



1991

## Attorney and Client: Duty to Report Lawyer Misconduct

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### Recommended Citation

Schafer, Larry (1991) "Attorney and Client: Duty to Report Lawyer Misconduct," *North Dakota Law Review*: Vol. 67 : No. 3 , Article 2.

Available at: <https://commons.und.edu/ndlr/vol67/iss3/2>

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## ATTORNEY AND CLIENT: DUTY TO REPORT LAWYER MISCONDUCT

In June of 1980, Tammy Forsberg retained John R. Casey to represent her in a personal injury claim.<sup>1</sup> Casey negotiated a \$35,000 settlement on behalf of Forsberg and then converted the entire amount to his account.<sup>2</sup> Forsberg then retained James H. Himmel to recover her share of the settlement from Casey.<sup>3</sup> Himmel drafted an agreement in which Casey agreed to pay a \$75,000 settlement to Forsberg.<sup>4</sup> The agreement included a provision that prohibited Forsberg from initiating any criminal, civil, or attorney disciplinary action against Casey.<sup>5</sup> Casey breached the agreement.<sup>6</sup> Himmel then filed suit against Casey, and a judgment was docketed against him in the amount of \$100,000.<sup>7</sup> In January of 1986, a complaint was filed with the Illinois State Hearing Board by the Administrator of the Attorney Registration and Disciplinary Commission, alleging that James H. Himmel, a licensed and practicing attorney within Illinois, violated Disciplinary Rule (DR) 1-103(A) of the Code of Professional Responsibility by failing to report to the Disciplinary Commission the known misconduct of another practicing attorney.<sup>8</sup> The Administrator alleged that

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1. *In re Himmel*, 125 Ill. 2d 531, \_\_\_, 533 N.E.2d 790, 791 (1988). Forsberg was injured in a motorcycle accident in October of 1978. *Id.* Forsberg retained Casey in June of 1980 for representation of the personal injury and property damage claims that stemmed from the accident. *Id.*

2. *Id.* Forsberg and Casey agreed that Casey was to take one-third of any settlement received as Casey's attorney fee. *Id.* Casey received a \$35,000 settlement check and converted the entire amount to his account. *Id.*

3. *Id.* Forsberg attempted to collect her share of the settlement from Casey for two years, was unsuccessful, and then retained Himmel in 1983 to recover the money. *Id.*

4. *Id.* Casey did not honor the settlement agreement negotiated by Himmel. *Id.* Himmel's fee would have been approximately \$17,000 if Casey had honored the agreement. *Id.*

5. *Id.*

6. *Id.* The agreement between Himmel and Casey for settlement of the misappropriated funds was consummated on April 11, 1983. *Id.* A suit was filed in opposition to Casey in February of 1985, due to the breach of the settlement agreement by Casey. *Id.*

7. *Id.* Had Casey satisfied the \$100,000 judgment, Himmel would have received approximately \$25,588 as his attorney fee. *Id.*

8. *Himmel*, 125 Ill. 2d at \_\_\_, 533 N.E.2d at 791. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980). DR 1-103 provides:

### DR 1-103 Disclosure of Information to Authorities

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980) [hereinafter DR 1-103].

Himmel knew of Casey's conversion of funds and that Himmel failed to inform the Commission of Casey's misconduct.<sup>9</sup> The Illinois Hearing Board decided that DR 1-103(A) had been violated and recommended to the Administrator that Himmel should be reprimanded.<sup>10</sup> The Administrator then filed exception from the Hearing Board's decision to the Review Board, which ruled that no violation of DR 1-103(A) had occurred and recommended that the complaint be dismissed.<sup>11</sup> The Administrator then excepted from the Review Board's decision to the Illinois Supreme Court.<sup>12</sup> The Illinois Supreme Court *held* that DR 1-103(A) had been violated by Himmel and suspended Himmel from the practice of law for a period of one year.<sup>13</sup> *In re Himmel*, 125 Ill. 2d 531, 533

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See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1980). DR 1-102 provides:

DR 1-102 Misconduct

(A) A lawyer shall not:

- (1) Violate a Disciplinary Rule.
- (2) Circumvent a Disciplinary Rule through actions of another.
- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1980) (footnotes omitted).

9. *Himmel*, 125 Ill. 2d at \_\_\_, 533 N.E.2d at 791. Casey was suspended from the practice of law because of his conversion of clients' funds and due to his poor conduct and moral turpitude in other matters. *Id.* On November 5, 1985, Casey consented to disbarment. *Id.*

10. *Id.* The Hearing Board's decision considered the status of Himmel, who had been practicing law for 11 years and who had no previous record of complaints. *Id.* at \_\_\_, 533 N.E.2d at 792. The Hearing Board concluded that in dealing with Casey, Himmel had obtained a reasonable result and that Himmel did not request a fee for the *minimum* amount recovered for his client. *Id.* Based on Himmel's prior record, and because of the result obtained, the Hearing Board recommended a private reprimand for Himmel. *Id.* The minimum due Forsberg was \$23,233.34 (two-thirds of \$35,000). *Id.* at \_\_\_, 533 N.E.2d at 791. The agreement between Forsberg and Himmel stated that Himmel would be paid one-third of any funds recovered above the minimum. *Id.* If Casey would have adhered to the settlement agreement of \$75,000, Himmel would have received over \$17,000. *Id.* Furthermore, if Casey had satisfied the judgment of \$100,000, Himmel would have received about \$25,600. *Id.*

11. *Id.* at \_\_\_, 533 N.E.2d at 792. The report from the Review Board stated that Forsberg had contacted the Attorney Registration and Disciplinary Commission before retaining Himmel, and that the Commission knew of Casey's alleged misconduct and Forsberg's wishes not to pursue the claim against Casey with the Commission. *Id.* The Review Board, therefore, recommended that the complaint by the Administrator be dismissed. *Id.*

12. *Himmel*, at \_\_\_, 533 N.E.2d at 792. The Illinois Supreme Court granted the Administrator's request for exception to the Review Board's decision and decided the case on September 22, 1988. *Id.* at \_\_\_, 533 N.E.2d at 790.

13. *Id.* at \_\_\_, 533 N.E.2d at 796. The Illinois Supreme Court agreed with the Hearing Board's finding that Himmel's conduct had violated DR 1-103(A). *Id.* at \_\_\_, 533 N.E.2d at 795. In determining the sanction to be imposed on Himmel, the court considered the amount recovered by Himmel for his client and the fact that Himmel had practiced law in Illinois for 11 years with no prior record of complaints. *Id.* at \_\_\_, 533 N.E.2d at 796. The court also took into consideration the fact that Himmel did not request a fee for the amount he recovered for his client. *Id.* The court then weighed these factors against Himmel's

N.E.2d 790 (1988).

In most states, an attorney's professional conduct is governed by the Model Rules of Professional Conduct; however, there are still some states utilizing the Model Code of Professional Responsibility.<sup>14</sup> In 1969, the American Bar Association (ABA) adopted the Model Code of Professional Responsibility.<sup>15</sup> In August of 1983, the ABA adopted the Model Rules of Professional Conduct, which replaced the entire Model Code.<sup>16</sup> The Model Code still exists, however, because many of the ethics rules of the majority of the states are still patterned after the Model Code.<sup>17</sup> Virtually all states have adopted some form of the Model Rules.<sup>18</sup> Only five states have not adopted the Model Rules per se, and only California has not adopted either the Model Code or the Model Rules.<sup>19</sup>

The Model Code of Professional Responsibility is designed to be an inspirational guide to the members of the legal profession.<sup>20</sup> The Model Code consists of three parts: Canons, Ethical Considerations, and Disciplinary Rules.<sup>21</sup> The Canons outline the general

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failure to report Casey's misconduct and the interference that failure to report caused in the Commission's investigation. *Id.*

14. American Bar Association/Bureau of National Affairs, *Lawyers' Manual on Professional Conduct*, 01:3-4 (1990) [hereinafter ABA/BNA]. Most states have adopted either the Model Rules or the Model Code. *Id.* All but five of the adopting states have adopted some form of the Model Rules of Professional Conduct. *Id.*

15. ABA/BNA, *supra* note 14, at 01:301. The Model Code was amended several times before 1980, when the last amendments were adopted. *Id.*

16. *Id.* The Model Rules have been amended twice: technical amendments in February of 1987; and substantive and technical amendments, as approved in February 1989. *Id.* at 01:101.

17. *Id.* at 01:301.

18. *Id.* at 01:3-4. Illinois, the state in which *Himmel* was decided, followed the Model Code until August 1, 1990, when the structure of the Model Rules was adopted, taking the substance of the adopted Rules from both the Model Rules and the Model Code. *Id.* Most states have adopted the Model Rules in some amended form, generally in the amended form nearest that of the adoption date. *Id.*

19. *Id.* at 01:3-4. California does not follow either the Model Rules or the Model Code. *Id.* at 01:3. The California Business and Professional Code became effective on May 27, 1989. ABA/BNA, *supra* note 14, at 01:3. Illinois follows a structure of the Model Rules with substance taken from both the Model Rules and the Model Code. *Id.* The Illinois Model Rules of Professional Conduct became effective on Aug. 1, 1990. *Id.* New York follows the Amended Model Code and incorporates the substance from some of the Model Rules. *Id.* The New York Model Code of Professional Responsibility became effective on Sept. 1, 1990. *Id.* North Carolina used the structure and substance from both the Model Rules and the Model Code. *Id.* The North Carolina Model Rules of Professional Conduct became effective on Oct. 7, 1985. ABA/BNA, *supra* note 14, at 01:3. Oregon follows the Amended Model Code and incorporates substance from some of the Model Rules. *Id.* at 01:4. The Oregon Model Code of Professional Responsibility became effective on June 1, 1986. *Id.* Virginia follows the Amended Model Code and incorporates substance from some of the Model Rules. *Id.* The Virginia Model Code of Professional Responsibility became effective on Oct. 1, 1983. *Id.*

20. ABA/BNA, *supra* note 14, at 01:301. It is quite clear that the Canons, Ethical Considerations, and the Disciplinary Rules do not and cannot apply to persons who are nonlawyers; yet, they do outline the standard of ethical conduct the public expects of lawyers and their nonprofessional staff. *Id.* at 01:301-02.

21. *Id.* at 01:301. The Canons are statements that express the standards of professional

notions of professional conduct lawyers expect from one another and the system.<sup>22</sup> The Ethical Considerations are altruistic in nature and provide goals and guidance to lawyers for specific situations.<sup>23</sup> The Disciplinary Rules serve as guidelines for the minimum level of conduct a lawyer cannot fall below without risking exposure to disciplinary action.<sup>24</sup> The Model Code does not prescribe penalties for violations of the Disciplinary Rules, but agencies that enforce the Rules may find guidance in the Canons and in the objectives related to the Ethical Considerations.<sup>25</sup>

The Model Rules of Professional Conduct are rules of reason which should be interpreted in connection with the objectives of legal representation together with the law itself.<sup>26</sup> Some of the Rules define proper conduct for purposes of professional discipline, while others are permissive and define areas under which the lawyer should use professional discretion.<sup>27</sup> Some of the Rules define the nature of the relationships between lawyers and others and are, therefore, partly obligatory and disciplinary.<sup>28</sup> The Rules are also partly constitutive and descriptive, because they define what the lawyer's professional role should be.<sup>29</sup> When a lawyer does not comply with an obligation or prohibition that is dictated by the Rules, a basis for enforcing the disciplinary process exists; however, a violation of the rules does not give rise to a cause of action per se, and a violation of the rules does not "create any pre-

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conduct expected of lawyers in dealing with the public, the legal system, and the legal profession. *Id.* at 01:302. The Ethical Considerations are principles that lawyers should rely upon in specific instances. *Id.*

22. *Id.* The Canons contain the general perceptions that have formed the Ethical Considerations and the Disciplinary Rules. *Id.*

23. *Id.* Ethical Considerations represent the lofty goals of character each lawyer should strive for. *Id.*

24. *Id.* at 01:302. The Disciplinary Rules are mandatory in nature, unlike the Ethical Considerations, which are mainly used for guidance. *Id.*

25. *Id.* When a lawyer is found guilty of violating the Disciplinary Rules, the character of the offense and the surrounding circumstances should determine the type and the severity of the punishment. *Id.*

26. ABA/BNA, *supra* note 14, at 01:102-03.

27. *Id.* at 01:103. The Rules that define proper conduct for purposes of professional discipline are imperatives and generally use the terms "shall" or "shall not." *Id.* The permissive terms which allow lawyers to use their professional discretion generally use the term "may." *Id.* If permissive terms are used within the Model Rules, disciplinary action should not be taken if a lawyer chooses to act or not to act within the boundaries of the suggested professional discretion. *Id.*

28. *Id.* Many of the comments to the Rules use the term "should," and appear to add obligations to the Rules; however, the comments to the Rules are intended merely to provide guidance, not obligations. *Id.* The guidance provided by the comments should help lawyers to practice in compliance with the Rules. *Id.*

29. *Id.* The definition is derived from the context of the rules from which a lawyer is better able to shape the proper professional role. *Id.* The Rules also include court rules, definitions of specific obligations, and a general outline for the ethical practice of law. *Id.*

sumption that a legal duty has been breached.”<sup>30</sup> The Rules are not intended to provide a basis for civil liability, but rather “to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.”<sup>31</sup>

Case law and ethics opinions indicate that lawyers have a duty to report to appropriate authorities unprofessional conduct as prescribed by the Model Code and the Model Rules.<sup>32</sup> “The Model Code in DR 1-103(A) imposes a broad duty on lawyers to report to the appropriate authorities all unprivileged knowledge of a violation of a disciplinary rule” by another attorney.<sup>33</sup> Ethical Consideration (EC) 1-4 further explains the reasons for the duty imposed under DR 1-103(A).<sup>34</sup> EC 1-4 suggests that the integrity of the legal profession can be properly maintained only by bringing to the attention of the proper officials the conduct of lawyers in violation of the Disciplinary Rules.<sup>35</sup> Furthermore, as reflected by the title of Canon 1, “a lawyer,” as an officer of the court, “should assist in maintaining the integrity and competence of the legal profession” and uphold the provisions of the Code.<sup>36</sup>

The duty to report the misconduct of another lawyer under the Model Rules is different than under the Model Code.<sup>37</sup> Under

30. *Id.* at 01:103-04.

31. *Id.* at 01:104. The purpose of the Rules is to provide lawyers with a basis for self-assessment. *Id.* The Rules also provide for the sanctioning of lawyers, when necessary, by appropriate administrative or disciplinary authorities. *Id.* There is no implication within the Rules that an antagonist in a collateral proceeding can invoke the Rules for enforcement purposes, or that the Rules amplify the legal duty of lawyers or the disciplinary consequences of a violation of the lawyer’s legal duty. *Id.*

32. ABA/BNA, *supra* note 14, at 101:202. *See also* Blacknell v. State, 502 N.E.2d 899 (Ind. 1987) (trial court judge properly reported a violation of a disciplinary rule as required under Disciplinary Rule 1-103).

33. ABA/BNA, *supra* note 14, at 101:203. DR 1-103(A) provides that lawyers have a duty under the Code to report unprivileged knowledge of a violation of DR 1-102. *See supra* note 8 (text of DR 1-102 and DR 1-103).

34. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-4 (1980). Ethical Consideration 1-4 provides:

The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

*Id.* *See also supra* note 8 (containing the text of DR 1-103).

35. ABA/BNA, *supra* note 14, at 01:303.

36. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1980). The title to Canon 1 provides that “A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.” *Id.* *See also In re Himmel*, 125 Ill. 2d 531, \_\_\_, 533 N.E.2d 790, 792-93 (1988) (as an officer of the court, a lawyer has an obligation to uphold the rules of the Code, as is reflected in the title to Canon 1).

37. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1989) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980) (a cursory examination discloses

the Model Rules, the duty to report arises when an attorney has "knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects . . . ." <sup>38</sup> The type of violation that must be reported is most easily understood by reading Model Rule 8.3 together with the comments to the rule. <sup>39</sup> A lawyer must have "knowledge" of a violation of the rules by another lawyer. <sup>40</sup> More specifically, the reporting lawyer must have knowledge of a clear violation, not merely a suspicion of a possible violation. <sup>41</sup> Nevertheless, the "knowledge" of a violation may be inferred from the circumstances surrounding the conduct. <sup>42</sup> Whether actual or inferred, the necessary knowledge must raise a "substantial question" as to

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a difference in the duty to report requirement when comparing the Model Rules with the Model Code). See *supra* note 8 (containing the text of DR 1-103). Model Rule 8.3 provides:

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the 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.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

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

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983).

38. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983) (discussing the test of whether an attorney has unprivileged knowledge of a violation of the Rules of Professional Conduct). See *supra* note 37 (containing the text of Model Rule 8.3).

39. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1983) (further the understanding of reportable violations and assists the lawyer in deciding what type of violation should be reported). In determining whether a violation is of the type to be reported, a lawyer must consider two major factors: 1) the self-regulation of the legal profession, and 2) the likelihood that a violation will be discovered. *Id.* The comment suggests that Model Rule 8.3 limits a lawyer's reporting obligation to those violations which "a self-regulating profession must vigorously endeavor to prevent." *Id.* This obligation requires the reporting lawyer to view the violation as a substantial or serious violation. *Id.* Since the legal profession is a self-regulating profession, lawyers are required to take the initiative and report violations. *Id.* The violation(s) should be reported to the bar disciplinary agency or other bar review agencies—especially when the other agencies may be more appropriate, in light of the surrounding circumstances. *Id.* Similarly, because of the self-regulating nature of the profession, it is important to begin disciplinary investigations to assist in the effort of uncovering what may be a pattern of violations. *Id.* A key factor in determining whether a violation should be reported is whether the violation may affect others who are unlikely to discover it. *Id.*

40. SBAND Comm. on Professional Ethics, Formal Op. 42 (1990) (Rule 8.3 applies when a lawyer has actual knowledge of a violation); *Formal Opinion 42: Duty to Report Lawyer Misconduct*, 37 THE GAVEL, April-May 1990, at 7 [hereinafter *Formal Opinion 42*].

41. *Id.* See *Williams v. Council of the North Carolina State Bar*, 46 N.C. App. 824, —, 266 S.E.2d 391, 392 (1980) (the knowledge requirement must be that of a clear violation); *Cleveland Ethics Opinion 85-1* (1985) (suspicions of violations may be reported, but they must not be privileged).

42. *Formal Opinion 42, supra* note 40, at 7. The inference of knowledge ascertained from circumstances surrounding the conduct is consistent with the terminology section included in the Rules of Professional Conduct. *Id.* The terminology section of the Model Rules of Professional Conduct defines "Knowingly," "Known," or "Knows" as "actual

whether the lawyer allegedly violating the Rule is "honest, trustworthy, or fit as a lawyer in other respects."<sup>43</sup> The question of whether a "substantial question" is raised is dependent upon the seriousness of the violation, not on the amount of evidence known by the reporting lawyer.<sup>44</sup>

The Code and the Model Rules treat privileged information differently.<sup>45</sup> When a lawyer has privileged knowledge of a violation, reporting is not required under either the Code or the Model Rules.<sup>46</sup> However, the reporting obligation of the Model Rules is narrower than the reporting obligation of the unprivileged information standard of the Model Code.<sup>47</sup>

If a lawyer is aware of a violation of the Disciplinary Rules, the question of whether the information obtained about a violation is privileged or unprivileged must first be answered before the lawyer reports the violation.<sup>48</sup> Under the Model Code, privileged information is generally protected from disclosure, and unprivileged information should be disclosed to the proper authorities in a timely manner.<sup>49</sup> Whether information is privileged may

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knowledge of the fact in question [which includes a] person's knowledge . . . inferred from the circumstances." ABA/BNA, *supra* note 14, at 01:105.

43. *Formal Opinion 42, supra* note 40, at 7. The language of Model Rule 8.3 is not as broad as the language of DR 1-103. The key words in Model Rule 8.3 are "violation[s] . . . that raise[s] a substantial question." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983). *See supra* note 37 (containing the text of Rule 8.3). The key words in DR 1-103 are "unprivileged knowledge of a violation." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980). *See supra* note 8 (containing the text of DR 1-103). A violation that raises a "substantial question" is dependent upon the seriousness of the violation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1983). DR 1-103 does not have this same qualification; but rather, "unprivileged knowledge" of all violations must be reported. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980). *See supra* note 8 (containing the text of DR 1-103).

44. *Formal Opinion 42, supra* note 40, at 7. A lawyer must exercise independent judgment when determining whether there is the required knowledge of a violation and whether the violation meets the standards of Rule 8.3. *Id.* *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1983) ("substantial" refers to the seriousness of the offense, not the amount of evidence a lawyer is aware of).

45. *See Formal Opinion 42, supra* note 40, at 7 (Model Rule 8.3(c) does not require disclosure of information protected by Rule 1.6, even if the information is unprivileged).

46. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980) (there is no requirement to disclose privileged information under DR 1-103). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983) (there is also no requirement to disclose privileged information within Model Rule 8.3).

47. *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983) (Model Rule 8.3 is narrower than DR 1-103 because the confidentiality rule extends to all information relating to the representation of a client). *See supra* note 8 (text of DR 1-103); *supra* note 37 (text Model Rule 8.3). *See also Formal Opinion 42, supra* note 40, at 7 (an exception to the confidentiality rule is when a client authorizes the disclosure); C. WOLFRAM, MODERN LEGAL ETHICS 685 (1986) (disclosure is forbidden if the disclosure would reveal any information related to the client's interest).

48. *Himmel*, 125 Ill. 2d 531, \_\_\_, 533 N.E.2d 790, 793-94 (1988).

49. *Formal Opinion 42, supra* note 40, at 7 (the information about a violation must be unprivileged and the reporting must be immediate).



depend on the state's definition of privilege as developed by that state's highest court.<sup>50</sup> Privilege has been said by some courts to encompass the relationship established between a lawyer and a client in which the lawyer obtains legal information from a client disclosed in confidence to that lawyer.<sup>51</sup> The information relayed by the client to a lawyer in confidence is protected by the relationship unless it is waived by the client.<sup>52</sup> However, information that has been voluntarily disclosed to an attorney by a client while in the presence of third parties who are not agents of either the attorney or the client is not privileged information.<sup>53</sup> Furthermore, information that is intended by a client to be disclosed by the client's attorney to third parties who are not agents of either the client or the client's attorney is also not privileged.<sup>54</sup> Therefore, if information obtained about another lawyer's violation of DR 1-103 falls within the protective cloak of the attorney-client relationship, and the protection has not been waived by the client, the information is exempt from the reporting rule.<sup>55</sup>

The Model Rules' disclosure rule, Model Rule 8.3, does not permit disclosure of information that is protected by Model Rule 1.6, which protects information that relates to the representation of the client.<sup>56</sup> Model Rule 1.6 provides that a lawyer should not

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50. *Himmel*, 125 Ill. 2d at \_\_\_, 533 N.E.2d at 794.

51. *Id.* See also 8 J. WIGMORE, EVIDENCE 2292 (McNaughton rev. ed. 1961) (a definition of privilege).

52. *Himmel*, 125 Ill. 2d at \_\_\_, 533 N.E.2d at 794. See also *People v. Adam*, 51 Ill. 2d 46, 48, 280 N.E.2d 205, 207 (1972) (an eight element definition of privilege as applied by the Illinois Supreme Court), *cert. denied*, 409 U.S. 948 (1972).

53. *People v. Williams*, 97 Ill. 2d 252, 295, 454 N.E.2d 220, 240 (1983), *cert. denied*, 466 U.S. 981 (1984).

54. *People v. Werhollick*, 45 Ill. 2d 459, 462, 259 N.E.2d 265, 266 (1970).

55. *Himmel*, 125 Ill. 2d at \_\_\_, 533 N.E.2d at 794.

56. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (1983) (Model Rule 8.3(c) does not require disclosure of information otherwise protected by Rule 1.6). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1986) (the scope of confidentiality under the Model Rules encompasses all information concerning a client, whether confidentiality is requested or not). Model Rule 1.6 provides:

Rule 1.6 Confidentiality of information.

(a) A lawyer shall not reveal 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).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

disclose any communication concerning the representation of the client; nor should a lawyer use the information to the disadvantage of a client, except when the lawyer is either required to or permitted to disclose under the Model Rules.<sup>57</sup>

Rule 1.6 allows for disclosure when the lawyer is impliedly authorized to disclose information necessary to the representation of the client.<sup>58</sup> The Rule also establishes that a lawyer cannot reveal any client information not authorized for disclosure, whether the information prejudices the client's interests or not.<sup>59</sup> If a client consents to the disclosure of client communication that contains information about a reportable violation, the violation should be reported.<sup>60</sup> The comment to Rule 8.3 suggests that when a lawyer is prohibited from reporting a violation because of a Rule 1.6 exemption, the lawyer should encourage the client to consent to the disclosure of the information.<sup>61</sup> Thus, it appears that reporting under Rule 1.6 is required when the reporting (1) "affirmatively advance[s] a client's interests; or (2) [does] not involve [revelation] of any information relating to the representation of a client."<sup>62</sup> Under Model Rule 8.3(c), reporting is required unless protected by Rule 1.6.<sup>63</sup> It follows, then, that reporting is required when a client consents to the disclosure of protected information, if the disclosure is of a violation of the Rules.<sup>64</sup> Rule 1.6 also permits disclosure of confidential information when a lawyer is preventing a client from committing a criminal act or when establishing a claim on the lawyer's behalf, resulting from a controversy between the client and the lawyer.<sup>65</sup>

There are certain instances when a lawyer is not required to

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57. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1986).

58. C. WOLFRAM, MODERN LEGAL ETHICS 685 (1986).

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1986). The confidentiality rule applies not just to matters communicated in confidence by the client, but to all information that relates to the representation, no matter what the source. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1986).

60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1986). A lawyer may not disclose any information about a client, unless authorized or required by the Rules of Professional Conduct or other law. *Id.*

61. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1983) (a report of misconduct is not required if reporting the misconduct involves a violation of Rule 1.6).

62. C. WOLFRAM, MODERN LEGAL ETHICS 685 (1986).

63. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(c) (1989).

64. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1989) (a lawyer should encourage a client to consent to the disclosure of information that is not incriminating).

65. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1)(2) (1986) (a lawyer is to use professional discretion when deciding whether to disclose any information that may help prevent controversies between the lawyer and the client or when preventing a client from committing a criminal act). See *supra* note 56 (containing the text of Rule 1.6).

report lawyer misconduct.<sup>66</sup> DR 1-103(A) states that a lawyer who possesses unprivileged knowledge of a violation of DR 1-102 should report that knowledge.<sup>67</sup> This language may be interpreted to include one's own misconduct.<sup>68</sup> However, the requirement of reporting one's own misconduct may be at odds with the fifth amendment privilege against self-incrimination.<sup>69</sup> Model Rule 8.3(a) clarifies the scope of a lawyer's duty to report oneself.<sup>70</sup> The Model Rules limit a lawyer's duty to report misconduct to the reporting of *another lawyer's* violation of the Rules.<sup>71</sup> Furthermore, a lawyer is not required to report lawyer misconduct if he or she is representing the lawyer whose professional conduct is in question.<sup>72</sup> Rule 1.6, the confidentiality rule, applies to this situation, and the applicable rules of the attorney-client relationship are invoked.<sup>73</sup>

After a lawyer concludes that there is unprivileged information as required by the Model Code or actual knowledge of a reportable violation as required by the Model Rules, the next step is to decide when the violation should be reported.<sup>74</sup> Under the Model Code, unprivileged knowledge of a violation should be reported immediately.<sup>75</sup> Reporting should not be postponed, because the violation may be part of a pattern of misconduct that

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66. ABA/BNA, *supra* note 14, at 101:206.

67. *Id.* See *supra* note 8 (containing the text of DR 1-103 and DR 1-102).

68. ABA/BNA, *supra* note 14, at 101:206.

69. *Id.* See Note, *Self-Incrimination: Privilege, Immunity and Comment in Bar Proceedings*, 72 MICH. L. REV. 84 (1973) (discussion of the fifth amendment right against self-incrimination); Comment, *The Privilege Against Self-Incrimination in Bar Disciplinary Proceedings: Whatever Happened to Spevack?*, 23 VILL. L. REV. 127 (1978) (addresses the self-reporting of misconduct and the fifth amendment). See also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1279 (1973). In 1973, the ABA Standing Committee on Ethics and Professional Responsibility attempted to clarify the question of whether reporting oneself for a violation was against the fifth amendment right against self-incrimination. ABA/BNA, *supra* note 14, at 101:206. The ABA Standing Committee limited the "unprivileged knowledge" requirement to not include information that is protected by the privilege against self-incrimination. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1279 (1973). Since Informal Opinion 1279 has been issued, at least one court has held that a failure to report one's own misconduct was a violation of DR 1-103(A). Office of Disciplinary Counsel v. Casety, 511 Pa. 177, 512 A.2d 607 (1986).

70. ABA/BNA, *supra* note 14, at 101:206. See *supra* note 8 (text of DR 1-103); *supra* note 37 (text of Model Rule 8.3). Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(a) (the Model Rules use the specific term "another lawyer").

71. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1989). See *supra* note 37 (text of Model Rule 8.3).

72. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1989) (duty to report professional misconduct does not apply to a lawyer representing a lawyer).

73. *Id.*

74. *Formal Opinion 42*, *supra* note 40, at 7 (reporting may not be postponed unless the requirements of the exception in Rule 1.6 are met).

75. *Id.* The only relevant exception to the immediate reporting requirement is the confidentiality rule, which "does not require disclosure of information." *Id.*

can only be detected through a disciplinary investigation.<sup>76</sup> Therefore, immediate reporting may spare some members of the public from lawyer misconduct.<sup>77</sup>

Misconduct should also be reported immediately under the Model Rules.<sup>78</sup> Neither Model Rule 8.3 nor the comment has language suggesting that the reporting of a violation should be postponed.<sup>79</sup> Immediate reporting is also consistent with the purpose of the rules, which is "to protect the public from lawyer misconduct"; it follows, therefore, that the purpose of the Rules is best served by immediate reporting."<sup>80</sup>

It is the courts' responsibility to determine the sanctions involved when dealing with the discipline of attorneys.<sup>81</sup> The courts may consider disciplinary recommendations from the Hearing Boards, the Review Boards, and the Administrator who is pursuing the misconduct allegations, but the court bears the ultimate burden of determining the proper sanction.<sup>82</sup> When determining the sanction to be imposed on the lawyer in violation of Rule 8.3(a) or DR 1-103(A), the court will balance the "quantum of discipline" with: 1) deprivation done to the public; 2) interference with the function of the investigative commission; and 3) interference with the "administration of justice."<sup>83</sup> The court may then dismiss the action, order a private reprimand, or order the lawyer to be pub-

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76. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1989). The self-regulation of the legal profession requires that the members begin disciplinary investigation as soon as a violation is known. *Id.* This is best facilitated by immediate reporting. *Id.* See also *Formal Opinion 42*, *supra* note 40, at 7 (the protection of the public from lawyer misconduct is best served by immediate reporting).

77. *Formal Opinion 42*, *supra* note 40, at 7 (citing *In re Himmel*, 125 Ill. 2d 531, \_\_, 533 N.E.2d 790, 796 (1988) (stating that some members of the public may have been spared from the misconduct had the misconduct been reported as soon as it was known)).

78. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1989) (members in the self-regulating legal profession should report the violation when they know of the violation). See also *Formal Opinion 42*, *supra* note 40, at 7 (there is no basis within the rules that suggests the reporting should be postponed).

79. See N.D.R. DISCIPLINARY P. 22(a) (1983) (a lawyer reporting misconduct is in little danger of being sanctioned if mistaken about the conduct being reported; the lawyer is protected by an absolute privilege and is not subject to sanctions).

80. *Formal Opinion 42*, *supra* note 40, at 7 (immediate reporting allows the disciplinary board to uncover a violation of the Rules which may effect an unsuspecting party).

81. *In re Himmel*, 125 Ill. 2d 531, \_\_, 533 N.E.2d 790, 795 (1988). See also *In re Levin*, 118 Ill. 2d 77, 87, 514 N.E.2d 174, 179 (1987) (when imposing discipline, the court determines the sanctions); *In re Hopper*, 85 Ill. 2d 318, 323, 423 N.E.2d 900, 903 (1981) (court bears the burden of deciding the appropriate sanctions for attorney misconduct).

82. See generally *In re Weinberg*, 119 Ill. 2d 309, 314, 518 N.E.2d 1037, 1041 (1988) (the court establishes the proper sanctions).

83. *Himmel*, 125 Ill. 2d at \_\_, 533 N.E.2d at 795. When determining the nature and extent of discipline, the lawyer's actions are balanced with the purpose of the discipline. *Id.* The purpose of disciplining an attorney is to maintain the integrity of the legal profession and to safeguard the administration of justice. *Id.*

lily disciplined.<sup>84</sup> Public discipline may result in a suspension of the practice of law for a set period of time.<sup>85</sup>

In *Himmel*, the Illinois Supreme Court held that James Himmel, an attorney, was in violation of his ethical duty to report the misconduct of another attorney as provided by the Illinois reporting rule, which, in 1988, followed the ABA Model Code of Professional Conduct.<sup>86</sup> The court found that a client's complaint to the Disciplinary Commission of an attorney's misconduct does not relieve a lawyer from the duty to report another lawyer's misconduct.<sup>87</sup> The court's rationale on this issue had its basis in the Canons of Ethics on which the Model Code is based.<sup>88</sup> The Canons provide that a lawyer may be disciplined for not observing the appropriate guides of professional conduct.<sup>89</sup> Himmel violated the code by not reporting attorney Casey's misconduct.<sup>90</sup> Whether or not the Commission was informed of Casey's misconduct by client Forsberg was irrelevant in the court's reasoning.<sup>91</sup> The court was not persuaded by Himmel's argument that the information was not disclosed to the Disciplinary Commission because Forsberg asked him to withhold the information.<sup>92</sup> The court stated that lawyers cannot ignore the rules of the Model Code simply because a client asks them to do so.<sup>93</sup>

The second issue in *Himmel* was whether or not the information received by Himmel from his client, Forsberg, was privileged.<sup>94</sup> The court found that the information was not privileged, because Forsberg discussed the matter with Himmel in the pres-

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84. *Id.*

85. *Id.* at \_\_\_, 533 N.E.2d at 796.

86. *Id.*

87. *Id.* at \_\_\_, 533 N.E.2d at 792.

88. *Id.* at \_\_\_, 533 N.E.2d at 792-93. The Illinois Supreme Court previously held that the Canons of Ethics in the Code make up a safe guidance for professional conduct, and there may be disciplinary measures if the Canons are not observed. *In re Yamaguchi*, 118 Ill. 2d 417, 427, 515 N.E.2d 1235, 1239 (1987) (citing *In re Taylor*, 66 Ill. 2d 567, 363 N.E.2d 845 (1977)).

89. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1980). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-6 (1980) (suggesting that a lawyer may temporarily or permanently be unqualified to practice law for deviating morally from the professional conduct requirement needed to practice law; in addition, the same standard is applicable for nonmoral deviations such as mental or emotional instability).

90. *Himmel*, 125 Ill. 2d at \_\_\_, 533 N.E.2d at 792. The court addressed the issue of whether Himmel violated the code, not whether the Review Board knew of attorney Casey's violation. *Id.* Casey was reprimanded in a prior action. *Id.*

91. *Id.* Lawyers may not choose to bypass the rules simply because a client has asked them to. *Id.* at \_\_\_, 533 N.E.2d at 794.

92. *Id.*

93. *Id.* The court also found that both Himmel and Forsberg may have been motivated by the financial benefits of not reporting Casey's misconduct. *Id.* at \_\_\_, 533 N.E.2d at 796.

94. *Id.* at \_\_\_, 533 N.E.2d at 793-94.

ence of her mother and fiancé.<sup>95</sup> The court did not find the relationship of the mother and fiancé with Forsberg and Himmel to be that of principal-agent; the information was, therefore, not privileged.<sup>96</sup>

The court suspended Himmel from the practice of law for a period of one year.<sup>97</sup> In Illinois, the court uses a doctrine of fairness as the mitigating factor in disciplinary cases.<sup>98</sup> The court found that Himmel's past record and his handling of Forsberg's case did not outweigh his failure to report Casey's misconduct to the Commission.<sup>99</sup>

The Illinois Supreme Court decision in *Himmel* has set off a heated debate in the legal community.<sup>100</sup> The decision has given bite to the reporting rules and has confused lawyers as to the type of conduct which must be reported.<sup>101</sup> At any rate, the Model Rules clarify many of the ambiguities left by the Model Code.<sup>102</sup> Model Rule 8.3(a) provides lawyers with a standard for determining when misconduct should be reported and obligates lawyers to report only those violations that raise "a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."<sup>103</sup>

North Dakota adopted the Model Rules of Professional Responsibility, including the disclosure rule, on January 1, 1988.<sup>104</sup> On April 4, 1990, the North Dakota Bar Association Ethics Committee unanimously adopted Formal Opinion 42, *Duty to Report*

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95. *Id.* at \_\_\_, 533 N.E.2d at 794. Forsberg's mother and fiancé were not within the attorney-client relationship, nor were the mother and fiancé agents of either the client, Forsberg, or the attorney, Himmel. *Id.*

96. *Id.*

97. *Himmel*, 125 Ill. 2d at \_\_\_, 533 N.E.2d at 796.

98. *Id.*

99. *Id.*

100. ABA/BNA, *supra* note 14, at 101:204. See Marcotte, *The Duty to Inform*, A.B.A. J. May 1989, at 17 (Illinois Disciplinary Commission received over 300 complaints from the legal profession in the first five months after Himmel's suspension). The *Himmel* court has been criticized for not addressing the issues dealing with the timeliness of reporting a violation and when a lawyer should honor the duty of confidentiality that exists between a lawyer and a client. *Id.* at 18.

101. ABA/BNA, *supra* note 14, at 101:204.

102. See *supra* note 37 (text of Model Rule 8.3); *supra* note 8 (text of DR 1-103). Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1989) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(a) (1980) (the Model Rules require lawyers to report only those violations that raise "a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," the lawyer is not required to report all violations that are unprivileged as required by the Model Code (subject to the fifth amendment right against self-incrimination)).

103. ABA/BNA, *supra* note 14, at 101:204.

104. *Id.* at 01:3 (North Dakota adopted the Model Rules in 1988, as amended by the ABA in February, 1987).

*Lawyer Misconduct.*<sup>105</sup> The Ethics Committee stated that if a lawyer has the requisite knowledge of a reportable violation of another lawyer but does not report the violation, the failure to report the violation is, in itself, a reportable violation.<sup>106</sup> The Ethics Committee is also of the opinion that if a violation is within the scope of Rule 8.3, and the knowledge of the violation becomes known to judges and lawyers while at a court proceeding, the reporting of the violation may not be postponed until the completion of the proceeding.<sup>107</sup> The Committee also suggests that the lawyer who reports the violation will be subject to sanctions if the reported conduct was not a violation and should not have been reported.<sup>108</sup> However, if a lawyer reports a violation, and there are other lawyers and judges who know of the same violation within the scope of Rule 8.3 but who do not report the violation, the other lawyers and judges may be in violation of the Rule.<sup>109</sup> It is important, therefore, to be able to ascertain what constitutes a violation of Rule 8.3 and to report the violation, even if the violation may have been reported by another party.<sup>110</sup>

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105. *Formal Opinion 42, supra* note 40, at 7 (the opinion is issued for advisory purposes only and is not to be considered as binding).

106. *Id.* The analysis to be used when evaluating whether a violation should be reported has four steps: (1) whether there is actual knowledge of a violation or failure to report a violation; (2) whether the knowledge of the violation or the failure to report the violation raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (3) whether the knowledge of the violation or the failure to report the violation raises a substantial question that depends, in part, on the seriousness of the violation; and (4) whether the confidentiality rule (Rule 1.6) applies and therefore prohibits the reporting of the violation or the failure to report a violation. *Id.*

107. *Id.*

108. *Id.* North Dakota Rule of Disciplinary Procedure 22(a) provides for an absolute privilege if and when complaints are submitted to the disciplinary board. N.D.R. DISCIPLINARY P. 22(a).

109. *Formal Opinion 42, supra* note 40, at 7.

110. *Id.*