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In re Himmel: Solo discusses the seminal case that bears his name

In its 1988 *In re Himmel* decision, the Illinois Supreme Court announced that lawyers with nonprivileged knowledge of an attorney's misconduct must inform the Attorney Registration & Disciplinary Commission — even if the knowledge is gained from a client who does not want it disclosed. 125 Ill. 2d 531.

The *Himmel* duty is now an established standard, but the opinion's far-reaching consequences were novel at the time and set the legal community ablaze. The controversial case has been analyzed by courts, debated by commentators, embraced by some state ethics commissions, and rejected by others.

And what of James Himmel, the young sole practitioner who found himself in the middle of a firestorm all those years ago?

Himmel shares his perspective on this landmark ruling and how it impacted him personally.

Protecting the client's interests

By all accounts, Himmel faithfully served the interests of his client, whose settlement proceeds from a motorcycle accident were stolen by her former attorney.

The theft was obvious misconduct, but the state's client protection program was still years in the future, and an ARDC investigation could have impeded recovery of the purloined funds. Therefore, the client instructed Himmel to pursue the former attorney directly, without contacting the ARDC.

Himmel recovered more than half the remaining balance from the rogue lawyer. Under the repayment arrangement, Himmel and the client agreed not to bring civil or criminal charges, or contact the ARDC, if the settlement payments were made.

Himmel next obtained a court judgment when the payments stopped, but no further funds were collected. Having agreed to take no fee until the client had a full recovery, Himmel was not paid for his work.

ARDC Review Board recommends no charges

When the ARDC filed a complaint for not reporting the theft, Himmel "had no idea what was coming." He acted in his client's best interests and at her direction and believed it was simply a matter of explaining the facts.

The ARDC proceedings seemed to confirm Himmel's view that his duty to the client outweighed any obligation to report.

Initially, the hearing board determined the ARDC should have been contacted, but noted Himmel obtained a good result for the client for no fee and recommended a private reprimand.

Next, the review board moved entirely in Himmel's favor, with a no-discipline recommendation. The review board explained that the client already contacted the ARDC before she retained Himmel, and in any event, Himmel properly obeyed the client's instructions not to make a report.

Supreme Court declares duty to report outweighs client's interests

On final review, the Supreme Court stunned Himmel by disregarding the review board and imposing a one-year suspension.

Whether the client directly contacted the ARDC was "irrelevant," the court said, because "the actions of a client would not relieve the attorney of his own duty."

On the question of attorney-client privilege, the court applied a strict evidentiary standard and denied the privilege

SOLE SPEAK

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because (1) the client's mother and fiancé attended client meetings; and (2) Himmel discussed the theft with third parties, including the company that issued the settlement check and the lawyer who stole the funds.

Finally, the court brushed aside Himmel's duty to obey the client's instructions. On this pivotal point, the court merely noted that a lawyer "should assist in maintaining the integrity and competence of the legal profession" and "may not choose to circumvent the rules by simply asserting that his client asked him to do so."

Himmel put the Illinois bar on notice that failing to report lawyer misconduct would not be tolerated.

Himmel was not alone in his shock at this result. According to a commentator, "*Himmel* was a dramatic surprise to the bar." Ronald D. Rotunda, "The lawyer's duty to report another lawyer's unethical violations in the wake of *Himmel*," 1988 Ill. L. Rev. 977, 991 (1988).

Warning to the bar in the wake of Greylord

Given the lack of precedent, the Supreme Court's suspension of Himmel is perplexing. Just three months earlier, the court discharged ARDC complaints against a group of attorneys who made loans or gifts to judges. Although each lawyer violated the disciplinary rules, the court found they "acted without the guidance of precedent or settled opinion" and "could not have been aware of the construction that we have, for the first time, placed on that rule in this opinion." *In re Corboy*, 124 Ill. 2d 29, 45, 49 (1988).

The *Himmel* court justified the suspension by citing aggravating factors, but the analysis appears to be a stretch.

First, the court decided that Himmel's agreement not to notify the ARDC or bring civil or criminal charges — in return for the settlement payments — somehow amounted to interference with an ARDC investigation and "compounding a crime" under the criminal code. Second, the court speculated that timely reporting might have "spared" other citizens from the fraudster-attorney's misconduct.

Himmel's severe sanction might best be understood as a response to Operation Greylord, a task force investigation that netted dozens of corruption convictions against Illinois lawyers, judges and other officials from 1984 to 1993.

Himmel put the Illinois bar on notice that failing to report lawyer misconduct would not be tolerated. See William J. Wernz, "To report or not to report, bench & bar of Minnesota" (December 1988) ("Himmel had nothing to do with Greylord, except that it seemed intolerable that many Chicago attorneys had been aware of

corruption without reporting it. Himmel may have suffered for the sins of others”).

Regardless, *Himmel* had its intended impact. Per the ARDC’s annual report from 1989 — the first year after the decision — total reports of misconduct increased by 877 and 922 of those reports were made by attorneys.

Surviving the aftermath

Although the passage of nearly three decades has tempered Himmel’s perspective, he still recalls how the case upended his life.

As the sole supporter of his wife and three young children, Himmel unexpectedly found

himself without employment. He obtained modest work as a real estate closer with a title company and was forced to fill the financial gaps with loans from family members.

Moreover, virtually overnight Himmel lost his privacy and became a reluctant celebrity of sorts. For 28 years, countless lawyers, and even judges, have asked: “Are you that guy?” Worse yet, his surname was co-opted by the legal profession, where judges, attorneys, academics, and even the ARDC, now routinely refer to a lawyer’s “Himmel obligation” or “Himmel duty” to make a “Himmel report.”

Nor was it easy to resume his

real estate and divorce practice, which took more than two years to rebuild. To this day, Himmel finds himself on occasion explaining the case to prospective clients, who sometimes ask if he was “disbarred.” Experience has taught Himmel to keep a printed synopsis of the case at hand for such occasions.

Despite the hardships, Himmel expresses satisfaction that mandatory reporting of misconduct has improved the profession and served the public interest. According to the ARDC’s 2015 annual report, an average of nearly one-quarter of all formal disciplinary cases over the prior 13 years include at least

one charge arising from a judge’s or lawyer’s report. Himmel is proud his case has helped “maintain[] the integrity and competence of the legal profession,” as envisioned by the Supreme Court.

In the end, Himmel said, “time heals all wounds,” and the decision is now a footnote in his long career. As he faced the inevitable ups and downs of practicing law over the years, Himmel has learned that “things happen — you just have to deal with them and move on.”

“Still,” Himmel concluded with a chuckle, “it would be nice to have a penny for every time my name has been mentioned.”