinion No. 84-18 (December 31, 1984)

Opinion No. 87-3 (January 27, 1987)

Opinion No. 87-22 (September 18, 1987)

Opinion No. 87-26 (December 30, 1987)

Opinion No. 88-08 (October 24, 1988)

Opinion No. 89-06 (July 16, 1989)

OPINION

The duty of members of the bar to report, in appropriate circumstances, apparent misconduct by fellow attorneys is an important aspect of the legal profession's relative autonomy and the concomitant "special responsibilities of self-government."

Rule 42, Rules of the Supreme Court, Rules of Professional conduct, Preamble-A Lawyer's Responsibilities, 17A A.R.S. at p. 327 (hereinafter "Ariz. Rules Prof. Conduct"). Lawyers often are in the best position to observe and evaluate misconduct by colleagues. Since the American Bar Association's first attempt, in 1908, to codify guidelines for professional conduct, it has endorsed at least a generic responsibility to report. See A.B.A. Canons of Professional Ethics, Canon 29 (1908) ("Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, …"). See also Canon 28 (1908) (duty to report lawyer " [s]tirring up strife and litigation).

A duty to report, however, can easily breed a climate of suspicion and distrust and, if applied too literally and not tempered with reason and judgment,[4] is susceptible to trivialization and abuse.[5] It also has been difficult to enforce. Despite reporting requirements in both the A.B.A. Model Code of Professional Responsibility, DR 1-103(A) (1970), and A.B.A. Model Rules of Professional Conduct, Rule 8.3 (1983), upon which most states base their provisions, until recently there were virtually no reported instances of an attorney being disciplined simply for failure to report another lawyer. See 2 G. Hazard and W. Hodes, The Law of Lawyering (2d ed., 1990) § 8.3:101 at 939; R. Rotunda, Professional Responsibility (2d ed. 1988) 31, citing, inter alia, Note, The Lawyer's Duty to Report Professional Misconduct, 20 Ariz. L. Rev. 509-547 (1978), and a "rare example" of a case where a court severely reprimanded a lawyer for failing to report another lawyer's wrongdoing, Matter of Bonafield, 75 N.J. 490, 383 A.2d 1143 (1978) (per curiam). In this context, the Himmel case is significant and came as a considerable surprise to the bar.[6]

A. The Himmel Case

Himmel's client, Ms. Forsberg, had been represented by attorney Casey on a contingency basis to recover for her injuries in a motorcycle accident. Casey negotiated a settlement but then converted the funds. After two years of trying unsuccessfully to collect her share of the settlement proceeds, about $23,000.00, from Casey, Ms.

Forsberg hired Himmel agreeing to pay him one third of whatever he recovered above that amount. Himmel conducted an investigation and discovered the conversion, but, instead of reporting it, drafted an agreement in which Casey would pay Ms. Forsberg $75,000.00 in settlement of any claim against the misappropriated funds, and in return for her agreement not to file any criminal or civil action, or any attorney disciplinary proceeding, against Casey.[7] Casey signed this agreement but then breached it, whereupon Himmel sued him and obtained a $100,000.00 judgment that went unsatisfied.

Himmel's efforts on behalf of Ms. Forsberg did net about $10,000.00 for her from Casey. Payment under either the settlement agreement or the judgment would have resulted in a fee for Himmel but, as it was, he never received anything pursuant to his agreement with Ms. Forsberg. Ms. Forsberg had told Himmel that all she wanted was her money back from Casey, and specifically instructed him to take no further action. There was some dispute as to whether Ms. Forsberg herself had notified the Illinois Attorney Registration and Disciplinary Committee about Casey, but the court considered this irrelevant because a client's complaint of another attorney's misconduct would not be a defense to her lawyer's failure to report the same misconduct. Himmel, 533 N.E.2d at 792-93.[8] The court similarly dismissed the notion that an attorney could circumvent ethical rules and fail to report another's misconduct simply because his client asks him to do so. Id. at 793.

Casey was suspended and subsequently disbarred for conversion of client funds and other conduct in matters unrelated to Ms. Forsberg's claim. The lawsuit Himmel filed against Casey provoked inquiry from the Committee and led to the conclusion, discussed below, that Himmel had possessed unprivileged knowledge of Casey's conversion of client funds (being illegal conduct involving moral turpitude) and had failed to report it as required by DR 1-103(A) in effect in Illinois. Himmel argued that he had no dishonest motive in failing to repost Casey, and was motivated by respect for his clients wishes,[9] rather than a desire for financial gain, as demonstrated by the fact that he received no fee for the small recovery he did effect for his client. The court, however, noted that Himmel's failure to report Casey as soon as he learned of his misconduct may have allowed Casey to subsequently convert other clients' funds,[10] and compounded Casey's crime by agreeing not to report him in return for the settlement. Himmel, 533 N.E.2d at 796. The court therefore suspended Himmel for one year even though the Committee's Hearing Board had recommended only a private reprimand and its Review Board had recommended dismissal of the entire matter.

B. Himmel in Arizona

As striking as the Himmel opinion is,[11] and as important as the principles it discusses are, its application in Arizona is limited by the significant differences in the Rules of Professional Conduct as adopted by our Supreme Court from the Model Code provisions in effect in Illinois.[12] The following discussion highlights the most important principles applicable here.

The Illinois disciplinary rule (Rule 1-103 (a)) under which Himmel was charged is substantially identical with DR 1-103(A) of the A.B.A. Model Code, reading:

> "(a) A lawyer possessing unprivileged knowledge of a violation of Rule 1-102 (a) (3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." Himmel, 533 N.E.2d at 793.

Rule 1-102 (a) (3) and (4) specifies attorney misconduct that is either illegal involving moral turpitude (a) (3) or involves "dishonesty, fraud, deceit, or misrepresentation" (a) (4). Id.

By contrast, in Arizona, ER 8.3 follows the A.B.A. Model Rules, reading in pertinent part:

"(a) A lawyer having knowledge 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, except as otherwise provided in these rules or by law.

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"(c) This rule does not require disclosure of information otherwise protected by ER 1.6."

Thus, in Arizona, not every violation need be reported. Reporting is mandatory only for a violation of the Rules[13] that goes to another[14] lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects." The reporting lawyer must have knowledge of a violation that raises a substantial question in this regard. Finally, and perhaps most importantly, the duty to report is surpassed by the broad confidentiality provisions of ER 1.6. As the Comment to ER 8.3 states, "[t]his rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule." See also our Opinion No. 89-06 at 8 where we advocated "careful use" of the judgment suggested in this Comment.

1. Fitness as a Lawyer

Thus, ER 8.3 covers only those violations that impact directly on the integrity of an attorney as a member of the legal profession. This comports with ER 8.4's inclusion, under one category of professional misconduct, of only those criminal acts that "reflect [ ] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." ER 8.4(b). As the Comment to ER 8.4 states, "[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice."[15]

For example, a single and apparently isolated instance of a conflict of interest under ER 1.9, or of negligently missing a filing date in possible violation of ER 1.1 and ER 1.3, might not be embraced within ER 8.3. See, e.g., Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Opinion 88-225 (undated), ABA/BNA Law. Man. Prof. Con., p. 901:7316 (isolated incident of lawyer missing statute of limitations filing deadline need not be reported). But, as the Comment to ER 8.3 makes clear, even such an apparently isolated violation "may indicate a pattern of misconduct that only a disciplinary investigation may uncover." Thus, if there are reasonable grounds to believe that the observed instance is indicative of a pattern of misconduct that reflects on the attorney's fitness as a lawyer, the balance should weigh in favor of reporting, especially if otherwise there is a realistic potential for future harm, and "the victim is unlikely to discover the offense." ER 8.3, Comment. See ER 8.4, Comment ("A pattern of repeated [criminal] offenses, even one (sic) of minor significance when considered separately, can indicate indifference to legal obligation."). See also Philadelphia Bar Association Professional Guidance Committee, Opinion 88-37 (Jan. 1989), 5 ABA/BNA Law. Man. Prof. Con. 68 (Mar. 15, 1989, issue) (as a general matter, it is not necessary for a lawyer to report every impermissible conflict of interest by opposing counsel but, when compounded with other misconduct, it all should be reported).

2. Substantial Question

This approach is supported by the Rules focus on whether a substantial question is raised as to the lawyer's fitness. "Substantial" here "refers to the seriousness of the possible offense and not the quantum of evidence of which the [reporting] lawyer is aware. " ER 8.3, Comment. In this context "substantial" also "denotes a material matter of clear and weighty importance." Ariz. Rules Prof. Conduct, Preamble-Terminology, 17A A.R.S. at 329 (emphasis added). Thus, for example, subornation of perjury

(ER 3.3(c)) or destruction or alteration of documents (ER 3.4(a)) ordinarily would be both a serious and material offense, and would reflect adversely upon the offending lawyer's fitness to practice, so that reporting would be required. See our Opinion No. 87-26 (lawyer's acknowledged, and apparently repeated and willful, failures to file income tax returns, is almost certainly a reportable offense). See also Nassau County Bar Association Committee on Professional Ethics, Opinion 90-9 (Mar. 14, 1990), 6 ABA/BNA Law. Man. Prof. Con. 146-147 (May 23, 1990, issue) (lying to client about the pendency of an action is a reportable offense).

3. Knowledge

The knowledge of another lawyer's misconduct that will trigger a duty to report also entails a measure of judgment. See generally What Does A Lawyer Know? in 1 G. Hazard and W. Hodes, The Law of Lawyering (2d ed. 1990) §§ 400-404 at 1xxiv-lxxx.[16] Absolute certainty is not required, for such a standard effectively could nullify the duty. On the other hand, a charge of professional misconduct is a serious matter that should not be undertaken lightly. Mere rumor or suspicion should not be enough to mandate reporting. Bar Association of Greater Cleveland, Professional Ethics Committee, Opinion 85-1 (Mar. 29, 1985), ABA/BNA Law. Man. Prof. Con., p. 801:6952 ("suspicion" does not constitute "knowledge" under DR 1-103) , accord Alabama State Bar Disciplinary Commission, Opinion 85-95 (Sept. 18, 1985), ABA/BNA Law. Man. Prof. Con., p. 801:1107. See Rotunda, supra note 6 at 986. The court in Himmel quoted A.B.A. · Informal Opinion 1210 (1972) discussing the duty to report lawyer misconduct "directly observed in the legal practice or the administration of justice." Himmel, 533 N.E.2d at 793. The Rules are not limited to matters directly observed, but do indicate that "knowledge," as used in ER 8.3 (a), means "actual knowledge of the fact in question. N Ariz. Rules Prof. Conduct, Preamble-Terminology, 17A A.R.S. at 329. Yet, "[a] person's knowledge may be inferred from circumstances." Id.

We also note that the language used in ER 8.3 is "knowledge" and not merely "reasonable belief." The latter denotes, with some circularity, that "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Ariz. Rules Prof. Conduct, Preamble-Terminology, 17A A.R.S. at 329. The linguistic inference, therefore, is that the knowledge required to trigger a duty to report, whether direct or inferred from circumstances, must be something more than merely a reasonable belief. See 1 Hazard and Hodes, supra § 401 at lxxv-lxxvi. A familiar and useful comparison may be the requirement of Rule 11(a), Rules of Civil Procedure, 16 A.R.S. 1990 cum. pock. part at 11, that an attorney's signature on a pleading, motion or other paper constitutes a certificate by the signer that, to the best of the attorney's "knowledge, information and belief formed after reasonable inquiry it is well grounded in fact." Thus, a "bona fide belief" is sufficient for Rule 11 (a), State Bar Committee Note (1984 Amendment) to Rule 11(a) (16 A.R. S. at 104), but more is required to constitute knowledge under ER 8.3. To be under a duty to report, therefore, a lawyer would need more justification than that needed merely to file a civil action against the offending lawyer were the offense actionable. See Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 1990-3, May 4, 1990, 6 ABA/BNA Law. Man. Prof. Con. 225-226 (July 18, 1990, issue) (full text at 3, n. 3).

Attorney Himmel presumably did not "directly observe" Casey's conversion of Ms. Forsberg's funds, but learned about it later in the course of investigating his client's claim against Casey. We agree that information learned in such an investigation, which well may be the way in which much attorney misconduct is discovered, can form the basis of a mandatory report so long as it rises to the level of "knowledge" as discussed herein. For example, the

Alabama State Bar Disciplinary Commission, in its Opinion 89-53 (May 19, 1989), states that a lawyer has a duty to report under DR 1-103(A) if, after a "thorough investigation," he has a "definite and firm conviction" that another lawyer has violated a disciplinary rule. Merely a suspicion of an ethical violation is not sufficient to impose the duty (citing Alabama Opinion 85-95, supra). 5 ABA/BNA Law. Man. Prof. Con. 219-220 (July 19, 1989, issue).

Similarly, the Maine Board of Bar Overseers Professional Ethics Commission, in its Opinion 100 (Oct. 4, 1989), ruled that a lawyer who does not share his client's conviction that the client's former lawyer was guilty of fraud lacks the requisite knowledge to be obligated to report. 5 ABA/BNA Law. Man. Prof. Con. 378 (Nov. 22, 1989, issue). And the Philadelphia Bar Association Professional Guidance Committee, in its Opinion 90-7 (June, 1990), has ruled that an attorney who finds a tape recorded by another lawyer (a former member of the inquiring attorney's firm) dictating a letter to the local tax review board in which the dictating lawyer, in conversation presumably with the transcriber, states that statements he is making to excuse his failure to pay delinquent taxes are false, is not ethically obligated under Rule 8.3 to report the matter if he does not have actual knowledge that the letter was indeed sent. This is because, unless the inquiring attorney knows that the dictated letter actually was sent, he has only suspected -- and no actual -- knowledge of misconduct. If, however, the inquiring attorney "knows for a fact that the letter on the dictated tape was actually sent," then he does have a duty to report. 6 ABA/BNA Law. Man. Prof. Con. 226 (July 18, 1990, issue).

On the other hand, a New Mexico attorney received sworn statements from two employees of his client that opposing counsel had offered them a monetary reward to influence their testimony in an arbitration proceeding. State Bar of New Mexico Advisory Opinions Committee, Opinion 1988-8 (Aug. 1988), ABA/BNA Law. Man. Prof. Con. p. 901:6008. He had no other facts to support or refute the statements, nor any reason to question the credibility of the two witnesses. Adopting a "substantial basis standard" of what constitutes "knowledge" (under either DR 1-103 or ER 8.3) of an ethical violation by another lawyer, the Committee found that this was enough to raise the duty to report, at least in the sense of informing the authorities of the information, rather than making a statement that a violation has occurred. We concur that, ordinarily, two sworn statements may constitute sufficient knowledge. But, while the New Mexico Committee also stated that there was no need to confront the implicated attorney first, nor to investigate independently the existence of a violation, we believe that, in most circumstances, an appropriate level of independent investigation -- perhaps including confrontation[17] - is preferable. By and large, however, we believe these Alabama, Maine, Philadelphia and New Mexico opinions represent a sound approach to articulating the knowledge requirement of ER 8.3(A).

4. Confidentiality

The most striking difference between Himmel and the situation in Arizona is the issue of confidentiality. DR 1-103(A) in Illinois encompassed all "unprivileged knowledge." The Illinois Supreme Court construed this expression to refer only to the attorney-client privilege in the evidentiary sense. This privilege did not apply because Himmel's client, Ms. Forsberg, discussed the matter with Himmel in the presence of others, and Himmel discussed Casey's conversion with third parties. Himmel, 533 N.E.2d at 794. Surprisingly, the court did not discuss whether the relevant information was "privileged" in the ethical sense as a "secret" to be preserved as confidential under DR 4-101, despite authority to this effect. See Rotunda, supra note 6 at 989-89.[18] See also ER 1.6, Comment, distinguishing the evidentiary and ethical principles. (Ariz. Rules Prof. Conduct, 17A A.R.S. at 345.)

In Arizona, under ER 1.6, without the client's consent after consultation, a lawyer may not reveal "information relating to representation of a client" except when impliedly authorized in order to carry out the representation or in a few specified circumstances. ER 1.6(a)[19] ER 8.3(c) explicitly provides that that Rule does not require disclosure of information otherwise protected by ER 1. 6.[20]

The confidentiality requirement of ER 1.6 is very broad. See generally, C. Wolfram, Modern Legal Ethics 296-302 (1986).

It applies not merely to matters communicated in confidence by the client but to all information relating to the representation, "whatever its source." ER 1.6, Comment. (Ariz. Rules Prof. Conduct, 17A A.R.S. at 345) The source, therefore, need not be the client. The information need not be embarrassing or likely to be detrimental to the client, as was the case for some “secrets” under Model Code DR 4-101 (A).

The duty of confidentiality continues after the client-lawyer relationship has terminated (ER 1.6, Comment, Ariz. Rules Prof. Conduct, 17A A.R.S. at 347), and encompasses information relating to the representation acquired before or even after the relationship existed. (ER 1.6, Code Comparison, id. at 348) Even if the information is shared with others and therefore not “privileged,” it may still be a client confidence that the lawyer may not disclose.[21] There is a presumption against other provisions of law superseding ER 1.6 (ER 1.6, Comment), but see our Opinion No. 87-3 (discussing an attorney’s duty to report receiving over $10,000.00 in cash from a client), and a client’s instructions or special circumstances may limit any otherwise implied authorization to disclose. (ER 1.6, Comment) See our Opinion No. 87-22 (usual implied consent does not apply, under the circumstances presented, to attorney disclosing former client’s name and present address).

Thus, in Arizona, Himmel might have been precluded from reporting what he learned about attorney Casey’s conversion of Ms. Forsberg’s funds, and therefore would not be subject to discipline for failure to report. Ms. Forsberg had specifically directed Himmel not to report Casey. She need not have had a good or even a rational reason for doing so.[22] See Wolfram, supra at 297 ("Nothing in the Code requires that a client's insistence on secrecy be reasonable."). Of course, if Himmel felt that the disclosure involved in reporting Casey would not have prejudiced Ms. Forsberg’s interests substantially, then, under Arizona’s Rules, he should have encouraged her to consent to disclosure. (ER 8.3, Comment; ER 1.6, Comment.) Absent such consent, however, he would be bound by the requirement of confidentiality. Even after filing suit against Casey and thus making the conversion a matter of public record, it may not have been sufficiently generally known to relieve Himmel of the duty of confidentiality. See supra note 21; Rotunda, supra note 6, at 989.

Opinions from other jurisdictions confirm the limitation ER 1.6 imposes on the duty to report under ER 8.3. For example, in Maryland, a lawyer was not required to report a breach of fiduciary duty committed by his client’s former lawyer that the client had specifically requested not be reported. Maryland State Bar Association Committee on Ethics, Opinion 89-46 (April 20, 1989), 5 ABA/BNA Law. Man. Prof. Con. 186 (June 21, 1989, issue). In Connecticut, an in-house corporate lawyer learned of possibly criminal misconduct by other corporate counsel, disclosure of which could be adverse to the corporation's interests. While the lawyer had several options, reporting the unprofessional conduct to the appropriate authorities under Rule 8.3 was precluded by the confidentiality requirements of Rule 1.6 if the inquiring lawyer does not choose the available option of disclosure, to legal counsel or an appropriate body such as the Ethics Committee, provided adequate steps are taken to protect the corporation’s confidences and its vulnerability. This disclosure option was authorized in Connecticut’s Rule 1.6(c) (a provision not included in A.B.A. Model Rule 1.6) whereby disclosure, to the extent necessary, was authorized "to prevent the company from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another." Connecticut Bar Association committee on Professional Ethics, Informal Opinion 89-14 (May 1, 1989), 5 ABA/BNA Law. Man. Prof. Con. 186-187 (June 21, 1989, issue). And, in Wisconsin, a lawyer’s reporting of opposing counsels misconduct was foreclosed if it would entail revelation of any client information, whether or not such revelation would prejudice the client’s interests. Wisconsin State Bar Committee on Professional Ethics, Formal Opinion E-89-12 (May 24, 1989), 5 ABA/BNA Law. Man. Prof. Con. 236-237 (Aug. 2, 1989, issue) (quoting Wolfram, supra at 685). But cf. Committee on Ethics of the Maryland State Bar Association, Opinion 89-36 (Feb. 14, 1989), ABA/BNA Law. Man. Prof. Con., p. 901:4323 (lawyer representing other lawyers must report their misconduct (if he has actual knowledge thereof) Which has

already been revealed to a court and, therefore, is a matter of public record); Philadelphia Bar Association Professional Guidance Committee, Opinion 83-23 (June 28, 1988), 4 ABA/BNA Law Man. Prof. Con. 248 (Aug. 3, 1988, issue) (lawyer who receives communication directly from another party to a pending litigation alleging unethical conduct by that party's lawyer must report the information to the disciplinary board of the Pennsylvania Supreme Court. Confidentiality does not apply, as the information came from another party to the litigation, not from the lawyer's client.).

Even with these guiding principles, we emphasize again that a good measure of discretion and the "exercise of sensitive professional and moral judgment," as called for in the Preamble to the Rules (Ariz. Rules Prof. Conduct, Preamble-A Lawyer's responsibilities, 17A A.R.S. at 326), is necessary in applying ER 8.3 consistently with ER 1.6. See, generally, Judgement calls and Discretion in Lawyering, in Hazard and Hodes, The Law of Lawyering (2d ed., 1990), §§ 500-502 at 1xxi-1xxxiii. With this general background, we turn to a discussion of the specific inquiries before us.

First Inquiry

The first situation is difficult for us to resolve on the information provided. We have no difficulty with the proposition that an attorney's deliberate filing of a false affidavit with a court to excuse a late filing is a material matter raising a substantial question as to that lawyer's fitness. See ER 3.3 (a) (1). And, presumably, the inquiring attorney's client would consent to the reporting, eliminating any possibly troubling issue of confidentiality under ER 1.6.[23]

The requisite knowledge, however, is what we are unable to determine. The two affidavits of opposing counsel may be inconsistent and represent a deliberate attempt to mislead the court. On the other hand, counsel may simply be saying that he signed the answer on October 24, gave it to his secretary to await the receipt of the necessary information, and then to complete and file it, which she did on October 26. This may be what is meant by the statement that the secretary had the duty to "make the proper arrangements" for its filing. At this distance, and without more information, we are unable to determine whether the inquiring attorney has "knowledge" of another's misconduct in the sense discussed above. The inquiring attorney may be able to make this determination, or he may need to investigate further, including, if appropriate, confronting opposing counsel.

This situation falls into what we believe to be a large gray area in the interpretation and application of ER 8.3 in which the duty to report depends upon a very fact-sensitive determination, and the exercise of appropriate professional judgment and discretion, in accordance with the principles we have discussed. In virtually all of such situations, the inquiring attorney will be in a much better position to make this determination than this committee. Indeed, we way be precluded from giving definitive answers to inquiries of this sort by our jurisdictional limitations which preclude our answering questions "involving solely the attorney's exercise of judgment or discretion. 1, Committee on Rules of Professional Conduct, Statement of Jurisdictional Policies, para. 6(d). We can state, however, that, in such situations which are not governed by confidentiality constraints, we believe that the reasonable exercise of such judgment and discretion, one way or the other, should not be the subject of disciplinary investigation and action.

Second Inquiry

The second inquiry is easier to resolve. Again, we have no difficulty in finding that rape, a criminal act of violence, raises a substantial question as to the offending lawyer's fitness. See ER 8.4 (b) and Comment (distinguishing acts of violence from offenses concerning matters of personal morality such as adultery). (Ariz. Rules Prof. Conduct, 17A A.R.S. at 432-433) The knowledge element is more difficult, since all the knowledge the inquiring attorney possesses is his client's possibly self-serving allegation. If he were to make an ER 8.3 report, all he could say is that his client makes certain accusations, not that he has any personal information. More would seem to be required to raise a duty under ER 8.3. See our Opinion No. 88-08 at 9.

We need not decide this, however, because 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. Since we are told that lawyer X has a heavy administrative law practice, there is the suggestion that the information about the rape may not be germane to the subject matter of the representation. But, we do not know this and it is not necessarily the case. Moreover, the information was gained in the course of the representation, is about the client, and therefore relates to the representation for purposes of ER 1.6(a). The client wishes the information kept confidential, and none of the exceptions to ER 1.6(a) apply. If the attorney believes that disclosure would not substantially prejudice the client's interests, he can encourage her not only to report her former attorney to the State Bar, but also to report the crime to the police. There may be additional redress with regard to the rape and pregnancy. But if, despite this urging, the client insists upon confidentiality, the inquiring attorney must respect the clients wishes, and thus there can be no duty to report under ER 8.3(a).

Third Inquiry

The third inquiry also is fairly easy to resolve. Attorney B's misappropriation of firm fees, and his alteration of the firm's books to conceal his acts, clearly raise a substantial question on a material matter that impacts his honesty, trustworthiness and fitness as a lawyer, and likely constitutes a breach of trust. Although questions of law are beyond our jurisdiction, Committee on Rules of Professional Conduct, Statement of Jurisdictional Policies, para. 6(a), we note that B's conduct may be a criminal offense whether characterized as theft, embezzlement or a false scheme or artifice to defraud. See ER 8.3(a), ER 8.4 (b). Even if not a criminal offense, it entails "fraud, deceit or misrepresentation." ER 8.4(c). The conduct did not consist of an isolated occurrence, but rather was a deliberate pattern or practice engaged in over many months. Attorney B and his wife have admitted their acts in the presence of all five attorneys, clearly establishing the requisite knowledge. There is no issue of attorney-client confidentiality. The other four attorneys therefore have a duty under ER 8.3(a) to report attorney B, which can be fulfilled by a complete and accurate report by any one of them. See supra note 8.

This conclusion is in no way affected by attorney A's decision as to whether or not to cause criminal charges to be filed against attorney B; by attorney B's commitment to report appropriately and to pay tax upon the income as a distribution of profit; or by the result of A's and B's negotiation of a buy-out agreement. Such factors might be relevant in a disciplinary proceeding, but they do not affect a lawyer's duty to report under ER 8.3(a). Indeed, resolution of any such matters must remain independent of the mandatory report of attorney B's violation. See supra notes 7 and 17.

Editor's Notes

1. In addition to the opinions of ethics committees of other jurisdictions cited in the Opinion, see Opinion 638 of the New Jersey Supreme Court Advisory Committee on Professional Ethics, issued April 5, 1990, 6 ABA/BNA Lawyers Manual on Professional Conduct 167 (June 6, 1990, issue), the summary of which reads:

> "Lawyer need not report misconduct of another lawyer discovered while representing that lawyer, unless lawyer's misconduct is continuing in nature or lawyer is using legal representation to carry out his misconduct."

That Opinion cites the New Jersey cases of Fellerman v. Bradley, 99 N.J. 493, 493 A. 2d 1239, 1 Law. Man. Prof. Conduct 861 (N.J. Sup. Ct., June 27, 1985), and In re Nackson, 114 N.J. 527, 555 A.2 d 1101, 5 Law. Man. Prof. Conduct 115 (N.J. Sup. Ct., March 29, 1989), in support of the statement that, if the acts of dishonesty, untrustworthiness or unfitness of the lawyer-client were of a continuing character, or if the reporting lawyer's services were being used in furtherance of such activities by the lawyer-client, then "there would be a clear obligation [on the reporting lawyer] to divulge the information." (In fact, in neither of the two cases, was the client a lawyer, however.)

2. 2 Hazard & Modes, The Law of Lawyering (2d ed. 1990), § 8.3:101 at p. 939, note 2 states:

> "For a comprehensive but critical survey of disciplinary enforcement, including mandatory reporting on the misconduct of fellow lawyers, see Marks & Cathcart, Discipline Within the Legal Profession: Is It Self-Regulation?, 1974 U. Ill. L. Forum 193." [- 236]

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[1] See, e.g., Corcoran, In re Himmel: Am I My Brother's Keeper?, Vol. 26, No. 2, Arizona Attorney 15 (Oct. 1989).

[2] Normally, the committee will not render an opinion involving the questioned ethical propriety of the conduct of any attorney other than the inquiring attorney. Committee on Rules of Professional Conduct, Statement of Jurisdictional Policies, para. 4. For purposes of responding to the second request, however, we will treat lawyer X as the inquiring attorney, since lawyer X is the attorney possessing information of another lawyer's misconduct that may trigger the reporting requirement. Lawyer X apparently has asked another attorney to present the inquiry to the committee to assure client confidentiality.

[3] In an appropriate case, this usually would be the preferred mechanism for reporting alleged attorney misconduct. See Rules 46 (g) (2), 49, and 53 (b) (1), Rules of the Supreme Court, 17A A.R.S. at 445, 451 and 464; ER 8.3, Comment.

[4] The discussion in our Opinion No. 89-06 (July 26, 1989) was meant to be "illustrative of problems we foresee in too rigid an application of principles enunciated by Himmel." Opinion No. 89-06 at 7.

[5] The potential for abuse is heightened by the absolute immunity conferred on complainants by Rule 54(1), Rules of the Supreme Court, 17A A.R.S. at 475, and Drummond v. Stahl, 127 Ariz. 122, 126, 618 P.2d 616, 620 (App. 1980) ("there is an absolute privilege extended to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney."), cert. den., 450 U.S. 967, 101 S. Ct. 1484, 67 L. Ed. 2d 616 (1981). See R. H. Underwood and W. H. Fortune, Trial Ethics, § 20.2.3 at 560-62 (1988) on the abuse of the disciplinary process. See also Ariz. Rules Prof. Conduct, Preamble-Scope, 17A A.R.S. at 328 ("the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons.").

[6] In determining the appropriate quantum of discipline to impose on Himmel, the Illinois Supreme Court noted that Himmel also violated that state's criminal statute against compounding a crime by agreeing not to report the offending lawyer in exchange for a settlement agreement and funds from him. Himmel, 533 N.E.2d at 795-96. But the disciplinary proceeding was premised solely on Himmel's failure to report. Id. at 790-91. See Rotunda, The Lawver's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel, 1988 U. Ill. L. Rev. 977, 984-85 n. 44.

[7] A portion of the $75,000.00 settlement might have represented "hush money" for Ms. Forsberg's silence. Alternatively, Himmel might have been justified in considering it compensation for Casey having settled her personal injury claim too cheaply. See Rotunda, supra note 6, at 983 n. 38.

Although questions of law are beyond our jurisdiction (Committee on Rules of Professional Conduct, Statement of Jurisdictional Policies, para. 6(a)), we note that, in Arizona, as the court in Himmel indicated for Illinois, such a settlement might constitute the offense of compounding under the Arizona Criminal Code, 5A A.R.S. § 13-2405. (Himmel, 533 N.E.2d at 796)

[8] We generally agree that simply the possibility that one's client already has reported the misconduct does not relieve the attorney from his or her duty to report, if otherwise required. On the other hand, however, there is no reason to foster a proliferation of cumulative reports. If an attorney is confident that a complete and accurate report of another attorney's misconduct already has been made to bar authorities sufficient to trigger an appropriate investigation under the circumstances, there is no reason to require an additional, superfluous report.

For example, an attorney in a law firm or other entity would not be excused from the duty imposed by ER 8.3(a), as discussed herein, to report misconduct by an attorney colleague. See our Opinion No. 84-18 at 4; Connecticut Bar Association Committee on Professional Ethics, Informal Opinion 89-21 (July 28, 1989), 5 ABA/BNA (Lawyer's Manual on Professional Conduct (hereinafter "Law. Man. Prof. Con.") 310 (Sept. 27, 1989, issue) (lawyer must report former partner's misconduct unless the reporting lawyer's Fifth Amendment rights apply). This duty would fall on any attorney in the firm or entity with the requisite knowledge. But, once one of the attorneys makes a complete and accurate report, this should satisfy the reporting duty of all of them. Again, a good measure of judgment should be applied, erring on the side of ensuring that all necessary information is reported.

[9] Not reporting Casey may have been in Ms. Forsberg's immediate best interests by maximizing her chances of recovering something from him. This apparently was her belief. See Burke, Where Does My Loyalty Lie? In re Himmel, 3 Georgetown Journal of Legal Ethics 643, 646 (1990). See infra note 22.

[10] One commentator, however, critical of the delay and inaction in many bar disciplinary proceedings, seriously questions whether earlier reporting of Casey would have had any meaningful effect. Rotunda, supra note 6 at 992-995.

[11] In a brief comment on the decision, Professor Hazard suggests that Rule 8.3(a) "has implications that need to be reconsidered. We might be better off if reporting a fellow attorney was much more broadly discretionary." Hazard, "Squeal Rule" Considered for Change, Nat'l L. J., Mar. 26, 1990, at 13, Col. 3, and 14, col. 4.

[12] In our Opinion No. 89-06 at 6 we commented that ER 8.3 "seems to require more incisive inquiry by the lawyer who detects misconduct by a colleague than does DR 1-103(A)", but we found "no practical substantive difference in the two provisions." That Opinion, however, in which, for stated reasons, we even declined to answer the specific questions posed, did not analyze the issues discussed here. See also our Opinion No. 84-18 at 4-5 indicating a significant difference between DR 1-103(A), then in effect, and ER 8.3(a), about to take effect; 2 G.

Hazard and W. Hodes, The Law of Lawyering (2d ed. 1990) § 8.3:102 at 939 ("Rule 8.3 continues the traditional rule mandating reporting of a fellow lawyer's misconduct, but in a compromise formulation that defers to the difficulties of enforcement").

[13]ER 8.3 speaks of a "violation of the Rules." ER 8.4 sets forth various categories of professional misconduct, the first of which involves violations of the "rules." Since ER 8.4 itself is a "Rule," the other categories of misconduct specified there would also entail a duty to report if otherwise appropriate.

[14] Thus, a lawyer need not report his or her own misconduct, thereby eliminating any potentially troubling issues of self-incrimination. See Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Op. 1990-3, May 4, 1990, 6 ABA/BNA Law. Man. Prof. Con. 225-226 (July 18, 1990, issue) (discussing New York's recently amended DR 1-103 (A)).

[15] Conduct involving "dishonesty, fraud, deceit or misrepresentation," whether or not criminal, separately constitutes professional misconduct under ER 8.4(c).

[16] "The notion that lawyers can 'know' the reality of a situation goes against the grain of many lawyers' conception of themselves. Lawyers are trained in disbelief, or at least unbelief or suspended belief, and are required to act in that frame of mind in many of their professional duties." Id. at 1xxvii.

On the other hand, "[s]tudious ignorance of readily accessible facts is... the functional equivalent of knowledge." Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Op. 1990-3, May 4, 1990, 6 ABA/BNA Law. Man. Prof. Con. 225-226 (July 18, 1990, issue) (full text at 3 citing C. Wolfram, Modern Legal Ethics § 13.3.3, at 695-96 (1986) and adopting a standard for "knowledge" of: "a lawyer must be in possession of facts that clearly establish a violation").

[17] We note, however, that any suggestion or appearance of a threat to report, used as leverage to gain an advantage, must be avoided. See Maine Board of Bar Overseers Professional Ethics Commission, Opinion 100 (Oct. 4, 1989), 5 ABA/BNA Law. Man. Prof. Con. 378 (Nov. 22, 1989, issue); Nassau County Bar Association Committee on Professional Ethics, Opinion 90-9 (Mar. 14, 1990), 6 ABA/BNA Law. Man. Prof. Con. 146-147 (May 23, 1990, issue); Alabama State Bar Disciplinary Commission, Opinion 85-95 (Sept. 18, 1985), ABA/BNA Law. Man. Prof. Con., p. 801:1107. See also supra note 7.

[18] Apparently, this was not argued to the court until Himmel's unsuccessful petition for rehearing. Burke, supra note 9 at 644, note 19.

[19] These are: 1) where disclosure is mandatory in order to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm, ER 1.6(b); 2) where disclosure of the client's intention to commit a crime and of the information necessary to prevent the crime is permitted so as to prevent the client's commission of the crime, ER 1.6(c); 3) where disclosure is permitted to enable the lawyer to establish a claim or defense in any proceedings concerning the lawyer's representation of the client, ER 1.6 (d); and 4) where disclosure of a material fact to a tribunal is required when necessary to avoid assisting a criminal or fraudulent act by the client, ER 3.3(a) (2).

[20] We note that the "Scope" provisions of the Model Rules, as adopted in Arizona, omit the following paragraph:

> "The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure." (A.B.A. Model Rules of Professional Conduct, Preamble-Scope.)

We are reluctant, however, to read much into this omission, especially in the current context of the explicit exception to the reporting duty of ER 8.3(a) and (b) for information confidential under ER 1.6, created by ER 8.3(c).

[21] It is a close question as to when information relating to the representation of a client is sufficiently "generally known" as no longer to be confidential under ER 1.6. See ER 1.9(b). See also our Opinion No. 87-22 at 3 (the fact that information appears in a public record does not mean that it should not be regarded as confidential).

[22] Ms. Forsberg may have had very good reasons of self-interest for not wanting Casey reported. See Rotunda, supra note 6, at 988.

[23] The information is to some degree public in that it can be pieced together by comparison of the records of the two courts in which the arguably inconsistent affidavits were filed. Moreover, the information does not appear to be "about a client" (ER 1.6, Comment), and in that sense may not relate to the representation. We make no attempt to resolve this issue here.