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THE LAWYER'S DUTY TO REPORT ANOTHER LAWYER'S UNETHICAL VIOLATIONS IN THE WAKE OF *HIMMEL*

Ronald D. Rotunda*

I. INTRODUCTION

The ethics of lawyers have been very much in the news in recent years, as several major law firms have settled, for substantial sums, various malpractice claims based on ethical violations. New York City's Rogers & Wells, for example, settled, for \$40 million, a case in which it continued to represent a client after it should have known that the client was perpetrating a fraud.¹ Chicago's Winston & Strawn settled, for approximately \$7.3 million, a lawsuit involving allegedly reckless advice it had given on securities law.² Baltimore's Venable, Baetjer & Howard had to pay \$27 million when it settled a lawsuit involving conflicts of interest.³ These are hardly nuisance settlements.

The lawyers for Ivan Boesky—the prestigious law firm of Fried, Frank, Harris, Shriver & Jacobson (Fried, Frank)—now find themselves as codefendants in an investors lawsuit brought against Boesky. Fried, Frank had prepared the private placement memorandum and had written legal opinions for Boesky. Judge Milton Pollack rejected defendants' motions to dismiss the complaint based on their arguments involving, *inter alia*, the substantiality of the alleged participation, the loss causation of the transactions pleaded, and the losses claimed to have occurred.⁴ Sullivan & Cromwell has been challenged for the fifth time in recent years on the grounds that its conduct in a case may have been unethical; the trial judge, in a precedent-setting decision, approved a tem-

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1. See *After A \$40M Payment, It's Not Over Yet for Rogers & Wells*, Nat'l L.J., Apr. 14, 1986, at 1, col. 1.

2. See *Winston & Strawn to Pay \$7.3M in Pact*, Nat'l L.J., May 18, 1987, at 3, col. 1.

3. See *Venable Agrees to \$27M Accord*, Nat'l L.J., May 25, 1987, at 3, col. 1.

4. *Arden Way Assoc. v. Boesky*, 87 Civ. 1865 (MP) (S.D.N.Y. July 28, 1987).

porary restraining order barring a tender offer because of alleged conflicts of interest involving Sullivan & Cromwell.⁵

Yet malpractice suits and motions for disqualification are not the only way—nor are they supposed to be the primary way—to enforce the minimum ethics of the legal profession. In modern times, state courts have established attorney discipline systems to enforce the rules governing the minimum standards for lawyers.⁶ Thus, the Illinois Supreme Court has established the Attorney Registration and Discipline Commission, often called, after its initial letters, the ARDC. The Illinois Supreme Court has also adopted rules governing lawyers.⁷ Although the legislature has not enacted these rules, they are still law in the same way, for example, that court-promulgated rules of civil procedure are law.

Until almost the beginning of this century there were no codes of ethics for lawyers.⁸ Various nineteenth-century commentators discussed attitudes among lawyers regarding ethics, and some even published their own proposals recommending how lawyers should behave.⁹ But there was no official, written, regulatory code. In fact, throughout the entire last century it was very unusual that a lawyer would ever be disciplined.¹⁰ If lawyers engaged in particularly outrageous conduct before the court, a local judge might impose some sort of discipline, even disbarment, but the judge based such discipline not on any promulgated code but on what the courts referred to as the inherent power of the judiciary to regulate the lawyers practicing before it.¹¹ Lawyers, proclaimed the

5. Cohen, *Sullivan & Cromwell Faces Challenge Over Role in Electroflux Bid for Murray*, Wall St. J., May 16, 1988, at 8, cols. 1-2 (midwest ed.). Jonathan Lerner, a partner with Skadden, Arps, Slate, Meagher & Flom commented: "I'm aware of no other situation in which an alleged conflict by a lawyer has been the basis for an injunction against a tender offer." *Id.* at 8, col. 1.

Subsequently, Skadden, Arps found itself in the middle of an ethics charge involving its tactics on behalf of Coastal Corp. in its takeover battle against Texas Eastern Corp. "The legal tangle, which has raised eyebrows and reddened faces in the closely knit world of takeover attorneys, involves secret court filings that opposing counsel didn't know about [and] admittedly false statements made by attorneys in court . . ." Cohen, *Texas Eastern-Coastal Battle Spurs Questions on Conduct of Skadden*, Wall St. J., Mar. 2, 1989, at B7, cols. 1-2 (midwest ed.).

6. From 1978 to 1982, there has been a 73% increase in sanctions. McPike & Harrison, *The True Story on Lawyer Discipline*, A.B.A. J., Sept. 1984, at 92.

7. ILL. REV. STAT. ch. 110A, art. VIII (1987).

8. Alabama, influenced by the works of Judge Sharswood and David Hoffman, *see infra* note 9, was the first state to publish a Code of Legal Ethics. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1420 (1978).

9. See D. HOFFMAN, *Fifty Resolutions in Regard to Professional Department*, in COURSE OF LEGAL STUDY 752-75 (1836); G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (2d ed. 1860).

10. See, e.g., R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 184-85, 242-48 (1953).

11. E.g., *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824) (Marshall, C.J.) (a court's disciplinary power is "incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession"); *cf.* *Beard v. North Carolina State Bar*, 357 S.E.2d 694 (N.C. 1987) (state supreme court upholds plan requiring each lawyer to pay \$50 each into a client security fund; this opinion extensively discusses the "inherent power" of courts over attorneys).

Needless to say, some of the early discipline actions do not comport with modern notions of due process. Gressman, *Inherent Judicial Power and Disciplinary Due Process*, 18 SETON HALL L. REV. 541, 542-46 (1988); *cf.* *Ex parte Wall*, 107 U.S. 265 (1883); *id.* at 290-318 (Field, J., dissenting).

judges, are "officers of the court."¹²

Not until 1908, at the thirty-first annual meeting of the American Bar Association, did that organization adopt anything resembling a code of ethics. The document was entitled the "Canons of Professional Ethics," and its preamble emphasized that it was not really a code of law but only "a general guide,"¹³ not at all intended to be definitive. The Canons' "enumeration of particular duties should not be construed as a denial of the existence of other equally imperative, though not specifically mentioned" duties.¹⁴

It is fair to say that, while there has not been an extensive conspiracy of silence among lawyers,¹⁵ many lawyers in fact are reluctant to sue their fellow lawyers and, naturally, also disinclined to report them to the disciplinary authorities.¹⁶ Thus, it is interesting that as early as 1908 the American Bar Association supported, in somewhat generic terms, a duty to report. Canon 29 of the Canons of Professional Ethics, the first ABA code, is entitled "Upholding the Honor of the Profession." Canon 29 provided that "lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client."¹⁷

It is easier for the organized bar to agree that there is such a duty than to enforce it. Over sixty years after the ABA promulgated its Canons, an ABA special committee, chaired by former United States Supreme Court Justice Tom Clark, concluded that lawyers' and judges' reluctance to report attorney misconduct was a major problem with attorney discipline.¹⁸ Nonetheless, the ABA, at the turn of the century, set the stage by endorsing an attorney's obligation to report professional misconduct.

The general public and the average lawyer probably did not really expect this primitive code of ethics to be the basis for statutory rules

12. Gaethe, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989).

13. CANONS OF PROFESSIONAL ETHICS Preamble (1908), reprinted in T. MORGAN & R. ROUNTON, *SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY* 412 (1989).

14. *Id.*

15. An attorney's belief in a "code of silence" that would prevent him from answering questions regarding his knowledge of another attorney's misconduct is evidence that he is not "fit to practice law." *In re Anglin*, 122 Ill. 2d 531, 539, 524 N.E.2d 550, 554 (1988).

16. Burbank & Duboff, *Ethics and the Legal Professional: A Survey of Boston Lawyers*, 9 SUFFOLK U.L. REV. 66, 100-01 (1974); Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 207; Hill, *The Bar at Bay: Malpractice Woes Hit Attorneys as Lawsuits Against Them Increase*, Wall St. J., Feb. 3, 1976, at 1, 26, cols. 1-2 (eastern ed.).

17. CANONS OF PROFESSIONAL ETHICS Canon 29 (1908), reprinted in T. MORGAN & R. ROUNTON, *supra* note 13, at 420; see also *id.* at Canon 28 ("A duty to the public and to the profession devolves upon every member of the Bar having knowledge of [improper solicitation] to immediately inform thereof, to the end that the offender may be disbarred.")

18. ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT* 167 (1970); see also *supra* note 16 and accompanying text.

imposing legal discipline on lawyers.¹⁹ Most of the sections are written in rather quaint and vague terms,²⁰ homilies of an earlier era.²¹ Such nebulous language is not like statutory language at all.²² Nonetheless, after the Canons were published, the courts, when confronted with a lawyer's conduct that they viewed as improper, would often cite these ABA Canons (or local bar association canons, derived from the ABA Canons) as evidence of lawyers' ethical obligations.²³ Although the ABA Canons had not been enacted into law by court rule or legislative action, judges perhaps believed that it would be prudent to refer to some authority for their actions other than merely the court's inherent power. Often that other authority was the American Bar Association's Canons of Professional Ethics.

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. It was written in much more statutory terms, with black letter requirements called "Disciplinary Rules" (DRs). This code made very clear that its Disciplinary Rules set a minimum standard below which a lawyer could not fall.²⁴ Strong evidence that the American Bar Association clearly intended its new code was to be not merely self-edifying but binding was its accompanying statement: the Code was "adopted" on August 12, 1969 by the ABA House of Delegates "to become effective for American Bar Association members on January 1, 1970."²⁵ Years later, in an atmosphere where the Department of Justice had brought antitrust charges against the ABA,²⁶ the ABA changed the title of the Code of Professional Responsibility to the *Model Code of Professional Responsibility*.²⁷ No longer did the ABA speak of this Model

19. C. WOLFRAM, *MODERN LEGAL ETHICS* 54 (1986).

20. The Canons were based on the model of a solo practitioner usually engaging in litigation, that is, in litigation that is straightforward, not complex multiparty litigation. Its successor, the *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* (1970), shares this same mind-set. See G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 7, 16-18 (1978).

21. Stone, *The Public Influence of the Bar*, 48 *HARV. L. REV.* 1, 10 (1934).

22. E.g., *CANONS OF PROFESSIONAL ETHICS* Canon 2 (1908) ("The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.").

23. E.g., *Jedwabny v. Philadelphia Transp. Co.*, 390 Pa. 231, 235, 135 A.2d 252, 254 (1957) (citing ABA's *CANONS OF PROFESSIONAL RESPONSIBILITY* Canon 6 (1937)), *cert. denied*, 355 U.S. 966 (1958).

24. E.g., *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* DR 1-102(A)(1) (1980); see also *id.* Preliminary Statement ("The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.").

25. This statement is reprinted in V. COUNTRYMAN, T. FINMAN, & T. SCHNEYER, *THE LAWYER IN MODERN SOCIETY* 889 n.* (2d ed. 1976).

26. See *Justice Department Dismisses Antitrust Suit Against the ABA*, 64 *A.B.A. J.* 1538 (1978) where the Justice Department memorandum in support of its motion to dismiss its antitrust suit against the ABA without prejudice because of change in circumstances and the increase in competition is reprinted. The Government filed its suit on June 25, 1976, and dismissed it on August 30, 1978.

27. See ABA Comm. on Ethics and Professional Responsibility, *Informal Op.* 1420 (1978). The title of this informal opinion is: "Purpose and Intended Effect of the American Bar Association Code of Professional Responsibility and the Opinions of the Ethics Committee." The ABA ethics

Code as binding on its members.

This new ABA code set out not only discipline standards, below which a lawyer may not go, but also aspirational standards expressed in what were called "Ethical Considerations." The very first version of the ABA Model Code—it was amended periodically until 1981 and, in 1983, replaced by the new ABA Model Rules of Professional Conduct²⁸—provided a whistle-blowing role for lawyers similar to that found in the earlier Canons of Professional Responsibility. In addition, the Model Code made clear that this duty to report is not merely an aspirational one but one of discipline. Disciplinary Rule 1-103(A) provides, "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority in power to investigate or act upon such violation."

The cross reference to "DR 1-102" indicates the breadth of the reporting obligation. Disciplinary Rule 1-102 is entitled "Misconduct" and it provides a lawyer shall not "[v]iolate a disciplinary rule," or "circumvent a disciplinary rule through actions of another," or engage in "illegal conduct involving moral turpitude," or any conduct "involving dishonesty, fraud, deceit, or misrepresentation."²⁹ In addition, Disciplinary Rule 1-102 has two other broad-brushed prohibitions: a lawyer shall not engage in conduct "prejudicial to the administration of justice"³⁰ or "any other conduct that adversely reflects on his fitness to practice law."³¹

Illinois, like almost all other states, has followed the lead of the ABA Model Code and imposed a whistle-blowing rule for its lawyers. However, the Illinois cross-references are more specific and more carefully drafted than ABA Disciplinary Rule 1-103 from which the Illinois rule is derived. Illinois Rule 1-103(a) provides that a lawyer "possessing unprivileged knowledge of a violation of Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority in power to inves-

committee published this informal opinion on June 5, 1978, shortly before the Department of Justice dismissed its antitrust case against the ABA. See *Justice Department Dismisses Antitrust Suit Against the ABA*, *supra* note 26.

The Informal Opinion took pains to emphasize:

Other than serving as a model or derivative source, the American Bar Association Code of Professional Responsibility plays no part in the disciplinary proceeding, except as a guide for consideration in the adoption of local applicable rules for the regulation of conduct on the part of legal practitioners. . . .

At one time the American Bar Association membership application form contained a statement to the effect that the member would abide by the American Bar Association canons of ethics and later by the American Bar Association Code of Professional Responsibility. . . .

[T]his statement on the application form ceased to have any meaning long before it was belatedly removed by the Board of Governors in 1976.

28. The ABA House of Delegates adopted the Model Rules of Professional Conduct on August 2, 1983. Because they were "model" rules, they had no effective date. About half of the states have adopted the new Model Rules. *Law. Man. on Prof. Conduct (ABA/BNA) 01:3-4* (Dec. 21, 1988).

29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(1)-(4) (1980).

30. *Id.* DR 1-102 (A)(5).

31. *Id.* DR 1-102(A)(6).

tigate or act upon such violation."³² Subsection (a)(3) of Illinois Rule 1-102, in turn, states that a lawyer should not engage in illegal conduct involving moral turpitude, and subsection (a)(4) says that the lawyer should not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The Illinois rule regarding whistle blowing is not unusual. What is unusual is its enforcement. While there are lawyers who take seriously their ethical obligations to report the violations of other lawyers, it is unusual to find the bar authorities enforcing this rule. If we look through all of the courts of this land, it is virtually unheard of to find a case where a lawyer is disciplined merely for refusing to report another lawyer.³³ We can find cases where lawyers are disciplined under the state rule corresponding to ABA Disciplinary Rule 1-103(A), but a close reading of these cases shows that the lawyer also did something else wrong. In those cases where the lawyer was disciplined for failing to report another lawyer, the failure to report was merely one of several discipline violations, with the bar authorities or the court throwing in the failure to report as one violation among many.³⁴

That is, until *Himmel*.³⁵

II. THE *HIMMEL* CASE

The *Himmel* case is very significant. It is the first case in which a lawyer is charged with nothing *except* failing to report another lawyer's misconduct, under circumstances in which the client specifically told her lawyer not to report the other lawyer's misconduct. Attorneys have greeted *Himmel* with surprise.³⁶ The Illinois Supreme Court did not treat Mr. Himmel's violation lightly; it disciplined this solo practitioner by suspending him for one year.

Let us briefly look at the facts of *Himmel*. The beginnings of the case stretch back more than a decade. In October 1978, after one Tammy Forsberg had been injured in a motorcycle accident, she retained an attorney named John R. Casey to represent her. Casey worked out a settlement of \$35,000, one-third to go to him and two-thirds to Ms. Forsberg. However, when Casey received the \$35,000 settlement check, he converted the funds.

After several unsuccessful attempts to collect her share of over

32. ILL. REV. STAT. ch. 110A, Rule 1-103(a) (1987) (emphasis added).

33. R. ROTUNDA, PROFESSIONAL RESPONSIBILITY 31 (2d ed. 1988).

34. Attorney Grievance Comm'n v. Kahn, 290 Md. 654, 431 A.2d 1336 (1981) (attorney disbarred for failing to report and aiding unethical conduct of his law firm); Matter of Bonafield, 75 N.J. 490, 383 A.2d 1143 (1978) (attorney disciplined for failing to report another and for aiding another attorney's unethical conduct).

35. *In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (1988).

36. Harlan, *Illinois Decision Muddles Attorney-Client Privilege*, Wall St. J., Feb. 3, 1989, at B1, cols. 5-6 (midwest ed.); Middleton, *Illinois Bar Is Jarred by "Snitch" Case*, Nat'l L.J., Dec. 19, 1988, at 3, 23.

\$23,000, Ms. Forsberg hired James H. Himmel to represent her. He offered not to collect any fees until she had recovered her full \$23,233.34; he would then collect only one-third of any funds recovered in excess of that amount. After Himmel entered the case, Casey agreed to pay Forsberg \$75,000 in settlement of all claims she might have against him including, presumably, any claims for punitive damages.³⁷ Under the settlement agreement, Ms. Forsberg agreed not to initiate any criminal, civil, or disciplinary action against Casey.³⁸ Casey, it seems, did not honor this agreement, and so Himmel, on behalf of his client, sued Casey and won a judgment of \$100,000. Himmel was never able to collect all of this award, but because of Himmel's efforts, Ms. Forsberg eventually collected a total of \$15,400 from Casey. Himmel therefore received no fee for his efforts because, pursuant to his agreement with Ms. Forsberg, the amount was less than the full amount owed her.

Neither before nor after the \$100,000 judgment against Casey did Himmel report Casey to the disciplinary authorities, because Forsberg had specifically instructed him not to take any other action. She said she simply wanted her money back. She may have wanted to do nothing that might be construed as desiring revenge. Also, Ms. Forsberg may have been concerned that by having her attorney report Casey she would raise the stakes in their dispute and make it that much more difficult to collect any money from Casey.³⁹

On January 22, 1986, a few months after Ms. Forsberg's judgment against Casey, the ARDC began formal disciplinary proceedings against Himmel, for failing to report Casey.

Apparently Ms. Forsberg, prior to retaining Himmel, had contacted the ARDC. Whether she actually reported Casey to the ARDC was a matter of some dispute. The Review Board (the intermediate appellate authority for the ARDC), over the objections of the ARDC, specifically found that Ms. Forsberg had complained to the ARDC about Casey prior to hiring Himmel. Presumably, she had turned to the lawyers in the ARDC in her efforts to secure their aid in recovering from Casey the money that he had converted from her. Following that attempt, she retained Himmel. The Review Board specifically found that Ms. Forsberg had contacted the ARDC prior to hiring Himmel and that therefore the

37. This agreement occurred in April 1983. 125 Ill. 2d at 535-36, 533 N.E.2d at 791.

38. Perhaps a portion of the \$75,000 settlement represented "hush money," i.e., an amount paid in consideration of not initiating any criminal or discipline action against Casey. See *infra* note 44. Himmel, however, probably thought of the extra amount as akin to treble damages. Telephone conversation with ARDC spokesperson (Mar. 31, 1989). Ms. Forsberg was on a motorcycle that was struck by a Corvette that went through a stop sign. Ms. Forsberg suffered a concussion, was in the hospital for about a month, was in a cast for many more months, and had \$20,000 to \$25,000 in medical bills alone. Transcript of Disciplinary Proceeding at 12-17, *In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (1988) (No. 86, ch. 24). This evidence suggests that Casey probably settled Ms. Forsberg's personal injury claim too cheaply.

39. Cf. *Yokozeki v. State Bar*, 11 Cal. 3d 436, 449, 521 P.2d 858, 866 ("It is not unreasonable for a disgruntled client to attempt to resolve his differences with an attorney through a civil action before filing a complaint with the State Bar."), *cert. denied*, 419 U.S. 900 (1974).

ARDC "did have knowledge of the alleged misconduct [by Casey]."⁴⁰

The ARDC disputed the finding of the Review Board that it had actually learned about Casey from Ms. Forsberg's initial complaint. The Illinois Supreme Court did not disturb this finding and assumed it to be correct. In fact, the court found this factual issue irrelevant to its holding. "The question is," the court said, "whether or not respondent violated the Code, not whether Forsberg informed the [Attorney Registration and Disciplinary] Commission of Casey's misconduct."⁴¹

The ARDC apparently learned of Casey because of various other complaints against him brought by additional clients also harmed by Casey's violations of his ethical obligations. During April 1985, the ARDC administrator petitioned to have Casey suspended because of his "conversion of client funds and his conduct involving moral turpitude in matters *unrelated* to Forsberg's claim."⁴² On November 5, 1985, Casey was disbarred on consent.⁴³ On January 22, 1986, the ARDC turned its attention to Mr. Himmel and filed a complaint before the Hearing Board.

The Hearing Board concluded that Himmel had received "unprivileged information" about Casey's violations and therefore should have reported his actions to the disciplinary authorities. However, because Himmel had practiced law for eleven years, had no prior record of any complaints, and did not even receive a fee for recovering what money he could for Ms. Forsberg, the Hearing Board (the initial disciplinary authority of the ARDC) said that it recommended only a private reprimand.

The administrator of the ARDC appealed that decision to the Review Board. On this level the ARDC was even less successful, for the Review Board recommended that the complaint be dismissed. First, the Review Board concluded that the disciplinary authorities already had knowledge of Casey's problem, from Ms. Forsberg herself. Second, it noted that Ms. Forsberg had specifically instructed Himmel not to report Casey to the disciplinary authorities or to anybody else.

Then, the administrator of the ARDC filed before the Illinois Supreme Court a petition for leave to file exceptions. He argued, among other things, that there was misconduct in failing to inform the disciplinary commission of Casey's conversion of Ms. Forsberg's funds and that this conduct warranted at least a censure under the law. The Illinois Supreme Court responded by imposing a much more severe sanction: it suspended Himmel for one year.⁴⁴

40. 125 Ill. 2d at 537, 533 N.E.2d at 792. An independent review of the transcript indicates that the Review Board finding that Ms. Forsberg had effectively reported Casey to the ARDC is against the weight of the evidence.

41. *Id.* at 538, 533 N.E.2d at 792.

42. *Id.* at 536, 533 N.E.2d at 791 (emphasis added).

43. *Id.*

44. When the Illinois Supreme Court turned to what it called the "quantum of discipline" to be imposed on Himmel, the court expressed a great deal of concern that Himmel drafted a settlement agreement between his client and Casey in April 1983, and this settlement provided that "For-

A. *The Quantum of Evidence Needed*

On its face, the whistle-blowing rule in canon 1 of the Illinois Code of Professional Responsibility applies to all disciplinable violations within its terms, whether they are, in the reporting lawyer's view, flagrant and substantial, or minor and technical. However, an element of judgment remains because lawyers need not (though they may) report suspected violations that are not clear violations of the disciplinary rules. In this case, allegations regarding Casey's conduct, if true, constituted a clear and serious violation of the relevant disciplinary rules. Indeed, in this case, the facts regarding Casey's conduct were not in dispute. The Illinois Supreme Court does not really discuss this issue in any detail, but the point seems clear enough.

What if the evidence regarding Casey's conduct were more ambiguous? The Illinois Supreme Court does not directly analyze this question, but its discussion supports the view that the duty to report is a function of the nature of the offense (for example, conduct involving dishonesty) and of the quantum of evidence of which the lawyer is aware. The fact that the lawyer who is being reported may deny the charge against him does not relieve the reporting lawyer of the obligation to blow the whistle. There was eventually a civil judgment against Casey, but Casey apparently did not simply admit guilt and turn over the money when Himmel presented him with Ms. Forsberg's claim. Recall that even the Review Board referred to Casey's "alleged misconduct."⁴⁵

Typically, the reporting rule does not require that the quantum of evidence of which the lawyer is aware be beyond dispute. After all, the

sberg agreed not to initiate any *criminal*, civil, or attorney disciplinary action against Casey." *Id.* (emphasis added). The court stated at the end of its opinion: "We are particularly disturbed by the fact that respondent chose to draft a settlement agreement with Casey rather than report his misconduct. As the Administrator has stated, by this conduct, both respondent and his client ran afoul of the Criminal Code's prohibition against compounding a crime . . ." *Id.* at 545, 533 N.E.2d at 796. The court then quoted from ILL. REV. STAT. ch. 38, § 32-1 (1987). The 1961 committee comments to this section state: "There is no intent to prohibit a victim of theft or other property offense taking steps to recover his property, so long as such action does not involve, as consideration for such recovery, a promise not to prosecute or aid in the prosecution." ILL. ANN. STAT. ch. 38, § 32-1 committee comment (Smith-Hurd 1977).

In contrast to the Illinois law, the Model Penal Code § 223.4 (Proposed Official Draft 1962) ("Theft by Extortion") provides that one:

is guilty of theft if he obtains property of another by threatening to . . . accuse anyone of a criminal offense; or . . . cause an official to take or withhold action However, it is an affirmative defense that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done

Note that Casey breached the April 1983 settlement agreement. Consequently, Mr. Himmel did not continue to fail to report Casey because of that agreement. The Illinois Supreme Court made clear that its reliance on the Illinois Criminal Code was only to determine the *degree* of the sanction against Himmel, not the decision whether there should be any sanction. *Himmel*, 125 Ill. 2d at 545, 533 N.E.2d at 796.

Oddly enough, the Illinois court never cited Illinois Rule 7-105, providing that: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter."

45. See *supra* text accompanying note 40.

reporting rule refers to "knowledge" of a violation of a disciplinary rule. It does not require "certainty." The lawyer's knowledge may not go unchallenged. If "knowledge" were interpreted in its existential sense rather than its practical sense, the reporting requirement would be a nullity.⁴⁶

On the other hand, there is no mandatory obligation to report mere rumor or suspicion. The ABA Model Code does not specifically define "knowledge." But, by analogy, the Model Rules define "[k]nowingly," "[k]nown," or "[k]nows" as "actual knowledge of the fact in question"; "[r]easonable belief" or "[r]easonably believes" means "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."⁴⁷ The Model Rules explain that a "person's knowledge may be inferred from circumstances."⁴⁸

In other words, at some point the lawyer's investigation and study of the client's charges will convince her that the allegations involving the other lawyer's misconduct are serious and substantial; that these allegations pertain to illegal conduct involving moral turpitude or conduct involving dishonesty, fraud, deceit, or misrepresentation within the meaning of Illinois Rules 1-102 and 1-103; and that the evidence of such conduct is substantial enough that the lawyer has "knowledge." Within a reasonable time thereafter, the lawyer must report this knowledge *if* it is unprivileged. The Illinois Supreme Court did not focus on this interpretation of the rules but rather centered its discussion on the main question before it: did Himmel have "unprivileged" knowledge of a violation?

B. *The Definition of Unprivileged Information*

The most critical issue before the Illinois Supreme Court was whether Himmel's knowledge of Casey's violation of Illinois Rule 1-102(a)(3) or (4) was "unprivileged."

The Illinois Supreme Court explicitly asserts that, in interpreting its own reporting rule, it finds "instructive" the ethics opinions of the American Bar Association, because the Illinois rules "essentially track the language" of the ABA's Model Code.⁴⁹ In the course of its opinion, the court emphasized this point by citing such an opinion.⁵⁰ In this respect the Illinois Supreme Court has done what many other state and federal courts have done in the past; there is nothing unusual about referring to the work product of the ABA Ethics Committee. What is unusual is that *Himmel* never referred to how the American Bar Association interprets

46. See Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 672 (1981); Lynch, *The Lawyer As Informer*, 1986 DUKE L.J. 491.

47. MODEL RULES OF PROFESSIONAL CONDUCT Terminology, paras. [5], [8] (1983).

48. *Id.* at para. [5].

49. 125 Ill. 2d at 540, 533 N.E.2d at 793.

50. *Id.* at 540-41, 533 N.E.2d at 793 (citing and discussing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1210 (1972)).

the term "privileged information." In particular, the *Himmel* court never even cited ABA Formal Opinion 341, interpreting "privileged" to mean "those confidences and secrets that are required to be preserved by DR 4-101."⁵¹ Nor did the court cite the Opinion of the Committee on Professional Ethics of the Illinois State Bar Association holding that when DR 1-103 requires a lawyer to report "unprivileged knowledge" of another lawyer's misconduct, "unprivileged" means information that is not a confidence or secret under Canon 4.⁵²

The Illinois court, in determining what "privileged" meant, assumed that "privilege" referred only to the law of evidence. The court cited and relied on Professor Wigmore's classic definition of when the privilege is lost—the evidentiary privilege was never a favorite of Wigmore's, and he always interpreted it narrowly—and concluded that there was no attorney-client privilege in the evidentiary sense.

This conclusion that the evidentiary privilege was lost, given the facts of *Himmel*, is within the scope of how that privilege has been interpreted and applied by some courts. The Illinois Supreme Court noted that at some times Forsberg discussed her problems with Himmel while Forsberg's mother and her fiancée were present. Because the mother and fiancée were not agents of Attorney Himmel, under the Wigmore analysis the information communicated is not privileged: Ms. Forsberg was making statements to her lawyer in the presence of third parties not necessary for her communication, and their presence meant that this information was no longer communicated "in confidence."⁵³ The court also pointed out that, with Ms. Forsberg's consent, Himmel discussed Casey's conversion of Forsberg's funds with Casey's insurance company, with the insurance company's lawyer, and with Casey himself. The court could have also added that there could be no evidentiary privilege regarding information communicated in the civil complaint against Casey once that complaint, through a court filing, had been made public.

Himmel, of course, responded to this argument by explaining that his client specifically had instructed him not to tell the disciplinary authorities. The court's retort to this argument was rather curt: "A lawyer

51. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975), reprinted in T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 239, 240 (4th ed. 1987). See generally Rotunda, *When the Client Lies: Unhelpful Guides from the ABA*, 1 CORP. L. REV. 34, 39 (1978); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 837 (1977).

ABA Formal Opinion 341 interprets "privileged" as used in MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1980). However, the reasoning of Formal Opinion 341 is not limited to the term "privileged" as used only in Disciplinary Rule 7-102. Indeed, Formal Opinion 341 specifically cites the obligation in MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1980) to reveal knowledge of misconduct by a judge or lawyer. Formal Opinion 341 concluded: "The balancing of the lawyer's duty to preserve confidences and to reveal frauds is best made by interpreting the phrase 'privileged communication' in the 1974 amendment to DR 7-102(B) as referring to those confidences and secrets that are required to be preserved by DR 4-101."

52. ISBA Comm. on Professional Ethics, Opinion 365 (June 26, 1971), reprinted in 60 ILL. B.J. 153 (1971).

53. 125 Ill. 2d at 541-43, 533 N.E.2d at 794.

may not choose to circumvent the rules by simply asserting that his client asked him to do so."⁵⁴ The court's argument assumes the point in dispute. Is the client's instruction to the lawyer not to report Casey to the disciplinary authorities a request that the rules of ethics require the lawyer to respect?

For the answer to this question, the court should have discussed its own canon 4 in the Illinois Code of Professional Responsibility.⁵⁵ This canon, like canon 1 of the Illinois code, is derived from the ABA Model Code's Canon 4. Illinois Rule 4-101(a) defines the term "confidence" and the term "secret." "Confidence" is the attorney-client privilege, as recognized under applicable state law, that is, the law of evidence. The evidentiary privilege varies from one jurisdiction to another,⁵⁶ but the ethical privilege—the definition of "secret"—is uniform in all states, like Illinois, that have adopted the ABA's Disciplinary Rule 4-101(A). The Illinois Code of Professional Responsibility and the ABA Model Code of Professional Responsibility both define "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."⁵⁷

In this case the client specifically directed the lawyer not to report Casey. The client had requested the lawyer to keep secret this information, whether or not it was protected by the attorney-client privilege. Ms. Forsberg's instruction to her attorney is not surprising. She may have concluded that if she or her lawyer made trouble for Casey by reporting him to the ARDC, then Casey might lose his interest in settling and use up financial resources in defending the ARDC that could have been used to reimburse Forsberg. If the client instructs the lawyer not to report something to the ARDC for whatever her reasons—whether she is embarrassed by the fact that her former lawyer cheated her, whether she does not want to involve her former lawyer in any more trouble than necessary to get her money back, or whether she does not want to become involved in extensive, time-consuming, and (given her point of view) possibly fruitless disciplinary proceedings—Mr. Himmel under canon 4 of the Illinois Code of Professional Responsibility is supposed to hold her "secret" inviolate.⁵⁸

54. *Id.* at 539, 533 N.E.2d at 793.

55. ILL. REV. STAT. ch. 110A, canon 4 (1987).

56. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment [19] (1983).

57. ILL. REV. STAT. ch. 110A, Rule 4-101(a) (1987); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980).

58. ILL. REV. STAT. ch. 110A, Rule 4-101(d)(2) (1987) provides that an attorney "may" reveal a confidence or secret "when permitted under disciplinary rules or required by law or court order." If that exception were applicable, it would not require the lawyer to reveal, only permit him to reveal. More significantly, ILL. REV. STAT. ch. 110A, Rule 1-103(a) (1987) does not "permit" the lawyer to reveal; by its own terms it excludes from its coverage "privileged" knowledge. In the *Himmel* case, of course, the ARDC could refer to no court order or other law—that is, law other than Illinois Disciplinary Rule 1-103(A)—that required Himmel to violate his client's instructions.

Prior to filing the complaint against Casey, Himmel's knowledge clearly was a "secret" as defined by Illinois Rule 4-101(a). After Himmel filed the civil complaint in February 1985, the question is much less clear, but it is possible that even then the information contained in that complaint may not have lost its "secret" status. Once Ms. Forsberg's case is filed in a court, her complaint against Casey is "public" in the sense that someone could uncover it and read about it. But even after the complaint is filed, information about it might still be "secret" in the sense that the information has not become "generally known."⁵⁹ Recall that the ARDC denied that Ms. Forsberg had reported Casey to it. When the ARDC did proceed against Casey in April 1985, and when Casey was subsequently disbarred on consent, it was for matters "unrelated to Forsberg's claim."⁶⁰ The ARDC apparently did not argue that the Forsberg complaint and civil action against Casey had become "generally known."

In a busy court system where many cases are filed, Ms. Forsberg's judicial action is not necessarily public in the sense that it is front page news (or even that it is news buried on page twenty-four). Her case is simply one of many cases thrown into an anonymous judicial system. Whether it is a federal or state case, even if it reaches verdict, it may (like most cases) never reach an appeal and never be immortalized in a published decision. Even though the information is "public" in the sense that it is not covered by the attorney-client privilege, it is "secret" in the sense that knowledge of it is not widely available. The case may remain obscure and uncelebrated, not "generally known": that is how the American Bar Association uses the word "secret." It states that the "ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."⁶¹

Himmel is significant not only because it disciplines a lawyer solely for the failure to report (there were no other disciplinary charges filed against Mr. Himmel) but primarily because it interprets the word "privileged" in Illinois Rule 1-103(a) very narrowly and differently than the way the ABA uses the very same term in the Model Code.⁶² Illinois interprets "privileged" in its ethics code to exclude the ethical privilege. It is now clear under Illinois law that a lawyer who has knowledge of another lawyer's disciplinary violations must report those violations unless that knowledge is protected by the very narrow attorney-client evidentiary privilege. Attorneys should now realize that if they fail their reporting obligation under *Himmel* they have no protection based on the claim that they were obeying the "secret" requirement of Illinois Rule 4-101(a).

59. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment [3] (1983).

60. 125 Ill. 2d at 536, 533 N.E.2d at 791.

61. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1980); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment [5] (1983).

62. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975).

Himmel raises many supplementary questions that future courts must sort out. The *Himmel* opinion says that Mr. Himmel had unprivileged knowledge of Casey's conversions of funds. Of course, Casey also had that knowledge. Must he report himself? The answer is not entirely clear, but there is evidence that this canon may require a lawyer to report himself. Some courts suggest that conclusion.⁶³ In addition, the very language of the relevant rule, which provides that a lawyer possessing unprivileged knowledge of a violation of certain disciplinary rules must report that conduct, invites that conclusion. The rule does not say a lawyer possessing unprivileged knowledge of *another* lawyer's violation must report. The rule could easily have been drafted to make that point, but it was not.⁶⁴

In future cases we might find that when a lawyer is alleged to have violated a disciplinary rule, there might be another and extra punishment meted out if he did not turn himself in. Of course, an attorney who could plead the fifth amendment right not to incriminate himself could not be within the reporting requirement of Illinois Rule 1-103(a). Not only does the fifth amendment override a contrary disciplinary rule, but Illinois Rule 1-103(a), by its own terms, exempts from its application "unprivileged" knowledge.⁶⁵ Knowledge protected by the privilege against self-incrimination would, therefore, not be protected under the reporting rule. Casey, who stole his clients' funds, would have a fifth amendment right not to incriminate himself. Ironically, Mr. Himmel is suspended from the practice of law for refusing to report Casey, though Casey has a constitutional right not to report himself.

Leaving aside Mr. Casey, what about the insurance company lawyer and Casey's lawyer, if Mr. Casey had retained separate counsel? Should not these lawyers—if they were members of the Illinois bar—have an equal obligation to report? Casey's lawyer is protected by the evidentiary privilege to the extent that he received confidential information from his client, Mr. Casey. However, recall that Himmel eventually had to file suit against Casey. The information that Himmel filed in that complaint is not privileged under the law of evidence as to Casey. Nor is anything in the defendant's answer privileged under the law of evidence. Because the insurance company lawyer represents either Mr. Casey or the insur-

63. Cf. *Tallon v. Committee on Professional Standards*, 86 A.D.2d 897, 898, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him."). But see 2 R. MALLIN & J. SMITH, *LEGAL MALPRACTICE* § 19.5, at 162 (3d ed. 1989) ("Notwithstanding moral considerations," there is "no civil or ethical standard [that] seems to compel" an attorney to disclose his legal errors to the client.). Of course, "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-2 (1980); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983).

64. In contrast, MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1983) is drafted differently. It requires a lawyer to report relevant misconduct of "another lawyer."

65. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1279 (1973); see also Comment, *The Privilege Against Self-Incrimination in Bar Disciplinary Proceedings: Whatever Happened to Spevak?*, 23 VILL. L. REV. 127 (1978).

ance company (but not Himmel's client, Ms. Forsberg), whatever Mr. Himmel told the insurance company lawyer in negotiations is also not protected in any way by the attorney-client evidentiary privilege. The insurance company lawyer then should also have the obligation to report the charges involving Casey to the disciplinary authorities. Under *Himmel*, when insurance company lawyers acquire "knowledge" of a possible disciplinary violation and this knowledge is not privileged under the law of evidence, their obligation should be to report it.

And then, of course, there is the judge, who presided at the trial of Forsberg versus Casey. Because this case was brought before a court, a judge had to hear the allegations regarding Mr. Casey. The judge is, most likely, also a member of the Illinois bar and therefore should be subject to Illinois Rule 1-103(a). In such a case, the judge should also report Mr. Casey.⁶⁶ Whether it is a bench trial and whether the jury issues a verdict in favor of the plaintiff,⁶⁷ the judge is made aware that he or she does have knowledge of claims against a lawyer. These claims are serious indeed, for they involve questions of Casey's honesty and his willingness to convert funds. The court did not discuss these issues regarding a judge's duty to report. But one would think that in the future, Illinois judges who are members of the Illinois bar should have an obligation to report to the ARDC similar to the obligation imposed on Mr. Himmel.

III. WHAT HAPPENS NEXT

Himmel was a dramatic surprise to the bar.⁶⁸ The supreme court, having made its rule, has given itself a lot to sort out. If lawyers are to be suspended for the practice of law, the court should offer clearer guidelines describing, for example: (1) to what extent does the reporting rule apply to a lawyer who is asked to represent another lawyer accused of offenses like fraud or conversion, (2) how soon after the lawyer first learns of another lawyer's misconduct must the lawyer file the mandated report, (3) to what extent does the lawyer's duty of zealous representation of the client affect the lawyer's duty to report, especially in cases where the reporting might hurt the client's cause of action, and (4) how much knowledge must the lawyer acquire before the mandatory duty to report is created. These are serious and important issues, and the Illinois Supreme Court should discuss them in detail. Preferably, the court will proceed by carefully drafted rules; attorneys who have their livelihood on the line deserve fair warning rather than after the fact rule making by case law.

66. Since January 1, 1987, an Illinois state judge also has a reporting obligation under ILL. SUP. CT. R. 63, Canon 3B(3).

67. The jury could render a verdict against the plaintiff on grounds, such as statute of limitations, that do not dispute that the lawyer engaged in conversion.

68. E.g., Middleton, *supra* note 36.

In the meantime, whatever criticisms the decision might draw, one important fact is that the court's definition of "privileged communication" is narrow and clear. After *Himmel*, we should see a lot more reporting of lawyers. In fact, the preliminary empirical evidence already suggests that the number of cases in which lawyers report other lawyers has gone up.⁶⁹ This state of affairs should not be surprising for two reasons. First, most lawyers do obey the law. The good apples still outnumber the bad apples; so if the law says that lawyers must report (even if the client instructs them not to report) and the information is not protected by the evidentiary privilege, then lawyers will report. Second, many lawyers who do come across truly serious misconduct by other lawyers want to report to the disciplinary authorities. They are normally reluctant, on mere suspicion or slight infractions, to raise their fingers and accuse their fellow lawyers, but when the action is serious enough and the evidence is convincing, the empirical data indicates that lawyers desire to bring corrupt members of the bar to the attention of the disciplinary authorities.⁷⁰ A rule requiring lawyers to report serves to reduce the internal debate between one's desire to weed out the corrupt element from the bar and the concern that one must not snitch, squeal, or tattle on a colleague. All of these synonyms for "disclose" have pejorative connotations; consequently, a clear duty of mandatory reporting serves to help reduce this constant pressure not to report, a pressure reflected in our use of language.⁷¹

However, neither we nor the Illinois Supreme Court should naively think that the *Himmel* decision, by itself, will make any dramatic difference in lawyer discipline, because the number of lawyers who report is not the only bottleneck. The procedures and practices under which the Attorney Registration and Discipline Commission operates are an equally important bottleneck. If *Himmel* had reported Casey, either before or after *Himmel* had filed suit against Casey for conversion, there is no assurance that the ARDC would have proceeded against Casey with any greater dispatch. The main problem is the practice of abatement.

Assume for the moment that *Himmel* had reported to the ARDC the complaints of his client, Ms. Forsberg. Assume, further, that *Himmel* had reported Casey *before* *Himmel* filed the civil conversion suit against Casey on behalf of Ms. Forsberg. I know of cases where lawyers have done that, and the response they receive is not too encouraging. The lawyer who is the subject of the report (or the lawyer whom that lawyer has retained) may immediately retaliate by claiming that the first

69. Gross, *Legal Ethics for the Future: Time to Clean Up Our Act?*, 77 ILL. B.J. 196, 198 n.26 (1988); Middleton, *supra* note 36, at 3, col. 3.

70. See Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509, 515-16 (1978).

71. See generally R. ROTUNDA, *THE POLITICS OF LANGUAGE passim* (1986).

lawyer (the reporting lawyer) is "abusing" the ARDC procedures to apply "improper pressure" on the allegedly wayward attorney.

The notion that the ARDC would apply improper pressure on the wayward attorney is somewhat less than compelling. Nonetheless, it often does seem to muddy the waters when the lawyer who is the subject of the report retaliates against the reporting lawyer and claims that the reporting lawyer seeks to profit from ARDC action. With the two lawyers raising charges against each other, we should not be surprised that the disciplinary authorities wait until after the original underlying lawsuit is filed; once suit is filed, the disciplinary authorities then wait until the results of that suit are final.

Let us assume, alternatively, that Mr. Himmel reported Casey *after* Himmel had filed a lawsuit against Casey for conversion of Ms. Forsberg's assets. What would the ARDC have done? Recall the *Himmel* court noted that "[p]erhaps some members of the public would have been spared from Casey's misconduct had respondent reported the information as soon as he knew of Casey's conversion of client funds."⁷² However, it is quite reasonable to assume that nothing different would have happened. If Mr. Himmel had candidly reported Casey to the ARDC, and disclosed that his client was about to sue Mr. Casey or had sued Casey, nothing would have prevented the ARDC from abating the disciplinary proceeding. Illinois, like most states, typically abates disciplinary actions when the complainant files a civil action against the attorney.⁷³

The practice of abating disciplinary actions, though common, is perverse. If the lawyer has engaged in conduct that violates the disciplinary rules but does not cause client harm—for example, the lawyer commingles client trust funds but returns the funds with interest so there is no harm caused to the client—then the disciplinary authorities may promptly proceed with the discipline.⁷⁴ But if, as in Ms. Forsberg's case, the attorney violation is so bad that the client has a legal claim for damages and the damages are so great that it is worth the expense of litigation for the client to find another attorney to proceed with a lawsuit, then the disciplinary action abates and the lawyer subject to discipline can properly announce that he is an active member of the bar "with no disciplinary record."⁷⁵ One would think that the preferable alternative is for the bar authorities to proceed or, at the very least, to suspend the pro-

72. *Himmel*, 125 Ill. 2d at 545, 533 N.E.2d at 796. The ARDC administrator specifically presented this argument to the court. See *id.* at 544, 533 N.E.2d at 795 ("[T]he Administrator notes that Casey converted many clients' funds after respondent's duty to report Casey arose.").

73. See, e.g., Weber, "Still in Good Standing: The Crisis in Attorney Discipline," A.B.A. J., Nov. 1987, at 58-59; Rotunda, *The Litigator's Responsibility*, TRIAL, Mar. 1989, at 98, 100; see also telephone conversation with ARDC spokesperson (Mar. 31, 1989).

74. For an instance in another state where that is exactly what happened, see *What Went Wrong?—Conversations with Disciplined Lawyers: A Documentary*, by Professor Larry Durbin, U. of Detroit School of Law (1985) (videotape interviews with several lawyers, one of whom was in this situation).

75. Weber, *supra* note 73, at 58.

ceedings rather than abate them.⁷⁶ But that is not what happens. In *Himmel* it is interesting to note that when the ARDC eventually disbarred Casey on consent it did so based on "matters unrelated to Forberg's claim."⁷⁷

*Hartford Accident & Indemnity Co. v. Sullivan*⁷⁸ illustrates the inaction or delayed action relating to the procedures and practices of the ARDC. The Seventh Circuit filed its opinion on April 28, 1988. In the course of this opinion it stated the following:

Finally, we were astonished to learn at argument that disciplinary proceedings had never been initiated against [Attorney] Sullivan and that he remains to this day a lawyer in good standing in the Illinois bar, continuing to practice real estate law. Yet the trial of this case revealed acknowledged and very serious fraud on his part, for which he might well have been prosecuted criminally although he was not. (The other three conspirators pleaded guilty to federal criminal charges.) And this has been known for many years. We are mailing this opinion to the Illinois Attorney Registration and Disciplinary Commission for such disciplinary action against Sullivan as the Commission may deem appropriate.⁷⁹

Whether the ARDC knew of Mr. Sullivan's criminal fraud before April 28, 1988, it certainly knew of it after that date. On that date three Seventh Circuit judges, comprising a unanimous panel, asked the ARDC to take action against a lawyer whom they concluded was involved in a criminal conspiracy. Mr. Sullivan, the Seventh Circuit ruled, engaged in "acknowledged and very serious fraud" and "this has been known for many years."⁸⁰ What has the ARDC done since then? The ARDC has the power to act swiftly, and it has the power to seek an interim suspension if the Inquiry Board of the ARDC votes a complaint charging Mr. Sullivan with a code violation involving fraud with "persuasive evidence" to support the charge.⁸¹

On January 18, 1989, in response to a letter from the ARDC administrator, I asked what, if anything, the ARDC has done with regard to the *Sullivan* case. As of this date (July 7, 1989), I have received no re-

76. It is interesting to note that the government of Great Britain, in a green paper on the British legal system, voiced similar complaints. "The possibility of court proceedings should not be used as an excuse to prevent or delay making right what has gone wrong, especially when the damage is perfectly clear." LORD CHANCELLOR'S DEPARTMENT, *THE WORK AND ORGANISATION OF THE LEGAL PROFESSION*, 1989, CMND. NO. 750, at 18.

77. *Himmel*, 125 Ill. 2d at 536, 533 N.E.2d at 791.

78. 846 F.2d 377 (7th Cir. 1988).

79. *Id.* at 385.

80. *Id.*

81. See, e.g., Mulroy & Palmer, *The Illinois Attorney Registration and Disciplinary Commission: Its Structure, Operation, and Limitations*, 18 LOY. U. CHI. L.J. 1181, 1186-87 (1987); see also *id.* at 1193-94 ("The ARDC rules reflect an awareness that disciplinary cases should be handled expeditiously. An attorney's fitness to practice law should not be adjudicated three to six years after the misconduct is discovered, allowing that attorney to engage in further improper behavior in the meantime.") (footnotes omitted).

sponse. Yet surely an attorney's "acknowledged and very serious fraud" by an attorney continuing to practice law suggests that some sort of public discipline may be in order and that the ARDC should act with some dispatch. The United States Supreme Court has commented that the "glacial pace of much litigation breeds frustration with the federal courts and, ultimately, disrespect for the law."⁸² This litigation glacier may easily outrun the pace of ARDC proceedings. And, one should add, concerns like those raised by the *Sullivan* case are no anomaly.⁸³

Another problem with ARDC procedures as they work in practice is that the outside lawyers who serve as fact finders (i.e.—jurors) for the ARDC do not always appear to follow the ARDC's own rules. As one member of the ARDC Inquiry Board has noted:

Although the [ARDC] panel's function is to determine probable cause rather than the merits of the case, the panels frequently will not vote a complaint unless a majority is persuaded that the respondent has violated the disciplinary code. . . . Thus, in some cases, a panel might close a matter with a *self-contradictory* letter to the respondent saying, in effect, "We find no probable cause to vote a complaint, but don't do it again."⁸⁴

The failure of the Inquiry Board to follow its own rules is always an unfortunate practice. It is particularly so in these circumstances, for it allows an accused attorney, relying on this "self-contradictory letter" to represent to the outside world (and to the victim who had complained to the ARDC) that the ARDC found no probable cause, so that the accused attorney appears to have done nothing wrong. What is supposed to be a

82. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757 n.4 (1980).

83. A recent article in the Chicago Tribune quoted an ARDC member's comments on the *Himmel* case: "If he [Himmel] was a partner at a big firm, like Jenner & Block, nothing would have happened." Warren, Possley & Tybor, *Supremely Ethical, or An Easy Mark*, Chicago Trib., Nov. 1, 1988, § 3, at 3, col. 1. This remark may illustrate the attitude of some people who make up the "Board of Directors" of the ARDC.

The popular press shares this distrust of, and unhappiness with, the ARDC. For example, a recent editorial complained of the Doss case:

Doss finally surrendered his law license . . . but those close to the case say the state Supreme Court Registration and Discipline Commission, the agency charged with weeding unfit lawyers from practice, never conducted a real investigation of the case. Despite serious complaints about Doss' conduct that date back nearly a decade, he never was ordered to cease the practice of law.

Foreman, *Justice In Doss Case Isn't Blind, Just Lame*, Champaign-Urbana News Gazette, Oct. 25, 1988, at A4 (editorial). Doss stole \$2.5 million from his client, Mr. Eugene Bloomingdale, and then lied to conceal it. He was convicted of perjury and, in 1989, sentenced to 30 months probation. Dey, *Doss' Poor Health Yields Sentence of Confinement*, Champaign-Urbana News Gazette, Jan. 18, 1989, at A1, cols. 5-6. Doss cheated Mr. Bloomingdale out of his money in 1973. Mr. Bloomingdale's widow now lives with her mother because she has extensive bills and she does not "have anyplace else to live." *Id.* at p. A10, col. 6.

After all of these years, "Doss has served not one day in jail, done not one hour of public service, paid not one penny in fines and paid exactly none of the \$2.5 million he owes Eugene Bloomingdale." Foreman, *supra*, at A4.

84. Mulroy & Palmer, *The Illinois Attorney Registration and Disciplinary Commission: Its Structure, Operation, and Limitations*, 18 LOY. U. CHI. L.J. 1181, 1192 (1987) (footnote omitted) (emphasis added). One of the authors of this article is a member of the ARDC Inquiry Board.

discipline proceeding instituted to protect the public becomes a white-wash, a vindication of the accused, a decision by the ARDC that the charges against the accused did not even rise to the level of probable cause. The ARDC, an institution designed to protect the public, is used by the lawyer to protect his or her misconduct.

Trial lawyers often say that they do not want members of the bar to be on juries. The concern is that jurors who are also lawyers are more likely to ignore the judge's instructions and take the law into their own hands. Perhaps some of the lawyers on the ARDC panels are only doing what comes naturally when they send this "self-contradictory letter." If so, the Illinois Supreme Court should consider revamping the entire system and treat disciplinary complaints like civil cases, where the ARDC presents its case to a real judge and a jury of lay people.⁸⁵ Then, public scrutiny of such proceedings, open to the public and not held behind closed doors,⁸⁶ will serve as an independent check of the fairness of attorney discipline procedures. Such a proposal is hardly radical; several states already have opened discipline procedures to the public and, contrary to the expectations of the opponents of such reform, the sky has not fallen.⁸⁷

85. The ABA has recommended that one-third of the statewide agencies on discipline should be nonlawyer, public members, with a lawyer as chairperson. ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 3.4 (Feb. 1979). BLUE RIBBON COMMITTEE TO STUDY THE FUNCTIONS AND OPERATIONS OF THE ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION, FINAL REPORT (Apr. 1989) [hereinafter FINAL REPORT], recommended that nonlawyers be placed on the Inquiry Board. *Id.* at 6, 18-22. The National Organization of Bar Counsel has also recommended that nonlawyers be involved in the disciplinary process at all levels. Woytash, *It's Time To Do Something About Lawyer Competence*, 64 A.B.A. J. 308 (1978).

However, to have some lay members and yet to have the fact finding controlled by lawyer members is tinkering with the system rather than reforming it.

In Great Britain as well, the government has determined that there should be stronger and more effective lay control over the machinery of discipline of attorneys. In its green paper, the government proposes to authorize the lord chancellor to appoint a "Legal Services Ombudsman" with broad powers, much broader than the "office of Lay Observer," which the ombudsman will replace. The new ombudsman will have power: to examine the way lawyers have handled complaints brought against them; to reinvestigate cases; to refer cases back to the disciplinary tribunal; to recommend that the relevant professional legal body pay compensation; to recommend improvements to the discipline procedure; and to "publicise his decisions." LORD CHANCELLOR'S DEPARTMENT, THE WORK AND ORGANISATION OF THE LEGAL PROFESSION, 1989, CMND. NO. 570, at 18. The FINAL REPORT, *supra* note 85, at 5, also noted: "There is mistrust of the Illinois disciplinary system because it is conducted in secret."

86. The American Bar Association recommends that prior to the filing and service of formal discipline charges, the proceedings should be confidential (unless the respondent has waived confidentiality, the proceeding is based on the conviction of a crime, or the proceeding is based on allegations that have become generally known to the public). ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS § 8.25 (1979). Then, the proceedings should be open to the public, "[U]pon the filing and service of formal charges the proceedings should be public, except for: (a) deliberations of the hearing committee, board or court; and (b) information with respect to which the hearing committee has issued a protective order." *Id.*

87. See Moya, *The Doors Stay Shut on Discipline*, Nat'l L.J., Dec. 8, 1980, at 1, col. 4, & 12, col. 1. Proponents of open procedures note that there is "no reason for protecting lawyers' privacy in disciplinary proceedings when no similar protective measures exist for laymen charged with crime." *Id.* at 12, col. 4. It is much more serious to be charged with a crime than with a discipline violation, and the person charged with a crime is subject to discipline procedures even though we

know he or she may ultimately be acquitted. The FINAL REPORT, *supra* note 85, at 44, recommends that the discipline proceedings should be public "upon the filing and service of formal charges" except for "(a) deliberations of the Hearing Panel, Review Board or Court; and (b) information with respect to which the Hearing Panel has issued a protective order (including information protected by the attorney-client privilege.)"