A LAWYER'S DUTY TO REPORT ANOTHER LAWYER'S MISCONDUCT: THE ILLINOIS EXPERIENCE

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In September 1988, the Illinois Supreme Court issued an opinion in a disciplinary case, suspending a lawyer for one year because the lawyer failed to report another lawyer's misconduct. The decision rocked the legal profession in Illinois and beyond. For Illinois practitioners, the name of the unfortunate lawyer disciplined in the case of *In re Himmel*,[1] has become synonymous with the reporting obligation set forth in Rule 8.3 of the Illinois Rules of Professional Conduct. Indeed, in Illinois legal vernacular, "*Himmel"* is a verb, as in "to *Himmel* another lawyer" by reporting her misconduct.

At the time *Himmel* was decided, I was in private practice, largely oblivious to the workings of the disciplinary agency, and I participated with some energy in the collective gasp that went up from Illinois lawyers. The following year, I was appointed to serve on the Commission that oversees the work of the Illinois Attorney Registration and Disciplinary Commission (ARDC), and then, in 1992, I was appointed Administrator, where I have served as the chief executive and prosecutor of the ARDC for the past fifteen years. My initial horror[2] at the *Himmel* outcome has been replaced by a healthy respect for what that decision has contributed to the effectiveness of lawyer discipline in Illinois from two perspectives: 1) lawyer reports tend to involve more serious conduct and to be made more promptly, giving discipline the ability to act expeditiously to prevent harm to other clients; and 2) the fact that Illinois lawyers face discipline if they do not report another lawyer's misconduct results in discipline cases against lawyers who, because of their practice setting, would never otherwise come to the attention of discipline authorities. Those results depend upon widespread compliance with the reporting obligation by Illinois lawyers which was prompted by the *Himmel* decision and which is facilitated by the comparatively narrow scope of misconduct which Illinois Rule 8.3(a) requires Illinois lawyers to report.

Consideration of the impact of the *Himmel* decision on Illinois discipline must begin with the particulars of the *Himmel* case. Mr. Himmel agreed to represent a client whose former attorney, John Casey, had settled the client's personal injury case and then converted the entire $23,233.34 portion of the settlement due to the client. On behalf of the client, Himmel negotiated an agreement with Casey whereby Casey promised to pay the client $75,000 and the client agreed not to initiate any criminal, civil, or attorney disciplinary action against Casey. Himmel's agreement with the client entitled him to be paid one-third of any amount collected beyond the $23,233.34 Casey had initially converted. Due to Himmel's efforts, the client recovered about $10,000 from Casey, but when Casey failed to pay any more, Himmel sued and the lawsuit was reported to the ARDC. Himmel insisted that he did not make a report to the ARDC because his client directed him not to do so. The Illinois Supreme Court gave that argument short shrift, observing that a client cannot absolve a lawyer of a duty imposed by the Court. In aggravation, the Court found that Himmel's failure to report had interfered with a timely ARDC investigation, with the result that Casey had converted funds from other clients

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1. *In re* Himmel, 533 N.E.2d 790 (Ill. 1998).

2. I had tempered this description until one of my ARDC colleagues informed me that they all carefully avoided talking about *Himmel* around me because I had such a strong adverse reaction.

after Himmel learned of, and decided not to report, Casey's misconduct. The Court was particularly incensed that Himmel had bargained away his duty to report in return for economic concessions from Casey, which, the Court held, ran afoul of the criminal proscription against compounding a crime.

There is another circumstance that contributes to the real story of the *Himmel* result. Himmel represented himself throughout the proceedings, including at the oral argument before the Supreme Court. In speaking engagements after his suspension, Mr. Himmel told audiences that was a costly mistake. Some who observed the oral argument in the case felt that Himmel inadvertently managed to convince the Court that he had made a calculated decision to use Casey's fear of a disciplinary report to leverage a greater settlement for his client and a bigger fee for himself.

An important factor in the *Himmel* outcome was the comparatively narrow scope of the Illinois reporting obligation, and the fact that the evidence so clearly showed that Himmel knew that Casey's misconduct fell within the narrow parameters of the rule. At the time this case arose, Illinois still operated under a Code of Professional Responsibility. Himmel was charged with violating Illinois Disciplinary Rule 1-103(a), which provided:

> (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.

Illinois DR 1-102(a)(3) and (a)(4) prohibited lawyers from engaging in illegal conduct involving moral turpitude and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. In contrast, ABA Model Code of Professional Responsibility, Disciplinary Rule 1-103(a) required lawyers to report unprivileged knowledge of *any* violation of DR 1-102, which proscribed virtually all lawyer misconduct. Under a broader rule, it seems somehow more acceptable that lawyers will assume that the rule could not really mean what it says, or, at least, that no one would seriously consider rigorously enforcing such a broadly framed obligation. Under the narrower Illinois rule, there was considerably less room for the Court to entertain that reasoning. Moreover, by bargaining with Casey to withhold criminal and disciplinary complaints in exchange for payment of a rather substantial sum and making the mistake of standing on his right to do so in his argument to the Supreme Court, Himmel signaled his recognition that Casey's misconduct fell within the parameters of the rule.

Shortly after *Himmel* was decided, the Illinois Supreme Court adopted a version of the Model Rules, but it held to the Illinois formulation of the reporting requirement. Whereas Model Rule 8.3(a) requires a report when a lawyer knows that another lawyer has committed a violation of the rules that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," Illinois Rule 8.3(a) continues to require a report only when a lawyer has unprivileged knowledge that another lawyer has committed *a criminal act* that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects or has engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, as proscribed by Illinois Rule 8.4(a)(3) and (4). In reaction to the ABA's adoption of Ethics 2000 recommended revisions to the Model Rules, the Illinois State Bar Association and the Chicago Bar Association convened a joint committee to consider revisions to the Illinois Rules of Professional Conduct. During the deliberations of that joint committee, the ARDC urged that the committee's report recommend that the Illinois Supreme Court retain the present Illinois Rule

8.3(a) formulation of what conduct must be reported, and the joint committee's proposal does, indeed, recommend that Illinois retain its "more precise and limited" version of Rule 8.3(a).[3]

Since the *Himmel* case was decided, the Illinois ARDC has tracked grievances filed by lawyers separately. In 1989, the first full year after *Himmel* was decided, Illinois lawyers filed over 900 grievances out of about 6000 total grievances filed that year. The flurry of *Himmel*-motivated activity and widespread complaints that lawyers were threatening each other with Himmel reports prompted the Illinois Supreme Court to add a provision to Rule 1.2 when the Court adopted the Illinois version of the Model Rules in 1990. Illinois Rule 1.2(e) provides that a lawyer "shall not present, participate in presenting, or threaten to present criminal charges *or professional disciplinary actions* to obtain an advantage in a civil matter." Whether in response to that provision or because the initial hysteria died down of its own accord, in all years after 1989, the number of grievances filed by lawyers or judges dropped to about 500 a year, out of an average 6180 grievances per year.

While the lawyers who file reports to Illinois disciplinary authorities routinely cite *Himmel* as requiring them to do so, many of the reports would not be required under that decision. A substantial number of attorney reports complain about another lawyer's advertising, without any expressed concern that there is something dishonest in the ads. Some other common nonmandatory reports include complaints about incivility, neglect, Rule 4.2 violations, and the filing of frivolous pleadings. Nevertheless, while many of the attorney reports would not be required under Illinois Rule 8.3(a), the conduct Illinois lawyers report does tend to be more serious than conduct reported by other sources. As the chart at the end of this article shows, a report that comes from a lawyer is twice as likely to result in a formal disciplinary complaint as is a grievance that comes from another source.

My experience as Administrator of the ARDC has persuaded me that the Illinois Supreme Court's readiness to enforce the attorney reporting rule is a significant factor in the efficacy of our discipline system. Lawyers are in positions to know things about other lawyers that might not be known to others and to understand the significance of matters that might be lost on others. Yet very few lawyers want to make reports, and many would talk themselves out of it if they felt free to ignore Rule 8.3. Doubtless, much of the conduct that results in formal disciplinary charges would eventually have been reported by a client or someone else if a lawyer had not first made a report. Nevertheless, lawyers faced with potential disciplinary exposure make prompt reports, and particularly in cases where offending lawyers have high volume practices or are spending client funds, that promptness makes it possible for discipline to intervene more swiftly and limit the potential damage that might be done by the offending lawyer. Enforcing a lawyer's obligation to report enhances the public protections goals of attorney discipline.

It is also my belief that enforcing the reporting rule creates a leveling effect in terms of which lawyers are subjected to discipline. Jurisdictions which have published statistics, including Illinois, acknowledge that the overwhelming number of lawyers disciplined are sole practitioners.[4] One reason is that a sole practitioner's clients are more likely to complain to discipline. Clientele of a solo practice tend to be individuals, often of lesser means, who have little leverage if a lawyer fails to live up to their expectations, and most feel that complaining to

3. Joint ISBA/CBA Committee on Ethics 2000 Final Report (October 17, 2003) at p. 38. The report is under review by Illinois Supreme Court Committee on Professional Responsibility.

4. The data usually captures a lawyer's practice setting at the time of the misconduct or at the time the lawyer is disciplined. It is not uncommon for lawyers who are solos at the time of discipline to have formerly practiced in a more prestigious setting.

discipline is their only hope. In contrast, major corporate clients of a large firm tend to avoid complaints to discipline, and many resist becoming involved in discipline cases. It is much more efficient and palatable for them to seek a resolution of their grievances directly from the firm. Firms that become aware of serious breaches by their lawyers, e.g., fraudulent billing of fees or expenses, typically go to substantial lengths to quickly make the client whole. In most states, that will be the end of the incident. In Illinois, the partners who learned of a colleague's criminal or dishonest conduct must make a report or face potential discipline themselves. As a result, large firm lawyers are more likely to be held accountable for misconduct.

Contrary to the worst fears of some practitioners, the ARDC has not aggressively hunted for evidence of *Himmel* violations. In Illinois, the ARDC Administrator has authority to initiate an investigation on her own, without a grievance being filed by anyone. Yet over the years, the total number of *Himmel* investigations docketed by the Administrator *and* generated by a grievance from someone else has averaged only 7 a year, about one-tenth of one percent of the investigative caseload.

As a rule, the ARDC looks for factors beyond whether an attorney knew of, but failed to report, misconduct. Two such factors drove the Court's decision to discipline Himmel: evidence that the failure to report enabled the offending lawyer to cause additional harm to others and evidence that the nonreporting attorney chose to withhold a report for personal gain. Another consideration is whether the failure to report impacted public perception of the integrity of lawyers.

Since *Himmel*, there have been only two cases where an Illinois lawyer was disciplined for failing to report another lawyer's misconduct. Both cases involved facets of the above factors and, in both cases, other misconduct was also charged. In *In re Arnold,*[5] a lawyer was suspended for one year, followed by two years of probation for having possessed a controlled substance (cannabis) and having failed to report the misconduct of a judge/friend from whom he purchased cannabis several times over several years. The *Arnold*, case arose in a small city in Illinois and first came to light when federal authorities arrested a sitting judge for growing cannabis in his basement. The papers widely reported that a lawyer who regularly appeared before the judge bought cannabis the judge had cultivated. Arnold also acknowledged that he decided not to report the judge because he would have lost his source for cannabis. In *In re Daley*,[6] an attorney was suspended for nine months for entering pleas and taking other action on behalf of criminal defendants at the direction of another client of the firm, without conferring with or informing the individual clients of the actions being taken or dispositions imposed in their cases, and failing to report another attorney's use of a falsified court order to lure an undercover agent to court for purposes of obstructing a criminal investigation. The lawyer Daley failed to report and was shortly thereafter indicted for conspiracy and obstruction of justice.[7] In covering the *Cueto* trial and appeals, the local media repeated incessantly Mr. Cueto's alleged boast that he controlled the judiciary of the circuit.

In neither of those cases did the Illinois Supreme Court issue an opinion, and instead, the Court entered orders imposing discipline based upon the recommendations of lower boards. Yet from the opinion the Court did issue in an appeal from an order entered in civil litigation,[8] it seems clear that the Court did not lose its enthusiasm for enforcing the reporting obligation.

5. 93 SH 436, M.R.10462 (1994).
6. 98 SH 2, M.R.17023 (2000).
7 *See* United States v. Cueto, 151 F.3d 620, (C.A.7, 1998).
8 Skolnick v. Altheimer and Gray, 730 N.E.2d 4 (Ill. 2000).

Attorney Skolnick and his wife sued his former firm and an associate from that firm (Kass) who had reported alleged misconduct by Skolnick to the ARDC.[9] During discovery, the associate, Kass, came into possession of documents which she believed showed misconduct by Skolnick which she was required to report under Rule 8.3(a). She asked the trial judge to modify an agreed protective order governing documents produced in discovery to allow her to report the misconduct to the ARDC, but the judge declined to do so.

The Supreme Court held that the trial judge had abused his discretion. The Court reiterated its holding in *Himmel* that a lawyer's duty to report criminal or dishonest conduct by another lawyer is absolute, and observed that " . . . the principles underlying a lawyer's *Himmel* obligation are so important that, in our opinion, only the weightiest considerations of 'justice' (166 Ill.2d R. 201(c)(1)) could excuse a trial court's refusal to modify a protective order so that counsel could fulfill its absolute, ethical duties."[10] Finding no justification for refusing to modify the protective order, the Court concluded that the interests of justice weighed decidedly in favor of allowing Kass to fulfill her ethical duty.

The plaintiffs' argued that, because Rule 8.3(a) requires that a report be made to "a tribunal or other authority empowered to investigate or act upon . . ." a violation, Kass could discharge her duty by reporting Skolnick's alleged misconduct to the trial court, so that it was not necessary to modify the protective order to allow a report to the ARDC. The Court held:

> "The proper inquiry is not whether a "tribunal" means a "trial court," as the Skolnicks contend, but rather means what authority or authorities are "empowered" to act upon a charge of attorney misconduct. As stated in Rule 8.3(a), only an authority granted such power may receive reports of misconduct. In Illinois, only this court possesses the "inherent power to discipline attorneys who have been admitted to practice before it." The court, in turn, has delegated the authority to investigate and prosecute claims of attorney misconduct to the ARDC. Further, while a trial court bears an independent responsibility to report attorney misconduct to the ARDC, only this court may discipline an attorney found guilty of ethical misbehavior. Thus, Kass is correct in arguing that she was required to report the claimed misconduct to the ARDC. Her duty to report cannot be discharged by reporting the suspected misconduct to the trial court."[11] (citations omitted)

Mr. Skolnick was subsequently suspended for three years for having submitted a series of loan applications that materially misstated his financial condition.[12]

Former Illinois Supreme Court Justice Daniel Ward was fond of describing the Court's responsibility to sanction lawyers as a "melancholy business."[13] The description applies equally to the duties Rule 8.3(a) imposes upon Illinois lawyers. Many *Himmel* reports reflect a mixture of reluctance and relief, reluctance at finding oneself in the role of informer, relief that one is required to do something about conduct which all of one's professional instincts say warrants

9. Under Illinois Supreme Court Rule 775, complainants to the ARDC enjoy civil immunity, but Mr. Skolnick alleged that the firm and Kass published their allegedly defamatory statements to persons outside the ARDC.
10. 730 N.E.2d 4, 13.
11. 730 N.E.2d 4, 15.
12. *In re* Skolnick, 00 CH 92, M.R. 17529 (2001).
13. *In re* Gold, 396 N.E.2d 25, 27 (1979); *In re* LaPinska, 381 N.E.2d 700, 705; (1978); *In re* Broverman, 239 N.E.2d 816, 819 (1968).

attention. The Illinois experience suggests that as uncomfortable and even painful as a reporting obligation can be, enforcement of a duty to report precisely defined misconduct can play a significant role in enhancing the efficacy and fairness of lawyer discipline.

The Illinois *Himmel* Experience:
Proportion of Attorney Reports to All Illinois Investigations
and to Investigations that Result in Formal Disciplinary Charges, 1992 - 2006

Year	Number of Investigations	Numbers of Attorney Reports	Percent of Attorney Reports to All Investi-gations	Number of Investigations That Became Charges in Formal Complaints	Number of Attorney Reports That Became Charges in Formal Complaints	Percent of Attorney Reports to All Investigations That Became Charges in Formal Complaints
1992	6,291	554	8.8	277	50	18.0
1993	6,345	594	9.3	241	48	19.9
1994	6,567	578	8.8	247	54	21.8
1995	6,505	555	8.5	277	38	13.7
1996	6,801	549	8.0	300	60	20.0
1997	6,293	591	9.4	342	64	18.7
1998	6,048	539	9.3	259	54	21.0
1999	5,877	517	8.8	231	54	23.0
2000	5,716	512	8.9	224	31	13.8
2001∗	5,811	201	3.6	273	27	9.8
2002∗	6,182	346	5.6	334	53	15.8
2003	6,325	510	8.1	353	44	12.5
2004	6,070	503	8.3	320	42	13.1
2005	6,082	505	8.3	317	47	14.8
2006	5,800	435	7.5	217	35	16.1
Average	6,180	499	8.08	281	47	16.8

∗ Coding changes in these years resulted in a number of attorney reports not being recorded, so that the number of attorney reports for 2000 and 2001 are underreported.