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 1.6, 1.8(c), 8.3(a), and 8.4(b) and (c). 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. 91-23
April 3, 1992

Topic: Reporting Professional Misconduct

Digest: An attorney is not required to report misconduct of another attorney learned through a privileged attorney/client communication.

An attorney is obligated to report only certain forms of misconduct by another attorney, and only if he has "knowledge" of such misconduct as defined in the Rules of Professional Conduct.

Ref.: Illinois Rules of Professional Conduct, Rules 8.3(a), 8.4(a)(3) and (a)(4), and Rule 1.6, 1.8(c)
In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988)
Illinois Bar Journal, "Revisiting Himmel under the 1990 Rules of Professional Conduct", Creamer and Jacobson (October, 1990)
ISBA Advisory Opinion on Professional Conduct Nos. 90-8 and 90-28

FACTS

The aunt of Attorney A's client is seriously ill and in the hospital. Attorney A's client discovers the aunt's will, which was drawn by Attorney B in 1987. The will leaves a specific bequest of jewelry to the daughters of Attorney B, and the residuary clause leaves the rest of the aunt's estate (presently $300,000) to Attorney B. Attorney B is named the executor.

Attorney A suggests that it may be his duty to report Attorney B to the Illinois Supreme Court's Attorney Registration and Disciplinary Commission (ARDC). Attorney A's client, being the primary heir at law of her aunt's estate, and believing the will to be presumptively voidable, desires that no such report be made.

INQUIRY

Must Attorney A disclose the above conduct of Attorney B to the ARDC?

OPINION

The present inquiry raises several questions, the answers to which are provided by the Supreme Court's holding in In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988), and by the provisions of Rule 8.3(a) of the Rules of Professional Conduct.

Initially, it is unclear from the inquiry as to the exact manner in which Attorney A obtained the information as to Attorney B's preparation of the aunt's will and the provisions of the will. Under both Himmel, supra, and Rule 8.3(a), an attorney must report knowledge of misconduct only when such knowledge is not obtained through a confidence from the client. A "confidence" is defined in the Rules as denoting "information protected by the lawyer-client privilege under applicable law." A confidence thus differs from a "secret" (as referred to in Rule 1.6(a)), which is defined in the Rules as denoting "information gained in the professional relationship, that the client has requested be held inviolate or the revelation of which would be embarrassing to or would likely be detrimental to the client." Information learned as a secret by the attorney, as opposed to a confidence, is not exempt from the reporting requirements of either Himmel, or Rule 8.3(a).

In the present instance, if Attorney A learned of the purportedly improper conduct of Attorney B through a confidence from Attorney A's client, no reporting requirement exists, regardless of whether the conduct is otherwise of the type to be reported under Rule 8.3(a). However, if Attorney A learned of Attorney B's conduct through A's representation of the niece, but not through a protected attorney-client privilege, then the information is not exempt from the reporting requirement. In such case, we must proceed to an analysis of whether what Attorney A learned is subject to the mandatory reporting requirements of Himmel and Rule 8.3(a).

Not all violations of the Rules of Professional Conduct by another attorney must be reported. Rather, Rule 8.3(a) mandates reporting of misconduct by another attorney only when such misconduct violates Rules 8.4(a)(3) or (a)(4). Rule 8.4(a)(3) prohibits an attorney from committing "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Rule 8.4(a)(4) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." The terminology section of the Rules defines "fraud" as conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." The terms "dishonesty", "deceit" and "misrepresentation" are not defined in the Rules, but would appear, like fraud, to require some intentional deception on the part of the attorney. See Ill. Bar Journal, Revisiting Himmel under the 1990 Rules of Professional Conduct, Creamer and Jacobson (October, 1990).

Clearly, Attorney B's having drafted the will leaving the aunt's estate to himself and his daughters does not constitute a criminal act so as to run afoul of Rule 8.4(a)(3), and thus would not be required to be reported as a violation of that section.

The question then becomes whether Attorney B's conduct involves dishonesty, fraud, deceit or misrepresentation so as to violate the provisions of Rule 8.4(a)(4) and thus be reportable under Rule 8.3(a). Coupled with such inquiry is the further question of whether Attorney A's information as to Attorney B's conduct rises to the level of "knowledge" that the conduct constitutes a violation of Rule 8.4(a)(4), inasmuch as the reporting requirements of Rule 8.3(a) apply only when "knowledge" of another attorney's reportable violation exists. The Rules define the words "knowingly", "know", or "knows" as denoting "actual knowledge of the fact in question" (further stating that "a person's knowledge may be inferred from circumstances.")

In the present instance, based on the facts as provided by the inquirer, we are of the view that Attorney A cannot be said to have knowledge of a violation of Rule 8.4(a)(4) having been committed by Attorney B so as to be the subject to the mandatory reporting requirements of Rule 8.3(a). Attorney B's having drafted a will leaving his client's estate to himself and his daughters raises obvious questions as to the enforceability of the will and the possible existence of undue influence. However, the fact of Attorney B's having drafted such a will, without more information as the circumstances there involved, the aunt's intent in having such a will drawn and relationship with the attorney, and the information or advice provided by the attorney to the aunt at the time of preparation of the will, is insufficient to establish the existence of an intentional deception on the part of Attorney B so as to constitute fraud, dishonesty, deceit or misrepresentation as such terms are used in Rule 8.4(a)(4). Nor do such facts establish knowledge on the part of Attorney A that a violation of Rule 8.4(a)(4) was committed.

Accordingly, we are of the view that, whether by reason of Attorney A's information having been obtained through a confidential communication, or by reason of the fact that Attorney A does not have knowledge of a reportable violation, Attorney A is not required on the facts provided to us to report Attorney B's conduct to the ARDC.

By way of comment, we note that under Himmel it is clear that if reporting the conduct of Attorney B would have been required in the present circumstances, such obligation on the part of Attorney A would in no way be obviated by the fact that reporting the conduct would be adverse to the interests of Attorney A's client, or that the client had requested Attorney A not to report the information. It should be further recognized that under present Rule 1.8(c), it is improper for an attorney to prepare any instrument for a non-relative giving a substantial gift to the lawyer or his family.

Other prior Opinions of the Committee reaching similar conclusions as to various issues herein discussed include Nos. 90-8 and 90-28.

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