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THE SNITCH RULE: DOES IT WORK?

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On December 19, 1988, the National Law Journal carried a story on *In re Himmel*.[1] The article was headlined, "Illinois Bar Is Jarred by 'Snitch' Case," and the kicker inquired, "First of Its Kind?"[2] The North Dakota Bar was, and is, jarred, also. With that story, the phone in the Office of Disciplinary Counsel started ringing. A one-year suspension based on the violation of the duty to report misconduct? And, get this, the client *had* reported. Had I ever heard of such a thing in North Dakota?

Well, no. Not under Rule 8.3 of the Rules of Professional Conduct,[3] and not under the "old" DR 1-103(A) of the Code of Professional Responsibility.[4] Not before *Himmel* and the North Dakota State Bar Association Committee on Professional Ethics Formal Opinion 42,[5] which affirmed the duty to report, and not after, either. This is not to say that there has never been a complaint based on the duty to report misconduct. Yet, I cannot recall any time, no matter how egregious the misconduct, when there has been the least bit of attention given to whether or not a file should be opened to inquire into whether a lawyer had the requisite knowledge under Rule 8.3 of the Rules of Professional Conduct of possible misconduct that should be considered by the Disciplinary Board.

However, attention *is* given, and utmost professional soul-searching prompted by *Himmel* and Opinion 42, by the individual lawyer who must make the call on whether or not to file a given complaint. At least one question a week is referred by the Office of Disciplinary Counsel to the State Bar Association of North Dakota Ethics Committee for help with that decision.

The conversations regarding those questions sound like class discussions of the *amicus curiae* briefs filed in support of Himmel's

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1. 125 Ill. 2d 531, 533 N.E.2d 790 (1988).

2. *Illinois Bar Is Jarred by 'Snitch' Case,* Nat'l L. J., Dec. 19, 1988, at 3.

3. N.D. RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1988) (North Dakota adopted the Rules of Professional Conduct effective January 1, 1988, replacing the Code of Professional Responsibility).

4. N.D. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1986).

5. State Bar Association of North Dakota (SBAND) Comm. on Professional Ethics, Formal Op. 42 (1990).

petition for rehearing.[6] For starters, do we really want duplicate filings if a lawyer knows, as Himmel did, that a complaint regarding the conduct has already been lodged? But the primary and more difficult concern is the impact that an enforced duty to file can have on privilege and confidentiality. Does the client who brings along a relative to provide moral support or help with lawyer consultation unwittingly destroy the privilege? Is confidentiality lost because of a supervening duty to report, if the problems presented by the client reveal an area of lawyer misconduct? Does the duty outweigh zealous advocacy as well?

One can barely sketch the parameters, although the language of Rule 8.3 of the Rules of Professional Conduct directed to the lawyer having knowledge of conduct that raises a *substantial* question as to honesty, trustworthiness and fitness of a lawyer or judge may be read to mandate reporting of serious misconduct only. There is the situation in which a lawyer settling a client's claims against another lawyer for "lawyer theft" or malpractice is fearful, suspicious, or concerned (choose the word—the one we are avoiding is *knows*) that there is misconduct relating to the source of the settlement funds. There is no question that lawyer theft frequently leads to discipline, and one can be comfortable with a duty to report such misconduct.

But there is also the situation in which a lawyer has exhibited incompetence, in violation of Rule 1.1 of the Rules of Professional Conduct.[7] The fact is that incompetency issues, unless they can be defined as neglect, are not often reached through discipline. Many lawyers can tell about cases in which opposing counsel, deficient by almost any measure, nevertheless prevailed. Filing a complaint may seem like sour grapes or harassment after losing a case. Moreover, and here's the rub, if it is unlikely that a disciplinary order would be entered based on the incompetence, it follows that a disciplinary case could not possibly be premised on failure to report.

There has been a growing number of sanction orders entered

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6. The following *amicus curiae* briefs were filed in support of Himmel's petition for rehearing:

Illinois Attorneys for Criminal Justice in Support of Petitioner on Rehearing.

Brief of Tau Epsilon Rho Law Society, and Its Chicago Graduate Chapter, Amicus Curiae.

Brief Amicus Curiae of Illinois State Bar Association.

The petition for rehearing was denied by the Illinois Supreme Court on January 30, 1989. *Himmel*, 125 Ill. 2d at —, 533 N.E.2d at 790.

7. N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1990).

under Rule 11 of the Federal Rules of Civil Procedure.[8] They address competency issues but, contrary to my prediction of several years ago, they have not signaled a comparable focus on competency issues within disciplinary agencies. This is also true of malpractice cases against lawyers, which have increased and seem to me to be moving beyond competency and neglect to issues more traditionally ethical, such as conflict of interest. Sometimes I read malpractice cases in which a hefty judgment is entered against the lawyer and think that there would be low-level or no discipline if the same facts were presented for professional discipline. If there is a cutting edge, it is Rule 11 and malpractice, not their counterparts in the Rules of Professional Conduct, that are on it.

There is a further problem with the snitch rule which runs so deep that it is surprising that anyone actually expects the rule to work. That problem is the way in which reporting—turning someone in—runs against the grain. Competency, safekeeping client funds, and avoiding conflicts of interest are good professional tenets, but *snitching*? It is an alien norm, and adherence to its precepts makes us profoundly uncomfortable.

Rule 8.3 of the Rules of Professional Conduct, *Himmel*, and Opinion 42 may offer some comfort to the lawyer who decides to report misconduct. And they do report, although not in great numbers, and certainly not enough, in my opinion, to have a substantial impact on the way lawyers or judges do business. Even if they are personally at peace with reporting, lawyers worry that they will be branded unfavorably within the collegial ranks of the profession. Ask a lawyer how he or she feels about reporting judicial misconduct and see if the answer includes "professional suicide," a fate far from what anyone would—or should have to—contemplate within allegiance to an ethical code.

Even if caseload and staffing were the only considerations, it would be hard to advocate that a disciplinary system, already so

8. Rule 11 provides as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose . . . an appropriate sanction . . . .

FED. R. CIV. P. 11.

reliant upon volunteer work, should expend resources pursuing not lawyer misconduct, but what other lawyers knew and when they knew it. But it is clear to me that institutional progress is necessary before we can reasonably expect the "duty to report" to provide significant support for maintaining high professional standards.