COMBATING *HIMMEL* ANGST

Patricia A. Sallen*

During my years as a bar counsel, I don't remember having even *investigated* an allegation that a lawyer violated Arizona's Ethical Rule 8.3, which closely tracks Model Rule 8.3.[1] I know I never prosecuted one. Yet, by the second day after I took over as the State Bar's ethics counsel, I had already fielded two calls on our ethics hotline from attorneys asking for ethics advice on the subject.

Many more were to come. In fact, questions from lawyers about their obligations under ER 8.3 have consistently ranked in the top five subjects of calls to the State Bar's ethics hotline, behind topics such as conflicts and confidentiality. Of more than 2,100 calls to our hotline in 2006, more than 120 concerned the reporting requirement.

Angst over the reporting requirement has resulted in the State Bar's Committee on the Rules of Professional Conduct issuing 10 formal written opinions on ER 8.3, all triggered by members' questions, since 1987.[2]

Where has all this angst come from?

It's certainly not because of a raft of public disciplinary proceedings in Arizona. Formal prosecutions for ER 8.3(a) violations have been few and far between. Since Arizona adopted the Model Rules, effective in 1985, the State Bar has had only three formal disciplinary proceedings involving ER 8.3 violations, all of which resulted in sanctions against the attorneys, but none of which resulted in substantive reported court decisions.[3]

Informal proceedings also have been exceedingly infrequent, although an Arizona attorney recently accepted an order of diversion for failing to report his subordinate attorney. The attorney's subordinate had admitted to him that she had engaged in misconduct while representing a former client, but the respondent had not reported her because he believed that the former client or the former client's new counsel had done so. The respondent complied with his diversion program, resulting in the complaint being dismissed.[4]

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* Ethics counsel, State Bar of Arizona.

[1] Arizona has adopted the current version of the Model Rule with two exceptions. Arizona has added to the end of Model Rule 8.3(a) the phrase "except as otherwise provided in these Rules or by law." In Model Rule 8.3(c), Arizona has replaced "while participating in an approved lawyers assistance program" with "while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it related to the representation of a client."

[2] Arizona ethics opinions are available on the State Bar's website at http://www.myazbar.org/Ethics/.

[3] *In re* Woltman, 181 Ariz. 525, 892 P.2d 861 (1995); *In re* Condit, SB-94-0021-D (1995); and *In re* Lustig, SB-01-01490-D (2001). *Woltman* is technically a reported opinion, but in reality is just the Supreme Court's judgment and order accepting the Disciplinary Commission's report in the matter. Woltman, who already had been disbarred, defaulted in the formal proceedings and was disbarred again. The report of Woltman's case does not disclose the facts behind the ER 8.3 violation. Condit's case will be discussed below. Lustig consented to a censure for, among other violations, failing to report his employee's conduct of fee sharing with a non-lawyer.

[4] The subordinate attorney was suspended for one year. She had allowed the statute of limitations to run on a personal-injury case and then repeatedly misrepresented the status of the matter to the client, even going so far as to prepare fraudulent settlement documents. *In re* Gieszl, SB-06-0013-D (2006).

So, if disciplinary proceedings–formal and informal–have not led to lawyer concerns about the reporting requirement, what has?

We have *In re Himmel*[5] to thank for sparking this sensitivity.

Instead of direct public discipline, it was the Illinois Supreme Court decision that promptly piqued the interest of an Arizona Supreme Court justice, who used the case to attract attention to the reporting obligation. In the article *Am I My Brother's Keeper?* in the October 1989 issue of *Arizona Attorney* (the State Bar's monthly magazine), then-Justice Robert Corcoran wrote:

> Ever since this question was asked by Cain of the Lord, it has been discussed in many different contexts. As lawyers and judges in a learned profession, the questions put to us are: "Am I the Bar's keeper?" and "Am I the Bench's keeper?" The answers to these questions are clearly "yes."
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> However, these ethical questions largely are ignored because Ethical Rule 8.3 of the Rules of Professional Conduct and Canon 3(B)(3) of the Code of Judicial Conduct are ignored.

Justice Corcoran then used the platform of reported discipline cases–none involving prosecutions for ER 8.3, however–to repeatedly remind lawyers of the reporting obligation. The cases included:

- *In re Ockrassa*,[6] in which a defense-counsel-turned-prosecutor was suspended for 90 days for prosecuting his former DUI client. In his opinion for the court, Justice Corcoran specifically–and, perhaps, tangentially–noted that the trial judge had explicitly advised the deputy public defender that he had an obligation under ER 8.3(a) to report the defense-counsel-turned-prosecutor for the conflict of interest. (The public defender did, in fact, file the bar complaint.)
- *In re Wolfram*,[7] involving misconduct by a criminal defense attorney. In a specially concurring opinion, Justice Corcoran took pains to note that the trial judge and the prosecutor who observed the defense attorney's misconduct had been obligated under judicial canons and ER 8.3(a) to report him. (According to State Bar records, neither did.)
- *In re Fee*,[8] in which, in a dissenting opinion, Justice Corcoran seemed to point to the reporting requirement as a reason the respondents should have disclosed their secret fee agreements. If the lawyers had disclosed, "all parties who became aware of the secret fee agreement would have been required to report respondents' misconduct to the state bar…. In fact, when the settlement judge learned of respondents' misconduct, he filed a complaint…."[9]

[5] 125 Ill.2d 531, 533 N.E.2d 790 (1988).
[6] 165 Ariz. 576, 799 P.2d 1350 (1990).
[7] 174 Ariz. 49, 847 P.2d 94 (1993).
[8] 182 Ariz. 597, 898 P.2d 975 (1995).
[9] *Id*. at 603, 898 P.2d at 981. The attorneys were censured for failing to disclose to the settlement judge a separate agreement they had with the client that required the client to pay attorney fees in addition to those specified in the settlement agreement. Justice Corcoran agreed with the hearing officer and the Disciplinary Commission that the respondents should have been suspended.

Disciplinary statistics show Arizona lawyers have taken Justice Corcoran's reminders to heart, because attorneys now constitute a sizable portion of complainants. In 2004, opposing counsel filed 9 percent of all bar charges[10]; other attorneys filed an additional 6 percent. In 2005, opposing counsel filed 4 percent; other attorneys filed almost 5.5 percent.

We want lawyers–we *need* lawyers–to report misconduct. "[A]s in any adjudicative system, the lifeblood of the disciplinary process remains the initial grievance; without a steady stream of individualized complaints, the system would have little to act upon."[11] The Louisiana Supreme Court recently put it this way:

> [T]he lawyer's duty to report professional misconduct is the foundation for the claim that we can be trusted to regulate ourselves as a profession. If we fail in our duty, we forfeit that trust and have no right to enjoy the privilege of self-regulation or the confidence and respect of the public.[12]

But now what? Now that we've so successfully primed the pump, how do we help the many lawyers who worry about complying with ER 8.3?

It seems we need to do something concrete to help, particularly on two fronts: giving lawyers more specific help on whether they *know* that another lawyer has engaged in misconduct to justify reporting and clarifying exactly how ER 1.6 (Confidentiality of Information) can trump the reporting obligation.

Who Knows What?

Lawyers with questions about ER 8.3 seem to fall into three categories: those who want to be told that they definitely *must* report another lawyer; those who want to be told that they definitely *don't have* to report another lawyer; and those who worry they must report every hint of misconduct, even their own.

I think the only group ever satisfied with the State Bar's ethics advice is the last one. No, the rule doesn't require that you report every hint of misconduct.[13] No, the rule doesn't require self-reporting.[14]

For everyone else, my response to their request for ethics advice often begins with "It depends" and "*You* have to determine. . . ." because Arizona ethics opinions have made it clear that the duty to report under ER 8.3 "requires the exercise of an attorney's sound professional judgment on a case-by-case basis."[15]

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[10] "Charge" means any allegation of misconduct or incapacity brought to the State Bar's attention. Rule 46(f)(3), Ariz.R.S.Ct. A charge is investigated only if it contains allegations that, if true, would be grounds for discipline or transfer to disability inactive status. Rule 54(b), Ariz.R.S.Ct.

[11] G. HAZARD & W. HODES, THE LAW OF LAWYERING at § 6.42, p. 64-4.1 (2004-2 supp.).

[12] *In re* Riehlmann, 891 So. 2d 1239, 1249 (La. 2005).

[13] ER 8.3, comment 3.

[14] ER 8.3(a): "A lawyer who knows that *another* lawyer has committed a violation of the Rules of Professional Conduct…" [Emphasis added.] A lawyer may have tactical or other reasons for self-reporting, but no ethical obligation in Arizona.

[15] Arizona Ethics Op. 98-02 (January 1998) at 4 (concluding that the filing of an affidavit of ineffective assistance of counsel in a criminal case does not necessarily require reporting). *See also* ER 8.3 cmt. 3,

In construing *Himmel*, Arizona Ethics Op. 90-13 (October 1990) focused on the definition of "knowledge." The lengthy opinion concluded that because "knowledge" denotes actual knowledge, the standard is not merely reasonable belief.[16] Whereas mere rumor or suspicion is not enough to mandate reporting, "studious ignorance of readily accessible facts is … the functional equivalent of knowledge."[17]

One of the three scenarios addressed in Arizona Ethics Op. 90-13[18] involved a plaintiff's attorney who believed that his opposing counsel in pending litigation had submitted inconsistent affidavits explaining his failure to timely answer a complaint. In one affidavit, the opposing counsel had stated that he had signed a final draft of the answer on October 24 but could not file it because he was waiting for information. In a subsequent affidavit executed about six weeks later, the opposing counsel avowed that he had finalized and signed the answer on October 24 and had given it to his secretary to file. The second affidavit did not refer to the need, as described in the first affidavit, to wait for information. The inquiring attorney suggested that the opposing counsel had signed the second affidavit "apparently in an attempt to demonstrate excusable neglect."

The ethics opinion concluded that "[a]t this distance, and without more information, we are unable to determine whether the inquiring attorney has 'knowledge' of another's misconduct…."[19] The two affidavits could have represented a deliberate attempt to mislead the court, or the opposing counsel might have meant, by his language in the second affidavit, that the secretary was to wait for the necessary information before filing the answer. The ethics opinion concluded that the inquiring attorney "may be able to make this determination, or he may need to investigate further, including, if appropriate, confronting opposing counsel."[20]

The opinion then describes how many decisions under ER 8.3 must be left to an attorney's judgment and discretion:

> This situation falls into what we believe to be a large gray area in the interpretation and application of ER 8.3 in which the duty to report depends upon a very fact-sensitive determination, and the exercise of appropriate professional judgment and discretion, in accordance with the

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("This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule.").

[16] Arizona Ethics Op. 90-13 at 11. *But see In re* Riehlmann, *supra*, note 12. "We hold that a lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred. As such, knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question." 891 So. 2d at 1247. At the time charges were filed against Riehlmann, Louisiana's Rule 8.3(a) provided, in part: "A lawyer possessing unprivileged knowledge of a violation of this code shall report such knowledge to a tribunal…."

[17] *Id*. (citations omitted).

[18] The Committee on the Rules of Professional Conduct indicated in Arizona Ethics Op. 90-13 that the opinion resulted from "an increasing number of requests from attorneys as to the parameters of their duty to report another lawyer's apparent misconduct." Op. 90-13 at 1. Not only did it address three specific factual questions, but it also in general discussed *Himmel*, *Himmel* under Arizona rules, and the definitions of fitness as a lawyer, substantial question, knowledge, and confidentiality.

[19] Arizona Ethics Op. 90-13 at 16.

[20] *Id*.

> principles we have discussed. In virtually all of such situations, the inquiring attorney will be in a much better position to make this determination than this committee. Indeed, we may be precluded from giving definitive answers to inquiries of this sort by our jurisdictional limitations which preclude our answering questions "involving solely the attorney's exercise of judgment or discretion"…. We can state, however, that, in such situations which are not governed by confidentiality constraints, we believe that the reasonable exercise of such judgment and discretion, one way or the other, should not be the subject of disciplinary investigation and action.[21]

Lawyers don't relish being told that ER 8.3 applies on a "case-by-case basis" and depends on the "exercise of appropriate professional judgment and discretion." That is especially true of those lawyers who remember that Himmel was suspended. Nor is it necessarily consoling to be told that ER 8.3 only sets the threshold for when an attorney *must* report another lawyer's misconduct and that "[t]here well may be other situations in which a lawyer, not constrained by confidentiality or other requirements … can–and in a normative but non-obligatory sense should–report another lawyer's misconduct."[22] Most lawyers simply don't seem to want to report another lawyer's misconduct.

Not only have Arizona lawyers been told ER 8.3 applies on a case-by-case basis, but they also have been warned against being too willing to file bar complaints. If the apparent violation doesn't meet the criteria of ER 8.3(a), "we should not burden the State Bar disciplinary staff with such minor complaints"[23] and "[t]he application of ER 8.3 is governed by a rule of reason, and is not intended to inundate the disciplinary system with minor infractions."[24] The fact that anyone who files a bar complaint has an absolute privilege for defamatory statements[25] is probably not a tipping point for a lawyer weighing this decision. Many don't want to take the risk of getting a reputation for filing bar complaints unless they have to under ER 8.3.

Condit: A Missed ER 1.6 Opportunity

Exactly how does ER 1.6 trump the reporting requirement? When can the client prevent a lawyer from reporting? When–or can–a confidentiality clause do the same?

If only *In re Condit* had resulted in a reported opinion, then we'd have a post-*Himmel* decision based on the Rules of Professional Conduct involving a prosecution *solely* for ER 8.3 that acknowledged the tension between ER 1.6 and the reporting

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[21] *Id.* at 16-17. Those "jurisdictional limitations" referred to above pose a specific limitation for the State Bar's ethics counsel and members of the State Bar's Committee on the Rules of Professional Conduct who give telephone advice and issue formal and informal written opinions. We cannot opine on the "questioned ethical propriety of the conduct of any attorney other than the inquiring attorney." Committee on the Rules of Professional Conduct Statement of Jurisdictional Policies at ¶ 4 (2000). To give specific advice about whether one attorney is obligated to report a second attorney would necessarily require passing judgment on the second attorney's conduct.

[22] Arizona Ethics Op. 90-13 at 3.

[23] Arizona Ethics Op. 89-06 (July 1989) at 8.

[24] Op. 98-02, note 3.

[25] Drummond v. Stahl, 127 Ariz. 122, 618 P.2d 616 (App. 1980), *cert. denied* 450 U.S. 967 (1981).

obligation. It could have laid down a concrete rule under ER 8.3: If a lawyer files a lawsuit against another lawyer and the alleged misconduct qualifies as the type that must be reported under ER 8.3(a), the cat is out of the bag and ER 1.6 doesn't stand in the way.

Because the case did not result in a published opinion, and perhaps because it is one of the few cases in which an attorney received public discipline solely for violating ER 8.3, it is worth exploring the facts and procedure behind the lawyer's discipline in detail.

In a way, *Condit* is *Himmel's* Arizona and Rules of Professional Conduct doppelgänger.

The respondent, Lawrence Condit, agreed to accept a censure for violating ER 8.3. In the consent documents, Condit conditionally admitted to certain facts to support the censure.

Condit had represented a client, Cohen, in a dispute with another Arizona attorney, Franklin Eldridge. Cohen alleged that Eldridge had persuaded Cohen to invest in fraudulent business transactions, created forged deeds, stolen money from Cohen's bank account, and forged a federal court order affecting Cohen's pending case. Condit negotiated a settlement agreement with Eldridge that included a confidentiality provision (at Eldridge's insistence) that precluded either party or its "agents, employees, attorneys or other representatives" from disclosing either the existence of the agreement or any of the facts and circumstances giving rise to the underlying claims. When Eldridge failed to make payments required under the settlement agreement, Condit, on Cohen's behalf, filed a lawsuit against him. Cohen eventually retained other counsel to represent him.

Condit never reported Eldridge to the State Bar. He did not believe he had "knowledge" (as ER 8.3(a) then was written) of any misconduct by Eldridge. Defense attorneys in the Cohen v. Eldridge case, however, eventually filed a bar complaint against Condit, claiming he had violated ER 8.3 by failing to report Eldridge's alleged misconduct.[26]

In accordance with the procedure at that time in Arizona, the consent agreement was filed directly with the Disciplinary Commission, the intermediate appellate body in Arizona's disciplinary system. The commission, without explanation, rejected the consent agreement and referred the matter back to the State Bar to file a formal complaint.

The State Bar and Condit jointly moved for reconsideration. After hearing argument, a five-member majority of the commission once again rejected the agreement, this time explaining its decision by saying:

> The majority of the Commission has a number of concerns about this situation. Initially, the majority is concerned by the term of the settlement agreement providing for complete confidentiality. While the majority acknowledges that this conduct predated the decision in In re Himmel, it believes that the inclusion of this term in the agreement raises additional questions about the settlement reached….

[26] Although not included in the consent agreement, the State Bar, in its later Supreme Court brief, advised that Eldridge's defense counsel filed the bar complaint against Condit "several years" after Condit withdrew as Cohen's counsel in the Cohen v. Eldridge case. Eldridge was disbarred in January 1988, by consent, after having been convicted of two counts of theft in state court and one court of wire fraud in federal court. The complainant in the Eldridge disbarment was one of his former law partners.

> In addition to urging the Commission to accept the agreement, at the hearing before the Commission the State Bar also raised the issue of whether ER 8.3, when read in conjunction with ER 1.6, even allows an attorney to disclose information concerning a client's case without that client's specific consent. In the instant matter, the client did not give specific permission to Condit. The State Bar suggested that the Commission evaluate the meaning of these two ethical rules. The majority of the Commission, however, believe that, at this point in the proceedings, the Commission is limited to either accepting or rejecting the agreement. The majority does not find the agreement acceptable and, therefore, finds this instance to be an inappropriate forum for making a determination on the significance of these ethical rules.

Two commissioners filed a dissenting opinion, saying, in part:

> Even if it rejects the agreement and remands, the Commission owes the parties and the public a discussion of the significant issues before it: Is the difference between DR 1-103(A) in Himmel, supra, and ER 8.3 in our rules significant? To what extent does ER 1.6 preclude prosecution in these circumstances under ER 8.3? Is the approach taken in Ethics Opinion No. 90-13 the appropriate one ([…] citing "problems we foresee in too rigid an application of the principles enunciated by Himmel")? How much consideration will the Commission give to the State Bar's considered opinion of the case and its possibilities?….

The State Bar appealed. Condit joined in that appeal.

In its appeal brief,[27] the State Bar argued that a threshold issue was whether the confidentiality mandate of ER 1.6(a) prohibited Condit from reporting Eldridge's misconduct to the State Bar. "If it did," the State Bar said in its brief, "then the court should reject the consent agreement and dismiss the case against [Condit]. The Bar is not necessarily advocating this result. It is, nonetheless, an issue which requires resolution."

On one hand, the State Bar argued, Cohen never authorized Condit to disclose the information about Eldridge to the State Bar. In fact, the State Bar pointed out that "the settlement agreement he signed can be construed as expressing a contrary instruction." On the other hand, the State Bar acknowledged, "[a]rguably, the strictures of ER 1.6(a) were rendered inapplicable" when Condit filed the lawsuit for Cohen against Eldridge, because the alleged misconduct then was a matter of public record.[28]

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[27] Although Condit had joined in the State Bar's appeal, he did not sign onto the brief nor did he apparently file a brief separate from that of the State Bar.

[28] Although, of course, ER 1.6 "applies not merely to matters communicated in confidence by the client but to all information relating to the representation, 'whatever its source.'" Arizona Ethics Op. 90-13 at 14, quoting ER 1.6, comment 3. Indeed, ER 1.6 covers information from any source, even information in the public record. Arizona Ethics Op. 97-05 (July 1997) (concluding that the presence of a third person, such as an interpreter, parent or advocate, during an attorney-client conversation does not affect the lawyer's duty of confidentiality).

In a rather unusual turn, the Supreme Court issued an order inviting the Disciplinary Commission to file an answering brief and participate in oral argument. The State Bar moved for reconsideration of that order, pointing out that the Disciplinary Commission, an arm of the Supreme Court, acts as an appellate body and is neither a party nor an advocate. The Disciplinary Commission's chairman responded to the court's invitation by advising that the commission felt it was inappropriate for it to participate other than through its report.

In a subsequent order, the Supreme Court said it wanted someone to "argue the view that the consent agreement should be rejected" and indicated that it would enlist a State Bar member to do just that. As a result, apparently at the court's request, a *former* member of the Disciplinary Commission filed what he called an amicus brief in support of the commission's decision to reject the consent agreement.

Among other issues, the amicus brief argued that it is "unrealistic, under the circumstances of present day litigation, for there to be any suggestion that a client would have any further expectation of confidentiality once a formal lawsuit was filed."

Agreeing with the amicus brief it had solicited, the Supreme Court ultimately accepted the consent agreement, thus censuring Condit solely for violating ER 8.3. It issued a unanimous memorandum decision, concluding:

> Given the peculiar procedural posture of this case, we do not believe that it is an appropriate vehicle for grappling with the tension that exists between ER 1.6 and ER 8.3. We agree with the amicus that no matter how that tension is resolved, once [the client] asked Condit to file the lawsuit against Eldridge, the alleged acts of misconduct became a matter of public record. *Whatever ER 1.6 means, "reveal" means "to make publicly known." Thus, after the action was filed, there was nothing left to reveal, and therefore ER 1.6 did not protect Condit from the requirements of ER 8.3.*

(Emphasis added.) The court added, "Nonetheless, we are concerned about the breadth of ER 1.6…."

Although it can't be used as precedent, the *Condit* memorandum decision shows that our Supreme Court might be inclined to support the proposition that, at least for ER 8.3 purposes, information in the public domain need not be deemed confidential for purposes of ER 1.6.[29]

On the other hand, all of the five justices who constituted the court that issued the *Condit* decision have since retired, perhaps leaving the question still unanswered.

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[29] *See* R. ROTUNDA & J. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2007-08) §1.6-1(b) (the purpose of ER 1.6 would not be furthered "if a lawyer would be forced to keep information confidential after it has become a matter of general knowledge. If everyone already knows about this information, there is really nothing to keep secret."). *See also* Arizona Ethics Op. 90-13 at 14, n. 21 (noting, as it relates to a former client under ER 1.9, that "[I]t is a close question as to when information relating to the representation of a client is sufficiently 'generally known' no longer to be confidential under ER 1.6").

Conclusion

Scholars have made a variety of suggestions for reforming the duty to report.[30] Maybe it is time to make ER 8.3 more specific–or even broader–to make life easier for attorneys.

From my perspective of providing ethics advice for the State Bar to Arizona attorneys, I know one thing for certain: when it comes to complying with ER 8.3, lawyers do not take their obligation lightly, and they want more specific advice and direction about whether they must report their peers.

[30] *See, e.g.* Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259 (Winter 2003).