

**POLICE YOURSELF:
A Guide for Understanding an Illinois Lawyer's Duty to
Report Other Lawyers' Misconduct**

by

Aaron-Michael H. Sapp

**Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Renee Knake
Spring, 2008**

INTRODUCTION

Attorneys are required to know and follow a set of ethical guidelines. While most recognize that they have ethical obligations to their clients, the courts, and the public in general, many attorneys fail to fully understand their obligation to each other. The State of Illinois, like almost every other jurisdiction, requires attorneys to police their profession and report the misconduct of their peers.

Titled “Reporting Professional Misconduct,” Illinois Rule of Professional Conduct (“IRPC”) 8.3(a) states that “[a] lawyer possessing knowledge not otherwise protected as a confidence by these Rules or by law that another lawyer has committed a violation of Rule 8.4(a)(3) or (a)(4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.”¹ Rules 8.4(a)(3) and (a)(4), respectively, prohibit attorneys from doing the following: “commit[ting] a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” and “engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.”²

Part I of this paper examines the history of the duty to report in Illinois and the agency charged with enforcing it. Part II analyzes the status of the duty to report in Illinois based upon the Illinois Supreme Court’s uniquely harsh imposition of punishment against attorneys who breach the ethical requirement. Part III provides a practical guide for navigating through the various aspects of IRPC 8.3(a). Lastly, Part IV identifies resources attorneys can use to assist them in complying with the duty.

¹ ILLINOIS RULES OF PROFESSIONAL CONDUCT, Rule 8.3(a) (2002), *available at* <http://www.law.cornell.edu/ethics/il/code/> [hereinafter “IRPC”].

² IRPC 8.4(a)(3), (a)(4).

I. BACKGROUND

The authority for state courts to regulate the conduct of the attorneys in their respective jurisdictions is well recognized through both the inherent powers doctrine and general constitutional language.³ Today, codes of ethics represent the main source of regulations governing attorneys' conduct.⁴ A history of the American Bar Association's ("ABA") various attempts at creating ethical codes reveals the evolution of the duty to report.

A. History of the Duty to Report

In general, the first code of ethics for lawyers did not appear until the turn of the 20th century. In 1908, the American Bar Association adopted the Canons of Professional Ethics.⁵ Canon 29, specifically, explained that "lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession."⁶ This rule, however, did not require lawyers to report their colleagues. As evidenced by the use of "should" rather than "shall," the Canons merely provided a set of permissive guidelines lawyers were encouraged to follow.

The Code of Professional Responsibility replaced the Canons of Professional Ethics in 1969.⁷ Disciplinary Rule 1-103(A) required lawyers to report another lawyer's

³ STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 2 (7th ed. 2005).

⁴ See 7 C.J.S. *Attorney & Client* § 42 (2004) ("Attorneys are subject to a Code of Professional Responsibility, and they must adhere to the moral standards prescribed by rules of ethics. Compliance with canons of professional ethics is a personal duty of each attorney.").

⁵ CANONS OF PROFESSIONAL ETHICS (1908), reprinted in T. MORGAN & R. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 412 (1989).

⁶ CANNONS OF PROFESSIONAL ETHICS, Canon 29 (1908)

⁷ See Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1998 U. ILL. L. REV. 977, 979 (1988) ("On August 12, 1969, the American Bar Association's House of Delegates adopted an entirely new code, then called the ABA Code of Professional Responsibility.")

violation of *any other* of the disciplinary rules.⁸ In addition, the rule required lawyers to report their colleagues who tried to do any of the following: (i) “[c]ircumvent a Disciplinary Rule through actions of another”; (ii) “[e]ngage in illegal conduct involving moral turpitude”; (iii) “[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation”; (iv) “[e]ngage in conduct that is prejudicial to the administration of justice”; (v) “engage in any other conduct that adversely reflects on [the attorney’s] fitness to practice law.”⁹ Unlike the permissive Canons, DR 1-103(A) was designed as a mandatory reporting requirement for attorneys.¹⁰ As a practical matter, however, DR 1-103(A)’s breadth made it unenforceable.

In 1983, the ABA adopted its third version of ethical rules – the Model Rules of Professional Conduct.¹¹ In an effort to increase its enforceability, the ABA significantly narrowed the reporting requirement in its latest version.¹² According to Model Rule 8.3(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 honest, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”¹³ Although narrower than its predecessor, Rule 8.3(a) still covers a variety of circumstances under which attorneys must report the actions of their peers.

⁸ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-103(A) (1980).

⁹ *Id.*

¹⁰ MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (“The Disciplinary rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”)

¹¹ MODEL RULES OF PROFESSIONAL CONDUCT, Chair’s Introduction (1998) [hereinafter MODEL RULES].

¹² Cynthia L. Gendry, Comment, *Ethics – An Attorney’s Duty to Report the Professional Misconduct of Co-Workers*, 18 S. ILL. U. L.J. 603, 605 (1994).

¹³ MODEL RULE 8.3(a).

The ABA's Rules of Professional Conduct are called "Model Rules" for a reason: Legally speaking, the ABA is simply a trade organization and does not possess the authority to promulgate binding regulations.¹⁴ They remain important, however, because most state courts use the ABA's rules for guidance when adopting their own disciplinary rules.¹⁵ Indeed, the Illinois Rules of Professional Conduct – which are binding on Illinois attorneys -- contains a similar Rule 8.3(a) mandatory reporting requirement.¹⁶

B. The Illinois Attorney Registration & Disciplinary Commission

While the Illinois Supreme Court possesses the ultimate authority to both generate rules of professional conduct and enforce those rules against the bar,¹⁷ various aspects of that authority have been delegated to other agencies. Specifically, the Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois ("ARDC") receives, investigates, and prosecutes reports of attorney violations of the Illinois Rules of Professional Conduct.¹⁸ The ARDC comprises seven Commissioners – four lawyers and three non-lawyers – who act as the Commission's board of directors and appoint an Administrator and a Hearing Board.¹⁹ It is the Administrator and the Administrator's staff who are in charge of conducting investigations and filing formal charges against attorneys who engage in unethical conduct.²⁰ Formal charges then proceed before the Hearing Board – who receive evidence, make factual determinations, and recommend discipline.²¹

¹⁴ W. BRADLEY WENDEL, PROFESSIONAL RESPONSIBILITY 5 (2d. ed. 2007).

¹⁵ *Id.*

¹⁶ See Part III.A, *infra*, for an analysis of the differences between Model Rule 8.3(a) and IRPC 8.3(a).

¹⁷ See *In re Ettinger*, 128 Ill. 2d 351, 365 (Ill. 1989) (explaining that the Illinois Supreme Court has original jurisdiction to regulate the admission and discipline of lawyers in Illinois).

¹⁸ See, *Skolnick v. Gray*, 191 Ill. 2d 214, 218 (Ill. 2000) (*citing* 134 Ill. 2d R. 751, *et seq.*).

¹⁹ ARDC Overview, <http://www.iardc.org/overview.html> (last visited Apr. 11, 2008).

²⁰ *Id.*

²¹ *Id.*

Both the Administrator and disciplined attorneys can appeal to the Review Board, whose nine lawyer members are appointed by the Illinois Supreme Court.²² Ultimately, the Illinois Supreme Court retains the right to fully hear the case and either (i) enter its own final order or (ii) sign off on the discipline recommended by either the Hearing or Review Board.²³ This brief overview illustrates how all disciplinary rules – including the duty to report – are generated and enforced in Illinois. Understanding the requirements of the duty to report, therefore, requires an examination of how both the ARDC and the Illinois Supreme Court apply the rule in practice.

C. The Importance of the Duty to Report in the Legal Profession

Before analyzing the enforcement of the duty to report, it is important to understand its purpose. Why require attorneys to report the misconduct of their peers? The medical profession, for example, has no similar reporting requirement. In fact, doctors follow a generally recognized code of silence – an implicit regulation *against* reporting other doctors' misconduct.²⁴ In the legal profession, however, reporting is not only encouraged, it is mandated.

All of the underlying rationales for the duty to report essentially fall into two categories: (i) the duty to report protects the public from attorneys, and (ii) the duty to report protects attorneys from the public. The first is the most obvious: Unethical attorneys can cause severe damage to their clients and the public as a whole. Converting funds, fraud, deceit, and misrepresentation all represent harms that lawyers – in whom

²² *Id.*

²³ *Id.* Reprimand, whether public or private, is the most basic form of discipline and can be ordered by the Hearing Board or the Review Board. *Id.* More serious forms of discipline, however, must be ordered by the Illinois Supreme Court and include: (i) disbarment, (ii) suspension; (iii) probation, and (iv) censure. *Id.*

²⁴ See, Charles B. Plattsmier, *Self Regulation and the Duty to Report Misconduct: Myth of Mainstay?*, THE PROF. LAW. SYMP. ISSUE, May-June 2007, at 41 (“In the medical profession, the so called ‘conspiracy of silence’ has become almost accepted as a deeply ingrained part of the fraternity of doctors and other health care providers.”).

clients place their trust and confidence – are in a unique position to inflict. Indeed, one of the aims of attorney discipline in general is to protect the public from unscrupulous attorneys.²⁵ As one commentator notes, the duty to report and attorney discipline are “inherently connected” because “[b]efore an attorney who acts unethically can be disciplined, his actions must be reported.”²⁶ Attorneys are ultimately best suited to perform this initial reporting function because, as empirical evidence demonstrates, their reports are both more accurate and effective.²⁷ The duty to report, therefore, plays an important part in weeding out unethical attorneys and protecting the general public.

By weeding out unethical attorneys, the duty to report also protects attorneys from a negative public perception. As recognized by the Illinois Supreme Court, one of the purposes behind the duty to report is guarding the integrity of the legal profession.²⁸ Another commentator further explains that “the message of the reporting requirement is that the integrity of the legal profession must be protected, even at the expense of zealous advocacy, and the lawyer’s own interests.”²⁹ A lack of public faith in the integrity of the legal profession could lead to the demolition of the legal profession’s current self-

²⁵ See AMERICAN BAR ASSOCIATION STANDARDS FOR IMPOSING LAWYER SANCTIONS, *reprinted in* ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT § 1.1, § 01:807 cmt. (1992) (listing the objectives of lawyer sanctions in general: (i) protecting public, (ii) protecting integrity of legal system, (iii) administering justice, and (iv) preventing unethical behavior).

²⁶ Gendry, *supra* note 12, at 605.

²⁷ See Thomas P. Sukowicz, *The Himmel Duty: Observations by an ADRC Lawyer*, CHI. B. ASS’N REC., Nov. 1997, at 17. Sukowicz notes that in 1996, 19% of the Illinois ARDC’s formal charges were the result of reports filed by other attorneys. *Id.* This, combined with the fact that reports filed by attorneys accounted for less than 8% of the total number of reports filed that year, reveal that attorney reporting resulted in “one-fifth of the formal charges filed against attorneys and for a much smaller percentage of matters that did not warrant formal disciplinary action.” *Id.*

²⁸ See *Skolnick*, 191 Ill. 2d at 226, 730 (noting that the duty to report “and the certain discipline that flows from a breach of that duty, is animated by a desire to: maintain the integrity of the legal profession”); See also, IRPC, Preamble (explaining that the duty to report “misconduct can be a formidable deterrent to such misconduct, and a key to maintaining public confidence in the integrity of the profession as a whole in the face of the egregious misconduct of a few”).

²⁹ David C. Olsson, *Reporting Peer Misconduct: Lip Service to Ethical Standards Is Not Enough*, 31 ARIZ. L. REV. 657, 659-60 (1989).

regulation process.³⁰ The power public outcry can have on elected officials should not be underestimated. One author argues that the duty to report is an important weapon in forming a defense against “the improper and truly frightening specter of political intervention in disciplinary regulation.”³¹ The message is clear: If lawyers don’t police themselves, someone else will.

II. ENFORCEMENT OF THE DUTY TO REPORT IN ILLINOIS

The above section demonstrates the importance of a reporting requirement; however, simply establishing a reporting rule does not automatically result in attorneys complying with it. Compliance with the duty to report requires enforcement.³²

Although almost every jurisdiction has adopted some form of the duty to report,³³ the enforcement of that duty varies widely. In Minnesota, for example, the duty to report exists, but it is simply never enforced.³⁴ Similarly, Georgia’s version of Rule 8.3(a) contains only permissive language (i.e. “should”) and further explains that “there is no

³⁰ See *In re Riehlmann*, 891 So.2d 1239, 1249 (La. 2005). In analyzing its own duty to report, the Louisiana Supreme Court succinctly explained:

[T]he lawyer’s duty to report professional misconduct is the foundation for the claim that we can be trusted to regulate ourselves as a profession. If we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public.

Id.

³¹ Plattsmier, *supra* note 24, at 44. Plattsmier further argues that weeding out incompetent, unethical lawyers is beneficial to attorneys for much more selfish reasons. *Id.* Incompetent attorneys damage other attorneys when their conduct results in (i) commingling of funds, which triggers reimbursement from attorney funded programs for client protection and (ii) ineffective assistance of counsel, which results in a new trial and further clogs the court system. *Id.*

³² See Nikki A. Ott & Heather F. Newton, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747, 757-58 (2003) (arguing that self-regulation does not occur unless combined with court enforcement).

³³ *Id.* at 755 (citing Kentucky and California as the only jurisdictions without a comparable reporting obligation as of 2003).

³⁴ Mary L. Galvin, *A Lawyers’ Duty to Report Misconduct Under 8.3*, MINN. LAW., Dec. 3, 2001, available at <http://www.courts.state.mn.us/lprb/fc120301.html> (last visited Apr. 11, 2008).

disciplinary penalty for violation of this Rule.”³⁵ The majority of jurisdictions, however, fall into the following category: The duty to report is only enforced in conjunction with at least one other ethical violation.³⁶ Illinois fell into this final category until 1988 – when the Illinois Supreme Court strictly enforced its version of the duty to report.

A. *In re Himmel*: Illinois' Uniquely Strict Enforcement of the Duty to Report

In *In re Himmel*,³⁷ the Illinois Supreme Court – for the first time – examined whether an attorney should be punished solely for his failure to comply with the duty to report.³⁸ By answering the issue in the affirmative and suspending the attorney’s law license for a year, the court sent a strong message to the Illinois legal community: The duty to report will be strictly enforced.

1. *The Facts and Holding of the Case*

The case involved attorney James H. Himmel; his client (“the client”); and his client’s former attorney, John R. Casey (“Casey”). After the client was injured in a motorcycle accident, Casey negotiated a \$35,000 settlement.³⁹ The client, however, never received her share of the settlement agreement because Casey converted it for his own use.⁴⁰ So she hired Himmel to collect her settlement from Casey, agreeing to pay Himmel one-third of any funds he recovered above her original share – which was \$23,2333.34.⁴¹

³⁵GEORGIA RULES OF PROFESSIONAL CONDUCT, Rule 8.3, *available at* http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/ (last visited Apr. 11, 2008).

³⁶ Ott & Newton, *supra* note 32, at 757.

³⁷ 125 Ill. 2d 531 (Ill. 1988)

³⁸ The case dealt with Rule 8.3’s predecessor: Rule 1-103(a) of the Code of Professional Responsibility. The text of the rules are substantially similar. However, see Part III.C, *infra*, for a discussion about how the language in IRPC 8.3(a) narrowed Rule 1-103(a)’s privilege exception.

³⁹125 Ill. 2d at 535

⁴⁰ *Id.*

⁴¹ *Id.*

Himmel discovered Casey's improper conduct and negotiated a settlement agreement between Casey and the client.⁴² The terms of the agreement stated that in exchange for \$75,000, the client would not initiate any criminal, civil, or attorney disciplinary action against Casey.⁴³ Although the agreement said nothing about Himmel reporting Casey's conduct to the ARDC, the client specifically asked him not to take such action.⁴⁴ When Casey breached this settlement agreement, Himmel filed suit to enforce the agreement and received a \$100,000 judgment against Casey.⁴⁵ The client ultimately collected \$10,000 from Casey.⁴⁶ Himmel took no fee.⁴⁷

After discovering Casey's actions and disbaring him for commingling client funds, the ARDC initiated disciplinary proceedings against Himmel for his failure to report Casey's conduct.⁴⁸ Finding Himmel in violation, the Hearing Board recommended a private reprimand.⁴⁹

On appeal, the Illinois Supreme Court not only agreed with the Hearing Board's finding, but increased Himmel's punishment to a one year suspension.⁵⁰ In its decision, the supreme court addressed three main issues. First, the court gave no weight to the fact that the client specifically directed him not to report Casey.⁵¹ Second, the court held that attorney-client privilege did not prevent Himmel from reporting because the client waived the privilege when she discussed Casey's actions in the presence of third

⁴² *Id.*

⁴³ *Id.* at 536

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 536-37

⁴⁷ *Id.* at 537

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 546

⁵¹ *Id.* at 539 ("A lawyer may not choose to circumvent the rules by simply asserting that his client asked him to do so.").

parties.⁵² Third, the court determined that a harsher punishment was necessary to serve the purpose of attorney discipline: “maintaining the integrity of the legal profession and safeguarding the administration of justice.”⁵³

2. Himmel’s *Impact on the Legal Community*

The outcome in *Himmel* sent shockwaves through the legal community.⁵⁴ The case represents the first time that any jurisdiction sanctioned a lawyer solely for violating the duty to report. In 1989, the year after the *Himmel* decision, the number of attorney misconduct reports filed by Illinois attorneys increased from 154 instances to 922 instances.⁵⁵

Since *Himmel*, there have been no other reported cases of Illinois attorneys sanctioned solely for violating the duty to report. Data reveals, however, that the number of reports Illinois attorneys file with the ARDC has remained relatively constant since 1992 – despite the fact that the decision occurred twenty years ago.⁵⁶ Attorney compliance with the duty to report in Illinois continues to substantially surpass all other jurisdictions.⁵⁷ Further, as one author notes, the *Himmel* case continues to “engender so much fretting and confusion on the part of Illinois lawyers that [the] ARDC has included

⁵² *Id.* at 541-42.

⁵³ *Id.* at 543.

⁵⁴ See, Rotunda, *supra* note 7, at 991 (“*Himmel* was a dramatic surprise to the bar.”). To say that the decision has provided fodder for legal academics is an understatement. An April 2008 LexisNexis citator report identified 108 law review articles citing to the decision.

⁵⁵ See Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-regulation*, 12 GEO J. LEGAL ETHICS 175, 182 (1999) (“In the first year after *Himmel* was decided, Illinois attorneys’ reports of professional misconduct increased by 500%.”).

⁵⁶ Mary T. Robinson, *A Lawyer’s Duty to Report Another Lawyer’s Misconduct: The Illinois Experience*, THE PROF. LAW. SYMP. ISSUE, May-June 2007, at 47, 54. Robinson charts, among other things, the number of ARDC investigations and the number of attorney reports with the ARDC from 1992 to 2006. *Id.* In 1992, the number of attorney reports was 554. *Id.* In 2006, the number was 435. *Id.* Over that time span, the number of attorney reports broke the 500 report barrier eleven times and dropped below 400 only twice. *Id.*

⁵⁷ Richmond, *supra* note 55, at 182 (“Illinois attorneys now report misconduct at a rate unmatched by any other state.”)

it in an ethics FAQ at http://www.iardc.org/ethics_faq.html.”⁵⁸ An analysis of the Illinois Supreme Court’s treatment of the duty to report in other contexts reveals the explanation for this continued concern.

B. *Skolnick v. Gray*: A Reminder that the Duty to Report in Illinois Is Absolute

Despite the fact that no other Illinois attorney has been sanctioned solely for violating the duty to report, the concern surrounding *Himmel* has not dissipated over the past twenty years. This is due, in part, to the Illinois Supreme Court’s commitment to strictly applying the duty to report. In *Skolnick v. Gray*,⁵⁹ for example, the Illinois Supreme Court forced a trial court to modify a protective order so that one of the attorney’s involved in the proceeding could comply with the duty to report.⁶⁰

The case surrounded Kenneth Skolnick – a partner in a large law firm. The firm suspected Skolnick of filing a forged document with the court and reported this alleged misconduct.⁶¹ The ARDC subsequently initiated an investigation, but the Commission ultimately dropped the complaint due to a lack of evidence.⁶² Skolnick then sued the firm, alleging that the firm’s accusations that he forged the document were defamatory and tortiously interfered with his business relations.⁶³ Given the nature of the claim, the trial court ordered a protective order, which it applied to all information supplied during the discovery process.⁶⁴ During this process, however, Terry Kass, one of the attorneys for the firm, discovered a document which indicated that Skolnick had engaged in

⁵⁸ Helen W. Gunnarsson, *What’s Your Duty Under Himmel?*, ILL. B.J., June 2007, at 296, 297.

⁵⁹ 191 Ill. 2d 214 (Ill. 2000).

⁶⁰ *Id.* at 226.

⁶¹ *Id.* at 217.

⁶² *Id.* at 218.

⁶³ *Id.*

⁶⁴ *Id.* at 218-19

unrelated, improper conduct.⁶⁵ She requested that the trial court modify the protective order so she could report the alleged misconduct.⁶⁶ Her argument was simple: The contents of the document triggered her duty to report, and since the duty to report is absolute, she must be allowed to notify the ARDC.⁶⁷

The Illinois Supreme Court agreed with Kass. The court began its decision by reaffirming that the duty to report is absolute.⁶⁸ Given this fact, the court further explained that “only the weightiest considerations of justice could excuse a trial court’s refusal to modify a protective order so that counsel could fulfill [her] absolute, ethical duty.”⁶⁹ Skolnick argued that Kass could satisfy her duty by simply reporting the conduct to the trial court – an act that would not require modification of the protective order.⁷⁰ In rejecting this argument, the court engaged in a three step analysis. First, only the Illinois Supreme Court has the inherent power to discipline attorneys.⁷¹ Second, similar to most jurisdictions, the supreme court delegated the investigative and prosecutorial aspects of that authority to the ARDC.⁷² The duty to report, therefore, is only satisfied when attorneys alert the entity with whom the investigative authority rests – the ARDC.⁷³

Skolnick sent two messages to the legal community. First, the court renewed its commitment to enforcing the duty to report by asserting that the duty is absolute. Second, the court clarified that the rule requires attorneys to report to the ARDC. In

⁶⁵ *Id.* at 219

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 216

⁶⁹ *Id.* (internal quotes and citations omitted).

⁷⁰ *Id.* at 223.

⁷¹ *Id.* at 229.

⁷² *Id.*; *See, supra* Part I.B.

⁷³ *Id.*

other words, reporting misconduct to a senior partner in a law firm or even a trial court judge does not discharge the attorney's obligation.

C. *Jacobson v. Knepper & Moga*: A Refusal to Protect Associates from Retaliation

The holdings of *Himmel* and *Skolnick* alone do not justify attorneys' concern with the duty to report. After all, as a mandatory guideline, IRPC 8.3(a) only establishes when attorneys *must* report their colleagues. Provided they are not violating a client's confidence, however, attorneys face no restriction on what they *may* report. The solution to curing *Himmel* anxiety seems clear: To avoid a *Himmel* fate, attorneys in Illinois should report all suspicious conduct.

This advice, however, oversimplifies the situation and fails to account for practical considerations attorneys face – especially newer attorneys in large firms. Attorneys prefer not to report their colleagues for several reasons. First, there is the general reluctance of reporting and being labeled a “tattletale” or “snitch.”⁷⁴ Second, the duty to report does not discriminate between friends and enemies or co-workers and opponents. Feelings of loyalty may prevent attorneys who work together from reporting each other's misconduct.⁷⁵ Finally, attorneys fear retaliation.

There are two ways retaliation may be an issue. First, the party who was reported may file lawsuits against the reporting attorney for libel or slander. In general, this should not concern attorneys too greatly because Illinois Supreme Court Rule 775 grants attorneys reporting to the ARDC immunity from any civil liability.⁷⁶ Note, however, that

⁷⁴ See Julie L. Hussey, *Reporting Another Attorney for Violating the Rules of Professional Conduct: The Current Status of the Law in the States Which Have Adopted the Model Rules of Professional Conduct*, 23 J. LEGAL PROF. 265, 265 (1998-99) (identifying the unpleasantness associated with the role of reporting other attorneys).

⁷⁵ See Gendry, *supra* note 12, at 605.

⁷⁶ ILL. SUP. CT. R. 775, *available at*: http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/default.asp.

the rules protection extends only to those communications made to the ARDC.⁷⁷ In *Skolnick*, for example, the firm not only reported Skolnick's conduct to the ARDC, but they also made public comments about their belief that he created the forged document.⁷⁸ These outside statements formed the basis of the lawsuit.

The second type of retaliation attorneys fear is adverse employment actions from their employer-firms. This reporting consequence is of specific concern to newer attorneys in large firms and best demonstrated by a hypothetical. Imagine that you are a young attorney, recently hired by a Chicago law firm. Shortly after starting, you discover that the firm is filing consumer debt collection actions that violate the venue provisions of several consumer collection protection statutes. Concerned with the legality of this practice, you alert one of your firm's principal partners. He thanks you and assures you the matter will be handled. A year later, however, you discover the matter was not handled and the firm continues to violate the consumer protection statutes.⁷⁹ You take the matter before the partner for a second time and again nothing changes. Two weeks after vocalizing your concerns for a third time, the firm's decision makers finally take action: They terminate your employment.

The above hypothetical mirrors the facts of *Jacobson v. Knepper & Moga*.⁸⁰ The fired associate, Jacobson, filed suit against his former firm under a theory of retaliatory discharge.⁸¹ The issue analyzed by the appellate court was whether Illinois precedent precluded an attorney "from maintaining a cause of action for the Tort of Retaliatory

⁷⁷ *Id.* ("The grant of immunity provided by this rule shall apply only to those communications made by such persons to the [ARDC], its administrators, staff, investigators and members of its boards.")

⁷⁸ 191 Ill. 2d at 218. In his nine-count complaint, Skolnick alleged that the firm accused him of the unethical conduct in front of other attorneys within the firm and other clients of the firm. *Id.*

⁷⁹ You know this to be a fact because the firm actually gave you the responsibility of reviewing and signing all the firm's consumer debt collection complaints.

⁸⁰ 185 Ill. 2d 372 (Ill. 1998)

⁸¹ *Id.* at 374.

Discharge against his . . . law firm employer due to the pre-eminence of the Rules of Professional Conduct.”⁸² Put another way, does an attorney have a cause of action against his employer when he is fired for attempting to comply with the mandatory duty to report? The appellate court found that such a cause of action exists and that the lawsuit should continue.⁸³

The Illinois Supreme Court, however, reversed the appellate court and ordered the trial court to dismiss the case.⁸⁴ The court began its opinion by broadening the issue to whether “an attorney who has been discharged by his law firm employer should be allowed the remedy of an action for retaliatory discharge.”⁸⁵ To satisfy Illinois’ requirements for a retaliatory discharge action, Jacobson had to establish two elements: (1) “he was discharged in retaliation for his actions,” and (2) “the discharge was in contravention of a clearly mandated public policy.”⁸⁶ Even assuming Jacobson could satisfy the first element, the court determined he failed under the second because the public’s interests were already adequately protected without extending the tort of retaliatory discharge.⁸⁷ In order to follow the court’s logic, it is important to understand that the court concerned itself with the public policy behind the collection protection statutes the firm was allegedly violating – not the public policy behind the IRPC. Jacobson argued that allowing firms to terminate attorneys for reporting this kind of violation would have a chilling effect on other attorneys – discouraging them from reporting similar violations by their firms for fear of retaliation.⁸⁸ This situation risks

⁸² *Id.* at 375.

⁸³ *Id.* at 374.

⁸⁴ *Id.* at 378

⁸⁵ *Id.* at 374.

⁸⁶ *Id.* at 376.

⁸⁷ *Id.* at 377-78

⁸⁸ *Id.* at 376.

significantly reducing compliance with the collection statutes and ultimately jeopardizing the public policy behind them: protecting consumer debtors' property and ensuring the debtors due process.⁸⁹ According to Jacobson, therefore, providing unfairly punished attorneys relief against their former firms through the tort of retaliatory discharge is necessary to adequately protect the collection statutes' underlying public policy.

The Illinois Supreme Court disagreed. In fact, the court used IRPC 8.3(a)'s duty to report as support for its conclusion that the underlying policy behind the collection statutes was already adequately protected.⁹⁰ Under IRPC 8.3(a), attorneys are required to report the type of conduct in which Jacobson's former firm engaged – whether or not they fear retaliation from the firm. According to the court, therefore, the mandatory ethical obligation to report, by itself, adequately protects the underlying public policy behind the collection statutes.⁹¹ Since the public policy is already sufficiently protected, the court concluded, expanding the tort of retaliatory discharge to Jacobson's situation is unnecessary and improper.⁹² Case dismissed.

D. Report or Not Report? An Illinois Attorney's Catch-22

From a purely theoretical standpoint, the court's reasoning in *Jacobson* is likely correct. One of the decision's pitfalls, however, is that the court failed to consider the practical effect such a result has on attorneys' likelihood to comply with the duty to report. On the one hand, the Illinois Supreme Court, through *Himmel* and *Skolnick*, consistently emphasizes the importance of following the duty to report. On the other, in *Jacobson*, the court fails to protect attorneys who attempt to comply with the requirement

⁸⁹ *Id.* at 377.

⁹⁰ *Id.*

⁹¹ *Id.* at 378.

⁹² *Id.*

and subsequently lose their jobs. In his dissenting opinion in *Jacobson*, Chief Justice Freeman identified that the majority's holding "serves as yet another reminder to the attorneys in [Illinois] that, in certain circumstances, it is economically more advantageous to keep quiet than to follow the dictates of the Rules of Professional Responsibility."⁹³

Collectively, the above three cases illustrate a true dilemma facing new attorneys in Illinois: report and risk professional ruin, or keep quiet and risk sanctions. Some commentators believe this dilemma illustrates the absurdity of extending Rule 8.3(a) to cover intra-firm reporting. One author, for example, argues that when faced with a situation like the one in *Jacobson* "almost every lawyer will [not report and] gamble (1) that his failure to report will never be discovered and (2) that he can avoid or mitigate any sanction for not reporting the misconduct."⁹⁴ These commentators agree that either the court should protect complying attorneys who suffer retaliation, or the rule should be modified to exclude intra-firm reporting.⁹⁵

While an analysis of whether the court should revisit the holding in *Jacobson* or amend the text of IRPC 8.3(a) is beyond the scope of this paper, the points discussed above demonstrate that Illinois attorneys face potentially competing interests in deciding whether to report another attorney's conduct. In reaching an ultimate decision, it is important for attorneys to be well-informed as to (i) the various requirements of IRPC 8.3(a) and (ii) the various resources available to assist them in their decision.

⁹³ *Jacobson*, 185 Ill. 2d at 378 (Freeman, J., dissenting).

⁹⁴ Richmond, *supra* note 55, at 203.

⁹⁵ *Id.*; See also, Ott & Newton, *supra* note 32, at 766 ("If more states . . . provided some basic remedy for attorneys who are terminated for following the mandates of Model Rule 8.3 and its state analogues, attorney reporting might improve.").

III. A PRACTICAL GUIDE TO NAVIGATING IRPC 8.3

An analysis of IRPC 8.3(a)'s requirements begins with an examination of its text. Titled "Reporting Professional Misconduct," Rule 8.3(a) states that "[a] lawyer possessing knowledge not otherwise protected as a confidence by these Rules or by law that another lawyer has committed a violation of Rule 8.4(a)(3) or (a)(4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."⁹⁶ Rules 8.4(a)(3) and (a)(4), respectively, prohibit attorneys from doing the following: "commit[ting] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" and "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation."⁹⁷

Understanding the specificities of IRPC 8.3(a), like any exercise in statutory interpretation, requires analyzing the language used in the rule. This analysis, however, can lead to more questions than answers – specifically: (i) what kind of misconduct is covered; (ii) when does an attorney have "knowledge" of this misconduct; (iii) when is that knowledge protected as a confidence or by law; and (iv) to whom should the attorney report? Further, as demonstrated by the outcome in *Jacobson*, knowing when *not* to report can be just as important as knowing when to report.

A. What Kind of Misconduct Is Covered?

Compared to other jurisdictions, the definition of reportable conduct in the Illinois version of the duty to report is actually more limited and precise.⁹⁸ Under the ABA's

⁹⁶ IRPC 8.3(a)

⁹⁷ IRPC 8.4(a)(3), (a)(4).

⁹⁸ See Robinson, *supra* note 56, at 49. Robinson notes that the Illinois State Bar Association and the Chicago Bar Association formed a joint committee to analyze the ABA's changes to the Model Rules in 2000. *Id.* The committee's report urged the Illinois Supreme Court to maintain IRPC 8.3(a)'s "more precise and limited" language in identifying what types of conduct must be reported. *Id.* (citing Joint ISBA/CBA Committee on Ethics 2000 Final Report (October 17, 2003) at p. 38).

Model Rule 8.3(a), for example, attorneys are required to report conduct that “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”⁹⁹ IRPC 8.3(a) provides more specific guidance by separating misconduct into two categories: (i) civil conduct that involves dishonesty, fraud, deceit, or misrepresentation and (ii) criminal conduct that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer.¹⁰⁰

To better understand the first category, recognize that the Illinois Rules define “fraud” as “conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.”¹⁰¹ This relatively narrow definition removes certain conduct from the reporting requirement. General acts of negligence, for example, are not the type of conduct for which attorneys must report their colleagues.¹⁰² Other conduct that, although prohibited elsewhere in the Illinois Rules, does not contain the requisite element of dishonesty and are therefore removed from IRPC 8.3’s scope include: attorneys who fail to identify conflicts of interest; attorneys who communicate with parties represented by counsel; attorneys who ignore advertising restrictions; and attorneys who fail to consistently communicate with their clients.¹⁰³ ARDC Administrative Counsel Mary Andreoni further explains that an attorney’s “knowledge of his friend’s failure to make a *Himmel* report is not the kind of offense he must report.”¹⁰⁴

⁹⁹ MODEL RULE 8.3

¹⁰⁰ IRPC 8.3(a).

¹⁰¹ IRPC, Terminology.

¹⁰² Sukowicz, *supra* note 27, at 17.

¹⁰³ *Id.*

¹⁰⁴ Mary Andreoni, *Ten Ethics Questions From Young Lawyers*, , CHI. B. ASS’N REC., Mar. 1998, available at: http://www.iardc.org/article_tenethicsquestions.html#6.

Although the IRPC contain a precise definition of “fraud”, the Illinois Supreme Court has applied the definition to a much broader range of conduct.¹⁰⁵ Former Senior Counsel for the ARDC, Thomas P. Sukowicz, identifies the following conduct as falling in this broader range: converting client funds; suppressing evidence; creating evidence; and engaging in deception or fraud in connection with business transactions.¹⁰⁶ He also notes that certain *material* misrepresentations – such as those made to clients in an effort to conceal misconduct; those made to opposing counsel during litigation; and those made to the court are tribunal – are covered by Rule 8.4(a)(4) and should be reported.¹⁰⁷

The second category of reportable misconduct covers attorneys’ criminal acts. The Illinois Supreme Court has established that in disciplining attorneys, “[i]t is not the conviction of a crime which justifies discipline, but the commission of the [underlying] act.”¹⁰⁸ This suggests that attorneys have a duty to report another attorney’s criminal conduct – even though the attorney has not been convicted or even prosecuted for that conduct.¹⁰⁹

IRPC 8.4(a)(3), however, does not encompass all criminal conduct and is limited to that conduct which “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”¹¹⁰ Sukowicz notes that this definition clearly covers theft, criminal fraud, drug dealing, obstruction of justice, bribery, and perjury.¹¹¹

¹⁰⁵ *Se In re Yamaguchi*, 118 Ill. 2d 417, 421 (Ill. 1987) (holding that fraud “includes anything calculated to deceive, including suppression of truth and the suggestion of what is false.”); *In re Armentrout*, 99 Ill. 2d 242, 245 (Ill. 1983) (determining that the dishonest conduct proscribed by Rule 8.4(a)(4) could arise by “direct falsehood or by innuendo, by speech or by silence, by word of mouth or by look or gesture”).

¹⁰⁶ Sukowicz, *supra* note 27, at 17.

¹⁰⁷ *Id.*

¹⁰⁸ *In re Rolley*, 121 Ill. 2d 222, 232 (Ill. 1988).

¹⁰⁹ See Michael L. Shakman et al., *Reporting Your Partners and Associates to the ARDC*, 90 ILL. BAR J. 143 (Mar. 2002)

¹¹⁰ IRPC 8.4(a)(3)

¹¹¹ Sukowicz, *supra* note 27, at 17.

Indeed, in *In re Arnold*¹¹² – one of the few post-*Himmel* cases involving an Illinois lawyer disciplined for violating the duty to report – a lawyer was disciplined for, among other things, failing to report a local judge whom the lawyer knew was growing marijuana.¹¹³ The lawyer later admitted that he didn’t report the judge because the lawyer didn’t want to lose his source for marijuana.¹¹⁴

While the conduct listed above illustrates obviously reportable crimes, analyzing conduct that lies at the margin is much more difficult. In one article, the authors cite authority that cocaine possession and driving under the influence are forms of criminal conduct prohibited under Rule 8.4(a)(3).¹¹⁵ This fact, combined with the lack of a conviction requirement, leads to an alarming result for newer attorneys. One can imagine a situation where an attorney watches a senior partner drive home from a firm social function after – in the attorney’s mind – drinking a few too many martinis. Does IRPC 8.3(a) really require the attorney to report this conduct to the ARDC? The previously mentioned authors say that, according to the strict text of the Rule, it does.¹¹⁶ It should be noted, however, that no cases exist where an attorney was punished for failing to report such conduct. Further, the hypothetical appears to describe the type of “de minimis” violations excluded by the Rule.¹¹⁷

A variation on the above hypothetical does present a situation where attorneys should consider reporting to the ARDC – even if they are not required to under the rule. If, for example, an attorney recognizes that a colleague is dealing with a substance abuse

¹¹² 93 SH 436, M.R. 10462 (1994)

¹¹³ Details of the case are described by former ADRC Administrator Mary T. Robinson. See Robinson, *supra* note 56, at 51.

¹¹⁴ *Id.*

¹¹⁵ See Shakman et al., *supra* note 109.

¹¹⁶ *Id.* (using this result to support their argument that Rule 8.3 is too broad and should be amended)

¹¹⁷ See *infra* text accompanying note 119.

issue, then that attorney may be doing the colleague a favor by reporting. As former ARDC Administrator Mary Robinson explains, “There are a number of lawyers who go into treatment only because they hit the brick wall [attorneys] call the ARDC.”¹¹⁸

Unfortunately for the inquiring attorney, the conduct listed in the paragraphs above is not exhaustive. IRPC 8.3(a), while drafted more narrowly than other jurisdictions’, still forces attorneys to analyze each instance on a case-by-case basis. In ultimately deciding whether particular conduct is covered, attorneys should remember that the duty to report is designed to identify serious misconduct. Deputy Administrator and Chief Counsel James Grogan clarifies that “De minimis violations need not be reported.”¹¹⁹ He further cautions that when determining whether misconduct is covered as either fraudulent or criminal, attorneys should remember that, “[a]ll rules must be interpreted with common sense as the guide.”¹²⁰

B. When Does an Attorney Have “Knowledge” of Misconduct?

Identifying whether an attorney has sufficient “knowledge” of another attorney’s misconduct is perhaps the murkiest aspect of IRPC 8.3. The Illinois Rules state that the term “knows” means “actual knowledge of the fact in question.”¹²¹ The definition further provides that “[a] person’s knowledge may be inferred from circumstances.”¹²² According to this definition, Sukowicz concludes that “[w]hile direct observation by the lawyer may not be required to constitute actual knowledge, it is safe to say that information based on hearsay or rumor need not be reported.”¹²³

¹¹⁸ Gunnarsson, *supra* note 58, at 298 (quoting Robinson).

¹¹⁹ *Id.* at 298 (quoting Grogan).

¹²⁰ *Id.*

¹²¹ IRPC, Terminology.

¹²² *Id.*

¹²³ Sukowicz, *supra* note 27, at 17.

The accuracy of this statement, however, depends on whether the Illinois Supreme Court has subsequently modified the knowledge definition. Referring back to *Skolnick*, the defense argued that Kass, the attorney requesting the modification to the protective order, did not possess sufficient “knowledge” of any alleged unethical conduct because she was not “absolute[ly] certain.”¹²⁴ In rejecting this argument, the court noted that the Illinois knowledge requirement was similar to the knowledge requirement under the ABA’s Model Rules – which define knowledge as “more than a mere suspicion” but less than “absolute certainty.”¹²⁵

Commentators disagree on the effect of this language. At one end, the court may have eliminated the “actual knowledge” requirement and replaced it with the more liberal “more than a mere suspicion” standard.¹²⁶ This broader standard likely encompasses knowledge that is based entirely on hearsay statements.¹²⁷ At the other end, the court may have simply used the ABA definition of actual knowledge to reject any suggestion that an attorney must be absolutely certain.¹²⁸ Supporters of this position argue that knowledge should only be based on facts that would be admissible in evidence.¹²⁹

The proper standard likely falls somewhere in the middle of these competing extremes. Rather than searching for a brightline standard, attorneys should approach the issue from a more objective standpoint and ask themselves the following question: Would this information cause a reasonable attorney to take action? Robinson notes that the answer to this inquiry often requires an attorney to analyze the source of the

¹²⁴ 191 Ill. 2d at 227.

¹²⁵ *Id.* at 228 (citing ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 555 (3d ed. 1996)).

¹²⁶ See Gunnarsson, *supra* note 58, at 298-99 (citing the opinion of Chicago lawyer Warren Lupe, who represents attorneys before the ARDC).

¹²⁷ *Id.*

¹²⁸ *Id.* (citing Robert A. Creamer & Richard J. Jacobson, *Revisiting Himmel Under the 1990 Illinois Rules of Professional Conduct*, ILL. B.J. (Oct. 1990)).

¹²⁹ *Id.*

information.¹³⁰ General complaints from a biased observer alone likely lack the credibility needed to trigger the rule.¹³¹ At the same time, information from a reliable, unbiased source alone may be enough to satisfy the knowledge requirement.¹³²

The struggle to determine when an attorney has “knowledge” is not unique to Illinois. In *Attorney U v. the Mississippi Bar*,¹³³ the Mississippi Supreme Court tried to use the case to “define the point at which a member of the bar has sufficient knowledge [of another attorney’s improper conduct] to be compelled to report that knowledge.”¹³⁴ The outcome resulted in a majority opinion, three dissenting opinions, and two dissenting and concurring opinions.

The facts of the case vaguely resemble the circumstances in *Himmel*. Attorney S and a testing lab, which performed testing services for S’s clients, disagreed on their financial arrangement.¹³⁵ They each subsequently hired separate counsel to handle the dispute.¹³⁶ The testing lab hired Attorney U and told him that the original arrangement between the lab and S included a fee-splitting provision – an arrangement Attorney U knew violated Mississippi’s Rules of Professional Conduct.¹³⁷ Without admitting or denying that such arrangement existed, attorney S disclaimed the arrangement and settled the dispute.¹³⁸ When attorney U was subsequently found in violation of Mississippi’s

¹³⁰ *Id.* at 299 (“Robinson suggests that a lawyer consider the information and the source from a neutral’s point of view.”)

¹³¹ *Id.*

¹³² *Id.*

¹³³ 678 So. 2d 963, 970 (Miss. 1996)

¹³⁴ *Id.* at 964.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 964-65.

¹³⁸ *Id.* at 966.

duty to report, he appealed and argued that he did not have sufficient “knowledge” of attorney S’s improper conduct.¹³⁹

The majority opinion analyzed the “knowledge” standard in a variety of different jurisdictions.¹⁴⁰ Eventually settling on an “actual knowledge” standard, the court refused to consider the attorney’s subjective beliefs in the analysis – focusing instead on whether the supporting evidence would cause a reasonable attorney to form a “firm opinion” that the unethical conduct “more likely than not occurred.”¹⁴¹ Despite the fact that attorney U’s client told him the conduct occurred, the court found he did not have sufficient “knowledge” because no corroboration of either the client’s story or the client’s trustworthiness existed.¹⁴² In applying its knowledge standard, the majority conveniently ignored the fact that when confronted with allegations of his misconduct, attorney S neither confirmed nor denied them and quickly settled the case. The dissent emphasized this point and other factual discrepancies that they believed demonstrated attorney U’s knowledge of the improper fee-sharing arrangement.¹⁴³ The discussion above demonstrates that the knowledge standard is far from well settled in Illinois and, even if it were, there is still room for judges to disagree on its application.

C. When Is an Attorney’s Knowledge Protected as a Confidence or by Law?

Assuming that an attorney has sufficient information of misconduct that is prohibited by Rule 8.4(a)(3) or (a)(4), that attorney is excused from reporting if the information is privileged from disclosure. The language of Rule 8.3(a) states that

¹³⁹ *Id.* at 969.

¹⁴⁰ *Id.* at 970-972 (identifying the knowledge standards of Maine, Nebraska, New Mexico, New York, Pennsylvania, and Washington D.C.).

¹⁴¹ *Id.* at 972.

¹⁴² *Id.*

¹⁴³ *Id.* at 980 (McRae, J., dissenting) (“Ordinary people are found guilty beyond a reasonable doubt and sentenced to decades in prison on less proof than this. One wonders what it would take to prove to the majority that Attorney U knew of the fee-splitting arrangement.”).

attorneys must only report knowledge of conduct “not otherwise protected as a confidence.”¹⁴⁴ The Rules define “confidence” as “information protected by the lawyer-client privilege under applicable law.”¹⁴⁵

The extent of the privilege exception is where Illinois Rule 8.3 and Model Rule 8.3 are significantly different. Model Rule 8.3 does not require the disclosure of information protected by the duty of confidentiality to the lawyer’s client.¹⁴⁶ This duty of confidentiality, defined by Model Rule 1.6, includes a broad category of unprivileged client information.¹⁴⁷ Indeed, in analyzing *Himmel* under the Texas Disciplinary Rules of Professional Conduct – which contain the ABA’s broader exception language – one author argues that the outcome would have been different.¹⁴⁸ In *Himmel*, the court analyzed the privilege issue under Rule 8.3’s predecessor, Disciplinary Rule 1-103(a).¹⁴⁹ That rule required the reporting by an attorney possessing “unprivileged” knowledge.¹⁵⁰ Although the facts of the case confined the court’s analysis to attorney-client privilege, the implication was that information protected by any legally recognized privilege did not require reporting. The language of IRPC 8.3, however, narrowed Illinois’ already narrow privilege exception – recognizing the attorney-client privilege only.

One of the benefits of Illinois’ narrow privilege exception is that it avoids the tension between client confidentiality and the duty to report. Reporting requirements in

¹⁴⁴ IRPC 8.3(a)

¹⁴⁵ IRPC, Terminology.

¹⁴⁶ MODEL RULE, 8.3(a).

¹⁴⁷ MODEL RULE, 1.6.

¹⁴⁸ Bruce A. Campbell, *To Squal or Not to Squal: A Thinking Lawyer’s Guide to Reporting Lawyer Misconduct*, 1 FLA. COSTAL L.J. 265, 275 (1999). The author notes that Himmel’s investigation included three steps: (i) talking to his client; (ii) talking to the party who paid the un-recovered settlement to his client’s former lawyer; and (iii) talking to the former lawyer. *Id.* These steps all arguably fall within the broad scope of confidential client information. *Id.*

¹⁴⁹ 125 Ill. 2d at 540.

¹⁵⁰ *Id.* (citing 107 Ill. 2d R. 1-103(a)).

other jurisdictions that contain the ABA's broader confidentiality exception cause commentators to wrestle with the extent to which client's can direct their attorneys not to report another attorney's misconduct.¹⁵¹ In Illinois, the analysis is much simpler: If the source of an attorney's knowledge falls outside the attorney-client privilege, then the exception does not apply.

As a final note to privilege, Illinois attorneys should recognize that information obtained during a formal proceeding before the Lawyers' Assistance Program does not trigger their reporting requirement. Rule 1.6(e) directs participating attorneys to treat information from the attorney before the panel as if the information came from a client – which invokes the attorney-client privilege exception and shields the information from being reported under IRPC 8.3.¹⁵²

Attorneys in firms, however, should note that this extension of the attorney-client privilege extends only to formal intervention programs. According to Gunnarsson, the ARDC's position is different regarding casual intra-firm communications: “[A] lawyer’s communication of her own reportable misconduct to another lawyer in her firm is not protected by attorney-client privilege, even though she may have been seeking legal advice.”¹⁵³

The implications of this position are important. Not only do newer associates face the prospect of having to report the conduct of senior associates and partners, but they may inadvertently obtain information from their fellow associates that trigger their

¹⁵¹ See, e.g., Patricia A. Sallen, *Combating Himmel Angst*, THE PROF. LAW. SYMP. ISSUE, May-June 2007, at 55, 60-61 (arguing that “(i)f a lawyer files a lawsuit against another lawyer and the alleged misconduct qualifies as the type that must be reported under [Arizona’s reporting rule], the cat is out of the bag and [the confidentiality rule] doesn’t stand in the way”).

¹⁵² See IRPC 1.6(e)

¹⁵³ Gunnarsson, *supra* note 58, at 299 (paraphrasing Administrator and Chief Counsel James Grogan)

reporting duty. As a practical matter, therefore, newer associates should disclose this potential conflict upfront to their advice-seeking peers. They should then suggest alternative ways the colleague can obtain advice. First, the firm may have in place internal reporting channels designed to resolve these situations. Second, the colleague might seek advice through one of the resources discussed in Part IV below. Finally, in some situations, the colleague may be forced to hire an attorney. Although this last option appears extreme, any information the hired attorney obtained would be covered by the attorney-client privilege. That attorney, therefore, could advise candidly without potentially violating the duty to report.

D. To Whom Should an Attorney Report?

The text of IRPC 8.3(a) directs attorneys to report violations “to a tribunal or other authority empowered to investigate or act upon such violation.”¹⁵⁴ This language is chalked full of ambiguity, exposing it to multiple interpretations. On the one hand, “the tribunal” could mean the Illinois Supreme Court, and “other authority empowered to investigate” could mean the ARDC. On the other hand, if the drafters meant the ARDC, then they simply would have written the Commission into the text of the rule. The broad language, therefore, could be interpreted to allow attorneys to report violations arising out of current litigation to the trial judge presiding over the matter.

Fortunately, this is one of the few areas of IRPC 8.3(a) for which the Illinois Supreme Court has issued a clear answer. In *Skolnick*, the court expressly stated that attorneys discharge their duty to report only after alerting the ARDC.¹⁵⁵ One commentator notes that the court’s interpretation of the text is likely accurate given the

¹⁵⁴ IRPC 8.3(a)

¹⁵⁵ 191 Ill. 2d at 229.

history of IRPC 8.3(a).¹⁵⁶ The language of the rule, identifying to whom an attorney should report, was taken primarily from the old Illinois Code – which was written before the ARDC officially existed.¹⁵⁷

Associates in firms should note the practical considerations of this requirement. The duty to report is not satisfied simply by bringing misconduct to the attention of a partner. In *Jacobson*, for example, Jacobson had not technically complied with his duty to report – despite his repeated insistence to several partners that the firm cease its improper conduct. Also, the duty to report is not satisfied simply by bringing misconduct arising out of litigation to the knowledge of the trial judge. This does not mean, however, that the trial judge should not be notified in these circumstances. There is nothing in IRPC 8.3 preventing attorneys from reporting information to whomever they want – provided, of course, that information is not confidential or otherwise protected by the attorney-client privilege. What it does mean, is that attorneys should recognize that even after reporting their opponent’s misconduct to the judge, they should not assume the judge will handle the proper disciplinary action. The rule requires attorneys to take that additional step themselves.

E. When Should an Attorney Not Report?

As stated above, there is nothing in IRPC 8.3(a) that prevents attorneys from reporting the misconduct of their peers. The Rule is meant only to mandate when attorneys *must* report. The above advice, therefore, is based on the practical restrictions that that provide an incentive for attorneys to (i) identify misconduct they must report and (ii) report that misconduct alone.

¹⁵⁶ See George W. Overton, *Legal Ethics: An Ambiguity Clarified*, CHI. B. ASS’N REC., May 2000, at 48.

¹⁵⁷ *Id.*

There are certain situations, however, where attorneys might be tempted to use the reporting requirement as a weapon in their advocacy arsenal. As one author notes, “[A] small minority of lawyers use [reporting requirements] as a sword – reporting others with whom they clearly have a personality conflict . . . or to gain advantage in a case.”¹⁵⁸ This view is shared by Kate Toomey, Deputy Counsel of the Utah State Bar’s Office of Professional Conduct. She explains that reporting requirements provide an “ostensible cloak of ‘duty’ for . . . tattletales, reporting easily remedied transgressions and insults from opposing counsel, or attempting to use a Bar complaint as leverage for settlement.”¹⁵⁹

Regarding the first point, attorneys should recognize that ARDC is not the proper forum for resolving personal disputes with other professionals. With over 6,000 investigations filed against attorneys each year to address, the ARDC has neither the time nor the resources to handle personal feuds.¹⁶⁰ Deputy Administrator Grogan further explains that “you must have a good faith basis for bringing a matter to ARDC’s attention.”¹⁶¹

Regarding the second point, attorneys should consult IRPC 1.2(e). According to the text of that rule, it is misconduct for an attorney to file an ARDC complaint, or even threaten to file an ARDC complaint, as a way of gaining leverage in a civil manner.¹⁶² This rule was not added to the IRPC until after *Himmel*, yet Robinson notes that violating

¹⁵⁸ Margaret Downie, *Attorneys Disciplined: Ethics in Practice Duty to Report*, 32 ARIZ. ATT’Y 42, 42 (1996).

¹⁵⁹ Kate A. Toomey, *Practice Pointer: the Snitch Rule*, 17 UTAH B.J. 24, 24 (2004).

¹⁶⁰ See Robinson, *supra* note 56, at 54 (identifying the annual number of investigations conducted by the ARDC between 1992 and 2006).

¹⁶¹ Gunnarsson, *supra* note 58, at 298 (quoting Grogan).

¹⁶² IRPC 1.2(e). An Arizona Administrator explains that, as a practical matter, investigators cautiously examine charges made during ongoing litigation. Downie, *supra* note 151, at 42. She further explains that “[b]ecause [investigators] do not want the disciplinary process to be used as leverage, [they] will often stay an investigation until the litigation has concluded.” *Id.*

the principle it represents is likely the real reason Himmel received such a harsh sanction.¹⁶³ For one, the court felt that Himmel negotiated away his duty to report in exchange for increased monetary compensation for both his client and himself.¹⁶⁴ Second, in representing himself before the court, Himmel further hurt his cause by convincing the court – perhaps inadvertently – that he used the threat of reporting as a bargaining tactic to gain additional leverage over his client’s former attorney.¹⁶⁵ As a practical matter, therefore, attorneys should avoid using the duty to report to either promote their personal agendas or gain the upper hand in an adversary proceeding.

While the above responses to the questions arising out of IRPC 8.3(a)’s language are far from concrete, they do highlight the key issues surrounding each requirement. Specific instances, however, are bound to fall in one IRPC 8.3’s many grey areas. For guidance in these situations, attorneys should take advantage of other resources.

IV. UTILIZING RESOURCES FOR MAKING JUDGMENT CALLS

As the sections above demonstrate, knowing whether the duty to report applies to a given situation is not always clear, and requires attorneys to use their professional judgment. This proves difficult, however, for newer attorneys who have not yet acquired the necessary cache of practical experience. For these attorneys, guidance through the duty’s specific application lies in the advice of others.

As an initial caveat, attorneys should use caution when discussing potential misconduct with their peers. This advice cuts against statements in the IRPC’s preamble that expressly encourage attorneys to “discuss particularly difficult issues with their

¹⁶³ Robinson, *supra* note 56, at 48

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

peers” in an effort to reach “correct ethical decisions.”¹⁶⁶ According to Administrator Grogan, however, the ARDC’s position is that a lawyers’ communication of their own misconduct with peers in their firm is not protected by the attorney-client privilege – even if the purpose of the communication is to discuss the issue and seek advice.¹⁶⁷ The practical effect of the ARDC’s stance broadens the application of IRPC 8.3. Attorneys who approach their peers for advice and disclose potential misconduct that either they or the partner they are working with engaged in, may trigger the listening attorneys’ duty to report. Associates should use caution, therefore, when either seeking advice or listening to other young associates seeking advice. The best approach is to alert the inquiring attorney that any improper conduct disclosed may trigger IRPC 8.3, and direct the attorney to the resources discussed below.

In an article published in the Chicago Bar Association Record, John Levin, a member of the publication’s editorial board, discussed available approaches for attorneys seeking advice about complying with the IRPC.¹⁶⁸ First, attorneys can use the Professional Responsibility Committee of the Chicago Bar Association.¹⁶⁹ The CBA uses a clever technique to provide advice without triggering the advisor’s duty to report: Its staff members are not lawyers.¹⁷⁰ When inquiring attorneys call to obtain advice, they communicate only with staff members.¹⁷¹ Since the staff members are not lawyers, Rule 8.3(a) does not apply to them.¹⁷²

¹⁶⁶ IRPC, Preamble. “To reach correct ethical decisions, lawyers must be sensitive to the duties imposed by these rules and, whenever practical, should discuss particularly difficult issues with their peers.”

¹⁶⁷ Gunnarsson, *supra* note 58, at 299.

¹⁶⁸ John Levin, *Legal Ethics: You Got Questions? They Got Answers*, CHI. B. ASS’N REC., Sept. 2004, at 47.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

After communicating with the attorney, the CBA's staff member deletes any identifying personal or firm information and sends the inquiry to the Professional Responsibility Committee.¹⁷³ This Committee then analyzes the request and issues an informal opinion.¹⁷⁴ The entire process, from initial inquiry to receipt of opinion, generally takes about a week.¹⁷⁵

An alternative program is the ARDC Ethics Inquiry Program. This program's goal is to "help lawyers understand their professional obligations and assist the in resolving important issues in their practice."¹⁷⁶ Run by ARDC attorneys and paralegals, the Program allows attorneys to call in and seek assistance resolving ethical dilemmas. This Program avoids triggering IRPC 8.3 by requiring attorneys to present all inquiries in the form of a hypothetical. Also, the attorney's call is not admissible in any subsequent disciplinary proceeding before the ARDC.¹⁷⁷ An advantage to inquiring with the Program is that the attorney generally receives a response within the same day.¹⁷⁸

Finally, attorneys should note that any advice rendered through programs established by either the CBA the ARDC – or any other Bar Organization for that matter – is only advisory. The opinions, and the advice they contain, are not binding on the ARDC or the Illinois Supreme Court.¹⁷⁹ So while these programs may provide newer

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ ARDC Ethics Inquiry Program, <http://www.iardc.org/ethics.html>.

¹⁷⁷ *Id.* (explaining that "neither the fact that an inquiry has been made nor the substance of the inquiry or any response is admissible in any attorney disciplinary proceeding").

¹⁷⁸ *Id.*

¹⁷⁹ Although evidence that the attorney attempted to comply with the IRPC by seeking advice through one of these programs would certainly be looked upon favorably during any subsequent disciplinary procedure.

associates with additional guidance, the attorneys themselves remain responsible for making their own final judgments.¹⁸⁰

CONCLUSION

In almost every jurisdiction, attorneys have an ethical obligation to report the misconduct of their peers. The State of Illinois, however, is unique because of the Illinois Supreme Court's strict application of IRPC 8.3(a). By understanding the history and purpose of the duty to report, educating themselves on the rule's various requirements, taking advantage of available resources, and remembering to apply their own common sense, Illinois attorneys can fulfill their ethical obligation without violating the trust of their employers, their peers, and the public in general.

¹⁸⁰ See ARDC Ethics Inquiry Program, *supra* note 176 (stating that “the caller is responsible for making his or her own final judgment on the ethical issues presented”).