



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4(a)(5), 8.3(a), and 8.4(b) and (c). See also *Skolnick v. Alzheimer & Gray*, 191 Ill.2d 214, 246 Ill.Dec. 324, 730 N.E.2d 4 (2000). This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 91-7
October 25, 1991

Topic: Duty to Report Professional Misconduct

Digest: An attorney retained to investigate a client's suspicions that the client's former attorney engaged in fraudulent conduct to the client's detriment must disclose unprivileged knowledge of violations of Rules 8.4(a)(3) and (4) to the Attorney Registration and Disciplinary Commission and must communicate that obligation to the client at the outset of the representation.

Ref.: Illinois Rules of Professional Conduct, Rule 8.3(a)
In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988)

FACTS

Attorney A is consulted by a client regarding potential claims the client might have against her former attorney, X, and her former attorney's corporation, which provided financial counseling and related legal advice to the client and members of her family. The client does not have direct evidence of wrongdoing. Rather, the client advises that she has learned from Y, a former lay partner to X, that X's corporation may have misappropriated the funds of the client and her family, and may have also engaged in fraudulent conduct, breaches of contract, and breaches of fiduciary

duty. The client also states that Y advised her that she may have claims against X, his law firm, and his corporation, and that Y recommended she retain independent counsel to represent her.

The client has selected Attorney A to investigate, with Y's assistance, the suspected wrongdoing of X and his corporation. In the event that any actual wrongdoing is discovered, the client has directed that suit be filed against X. The client has also instructed Attorney A not to report any wrongdoing by X to the Attorney Registration and Disciplinary Commission (ARDC) while any suit against X is contemplated or pending for fear that such reporting may hamper efforts to recover her funds in their entirety. The client is particularly concerned that such reporting may alert members of her family of potential claims against X, since some members of her family have continued their relationship with X and his corporation.

QUESTIONS

1. Notwithstanding the client's instructions, is Attorney A obligated to report X's suspected wrongdoing to the ARDC as soon as independent investigation reveals wrongdoing?
2. Because of the client's instructions, would it be an ethical violation for Attorney A to report any suspected wrongdoing of X to the ARDC before the client receives monetary satisfaction or her claims?

OPINION

Rule 8.3(a) provides that a "lawyer possessing knowledge not otherwise protected as a confidence by these Rules or by law that another lawyer has committed [fraudulent conduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation". A "confidence" is defined in the Rules as "information protected by the lawyer-client privilege under applicable law."

Under Illinois common law, the attorney-client privilege applies to communications from a client to an attorney where the client is seeking legal advice and intends that these communications be permanently protected from disclosure by the attorney. (In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988)).

The privilege applies not only to communications between the client and the attorney, but also to communications to persons who are agents of the client or the attorney. (Himmel, 125 Ill.2d at 542.) The client may waive the attorney-client privilege when circumstances indicate that the client intends that the matters communicated to the attorney will be disclosed by the attorney to third parties who are not agents of the client or the attorney. Himmel, 125 Ill.2d at 542 (privilege inapplicable where attorney discussed client's conversion claim with insurance company and former attorney who had converted client's funds); see also In re October 1985 Grand Jury, 124 Ill.2d 466, 530 N.E.2d 453 (1988) (information given to attorney to prepare tax return not privileged, as information intended to be transmitted to third party in completed tax return).

In the fact pattern, the attorney-client privilege applies to the communication between Attorney A and the client. The privilege also applies to communications to persons who are agents of the client or the attorney. The Committee assumes that Y has been retained to aid Attorney A's investigation, and is therefore an agent of the client. Consequently, communications between Attorney A and Y are protected by the attorney-client privilege, and Attorney A is not obligated to divulge these

communications to the ARDC.

If Attorney A's investigations result in his obtaining unprivileged knowledge of the violation of Rule 8.4(a)(3) and (4) by Attorney X, then such knowledge must be reported to the Attorney Registration and Disciplinary Commission. This obligation must be disclosed to the client at the outset of the representation.

The client's wishes that the communication remain unreported to the ARDC until resolution of any claims against X is not controlling, and Attorney A is affirmatively obligated under Rules 8.3 and 8.4 to report his unprivileged knowledge to the ARDC notwithstanding the client's instructions. Himmel, 125 Ill.2d at 541-42; see generally, Creamer and Jacobson, "Revisiting Himmel Under the 1990 Rules of Professional Conduct," 78 Illinois Bar Journal 488 (1990).

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