



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 3.1, 3.2, 3.3, 3.4(e), 8.4 (b)-(c), and 4.4(b) and its Comment [2]. 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. 98-05
January, 1999**

Topic: Mandatory Report of Lawyer Misconduct

Digest: A report to the ARDC is not mandatory under Rule 8.3 unless a lawyer has actual knowledge of a violation of Rules 8.4(a)(3) or (a)(4). A lawyer may report an abuse of the discovery process to the ARDC and may also file a Motion for Sanctions with the trial court.

Ref.: Illinois Rules of Professional Conduct, Rules 3.1, 3.2, 3.3(7), 3.3(13), 8.3, 8.4(a)(3), 8.4(a)(4)
ISBA Advisory Opinion on Professional Conduct 90-28
Supreme Court Rule 219(d)
In re Himmel, 125 Ill.2d 531, 533 N.E.2d 790 (1988)

FACTS

A lawyer was reviewing the litigation file of a client. The client was plaintiff in the case. The lawyer representing the client in that litigation was not in the reviewer's law firm.

The lawyer discovered a letter in that file from the litigation defense lawyer to the defendant's insurance carrier suggesting that defense counsel undertake a course of discovery designed primarily to be onerous enough to discourage plaintiff and plaintiff's counsel from proceeding with the case, while, at the same time, being obstructive in complying with the plaintiff's discovery requests. The letter was

received in error by plaintiff's litigation lawyer who returned it to the defense lawyer as a confidence received in error, but not before giving a copy of it to the plaintiff.

QUESTION

Is the litigation defense counsel's conduct the type of activity that must be reported to the ARDC pursuant to Rule 8.3(a) or any other Rule of Professional Conduct?

OPINION

Rule 8.3(a) of the Illinois Rules of Professional Conduct requires a lawyer to report another lawyer to the Attorney Registration and Disciplinary Commission (ARDC) if the lawyer has knowledge of a violation of Rule 8.4(a)(3) or 8.4(a)(4). This is knowledge that a lawyer has committed a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects or has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. See *In re Himmel*, 125 Ill.2d 519 (1988) and ISBA Advisory Opinion No. 90-28.

In the present inquiry, until such time as the discovery requests are served upon plaintiff, there has been no violation. There has merely been a suggestion to a client that an improper course of conduct be carried out. The mere suggestion of such a course of conduct does not rise to an ethical violation.

The conduct in this inquiry does not amount to a criminal act, although it may possibly involve dishonesty, fraud, deceit, or misrepresentation. The first question, however, if the recommended course of conduct is begun, is whether or not the discovery requests are relevant to the litigation in progress.

Supreme Court Rule 219(d) provides that if a party willfully attempts to obtain information by an improper discovery method, or attempts to obtain information to which that party is not entitled, or otherwise abuses the discovery rules, the court may enter an order, as provided in paragraph (c), that provides for a wide variety of sanctions.

If defense counsel engages in a course of discovery practice that is overly burdensome, the best course of action for plaintiff's counsel would be to file a motion under Supreme Court Rule 219 to have the court determine whether or not the discovery is proper or improper and request that the court issue sanctions. If the court determines an impropriety, then the lawyer may report the conduct to the ARDC, but is not required to do so, unless the abuse rises to the level of fraud, deceit, or misrepresentation, or is dishonest in some way.

Rule 3.1 provides that a lawyer shall not defend a proceeding or assert or controvert an issue therein unless there is a basis for doing so that is not frivolous.

Rule 3.2 provides that a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3(7) provides that a lawyer may not engage in conduct in violation of these rules when appearing in a professional capacity before a tribunal.

Rule 3.3(13) provides that a lawyer appearing in court may not suppress any evidence that a lawyer has

a legal obligation to reveal or produce.

The inquiry does not state in any great detail what defense counsel proposes to do; however, an abusive discovery plan may easily run afoul of all the above rules and be subject to discipline.

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