

EDITOR'S NOTE

This is the second "Bench and Bar" issue published by the North Dakota Law Review. The purpose of the Bench and Bar is to create a forum for professionals to exchange thoughts, experiences, and concerns about issues of importance to the North Dakota legal community.

In order to facilitate this exchange, the Review will consider for publication letters or other correspondence written in response to the issues addressed in the Bench and Bar. These responses will be published in a "Correspondence" section of issues following the Bench and Bar. We look forward to your submissions.

NORTH DAKOTA LAW REVIEW

Volume 67 1991 Number 3

CONTENTS

A Family Court for North Dakota.....	353
<i>Honorable Bruce E. Bohman</i>	
CASE COMMENT	
Attorney and Client:	
Duty to Report Lawyer Misconduct	359
Lawyers as the Police of Their Own Profession:	
Rule 8.3 and the Duty to Report	373
<i>Paul F. Richard</i>	
The Sault Rule: Does It Work?	381
<i>Yvonne E. Berg</i>	
Rule 8.3 and the Effect of <i>Himmel</i> on the	
Practicing Attorney in North Dakota	385
<i>John J. Casbee</i>	
Letter.....	395
<i>James H. Himmel</i>	
Proceedings of the Ninety-First Annual Meeting	
of the North Dakota State Bar Association.....	397

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

Larry Schaffer

LAWYERS AS THE POLICE OF THEIR OWN PROFESSION: RULE 8.3 AND THE DUTY TO REPORT

PAUL F. RICHARD*

The duty of a lawyer to report certain professional misconduct of another attorney or judge is an integral part of the obligation of every licensed attorney to police the profession. Since the publication of the Illinois Supreme Court's decision in *In re Hinman*,¹ there has been an increased interest in the extent of the obligation imposed by Rule 8.3. The following discussion will examine Rule 8.3 and discuss the dilemma experienced by lawyers when faced with another lawyer's or judge's misconduct.

1. WHAT DOES RULE 8.3 REQUIRE?

Rule 8.3 imposes upon each attorney and judge the obligation to police their own profession. The obligation imposed by Rule 8.3 should be viewed as being no different than the obligation of the profession to assure that individuals admitted to practice law in the State of North Dakota are competent and meet basic minimum requirements for admission to practice. Through the Admission to Practice Rules, it is lawyers and judges who determine which individuals will be permitted to practice law in the State. Through the admission process, the profession strives to determine which individuals will practice law ethically and competently.

Just like any other initial interview or assessment process, the procedures and protections afforded by the Admission to Practice Rules cannot protect the public from unethical or incompetent attorneys after admission to the Bar. The North Dakota Rules of Professional Conduct guide attorneys with respect to their ethical obligations once they are admitted to practice law in the State. Once an individual is admitted to practice, Rule 8.3 picks up where the Admission to Practice Rules leave off. That is, just as attorneys are involved in the assessment of the new lawyer prior to admission, Rule 8.3 imposes upon each licensed attorney and judge the obligation to police the profession and assure that individuals licensed to practice law continue to adhere to the require-

105. *Formal Opinion 45*, supra note 40, at 7 (the opinion is issued for advisory purposes only and is not to be considered as binding).

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

107. *Id.*

108. *Id.* North Dakota Rule of Disciplinary Procedure 82(a) provides for an absolute privilege if and when complaints are submitted to the disciplinary board. M.D.R. DISCIPLINARY P. 82(a).

109. *Formal Opinion 45*, supra note 40, at 7.

110. *Id.*

* Formerly in the law firm of Gerald, Lundberg, Erickson, Macrell & McLean, Ltd., Fargo, North Dakota; J.D., 1979, University of North Dakota; Member of the State Bar Association of North Dakota; Ethics Committee, 1988 to present (Chairman 1989 to present). Opinions expressed are his own and not necessarily those of the Ethics Committee or individual members thereof.

1. 195 Ill. 364, 531, 535 N.E.2d 790 (1968).

ments of the Rules of Professional Conduct. Rule 8.3 provides as follows:

(a) A lawyer having knowledge that another lawyer has committed a violation of these Rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall initiate proceedings under the North Dakota Rules of Disciplinary Procedure.

(b) A lawyer having knowledge that a judge has committed a violation of the North Dakota Rules of Judicial Conduct that raises a substantial question as to the judge's honesty, trustworthiness, or fitness for judicial office in other respects shall initiate proceedings under the Rules of the North Dakota Judicial Conduct Commission.

(c) This Rule does not require disclosure of information protected by Rule 1.6.³

The term "knowledge," as used in Rule 8.3, denotes actual knowledge of the fact in question.⁴ The Rules of Professional Conduct provide that a person's "knowledge" may be inferred from the person's conduct under the circumstances.⁵ The duty to report a violation of the Rules of Professional Conduct under Rule 8.3 may be applicable to an isolated violation of the Rules. Reporting is particularly important in situations where the victim of the misconduct is unlikely to discover the offense.⁶

It is important to recognize that Rule 8.3 does not require the reporting of every violation of the Rules of Professional Conduct of which a lawyer has knowledge. Rule 8.3 requires a lawyer to exercise independent judgment in each situation for purposes of making a determination of whether or not a known violation must be reported. Once a lawyer has actual knowledge of a violation by another lawyer of the Rules of Professional Conduct or a violation by a judge of the North Dakota Rules of Judicial Conduct, the lawyer must exercise independent judgment as to whether the violation raises a "substantial question" as to that person's "honesty, trustworthiness, or fitness" as a lawyer or judge. As noted in the comments to Rule 8.3, the issue of "whether a violation is 'substantial' depends on the seriousness of the possible offense and not

the quantum of evidence of which the lawyer is aware."⁷ The obligation to report a violation of the Rules of Professional Conduct under Rule 8.3 is limited "to those offenses that a self-regulating profession must vigorously endeavor to prevent."⁸

Once a lawyer determines that another lawyer or judge has violated the Rules of Professional Conduct or the North Dakota Rules of Judicial Conduct within the meaning of Rule 8.3, the lawyer must also determine whether the reporting of the violation is excused under Rule 8.3(c). The reporting requirement under Rule 8.3 is limited by the Rule 1.6 requirement that a lawyer not reveal or use information to the disadvantage of a client, except when required or permitted by Rule 1.6.⁹ The Ethics Committee for the State Bar Association of North Dakota has noted that:

"The reporting obligation of MR 8.3(c) is narrower than the Code's D.R. 1-103(A) in one material way. The confidentiality rule extends to all "information relating to representation of a client," the only relevant exception being that for "disclosures impliedly authorized to carry out the representation." Thus, reporting is foreclosed if it would entail revelation of any client information, whether or not the revelation would prejudice a client's interests. Reporting under Rule 8.3(c), therefore, is required only when (1) to do so would affirmatively advance a client's interest; or (2) reporting would not involve revelation of any information relating to the representation of a client."¹⁰

Of course, disclosure of client information is permitted if the client consents.¹¹ As noted in the comments to Rule 8.3, if a lawyer is excused from reporting a violation of the Rules of Professional Conduct on the basis of Rule 1.6, the lawyer "should encourage the client to consent to disclosure where prosecution would not substantially prejudice the client's interests."¹² Once the lawyer having knowledge of the violation of the Rules of Professional Conduct or the North Dakota Rules of Judicial Conduct has made the determination that the violation constitutes a reportable event

3. N.D. RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1980).
4. N.D. RULES OF PROFESSIONAL CONDUCT Terminology (1990).
5. *Id.*
6. N.D. RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1980).

7. *Id.*
8. N.D. RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1980).
9. State Bar Association of North Dakota (SBA) Comment on Professional Ethics, Formal Op. 42 (1980) (quoting C. WOLFRUM, MODERN LEGAL ETHICS 685 (1985) and State Bar of Wisconsin, Op. F-89-13).
10. N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c) (1990).
11. N.D. RULES OF PROFESSIONAL CONDUCT Rule 8.3 comment (1980).

and is not excused, the Rule does not appear to permit the lawyer to postpone the reporting.¹²

II. IS THE FAILURE TO REPORT AN EVENT THAT WOULD BE CONSIDERED REPORTABLE UNDER RULE 8.3 A BASIS FOR DISCIPLINARY ACTION AGAINST THE NONREPORTING ATTORNEY OR JUDGE?

An additional dilemma faced by lawyers or judges who have knowledge of a reportable violation under Rule 8.3, and who are not excused from reporting the violation under Rule 1.6, is the issue of whether their failure to make the report may serve as a basis for disciplinary action against them. During their careers, some practicing lawyers or judges will be faced with an issue of whether there is an obligation to report another lawyer's or judge's misconduct. As in any situation, there is a wide spectrum of possible scenarios that might be reportable under Rule 8.3. On the one end of the spectrum will be violations that any lawyer or judge would clearly conclude to be reportable under the Rule (e.g., theft of client funds). On the other end will be those violations for which there is no obligation to report. Unfortunately, there are a large number of violations that will fall in the middle. As indicated, each situation will have to be independently assessed by the lawyer or judge, and a judgment call made as to whether the situation falls within the reach of those violations that are reportable under the Rule.

When a lawyer or judge makes the determination that a violation is reportable under Rule 8.3, does he or she face the possibility of a disciplinary action for failure to make a report? Probably the most publicized case on this point is *In re Himmel*,¹³ *Himmel* involved a situation in which James H. Himmel, a lawyer licensed in Illinois, was suspended from practice for one year by the Illinois Supreme Court for failing to report another attorney's misconduct.¹⁴

Although Himmel argued that he was excused from reporting the attorney's misconduct because his client had done so, the court concluded that Himmel's obligation to report could not be excused on the basis that his client had made a report.¹⁵ In addition, the

court analyzed the information and the circumstances surrounding the failure to report the former attorney's misconduct and concluded that the failure to report was not excused on the basis that the information was privileged.¹⁶ Thus, the *Himmel* court recognized that the duty to report is excused in situations where it would require disclosure of privileged information.

The *Himmel* court went on to conclude that, in light of the fact that Himmel possessed unprivileged knowledge of the former attorney's conversion of client funds, which is a reportable violation of the Rules, the failure to report such misconduct was itself a violation of the Code of Professional Responsibility. In a recent case, the Appellate Court of Illinois cited *Himmel* and went on to state the following with respect to the obligation of lawyers to make the profession:

Lawyers also must assist in the policing of lawyer misconduct. The vigilance of the bar in preventing and, where required, reporting 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.¹⁷

It is uncertain whether *Himmel* would be followed by the North Dakota Supreme Court if the same situation arose in this state. The case, however, does demonstrate a situation in which an attorney with knowledge of what most lawyers would consider to be a clear violation of the Rules of Professional Conduct which raises a substantial question as to the violating attorney's honesty, trustworthiness, and fitness as a lawyer, failed to report the misconduct and then faced disciplinary action for his failure to abide by the duty to report obligation.

It is important to note that *Himmel* involved the interpretation of the Illinois Ethics Code. This code was modeled after the ABA's former Model Code of Professional Responsibility, which had broad requirements for the reporting of misconduct of other lawyers in cases where the information was unprivileged. Under the newer ABA Model Rules of Professional Conduct, after which the North Dakota Rules are patterned, a lawyer is required to report misconduct of other lawyers which "raises substantial questions as to the lawyer's honesty, trustworthiness, or fitness and is

12. *SBAND* Comment on Professional Ethics, Formal Op. 42 (1980).

13. 322 Ill. 2d 531, 533 N.E.2d 793 (1988).

14. *In re Himmel*, 322 Ill. 2d 531, 533 N.E.2d 793 (1988).

15. *Id.* at ___, 533 N.E.2d at 792.

16. *Id.* at ___, 533 N.E.2d at 792-93.

17. *Weber v. Canto*, 209 Ill. App. 3d 575, ___, 568 N.E.2d 513, 515 (1991) (quoting Ill. Rules of Professional Conduct, Transmittal (1989)).

not protected by Rule 1.6.¹⁸ Despite the difference between the Rule and the Model Code, however, it would seem that the theft of client funds would be reportable under both the Rules and the Model Code.

The *Himmel* case demonstrates what could happen in a situation in which an attorney fails to report another attorney's violation of the Rules of Professional Conduct. Clearly, the disciplinary action taken against the nonreporting attorney will be dependent upon the circumstances of each case. It would seem that the suspension from practice for one year was a rather harsh punishment for Himmel's failure to report under the facts of the case. In any event, *Himmel* serves as a reminder to North Dakota practicing attorneys of their obligations under the Rules of Professional Conduct.

III. DOES SELF-REGULATION WORK?

Following the *Himmel* decision, Illinois lawyers scrambled to report the misdeeds of their fellow lawyers. In the five months after Himmel was suspended, the Illinois Attorney Registration and Disciplinary Commission received 331 complaints under the "whistle-blowing rule."¹⁹ Obviously, the *Himmel* decision shook up the Illinois Bar. In North Dakota, the percentage of disciplinary complaints filed by attorneys and judges, compared to complaints from nonlawyers and judges, is relatively low. In 1989, approximately 18 out of 114 complaints were filed by lawyers or judges, and in 1990 the number was approximately 8 out of 150 complaints.²⁰ Presumably, most North Dakota lawyers would not have difficulty making a report if the violation by another attorney clearly fell within the reach of Rule 8.3. Such self-regulation is clearly important to the promotion of the ethics of the profession, and lawyers are in the best position to assess whether the conduct of another attorney or judge fails to meet the expectations of the profession.

The more difficult case arises in those situations in which an attorney must determine whether or not another lawyer is providing "competent representation to a client." Rule 1.1 of the North Dakota Rules of Professional Conduct indicates that competent representation requires the legal knowledge, skill, thoroughness

and preparation reasonably necessary for the representation undertaken by the lawyer.²¹ The comments to Rule 1.1 indicate that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation."²² It is difficult to determine whether disciplinary proceedings should be commenced against another lawyer due to his or her lack of preparation. The lawyer may have specific knowledge of an incident or general knowledge through other lawyers or judges that a particular attorney routinely fails to make an adequate inquiry into or analysis of the factual and legal elements of a problem and generally lacks adequate preparation for the cases he or she undertakes. At what point another attorney's repeated lack of preparation becomes reportable under Rule 8.3 is a difficult question to answer.

Do lawyers or judges in North Dakota have an obligation to report such lack of preparation? Clearly, if the repeated lack of preparation raises a substantial question as to the fitness of the lawyer to practice law, it is reportable under Rule 8.3. Rule 8.3 is designed to protect the public from lawyers and judges whose honesty, trustworthiness or fitness is in question. Presumably, at some point the knowledge possessed by lawyers or judges regarding another attorney's lack of preparation and competence, as defined by the Rules of Professional Conduct, must be reported if the purpose of the Rule is to be accomplished. For that matter, lawyers and judges are in the best position to make the assessment of whether or not another lawyer practices law competently.

Another dilemma facing attorneys and judges under Rule 8.3 is the conflict between the obligation of attorneys to report judges and the obligation of judges to report attorneys. This situation would most often arise in specific cases pending before a judge in which either the attorney believes the presiding judge has violated the North Dakota Rules of Judicial Conduct, or the judge believes the attorney has violated the North Dakota Rules of Professional Conduct. Unless the reporting is excused under Rule 1.6, the knowledge of a reportable violation, as outlined in Rule 8.3, may have a significant impact on the progress of the case. Rule 8.3 does not indicate that the required report is to be made only after the case is completed. Once it has been determined that a violation is

18. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3 (1989).

19. KANOSTA, *The Duty to Inform*, ABA JOURNAL, May 1989, at 17-18.

20. Letter from W. Brian Berg, Disciplinary Counsel, Disciplinary Board of the North Dakota Supreme Court (April 15, 1991).

21. ND RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1990).

22. ND RULES OF PROFESSIONAL CONDUCT Rule 1.1 comment (1990).

reportable under Rule 8.3, it would appear that the lawyer or judge may not postpone the reporting.

There probably is no truly accurate method to measure whether or not the Rule 8.3 duty to report works to control lawyer or judicial misconduct. Of course, Rule 8.3 is not the only method by which lawyer or judicial misconduct is reported. It would seem that the obligations imposed by Rule 8.3, when considered with the other methods by which lawyer and judicial misconduct are reported, should work as a system. It is natural for individuals to be reluctant to take the step of reporting because of the consequences that may flow from such reporting. On the other hand, Rule 8.3 does not appear to allow lawyers or judges who are aware of reportable misconduct to put their heads in the sand and let someone else deal with the problem. Thus, it is difficult to find any true measure of whether or not Rule 8.3 works. Yet, as an integral part of the entire lawyer and judicial disciplinary process, Rule 8.3 cannot be ignored.

IV. CONCLUSION

The utilization of self-regulation through Rule 8.3, in conjunction with other methods available for attorney and judicial discipline, works to enhance the legal profession in this state. The Rules of Professional Conduct, in conjunction with the Code of Judicial Conduct, continuing education requirements, Admission to Practice Rules, and the North Dakota lawyer disciplinary process, work to assure the competence and the ethics of the legal profession in the state. We all have an obligation to police the profession. The duty under Rule 8.3 is not new and is certainly a palatable alternative to nonlawyer regulation of the profession. Rule 8.3 is not an unyielding standard; it gives each lawyer latitude to exercise independent judgment in each situation and recognizes that the client's interest must be considered before any report is made. On the other hand, in the appropriate situation, every licensed attorney must be willing to accept the responsibility defined by Rule 8.3, so as to promote the ethics of the profession and protect the public.

THE SNITCH RULE: DOES IT WORK?

VIVIAN E. BERG*

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

Well, no. Not under Rule 8.3 of the Rules of Professional Conduct,² and not under the "old" DR 1-103(A) of the Code of Professional Responsibility.³ Not before *Himmelf* and the North Dakota State Bar Association Committee on Professional Ethics Formal Opinion 42,⁴ which affirmed the duty to report, and not after, either. This is not to say that there has never been a complaint based on the duty to report misconduct. Yet, I cannot recall any time, no matter how egregious the misconduct, when there has been the least bit of attention given to whether or not a file should be opened to inquire into whether a lawyer had the requisite knowledge under Rule 8.3 of the Rules of Professional Conduct of possible misconduct that should be considered by the Disciplinary Board.

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

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

* J.D., School of Law, University of North Dakota, 1979; Staff Counsel, Disciplinary Board of the Supreme Court and Judicial Conduct Commission, 1982 to present. Opinions expressed are her own and not necessarily those of either the Disciplinary Board or Judicial Conduct Commission or individual members.

1. 1988 ILL. 2d 531, 533 N.E.2d 780 (1988).

2. *Himmelf* Bar is jarred by "Snitch" Case, N477 L.J., Dec. 19, 1988, at 3.

3. N.D. Rules of Professional Conduct, Rule 8.3 (1983) (North Dakota adopted the Rules of Professional Conduct effective January 1, 1988, replacing the Code of Professional Responsibility).

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

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