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Rule 8.3 and the Effect of Himmel on the Practicing Attorney in North Dakota

John J. Gosbee

RULE 8.3* AND THE EFFECT OF *HIMMEL* ON THE PRACTICING ATTORNEY IN NORTH DAKOTA

JOHN J. GOSBEE**

WHAT IS A LAWYER TO DO? STIFLE THE CLIENT OR BLOW THE WHISTLE?

When a Corvette driver ran a stop sign in October of 1978 and ran into Tammy Forsberg's motorcycle, he little realized that his disregard for that sign would set into motion a course of events that would lead one lawyer to steal $35,000 and see another lawyer suspended from practice for one year.[1]

Forsberg retained attorney John R. Casey to represent her in any personal injury or property damage claim that might result from the accident.[2] Casey negotiated a settlement agreement, but later converted the entire $35,000 settlement.[3] Forsberg spent two years trying to recover her share of the settlement from Casey before turning to another attorney, James Himmel, for help.[4] Himmel investigated the matter and discovered that Casey had indeed converted Forsberg's money. Himmel then negotiated an

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* Distinctions between North Dakota Rule 8.3 and the ABA Model Rule are set out as an appendix.

** B.A., Brandeis University, 1971. J.D., St. Mary's University, 1977. LL.M. (Taxation), Boston University, 1981. Presently in the private practice of law in Mandan, North Dakota.

1. If the driver were a lawyer, he or she would no doubt have fun comparing this result with that of Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).

2. *In re* Himmel, 125 Ill. 2d 531, __, 533 N.E.2d 790, 791 (1988) *reh'g denied* January 30, 1989. *See* Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel,* 1988 UNIV. ILL. L. REV. 977, 983 n.38 (1988) [hereinafter Rotunda] (discusses *Himmel* in great depth).

3. *Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 791.

4. *Id.* By the time she came to Himmel, Forsberg's own efforts had netted her $5,000 from Casey. *Id.* Thus, she was still seeking $18,233.33 when she came to Himmel. The Illinois court describes Forsberg's share as $23,233.34. *Id.* Puzzling aspects of the opinion include its contradictory descriptions of what Forsberg received and its confusing description of the fee arrangement Himmel made with Forsberg. As to what Forsberg collected, we are told that she "collected $5,000 from Casey" before retaining Himmel, and that due to Himmel's efforts, "Forsberg collected another $10,400 from Casey." *Id.* at __, 533 N.E.2d at 791-92. That means Forsberg collected $15,400 in all. The court commented, in determining what type of discipline to impose, that "we do consider the fact that Forsberg recovered $10,400 through [Himmel's] services." *Id.* at __, 533 N.E.2d at 796. Yet, the court also stated that Himmel "requested no fee for recovering the $23,233.34." *Id.* at __, 533 N.E.2d at 792. Does that mean he collected "the" $23,233.34?

As to what Himmel's fee was, we are told that it was to be "one-third of any funds recovered above $23,233.34." *Id.* at __, 533 N.E.2d at 791. No explanation is offered as to why Himmel agreed to take on the case with no fee until his client more than broke even. She had already recovered $5,000.00, but Himmel wouldn't have been entitled to a fee until he got what was, in effect, a second $5,000.00. Basically, Himmel took the case on a pro bono basis, with any fees going to him only in the event of a lodestar recovery. If Himmel was indeed intending to pursue the case on a pro bono basis or out of some sense of loyalty to the profession and the desire to right a wrong wrought by one of its members, he was certainly ill served for his efforts.

agreement with Casey under which Casey would pay Forsberg $75,000 in full settlement for all her claims against Casey and would "not initiate any criminal, *civil*, or attorney disciplinary action against Casey."[5]

Disciplinary proceedings were begun against Himmel in January of 1986 for Himmel's failure to report Casey's misconduct. At the first level, the Hearing Board recommended a private reprimand.[6] The Administrator took the case to the Review Board, which found that Himmel had not violated the rules and recommended dismissal of the complaint.[7] The Administrator then took the case to the Supreme Court of Illinois, which found that Himmel had violated the rules by failing to report Casey's theft of Forsberg's money and suspended Himmel for one year.[8]

There is only one argument that the result in this case was fair. That is that if Himmel had reported Casey, Casey might have been caught and stopped sooner. Himmel willingly[9] engaged in a cover-up of Casey's theft and, significantly, Casey went on stealing for two more years before he was finally caught.[10]

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5. *Id.* at __, 533 N.E.2d at 791 (emphasis added). Although the agreement has the appearance of "hush money," it could have represented a settlement of a possible malpractice claim against Casey, since Forsberg "had $20,000 to $25,000 in medical bills alone . . . [suggesting] that Casey probably settled Ms. Forsberg's personal injury claim too cheaply." Rotunda, *supra* note 2, at 983 n.38. Another possibility is that $35,000 was the policy limit, and the Corvette's driver was judgment-proof for any more. If that was the case, Casey would not have been negligent in failing to get more, and the status of the extra $40,000 as "hush money" for the theft would have been clear. Rotunda's analysis is that Himmel "probably thought of the extra amount as akin to treble damages." *Id.* Rotunda does not elaborate on his theory of why Forsberg would have been entitled to treble damages, unless it was for the tort of conversion. For such a conversion in North Dakota, Forsberg would have been entitled to her $18,233 plus the reasonable expense of recovering her property. *See generally* N.D. CENT. CODE § 32-03-23(3) (1960) (setting out damages for conversion of property). No doubt this would have included a reasonable attorney's fee for Himmel.

6. *Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 792.

7. *Id.*

8. *Id.* at __, 533 N.E.2d at 796.

9. He was contractually bound to do so, having drafted an agreement in which his client "agreed not to initiate any criminal, civil, or attorney disciplinary action against Casey." *Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 791. The court noted that this was probably, in itself, a criminal offense, compounding a crime in violation of Illinois law, which prohibits receipt of "consideration for a promise not to prosecute . . . ." *Id.* at __, 533 N.E.2d at 796 (quoting ILL. ANN. STAT. ch. 38, § 32-1(a) (Smith-Hurd 1977)). North Dakota apparently doesn't have a similar prohibition, but the right to compromise a crime when the injured party "has received satisfaction" is limited to misdemeanors. N.D. CENT. CODE §§ 29-01-16 to 17 (1991). Casey's misapplication of the $18,233 Forsberg entrusted to him would be a Class B felony in North Dakota. *See* N.D. CENT. CODE § 12.1-23-07(2)(a) (Supp. 1989) (class B felony if property misapplied exceeds $10,000 in value).

10. *Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 795. Casey stole Tammy Forsberg's money in March of 1981. *Id.* at __, 533 N.E.2d at 791. Forsberg first came to Himmel in March of 1983. *Id.* Based on misconduct with other clients' funds, disciplinary actions were not started against Casey until April of 1985, twenty-five months after Himmel learned of Casey's action. *Id.* The court stated that "Casey converted many clients' funds after [Himmel's] duty to report Casey arose." *Id.* at __, 533 N.E.2d at 795.

Nonetheless, there are disturbing aspects of the case which, taken as a whole, suggest that Himmel was not fairly treated.[11] First of all, Himmel was suspended solely for failing to report the misconduct of a lawyer previously involved in the case. Clearly no "code of silence" should apply to the profession,[12] but sober consideration must be given to the real-world situation Himmel was required to deal with. For one thing, it is very likely that Himmel was sailing off toward uncharted shoals in considering whether he could face disciplinary action solely for his failure to report Casey.[13] Further, Himmel's client told him "she simply wanted her money back and specifically instructed [Himmel] to take no other action."[14] Even in the absence of express instructions, Himmel may reasonably have believed he couldn't disclose what Forsberg told him without her permission to do so; namely, that Forsberg's communication was privileged.

To justify punishing Himmel, the Illinois court had to drasti-

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11. After all, the first two levels of disciplinary authority sided in whole or in part with Himmel, recommending reprimand or a dismissal.

12. The Supreme Court of Illinois has stated that a code of silence doesn't apply to the profession. *In re* Anglin, 122 Ill. 2d 531, __, 524 N.E.2d 550, 554 (1988). *Anglin* shows that truth is indeed stranger than fiction—it certainly would have made a great *Untouchables* episode. In 1970, Anglin was suspended from the practice of law in Illinois for five years for comingling client funds. *Id.* at __, 524 N.E.2d at 551. In an unrelated matter, he was convicted in federal court of possession of stolen securities. *Id.* While serving his time, Anglin was subpoenaed and asked to identify his coconspirators in the securities scam. *Id.* at __, 524 N.E.2d at 552. For his refusal to answer, he served another 18 months. *Id.* His 1970 suspension having been turned into a consensual disbarment in 1974, Anglin eventually applied for reinstatement in 1984, at which time he still refused to identify his coconspirators from the old stock scam. *Id.* Even after all that, the hearing panel and review board both recommended reinstatement. *Id.* at __, 524 N.E.2d at 554. The Supreme Court of Illinois said no, holding that because Anglin "continues to express a belief in a code of personal conduct that is inconsistent with a portion of our Code of Professional Responsibility, we are not convinced that he has been fully rehabilitated . . . ." *Id.* at __, 524 N.E.2d at 555. The court alluded to the same Disciplinary Rules it would soon refer to in *Himmel*: DR 1-103 and DR 1-102(a)(3) to (4). *Id.* at __, 524 N.E.2d at 554. Four months later, the court cited *Anglin* in Himmel's case. *Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 793-94. Importantly, for this discussion, *Anglin* shows that a "code of silence" is indefensible.

13. Apparently the issue of failure to report a fellow lawyer's misconduct was, as a practical matter, a novel one:

> If we look through all of the courts of this land, it is virtually unheard of to find a case where a lawyer is disciplined merely for refusing to report another lawyer. . . . In those cases where the lawyer was disciplined for failing to report another lawyer, the failure to report was merely one of several discipline violations, with the bar authorities or the court throwing in the failure to report as one violation among many. That is, until *Himmel*.

Rotunda, *supra* note 2, at 982.

14. *Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 792. The court gave short shrift to Himmel's argument that the client's request excused his failure to report Casey. "A lawyer may not choose to circumvent the rules by simply asserting that his client asked him to do so." *Id.* at __, 533 N.E.2d at 793. That argument sounds quite appealing and sensible, and maybe Himmel did go over the line. After all, he and his client contractually agreed not to expose Casey, thereby freeing Casey to go about his nefarious ways. Forsberg's pact with the devil turned out not to be all that rewarding to her after all. As previously noted in note 4, *supra*, she only recovered $15,400.

cally shrink the ethical attorney-client privilege. The court held that "information voluntarily disclosed by a client to an attorney, *in the presence of third parties who are not agents of the client* or attorney, is not privileged . . . ."[15] In support of its conclusion, the court cited the fact that Forsberg's mother and fiance were present when she told her tale of woe to Himmel.[16] The loss of that privilege may be more serious to the profession than the damage done by a few Caseys. It may require lawyers to stifle their clients' rendition of the facts of a case, or to at least make sure there are no witnesses to the rendition.

True, Forsberg's mother and fiance might not have been her agents in the formal sense, but they no doubt came along for moral support. After all, Forsberg had suffered not only the indignity of being injured in a motorcycle accident, but the added insult of being fleeced by someone she had trusted. Having been tricked by one lawyer whom she presumably trusted at the outset, Forsberg certainly was not imprudent in bringing her mother and fiance along, either for moral support or as witnesses in case something went wrong again. What would have happened if Himmel had turned out to be unreliable? If the Illinois Supreme Court's standard is to apply, then the only way lawyers can safely protect client confidences is to either throw out of the office all persons who accompany the client or draw up a document appointing them as agents of the client.

The court also held that because the client allowed Himmel to talk about "Casey's conversion of her funds with the insurance company involved, the insurance company's lawyer, and with Casey himself . . . the information was not privileged."[17] How else could Himmel have handled the case? How could he have avoided potential liability for a Rule 11 violation?[18]

What if Forsberg had her facts wrong? Himmel at least had to check with the insurance company to see if the claim had been paid. He was certainly prudent in checking with Casey to hear his side of the story. What would have happened if Casey had said, "What are you talking about? I paid her. Here's a copy of the check from my trust account!" If it had turned out that Forsberg had lied to him, and Himmel hadn't done at least that much

15. *Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 794 (emphasis added).
16. *Id.*
17. *Id.* at __, 533 N.E.2d at 794.
18. Rule 11 of the North Dakota Rules of Civil Procedure requires pleadings to be filed in good faith after appropriate investigation. N.D.R. CIV. P. 11.

checking, a justifiably miffed Casey could have brought a motion for Rule 11 sanctions against Himmel.

What the Illinois Supreme Court has done is take two perfectly sensible courses of conduct (allowing the client to talk in the presence of friends and investigating the case) and turn them into a destruction of the ethical attorney-client privilege. This is applying bad logic to achieve a result the court desired.

It is difficult to predict what will result in North Dakota, and what effect *Himmel* will have on our practicing attorneys. The case is probably useful in at least making the issue open for discussion. We certainly now know that, in some jurisdictions at least, a strict construction is placed on the whistle-blowing rule.[19]

In one sense, *Himmel* might stand as persuasive authority in North Dakota, and in another sense it might not. It could be considered persuasive for its definition of the kind of misconduct that

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19. *Himmel* has already had some salutary effects. Not surprisingly, in Illinois there was an increase of reporting of misconduct by other lawyers. Rotunda, *supra* note 2, at 992, n.69. In another case, an Arizona public defender reported a prosecutor for a conflict of interest violation, when the prosecutor handled a case against a fourth and fifth-time DUI offender whom he had previously defended as a contract public defender. *In re* Ockrassa, 165 Ariz. 576, 799 P.2d 1350 (1990). The new public defender asked Ockrassa to withdraw, but he refused to do so, and later "the trial judge advised the [new] deputy public defender that he had an ethical obligation to report perceived violations of the Rules of Professional Conduct to the State Bar." *Id.* at 1350-51.

No doubt many lawyers may view Rule 8.3 as requiring them to report misconduct of opposing counsel during the conduct of litigation (*e.g.*, N.D. RULES OF PROFESSIONAL CONDUCT Rules 3.1-3.9, dealing with the lawyer's conduct as an advocate). Although such a report might very well be justified, it would be tainted with the suspicion that dissatisfaction with the results of a case was the motivation. One commentator has noted that "74 percent of docketed grievances filed by lawyers against their adversaries are eventually dismissed." Mitchem, *The Lawyer's Duty to Report Ethical Violations*, 18 COLO. LAWYER 1915, 1916 (1989). There are special pitfalls in making the report while a case is ongoing. As Rotunda notes, if the report is made at that point in time, the reported lawyer can "immediately retaliate by claiming that the [reporting lawyer] is 'abusing' the [disciplinary] procedures to apply 'improper pressure' on the allegedly wayward attorney." Rotunda, *supra* note 2, at 992-93.

In a result he describes as "perverse," Rotunda notes that in Illinois the existence of the civil action against the offending attorney can abate the disciplinary action. *Id.* at 993. One egregious example cited by Rotunda involved a lawyer who was sued by an insurance company for fraud in a federal case that went all the way to the Seventh Circuit Court of Appeals, which, in a panel opinion, stated that it was "astonished to learn" that disciplinary proceedings had never yet been started against the lawyer. Hartford Accident & Indemnity Co. v. Sullivan, 846 F.2d 377, 385 (1988). The court then emphasized that it would mail a copy of the opinion to the Illinois disciplinary authorities. *Id.* Rotunda followed up on the matter, and, as far as he could tell, no action had been taken some 14 months later. Rotunda, *supra* note 2, at 994-95.

In the context of this analysis, if the disciplinary proceedings were abated during the existence of a civil action against Casey, it wouldn't have made any difference that Himmel didn't report Casey's misconduct. However, no civil action was brought against Casey until he failed to pay the $75,000, as agreed to in 1983. *Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 791. In 1985, Himmel brought suit against Casey and obtained a $100,000 judgment. *Id.*

In North Dakota, disciplinary proceedings are not abated because of the existence of pending civil litigation against the lawyer "unless the [Disciplinary Board] in its discretion authorizes a stay for good cause shown." N.D. PROCEDURAL RULES FOR LAWYER DISABILITY AND DISCIPLINE Rule 3.5 (G) (1988).

creates a duty to report. That possible persuasiveness is probably outweighed, however, by the distinction the case makes between the evidentiary attorney-client privilege and the ethical attorney-client privilege. It appears that, in North Dakota, the ethical privilege would take precedence.

Although *Himmel* was based not on Rule 8.3, but on Disciplinary Rule 1-103,[20] on the issue of the kinds of misconduct that should be reported, the Illinois version of DR 1-103 was more closely analogous to both states' version of Rule 8.3 than to North Dakota's (and the model's) version of DR 1-103.[21] However, that comparison alone does not decide the issue.

As previously noted, a major reason the Illinois Supreme Court ruled against Himmel was that it applied the narrower evidentiary definition of the attorney-client privilege instead of the broader ethical definition.[22] Given that distinction and the language of both the model version and North Dakota's version of

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20. *Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 790-91. Some commentators distinguish between the two, holding that DR 1-103, with its reference to reporting violations of DR 1-102, "trigger[s] the reporting obligation, even if the violation is of a trivial nature." Olsson, *Reporting Peer Misconduct: Lip Service to Ethical Standards is Not Enough*, 31 ARIZ. L. REV. 657, 663 (1989) (citing C. WOLFRAM, MODERN LEGAL ETHICS 685 (1986)). In contrast, Model Rule 8.3 requires only the reporting of "substantial" violations, which are defined in the comment to the rule as those serious enough "that a self-regulating profession must vigorously endeavor to prevent." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1989). The comment also states that "substantial" does not refer to the quantum of evidence. *Id.* The distinction has no application to *Himmel*, because no matter how you slice it, what Casey did was substantial. Justification for Himmel's conduct is found in the attorney-client privilege. *See infra* notes 22-28 and accompanying text.

21. Model DR 1-103 requires reporting of all "unprivileged knowledge of a violation of DR 1-102." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1969). Model DR 1-102(A) prohibits six forms of misconduct: (1) violation of a Disciplinary Rule; (2) circumvention of a Disciplinary Rule through actions of another; (3) engaging in illegal conduct involving moral turpitude; (4) engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; (5) engaging in conduct that is prejudicial to the administration of justice; and (6) engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A) (1969). Illinois adopted only the first five subdivisions. ILL. ANN. STAT. ch. 110A, DR 1-102(A) (Smith-Hurd 1980). North Dakota adopted all six. N.D. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1981).

However, the Illinois version of DR 1-103 required only the reporting of violations of DR 1-102(A)(3) and (4). ILL. ANN. STAT. ch. 110A, DR 1-103 (Smith-Hurd 1980). Therefore, Illinois presaged the change made in Model Rule 8.3 by making mandatory reporting apply only to serious violations.

22. *Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 790 (1988) (citing People v. Williams, 97 Ill. 2d 252, 454 N.E.2d 220 (1983), *cert. denied*, 466 U.S. 981 (1984)).

> The rationale [in *Himmel*] is that the court interprets 'privilege,' as it is used in Rule 1-103(a), to include only the *evidentiary* attorney-client privilege. By excluding the *ethical* privilege, which is broader than the evidentiary privilege, the court has offered no protection to information that would be classified as a 'secret' under Rule 4-101(a).

Note, *The Lawyer's Duty to Report Another Lawyer's Misconduct*, 14 S. ILL. U. L. J. 683, 690 (1990) (italics in original, underscore added, and footnotes omitted).

Rule 8.3(c), the case may not be persuasive authority in North Dakota. The model version specifically "does not require disclosure of *information otherwise protected* by Rule 1.6."[23]

The distinction is that Rule 1.6 is client-focused, not evidence-focused. Rule 1.6 prohibits the revelation of "information relating to representation of a client *unless the client consents* after consultation, *except* for disclosures that are impliedly authorized *in order to carry out the representation*, and except as stated in paragraph (b)."[24] This provision resolves both points raised by the court on this subject. Forsberg told Himmel she didn't want the information disclosed, so that takes care of the issue of her mother and fiance being there when she told Himmel. Obviously, Himmel's discussions of the matter with the insurer and Casey were "impliedly authorized in order to carry out the representation," thus taking care of that issue.[25]

The North Dakota version of Rule 1.6 is somewhat different, *requiring* the disclosure when death or substantial bodily harm is imminent,[26] and *permitting* it when necessary "to prevent the client from committing a criminal or fraudulent act that . . . is likely to result in . . . substantial injury or harm to the financial interests or property of another."[27] No such consequence would have arisen from failing to report Casey, so it appears that, by operation of North Dakota's Rule 1.6(d), Himmel's conduct would not violate North Dakota's Rule 8.3.[28]

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23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (1981) (emphasis added). The Illinois provision requires reporting of information "not otherwise protected as a confidence under these Rules . . . ." ILL. ANN. STAT. ch. 110, RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (Smith-Hurd Supp. 1990). The North Dakota provision is identical to the model provision, except for the omission of the word "otherwise." N.D. RULES OF PROFESSIONAL RESPONSIBILITY Rule 8.3(c) (1988).

24. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1981) (emphasis added). Paragraph (b) permits disclosure to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm, or to deal with disputes with the client. *Id.* at 1.6(b). Therefore, even the Illinois Supreme Court's argument that Forsberg's conduct was probably the crime of compounding a crime wouldn't require disclosure, as imminent death or substantial bodily harm would not have resulted. *See Himmel*, 125 Ill. 2d at __, 533 N.E.2d at 796.

25. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (lawyer may reveal such disclosures).

26. N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1988).

27. *Id.* at 1.6(d).

28. The same reasoning probably wouldn't apply in Illinois. Illinois has yet another variation on Rule 1.6, probably crafted with the *Himmel* precedent in mind, *allowing* the lawyer to reveal: "(1) confidences or secrets *when* permitted under these Rules or *required by law or court order;* (2) the intention of a client to commit a crime in circumstances other than [one resulting in death or serious bodily harm, for which reporting is *required*] . . . ." ILL. ANN. STAT., ch. 110, RULES OF PROFESSIONAL CONDUCT Rule 1.6(c) (Smith-Hurd Supp. 1990) (emphasis added). One might argue that, unless he was ordered to do so, Himmel would not have to reveal Casey's conduct under the Illinois version of Rule 1.6. However, the counter argument would be that Rule 1.6(c)(1) allows revelation when "permitted"

So, we have two comparisons to make in evaluating *Himmel's* impact on the practicing North Dakota attorney. On the one hand, there is the argument that the Illinois version of DR 1-103 is sufficiently similar to North Dakota's Rule 8.3 to justify applying *Himmel* to our rule. On the other hand, there is the argument that the Illinois Supreme Court's reliance on the evidentiary version of the attorney-client privilege, rather than the ethical version of that privilege, erodes any persuasive authority of *Himmel*.

The second argument appears much stronger, and certainly the ethical version of the attorney-client privilege is the one that we, as lawyers, should adhere to, leaving it to our clients to waive the evidentiary one when they wish.[29] Therefore, the impact of *Himmel* on practicing North Dakota lawyers is probably limited to its educational impact; namely, that the duty to report misconduct can arise as an obligation independent of our efforts to otherwise comply with the rules that guide our profession.

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under these rules (which would include rule 8.3) or "required by law," which would presumably include the case law established in *Himmel*.

That there is a difference from Model Rule 1.6 in Illinois is recognized in that state:

> [N]ew Illinois Rule 8.3(a) is not significantly different from old Rule 1-103(a). Rule 8.3(a) is essentially the same except that instead of "unprivileged" knowledge, the knowledge that must be reported is that which is "not otherwise protected as a confidence by these Rules or by law. . . .
>
> These changes do not alter the practical effect of the duty to report because attorneys will experience difficulty interpreting the requirements of the new rule. For example, a lawyer must now determine whether 'applicable law' protects the knowledge as a 'confidence,' and what applicable law is, or determine whether the confidence is 'otherwise protected' by the rules. These problems demonstrate the need for better guidelines to assist lawyers in determining what knowledge must be reported and the scope of the attorney-client privilege.
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> The ABA Model Rules offer a potential solution to the problem of defining knowledge, while simultaneously providing guidance to lawyers in these situations. . . . *[T]he attorney-client privilege in ABA Rule 1.6 protects more knowledge and information than the court's definition of the privilege under the Illinois Rules.*

Note, *The Lawyer's Duty to Report Another Lawyer's Misconduct*, 14 S. ILL. U. L. J. 683, 694-5 (1990) (emphasis added and footnotes omitted).

29. The evidentiary privilege is claimed by the client, and the lawyer "is presumed to have the authority to claim the privilege but only on behalf of the client." N.D.R. EVID. 502(c).

APPENDIX

DISTINCTIONS[30] BETWEEN NORTH DAKOTA RULE 8.3 AND THE ABA MODEL RULE

~~RULE 8.3 Reporting Professional Misconduct~~[31]

RULE 8.3. Reporting professional misconduct.

(a) A lawyer having knowledge that another lawyer has committed a violation of ~~the~~ these[32] 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~~ initiate proceedings under the North Dakota Rules of Disciplinary Procedure.

(b) A lawyer having knowledge that a judge has committed a violation of ~~applicable rules of judicial conduct~~ the North Dakota Rules of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or[33] fitness for judicial office shall ~~inform the appropriate authority~~ initiate proceedings under the Rules of the North Dakota Judicial Conduct Commission.

(c) This Rule does not require disclosure of information ~~otherwise~~ protected by Rule 1.6.

Comment

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of ~~the Rules of Professional Conduct~~ these Rules.[34] Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where ~~it~~ making

30. Model language deleted in North Dakota version shown by ~~overstrikes~~; language added by North Dakota version shown underscored.

31. Differences in centering and bold-facing are based on comparison between ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3, at 346-47 (1984) and the Rules as published in the Michie Company version, pp. 905-06 (1990).

32. Except as noted in note 34, *infra*, the changes were made to "conform Rule 8.3 to North Dakota Law." *Minutes of Professional Conduct Subcommittee, Attorney Standards Committee, North Dakota Bar Association*, December 13, 1985, at 10.

33. Added at the suggestion of Randy Lee, member of the subcommittee, "to apply the same standard to lawyers . . . and judges." *Id.*

34. The reasoning behind most of the variations from the Model's comment can be gleaned from the context. However, no explanation is provided for any of the variations. *Minutes, supra* note 32, January 31, 1986, at 13.

the report would involve violation of Rule 1.6. However, a lawyer excused from reporting a violation on that ground should encourage ~~a~~ the client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of ~~the~~ these Rules, the failure to report ~~any violation~~ even technical or insubstantial violations would itself be a ~~professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable~~ violation of these Rules. This 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. ~~The term~~ Whether a violation is "substantial" ~~refers to~~ depends on the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. ~~A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency is more appropriate in the circumstances.~~ Similar considerations apply to the reporting of judicial misconduct.

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~~ rules applicable to the client-lawyer relationship.