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Recent Developments in the Law of Lawyering: The New Illinois Rules of Professional Conduct

*Alberto Bernabe**

I. INTRODUCTION

The most important development in the law of lawyering in the state of Illinois last year was the adoption of a complete revision of the current Rules of Professional Conduct, largely based on the current American Bar Association's ("ABA's") Model Rules of Professional Conduct.¹ The new rules became effective in January 2010 and are now the source of law for the state's disciplinary system while also providing guidance for questions of disqualification in litigation and for the standard of care of conduct in malpractice cases.² Needless to say, it is extremely important for all lawyers in the state to have a good understanding of the new rules.

The process to revise the Illinois Rules of Professional Conduct began in 1999 when the Illinois State Bar Association ("ISBA") appointed a special committee to monitor the work of the ABA's Ethics 2000 Commission³ and to consider recommendations for changes in the

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1. The fact that the Illinois rules are based on the ABA Model Rules is not surprising given that since the early 1900s states have looked primarily to the ABA for guidance in this area. By the end of 1999, almost all the states and the District of Columbia had adopted some version of the ABA Model Rules of Professional Conduct. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE 2007-2008*, § 1-1(e)(4), at 6-7 (2007).

2. Ill. Sup. Ct. Order of July 1, 2009, available at <http://www.state.il.us/court/supremecourt/rules/Amend/2009/070109.pdf> ("Effective January 1, 2010, the provisions of the Illinois Rules of Professional Conduct will be repealed and replaced by the following Illinois Rules of Professional Conduct of 2010.").

3. The ABA Model Rules were adopted in 1983 and remained largely unchanged until 1997, when the ABA created a special commission to evaluate and revise them as needed. The Commission became known as the "Ethics 2000 Commission" because it was expected to report its findings and recommendations to the ABA House of Delegates in the year 2000. However, the revision of the rules took longer than anticipated and the Commission did not present its final report until August 2001. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1-1(f)(1), at 8. The report suggested many changes to the rules. Most of these changes, in addition to some suggested by

Illinois rules.⁴ In 2002, this committee became a joint committee of the Illinois State Bar Association and the Chicago Bar Association (“CBA”).

The ISBA/CBA Joint Committee (“Joint Committee”) decided early on that it would recommend discarding the then current Illinois rules and adopt the language and structure of the ABA Rules⁵ with a few changes to conform to Illinois law.⁶ Following this approach, the Joint Committee issued a report with recommendations for changes in 2003. After considering comments to that report, the Joint Committee then

the ABA Commission on Multijurisdictional Practice and the ABA Task Force on Corporate Responsibility, were adopted in the current (2002) version of the ABA Model Rules. ISBA/CBA JOINT COMM. ON ETHICS 2000, REVISED FINAL REPORT 4 (2004) [hereinafter ISBA/CBA JOINT COMM. REPORT], available at http://www.state.il.us/court/SupremeCourt/Public_Hearings/Rules/2007/ISBACBAFinalReport.pdf. Since then, twenty-eight states and the District of Columbia have adopted new rules or made revisions to their existing rules. These jurisdictions and the effective dates of their revisions are: Arizona (December 2003), Arkansas (May 2005), Connecticut (January 2007), Delaware (July 2003), District of Columbia (February 2007), Florida (May 2006), Idaho (July 2004), Indiana (January 2005), Iowa (July 2005), Louisiana (March 2004), Maryland (July 2005), Minnesota (October 2005), Mississippi (November 2005), Montana (April 2004), Nebraska (September 2005), Nevada (May 2006), New Jersey (January 2004), North Carolina (March 2003), North Dakota (August 2006), Ohio (February 2007), Oregon (January 2005), Pennsylvania (January 2005), South Carolina (October 2005), South Dakota (January 2004), Utah (November 2005), Virginia (January 2004), Washington (September 2006), Wisconsin (July 2007), and Wyoming (July 2006). Memorandum from Richard A. Redmond, Report of the Supreme Court Comm. on Prof'l Responsibility, to John Niccoara, Supreme Court Rules Comm. Chair 5 (Feb. 20, 2007) [hereinafter Supreme Court Comm. Report], available at http://www2.state.il.us/court/SupremeCourt/Public_Hearings/Rules/2007/ProfRespReport.pdf.

4. ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 4–5; Robert Creamer & Thomas Luning, *Proposed New Rules of Professional Conduct for Illinois Lawyers*, 92 ILL. B.J. 306, 306 (2004).

5. ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 5. In their reports, both the ISBA/CBA Joint Committee and the Supreme Court Committee on Professional Responsibility support this approach with the following arguments: (1) the Model Rules are de facto the national standard for ethics rules; (2) the Model Rules are the standard for testing of applicants to the Bar in the Multistate Professional Responsibility Examination; (3) all the standard works on legal ethics are organized around the Model Rules; (4) following the Model Rules will achieve a higher level of uniformity and consistency with the rules of other jurisdictions; and (5) adopting purely unique rules could cause more problems. The Supreme Court Committee also emphasized the benefit of adopting comments to accompany the rules. ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 5–9; Supreme Court Comm. Report, *supra* note 3, at 6–9; *see also* Supreme Court Comm. Report, *supra* note 3, at 9 (“[T]he ISBA/CBA Joint Committee followed the language of the ABA Model Rules as well as the relevant Comments unless there were major policy considerations.”).

6. Typically, the policy considerations that resulted in suggestions to depart from the Model Rules were based on prior decisions of the Illinois Supreme Court or on the understanding that the text of the current Illinois Rules ought to be preserved. Supreme Court Comm. Report, *supra* note 3, at 9. One example is the decision to require disclosure of attorney misconduct under Rule 8.3 unless the information originated in a privileged communication, as opposed to a confidential one, which is the standard used in the Model Rule. Another example is the decision to retain a mandatory duty to disclose certain types of information under Rule 1.6, even though the Model Rule makes the disclosure just discretionary. *Id.*

issued a final report in 2004.⁷ This report was then submitted to the Illinois Supreme Court Committee on Professional Responsibility, which reviewed it and, three years later, issued its own report in which it agreed with most, but not all, of the Joint Committee's recommendations.⁸ Both reports recommended adopting the ABA Model Rules, but both suggested a number of changes, some of which are quite significant.

Two years later, after holding open hearings and considering comments by members of the profession, the Supreme Court approved the new rules. This article will take a closer look at the approved new rules and summarize the more significant changes.⁹ Part II of this article will examine important changes to some basic principles throughout the rules, including changes in the approach to the duty of confidentiality, the scope of representation, the duty to charge reasonable fees and retainers, the fiduciary duty, and the duty to provide pro bono services.¹⁰ Part III will discuss some changes to the approach to issues related to litigation.¹¹ Part IV will examine some new rules.¹² Part V will mention the regulation of a few other aspects of the practice of law including advertising, solicitation, and the regulation of multi-jurisdictional practice.¹³ Finally, this article will discuss the more likely areas of future changes in the regulation of the practice of law in Illinois.¹⁴

7. ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 1–2.

8. The Supreme Court Committee on Professional Responsibility began its review of the ISBA/CBA Joint Committee Report in October 2005 and finalized it in January 2007. Supreme Court Comm. Report, *supra* note 3, at 3. It submitted its final report in February of that same year. The committees disagreed on some aspects related to the Scope section of the rules: Rules 1.2, 1.6, 1.15, 6.3, 7.4, 8.4, and the comment to Rule 1.8.

9. If one compares the old rules and the new ones side-by-side, or reviews a “redline” version of the new rules, one will notice there are many changes. However, many of those changes are not particularly significant; the wording changed, but the substance remained the same. For example, the phrase “consent after consultation” has been replaced in most, if not all, instances with the phrase “informed consent,” which is clearly defined in the terminology section and is a familiar phrase to practicing lawyers. Also, some rules have been “relocated” or reorganized. For example, some sections that used to appear in Rule 1.2 have been moved to Rule 8.4, and some material was moved from Rule 3.3 to Rule 3.4. Also, the content of Rule 3.6 “on the subject of trial publicity” has been changed from an expression of what an attorney *cannot* discuss to what an attorney *can* discuss.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV (explaining some of the brand new rules imposed with respect to prospective clients and conflicts of interest).

13. *See infra* Part V.

14. *See infra* Part VI (hypothesizing future changes to the rules in areas including in-house lawyers, bundled legal services, and mistake disclosures).

A. *Two General Changes: Comments and State of Mind*

The first significant change to the rules relates to the format. Although the old Illinois Rules of Professional Conduct were adopted following the ABA Model Rules, most were adopted without their corresponding comments.¹⁵ This was a mistake, and the new rules remedy it by adopting the full format of the Model Rules, which includes comments to each rule. This is important because the comments provide helpful guidelines in interpreting the rules. They should be the first source of information consulted when attempting to interpret the application of a rule.¹⁶ For this reason, adopting the comments to the rules has resulted in a significant improvement over the old rules.

A second significant change concerns the approach to the state of mind needed to prove a violation of the rules. Many of the old rules recognized a possible violation if the attorney “should have known” something. In other words, the disciplinary authority could establish a violation of the rule by establishing that the attorney was negligent in not knowing something at the time. That notion has now been abandoned in most rules,¹⁷ leaving only the requirement that the attorney actually have knowledge of the matter in question, recognizing, however, that knowledge can be proven by circumstantial evidence.¹⁸

15. There were two exceptions: Rule 3.8 included “Committee Comments,” and Rule 8.5 was followed by a “Comment.” ILL. RULES OF PROF’L CONDUCT Terminology (repealed Jan. 1, 2010) [hereinafter REPEALED ILL. RULES OF PROF’L CONDUCT].

16. As explained in the Report of the Supreme Court Committee on Professional Responsibility:

Virtually all the black letter rules require some clarification or additional explanation. Comments allow expanded and more specific explanation of particular issues without cluttering the black letter provisions with unnecessary details. Thus the inclusion of the Comments will provide Illinois lawyers a larger base of analysis and authority concerning their professional conduct. This additional information could be critical to the interpretation and application of the rules by practicing lawyers, the courts, and disciplinary agencies.

Supreme Court Comm. Report, *supra* note 3, at 9.

17. See, e.g., ILL. RULES OF PROF’L CONDUCT R. 1.0(f) (2010) [hereinafter 2010 ILL. RULES OF PROF’L CONDUCT] (eliminating possible violations in instances where the attorney should have known something in Rules 1.1, 1.2, 1.8, 1.10, 1.11, 1.12, 1.16, 3.3, 3.7, 3.8, 4.1, and 7.3); *cf. id.* R. 1.13, 2.3, 3.6, 4.3, 8.4 (retaining the original view).

18. *Id.* R. 1.0(f).

II. CHANGES TO THE BASIC PRINCIPLES OF THE ATTORNEY-CLIENT RELATIONSHIP

A. *Duty of Confidentiality*

The new Illinois rules include several significant, and in some cases controversial, changes to the duty of confidentiality.¹⁹ These include a significant change in the approach to confidentiality itself and an expansion of the areas of mandatory and permissive disclosure of confidential information.

The newly adopted Rule 1.6 has finally abandoned the old approach to confidentiality based on the long rejected Model Code, which was based on a distinction between information that constituted a “confidence” and information that constituted a “secret.”²⁰ Instead, the new rules define confidential information as “information related to the representation”²¹ regardless of the source of the information, the detriment to the client, or the client’s specific request that it be kept confidential.²² For this reason, the duty of confidentiality under the new rule protects a much broader range of information than it did under the old Illinois rules.

But even though the definition of confidentiality protects more information, the newly adopted exceptions to the duty also expand the circumstances in which a lawyer can or must disclose confidential information. For example, the newly adopted Rule 1.6 states that if an attorney’s services are used to advance a fraudulent scheme, the attorney can disclose confidential client information to prevent fraudulent acts.²³ Whereas the old Rule 1.6(c)(2) stated that a lawyer could reveal a client’s intention to commit a crime, the new language expands the possibility of disclosure to include information about conduct that constitutes a civil fraud.

19. For a more detailed discussion of the criticism of the new rules, see Alberto Bernabe, *Coming Soon to a Law Practice Near You: The New (and Improved?) Illinois Rules of Professional Conduct*, 39 LOY. U. CHI. L.J. 691 (2008).

20. The old rules defined a confidence as “information protected by the lawyer-client privilege” and a secret as “information gained in the professional relationship that the client has requested be held inviolate or the revelation of which would be embarrassing to or would likely be detrimental to the client.” REPEALED ILL. RULES OF PROF’L CONDUCT, *supra* note 15, Terminology.

21. See 2010 ILL. RULES OF PROF’L CONDUCT, *supra* note 17, R. 1.6 (defining confidential information and the instances in which disclosure is permitted or required).

22. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 3 (2008) (“The confidentiality rule applies . . . not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”).

23. *Id.* R. 1.6(b)(2).

In addition, the exceptions recognized in Rule 1.6(b)(3) are even more expansive. According to this new rule, if the fraudulent act has been committed already, the attorney may disclose confidential information to prevent the financial injury that would result from the act,²⁴ and if it is too late for that (because the financial injury has already happened), the attorney may disclose the information to rectify the injury.²⁵

The adoption of these sections is of great significance. Before this new rule was approved, the circumstances that allowed for disclosure of confidential information under Rule 1.6 referred to situations where disclosure of the information was necessary to prevent *future* conduct. In contrast, these new exceptions to the duty of confidentiality allow for the disclosure of information about past conduct. That is an important change and, for some commentators, a troubling one.²⁶ Given that the rule does not allow disclosure about past conduct other than for conduct that has resulted in financial injury, it has been argued that the new rule weakens the duty of confidentiality “to provide greater protection to someone who has lost money through fraud, than to a person who has been intentionally maimed by the client or to the spouse of someone who has been murdered by the client.”²⁷

The new Illinois rules also expand the area of mandated disclosure. The old Illinois rule mandated disclosure of information to prevent the client from committing an act that would result in death or serious bodily harm.²⁸ The new exceptions to the duty of confidentiality expand this mandate by eliminating the requirement that the disclosure be limited to conduct of the client and simply mandating disclosure of confidential information to prevent “reasonably certain death or substantial bodily harm.”²⁹ Only a very small number of states have joined Illinois in adopting this rule.³⁰

24. *Id.* R. 1.6(b)(3).

25. *Id.*

26. *See, e.g.,* MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 3D 146–47 (2004) (characterizing the fraud exception under Model Rule 1.6 as unduly broad and outlining three objections). For a discussion of this debate, see Bernabe, *supra* note 19, at 703–10.

27. FREEDMAN & SMITH, *supra* note 26, at 147.

28. REPEALED ILL. RULES OF PROF'L CONDUCT, *supra* note 15, R. 1.6.

29. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 1.6.

30. Only twelve other states have mandatory disclosure: Arizona, Connecticut, Florida, Iowa, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin. SUSAN MARTYN ET AL., THE LAW GOVERNING LAWYERS: NATIONAL RULES, STANDARDS, STATUTES AND STATE LAWYER CODES 112–19 (2006–2007). As the ISBA/CBA Joint Committee Report states, the mandatory disclosure requirement represents a strongly-held policy position in Illinois, but it is interesting to consider the arguments in support of an alternative.

1. Duty of Confidentiality and the Entity Client

The newly adopted Rule 1.13, which regulates certain aspects of the attorney-client relationship when the client is an entity, also contains an exception to the duty of confidentiality. In this instance, however, the Illinois rule is an improvement over the Model Rule. The Model Rule provides that when a lawyer has reported a “violation of law” by a corporate constituent to the organization’s highest authority and the organization fails to take timely remedial action, the lawyer may disclose client confidences outside the organization to the extent necessary to prevent substantial injury to the organizational client.³¹ However, the language of Model Rule 1.13 is inconsistent with that of Model Rule 1.6.³² The new Illinois Rule 1.13 addresses this issue by changing the language in Rule 1.13 and making it consistent with Rule 1.6.³³ Thus, the Illinois Rule allows an attorney to disclose confidential information only if the relevant misconduct constitutes a crime or fraud, rather than a “violation of law.”³⁴

The Illinois Rule is also an improvement because its comment better explains the relationship between the two rules,³⁵ stating:

Compare ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 14–15 (advocating for adoption of Rule 1.6 and proposing further changes), *with* FREEDMAN & SMITH, *supra* note 26, at 152 (co-authored by Professor Monroe Freedman, who for many years advocated the need of a mandatory disclosure requirement but now argues in favor of the Model Rules’ approach). Freedman has stated that one type of case that helped persuade him is the type of case “where the lawyer learns that her client has agreed with a loved one who is terminally ill and in great pain to assist that person to commit suicide.” FREEDMAN & SMITH, *supra* note 26, at 152. At the other end of the spectrum, Professor Abbe Smith prefers “a strict principle that client secrets and confidences are sacrosanct and lawyers should not divulge them under any circumstances.” *Id.* at 154. She believes that in the rare case where it is truly necessary to disclose information obtained through the lawyer-client relationship (e.g., to stop the wrong person from being executed, to prevent premeditated murder, to prevent mayhem), a lawyer will do so notwithstanding the principle and will not be disciplined for it. *Id.* Smith believes it is more important to maintain and preserve the principle of confidentiality—no matter how difficult the circumstances—“than it is to affirm individual lawyer morality.” *Id.* To this position, Freedman replies, “[I]f lawyers will act that way in those rare cases, and if their actions will be condoned by the disciplinary authority, then the rules should comport with reality. It does not promote respect for law to promulgate rules with no expectations of either obedience or enforcement.” *Id.* at 154 n.135.

31. MODEL RULES OF PROF’L CONDUCT R. 1.13 (2007–2008).

32. Model Rule 1.6 refers to disclosure of information to prevent or remedy “crimes or frauds,” *id.* R. 1.6, while Model Rule 1.13 refers to disclosures related to “violations of law,” *id.* R. 1.13.

33. 2010 ILL. RULES OF PROF’L CONDUCT, *supra* note 17, R. 1.13; *see* ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 20–21 (“The Committee proposes that, consistent with proposed new Rule 1.6(b), the lawyer be permitted to disclose client confidences outside the organization only if the misconduct involved amounts to a crime or fraud, rather than a ‘violation of law.’”).

34. 2010 ILL. RULES OF PROF’L CONDUCT, *supra* note 17, R. 1.13.

35. Just like Model Rule 1.6, Model Rule 1.13 allows disclosure of confidential information to prevent fraudulent conduct, but the purpose of the rule is fundamentally different. While the

Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b). . . . If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(1), 1.6(b)(2) or 1.6(b)(3) may permit the lawyer to disclose confidential information.³⁶

It is important to remember, though, that Rule 1.6 does not *require* disclosure; it merely allows it. If the correct interpretation of Rule 1.13 is that the attorney is not allowed to disclose certain information, then the fact that Rule 1.6 allows it does not mean the attorney has to disclose it, and chances are that the attorney has a strong incentive *not* to disclose it, as it would be against the corporate client's interests to do so, and it would be a violation of Rule 1.13(c). Also, disclosure to avoid or rectify financial injury under Model Rule 1.6 is allowed only if the attorney's services are used to advance the client's crime or fraud. In the typical circumstances where an in-house attorney discovers wrongdoing by a constituent of the entity client, this would not be the case; thus, although disclosure might avert, or rectify, the injury, because the interest is not to protect the innocent third party, the disclosure is not allowed.³⁷

disclosures in Model Rule 1.6 are allowed to protect the victim of the fraudulent conduct, Model Rule 1.13 allows disclosure only to protect the client. If there is no reasonably certain substantial injury to the organization, the attorney seems to be precluded from disclosing the information under Model Rule 1.13 even if doing so would help prevent injury to others, but such disclosure would seem to be allowed under Model Rule 1.6. For this reason, it has been argued that Model Rule 1.6 "permits a lawyer to blow the whistle on an individual client's fraud, but [Model Rule] 1.13 forbids it when the client is a corporation," and that "the ABA has given the interests of corporate clients far greater protection than those of individual clients." FREEDMAN & SMITH, *supra* note 26, at 151. Professor Monroe Freedman is even more critical, claiming that Model Rule 1.13 "was designed from the outset by the corporate bar to give special protection to corporate clients, and this preferential treatment was accepted by the Kutak Commission in order to get the endorsement of the Model Rules from the ABA's powerful Corporate Section." *Id.* at 148; *see also* Monroe Freedman, *Lawyer Client Confidences: The Model Rules' Radical Assault on Confidentiality*, 68 A.B.A. J. 428, 432 (1982). Professor Ronald Rotunda reaches a different conclusion. He argues that because attorneys are allowed to reveal confidential information of corporate clients under two rules, the rules grant organizational clients less protection than they provide to non-organizational clients, whose confidential information can be disclosed only as an exception to one rule. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.13-2, at 540-62.

36. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 1.13 cmt. 6.

37. For more on this issue, see FREEDMAN & SMITH, *supra* note 26, at 148-49; Bernabe, *supra* note 19, at 709.

B. Scope of Representation and Allocation of Authority Between Attorney and Client

The title of Rule 1.2 has been changed from “Scope of Representation” to “Scope of Representation and Allocation of Authority Between Client and Lawyer” to reflect a new approach to some basic elements of the attorney-client relationship. For example, the new rule now explicitly recognizes that the attorney has the authority to take such action on behalf of the client as is impliedly authorized to carry out the representation. It also imports a unique element to the Illinois rules that used to appear in the old Rule 1.1 that banned the outsourcing of legal services without the client’s informed consent.³⁸

In addition, the new rule on the attorney-client relationship with a client with diminished capacity³⁹ is more specific as to the circumstances in which an attorney has the authority to take control of the representation because the client cannot adequately act in his or her own best interests. It now states:

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.⁴⁰

C. Duties Related to the Financial Aspects of the Representation: Setting Legal Fees and Retainers

The new Rules of Professional Conduct have not changed the standard by which the practice of financing a law practice is judged. Fees must be reasonable.⁴¹ However, because such a standard is difficult to apply, the rule is now more detailed as to some of the requirements needed to ensure that lawyers act properly when setting

38. Illinois Rule 1.2(e) states: “After accepting employment on behalf of a client, a lawyer shall not thereafter delegate to another lawyer not in the lawyer’s firm the responsibility for performing or completing that employment, without the client’s informed consent.” 2010 ILL. RULES OF PROF’L CONDUCT, *supra* note 17, R. 1.2(e). There is no equivalent to this section in the ABA Model Rules. Compare 2010 ILL. RULES OF PROF’L CONDUCT, *supra* note 17, with MODEL RULES OF PROF’L CONDUCT (2008).

39. See 2010 ILL. RULES OF PROF’L CONDUCT, *supra* note 17, R. 1.14 (using the phrase “Client with Diminished Capacity”). The old rule used the phrase “Client under a Disability.” REPEALED ILL. RULES OF PROF’L CONDUCT, *supra* note 15, R. 1.14.

40. 2010 ILL. RULES OF PROF’L CONDUCT, *supra* note 17, R. 1.14(b).

41. *Id.* R. 1.5.

fees. First of all, it clarifies that the reasonableness standard applies to costs and expenses as well as to fees.⁴² Second, the new rule specifies that unless the lawyer will charge a regularly represented client on the same basis or rate as in the past, the attorney must explain to the client, preferably in writing, the scope of the representation, the basis or rate of the fee, and expenses and any changes in the basis or rate of the fee or expenses.⁴³ In the case of a contingency fee, the new rule requires that the client sign the agreement,⁴⁴ which is one of the few instances that require a client's written consent.⁴⁵

The new rules also regulate the practice of charging retainers, which is another aspect of the process of financing a legal practice. For example, Rule 1.15(c) introduces retainers, which were developed by the Illinois Supreme Court in *Dowling v. Chicago Options Associates*.⁴⁶ Interestingly, the drafters of the rule chose not to place the regulations related to retainers in the rule about fees where they probably should have been placed. Instead, the details related to retainers appear in the provision that regulates how an attorney should "safe-keep" a client's property, which could create some confusion.

Before *Dowling*, Illinois recognized two different types of retainers: general retainers and security retainers. General retainers have always been considered a form of a fee that is paid before the representation to buy the attorney's availability for a specific period of time or for the performance of a specific task. In simple terms, the general retainer is money the client pays just to hire the attorney. Paying a general retainer allows a client to ensure that the attorney (or the firm) is, in fact, her attorney and gives her the right to expect the attorney (or firm) to be available to do work for her when she asks. Because the value bought in exchange for the retainer is provided at the moment it is paid, the money belongs to the attorney, and the attorney has a duty to keep it separate from any money in the attorney's possession that belongs to the client.⁴⁷

42. *Id.* R. 1.5(a).

43. *Id.* R. 1.5(b).

44. *Id.* R. 1.5(c). Further, the rule requires that the agreement clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. *Id.*

45. For a critique on the necessity of written consent in the context of conflicts of interests, see Bernabe, *supra* note 19, at 723–25.

46. 875 N.E.2d 1012, 1018–21 (Ill. 2007).

47. As a matter of fact, comment 3B to the new Rule 1.15 explicitly states that a general retainer "is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client." 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 1.15 cmt. 3B. On the other hand, a retainer is a form of a

In contrast, a security retainer is a fund provided by the client in advance of the representation out of which the attorney can recover fees as the attorney performs the services. Because the fund is there to buy actual services, until the services are actually performed the money belongs to the client even though it is in the attorney's possession. For this reason, the attorney has an obligation to keep it separate from the attorney's own money, and if the attorney completes the services and there is money remaining in the fund, the attorney is obligated to refund that amount.

In *Dowling*, the Illinois Supreme Court created a third, and somewhat controversial, type of retainer called an "advance payment retainer," defined as "present payment to the lawyer in exchange for the commitment to provide legal services in the future."⁴⁸ According to the decision of the Court, which has now been incorporated into the Rules of Professional Conduct, this type of retainer is earned immediately upon payment but, paradoxically, belongs to the client and must be refunded if not used.⁴⁹ Obviously, the notion of a "commitment to provide future services" and the notion that the retainer is earned upon payment make it sound like a general retainer. The notion of "present payment" and the fact that the attorney must refund what is not earned, however, make it sound like an agreement to provide a fund out of which future services would be paid or, in other words, a security retainer.

Yet, the Court decided it was neither. The advance payment retainer is a special agreement that allows the attorney to keep clients' funds in the attorney's account, and the attorney has a duty to return these funds if he or she does not earn them.⁵⁰ What the Court did not explain, and the new rules do not clarify, however, is how keeping unearned clients' funds in the attorney's general account does not violate the duty against commingling.⁵¹

fee and thus subject to the requirement of reasonableness in Rule 1.5, which means that, depending on the circumstances, even a general retainer can be unreasonable.

48. 875 N.E.2d at 1018, 1021.

49. Comment 3C to the newly adopted Rule 1.15 states, in part:

An advance payment retainer is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client with the lawyer's own property. However, any portion of an advance payment retainer that is not earned must be refunded to the client.

2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 1.15 cmt. 3C.

50. *Dowling*, 875 N.E.2d at 1022.

51. In contrast, in a different context, the new rules explicitly create an exception to the ban on

The new Rules of Professional Conduct now summarize these concepts related to retainers and include a detailed list of requirements that attorneys must meet to make sure their conduct in securing retainers is ethical.⁵² The contradiction between the duty against commingling and the duty of safekeeping the advance payment retainer in the attorney's account remains unexplained, however.

D. The Attorney's Fiduciary Duty and Transactions with Clients

The notion that attorneys need to be careful and fair when entering into business transactions with clients is not new, but the newly adopted rule on such transactions is much more detailed than the old one. The old rule simply stated that, absent consent by the client, a lawyer could not enter into a business transaction with a client if the lawyer knew or should have known that the lawyer and client had conflicting interests and that the client expected the lawyer to exercise the lawyer's professional judgment to protect the client.⁵³ Given that a lawyer is always expected to exercise independent professional judgment, the old rule essentially just banned transactions if the lawyer knew or should have known of a conflict of interest.⁵⁴

In contrast, the new rule is much more effective because it sets out specific requirements for attorneys to follow, which will in turn help authorities evaluate the fairness of the transaction. It begins by stating the basic standard by which transactions will be judged: they have to be "fair and reasonable."⁵⁵ It then sets out specific requirements to assure that they are indeed fair and reasonable. For example, the rule requires the terms of the transaction to be "fully disclosed and transmitted in

commingling the property of the client and the attorney by allowing attorneys to deposit an amount of money that belongs to the attorney in the client trust account to pay for bank service charges, but only for that purpose and in that amount. See 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 1.15(b) ("A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.").

52. See *id.* R. 1.15(c) (describing limitations and requirements imposed on lawyers receiving funds from clients in the form of general or advance payment retainers); *id.* R.1.15 cmts. 3A–3D (providing additional explanation of restrictions on funds received by lawyers in advance of the funds being earned).

53. REPEALED ILL. RULES OF PROF'L CONDUCT, *supra* note 15, R. 1.8.

54. The actual language of the old rule was as follows:

Unless the client has consented after disclosure, a lawyer shall not enter into a business transaction with the client if the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.

Id. R. 1.8(a).

55. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 1.8(a)(1)–(2).

writing in a manner that can be reasonably understood by the client.”⁵⁶ It also requires that the attorney inform the client in writing that he or she may “seek the advice of independent legal counsel.”⁵⁷ In addition, the lawyer must give the client a reasonable opportunity to seek that independent advice.⁵⁸ Finally, the rule requires that the lawyer secure the client’s written informed consent as to the terms of the transaction and the lawyer’s role in that transaction.⁵⁹

The new Rule 1.8(c) also institutes an important change in the doctrine related to preparing wills. The old rule held it was improper for a lawyer to “prepare an instrument giving the lawyer or a person closely related to the lawyer” a “substantial gift from a client, including a testamentary gift, except where the client was related to the donee.”⁶⁰ The new rule broadens this duty. In addition to banning the preparation of a document giving such a gift, the new rule also bans the lawyer from soliciting the gift.⁶¹

E. Termination of the Attorney-Client Relationship

The newly adopted Rule 1.16 on “declining or terminating representation” introduces some changes in language and approach that have broadened the circumstances where it is permissible for attorneys to withdraw from representation of a client. The old rule stated that, except in cases where withdrawal was required, an attorney could not withdraw unless it was for one of the enumerated reasons in the rule.⁶² The new rule, on the other hand, begins from the opposite premise—that the attorney *can* withdraw in any of the cases listed in the rule, including simply for “good cause.”⁶³ Also, more specifically, the old rule recognized that an attorney could seek to withdraw when the client failed to fulfill a financial obligation to the lawyer.⁶⁴ The new rule expands on this premise by holding that an attorney can seek to withdraw when the client “fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services,”⁶⁵ which presumably

56. *Id.*

57. *Id.* R. 1.8(a)(2).

58. *Id.*

59. *Id.* R. 1.8(a)(3).

60. REPEALED ILL. RULES OF PROF’L CONDUCT, *supra* note 15, R. 1.8(c).

61. 2010 ILL. RULES OF PROF’L CONDUCT, *supra* note 17, R. 1.8(c).

62. REPEALED ILL. RULES OF PROF’L CONDUCT, *supra* note 15, R. 1.16.

63. 2010 ILL. RULES OF PROF’L CONDUCT, *supra* note 17, R. 1.16.

64. REPEALED ILL. RULES OF PROF’L CONDUCT, *supra* note 15, R. 1.16(f).

65. 2010 ILL. RULES OF PROF’L CONDUCT, *supra* note 17, R. 1.16(b)(5). It is interesting to note that the new rule also adds that the attorney must give the client “reasonable warning” that the lawyer will withdraw unless the client fulfills the obligation. *Id.*

includes more than just financial obligations. Furthermore, the new rule adopts a separate section that recognizes the attorney's right to withdraw if "the representation will result in an unreasonable financial burden on the lawyer."⁶⁶

F. Duty to Provide Pro Bono Services

The ABA's Ethics 2000 Commission seriously considered adopting a rule that imposed a duty of mandatory pro bono service, but ultimately rejected the idea.⁶⁷ Thus, the Model Rule that was approved essentially states that all lawyers are expected, but not required, to perform pro bono services. The comment to the rule also makes clear that noncompliance with the rule cannot be enforced through the disciplinary process.⁶⁸ In other words, the rule is merely aspirational. For this reason, while in the process of adopting the new Illinois rules, the ISBA/CBA Joint Committee took the position that the new Illinois rules should reject the current Model Rule, stating, "The model rule articulates praiseworthy goals and aspirations for a lawyer, but aspirations are not appropriate subjects of a disciplinary rule."⁶⁹

Regardless of whether it was a mistake to reject the adoption of Model Rule 6.1,⁷⁰ the decision to do so should not be interpreted as a

66. *Id.* R. 1.16(b)(6).

67. This discussion is not new. One of the original drafts of the Model Rules prepared by the Kutak Commission included a mandatory duty to perform pro bono work. In fact, since the ABA started to draft model professional responsibility codes and rules, there has been a debate as to whether there ought to be a rule mandating pro bono service. Every time the matter has been discussed, however, it has been decided not to make pro bono service a mandated requirement. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 6.1–2(b), at 1005.

68. MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 12 (2007–2008).

69. ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 34 (citing GEORGE W. OVERTON, THE NEW ILLINOIS RULES OF PROFESSIONAL CONDUCT, AN ANNOTATED EDITION 28 (1991)).

70. First, there is no disagreement that encouraging attorneys to provide pro bono services is an important goal. The Model Rules state, in relevant part:

Every lawyer, regardless of professional prominence or professional work-load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule.

MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 1. Also, although the rule is not meant to be enforced through the disciplinary process, it would not be the first rule adopted that fits that description. If the logic of the ISBA/CBA Joint Committee's report were to be followed strictly,

rejection of the notion that attorneys have a responsibility to render uncompensated service in the public interest. Even though the new Illinois rules do not have a specific rule on the duty to provide pro bono services, they are not entirely silent on the subject. In fact, the new preamble to the rules includes three paragraphs that clearly express the same general⁷¹ aspiration the ABA Model Rule attempts to express in its Rule 6.1.⁷² The preamble to the new Illinois rules states in part:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. . . .

It is also the responsibility of those licensed as officers of the court to use their training, experience, and skills to provide services in the public interest for which compensation may not be available. It is the responsibility of those who manage law firms to create an environment that is hospitable to the rendering of a reasonable amount of uncompensated service by lawyers practicing in that firm. Service in the public interest may take many forms. These include but are not limited to *pro bono* representation of persons unable to pay for legal services and assistance in the organized bar's efforts at law reform. An individual lawyer's efforts in these areas is evidence of the lawyer's good character and fitness to practice law, and the efforts of the bar as a whole are essential to the bar's maintenance of professionalism. To help monitor and quantify the extent of these activities, and to encourage an increase in the delivery of legal services to persons of limited means, Illinois Supreme Court Rule 756(f) requires disclosure with each lawyer's annual registration with the Illinois Attorney

many other discretionary rules should also be eliminated, including some of the exceptions to the duty of confidentiality and the rules that suggest the circumstances in which an attorney can decline or terminate the representation of a client. As clearly explained in the Scope section of the Model Rules,

Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. *No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.*

MODEL RULES OF PROF'L CONDUCT Scope 14 (2007–2008) (emphasis added).

71. The ABA Model Rule is much more specific. It suggests a specific number of hours and an aspiration that the majority of those hours be dedicated to providing free services to persons of limited means or organizations in matters that are designed primarily to address the needs of persons with limited means. *Id.* R. 6.1.

72. To a certain extent, the newly adopted Rule 6.5 may also have the effect of encouraging pro bono services by relaxing the rules regarding conflicts of interests when an attorney provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter under the auspice of a program sponsored by a nonprofit organization or court. *See* 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 6.5 (discussing "nonprofit and court-annexed limited legal services programs").

Registration and Disciplinary Commission of the approximate amount of his or her *pro bono* legal service and the approximate amount of qualified monetary contributions. . . .⁷³

The absence from the Illinois Rules of a counterpart to ABA Model Rule 6.1 regarding *pro bono* and public service should not be interpreted as limiting the responsibility of lawyers to render uncompensated service in the public interest. Rather, the rationale is that this responsibility is not appropriate for disciplinary rules because it is not possible to articulate an appropriate disciplinary standard regarding *pro bono* and public service.⁷⁴

Given that the new Illinois rules do not recognize a duty to provide *pro bono* services as part of a rule itself, the adoption of these last two paragraphs, which do not appear in the Model Rules, is certainly a welcome addition to the Illinois rules.

III. CHANGES TO DUTIES IN THE CONTEXT OF LITIGATION

A. *Communicating with a Person Represented by Counsel*

The newly adopted Illinois Rule 4.2 corrects a major discrepancy between the old rule's title and its actual content. This rule, which regulates attempts by attorneys to communicate directly with persons who are represented by counsel, previously stated that it applied to communications with a "party," rather than with a person as suggested

73. See also ILL. SUP. CT. R. 756(f) comm. cmt. (June 14, 2006) (stating that the rule "is not intended to impose upon lawyers a mandatory duty to provide *pro bono* service but, rather, is intended to impose a mandatory reporting requirement" with the intention that the rule will "serve as an annual reminder to the lawyers of Illinois that *pro bono* legal service is an integral part of a lawyer's professionalism").

74. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, Pmb. ¶¶ 6–6B. Supreme Court Rule 756, which is mentioned in the Preamble, defines *pro bono* legal services as the delivery of legal services without charge or expectation of a fee to a person of limited means or "to charitable, religious, civic, community, governmental or educational organizations in matters designed to address the needs of persons of limited means," or "in furtherance of their organizational purposes." ILL. SUP. CT. R. 756(f)(1)(a)–(c). The rule also considers *pro bono* services to be "the provision of training without charge or expectation of a fee . . . intended to benefit legal service organizations or lawyers who provide *pro bono* services." *Id.* R. 756(f)(1)(d). Legal services for which payment is expected, but is uncollectible, do not qualify as *pro bono* legal services. *Id.* R. 756(f)(1).

It has been argued that the mandatory reporting of *pro bono* work is more effective than mandating *pro bono* service itself. See Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 424–26 (2007) (advocating for a mandatory reporting system). The constitutionality of a mandatory reporting statute has been questioned, but in *Schwarz v. Kogan*, 132 F.3d 1387, 1392 (11th Cir. 1998), the court decided that a mandatory reporting statute was constitutional and that a lawyer could be disciplined for failing to report. See ROTUNDA & DZIENKOWSKI, *supra* note 1, § 6.1–2(b), at 1006 (describing the reasoning of the *Schwarz* court in upholding Florida's mandatory *pro bono* reporting rule).

by its title.⁷⁵ The new Illinois rule fixes this important discrepancy and clarifies the extent of the application of the rule in the entity client context, making it a vast improvement over the old rule.⁷⁶ The comment to the new rule also clarifies the interplay between the rule and a client's right to communicate with another party.⁷⁷

These may sound like relatively minor changes, but in fact they are very significant. Under the old rule, it was not clear whether a lawyer who represented a client in litigation against a corporation could informally interview employees of the corporation without notifying the attorney for the corporation. The case law in Illinois is conflicting. For example, in *Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc.*,⁷⁸ the court interpreted the word "party" to include only the members of the organization's "control group," a concept often used in the context of the attorney-client privilege in the representation of an organization.⁷⁹ However, in *Weibrecht v. Southern Illinois Transfer, Inc.*,⁸⁰ the court rejected this interpretation.⁸¹

The comment to the new rule clarifies the debate by simply stating that, in the case of a represented organization,

Th[e] Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the

75. The old rule stated:

During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.

REPEALED ILL. RULES OF PROF'L CONDUCT, *supra* note 15, R. 4.2.

76. The new rule reads as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 4.2.

77. "Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." *Id.* R. 4.2 cmt. 4.

78. 471 N.E.2d 554 (Ill. App. Ct. 1984).

79. *Id.* at 561. *But see, e.g.,* Upjohn Co. v. United States, 449 U.S. 383, 391 (1981) (referring broadly to a control group as the group of officers and agents responsible for directing the organization's actions in response to legal advice).

80. 241 F.3d 875, 881-83 (7th Cir. 2001).

81. The *Weibrecht* court reasoned that because the current Illinois Rule was derived from the Model Rule at the time of its adoption, the proper way to interpret its meaning would be to look at the comments to the Model Rule even though the Illinois Rule was adopted without the comments. *Id.* at 882. This type of reasoning illustrates another reason why it is a much better approach to adopt the comments, as is being suggested presently.

organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. . . . If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.⁸²

Not surprisingly, there is also much disagreement on the propriety of communications with former employees. Many courts and the ABA Model Rules have taken the position that former employees do not have a relationship with their former employers, and therefore, attorneys are free to contact them without notice to opposing counsel for the entity.⁸³ At the other end of the spectrum, some jurisdictions have banned ex-parte contacts with former employees.⁸⁴ Yet, another view has allowed contact unless the objecting party can establish that the ex-employee's role was central enough to the litigation to be the basis of potential imputed liability, or if the ex-employee had been in a position to create or implement company policies relevant to the allegations of the lawsuit.⁸⁵

Again, the new comment to the rule settles this debate clearly. It states that a lawyer does not need to obtain consent from the

82. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 4.2 cmt. 7.

83. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2007–2008) (“Consent of the organization’s lawyer is not required for communication with a former constituent.”); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 91-359 (1991) (“[I]t is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation’s lawyer.”); *see also, e.g.*, *Orlowski v. Dominick’s Finer Foods, Inc.*, 937 F. Supp. 723, 731 (N.D. Ill. 1996) (“[F]ormer employees (including former managers) are not encompassed by the Rule, and Plaintiffs’ counsel may engage in informal communications with such individuals.”); *Valassis v. Samelson*, 143 F.R.D. 118, 124 (E.D. Mich. 1992) (“A blanket proscription on contact between a former employee and an adverse party’s attorney would be an unwarranted infringement on that [former] employee’s ability to communicate about her former employment.”); *Sanfill of Ga., Inc. v. Roberts*, 502 S.E.2d 343, 345 (Ga. Ct. App. 1998) (“[A] former employee who is not represented by a lawyer simply does not fall within the wording of the rule.”).

84. *See Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569, 573 (W.D. Va. 1998) (prohibiting ex-parte communications with former employees); *Pub. Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 745 F. Supp. 1037, 1042 (D.N.J. 1990) (prohibiting ex-parte contact with represented former employees, thus nullifying the opportunity for overreaching by the investigating party); *cf. N.J. RULES OF PROF'L CONDUCT R. 4.2* (2004) (“Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization’s litigation control group who seeks independent legal advice.”).

85. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 911 F. Supp. 148, 153 (D.N.J. 1995).

organization's lawyer to communicate directly with a former constituent of the organization.⁸⁶

B. Lawyer as a Witness

In another important area, the new rule that addresses the issue of whether an attorney can represent a client if the attorney would have to testify in the client's case is definitely an improvement over the old one.⁸⁷ When Illinois adopted the old rule, it did not follow the applicable ABA Model Rule at the time. Instead, the rule made a distinction between situations in which the lawyer would be a witness for the client and situations in which the lawyer would be called as a witness other than on behalf of the client. The lawyer would be disqualified in the first situation. In the second, the lawyer would be disqualified only if the lawyer's testimony would be prejudicial to the client.⁸⁸ However, as explained in the ISBA/CBA Joint Committee Report, this approach ignored the basic purpose of the rule. The rule is intended to protect both the bench and the opposing party by avoiding fact-finder confusion between the roles of advocate and witness, and by avoiding the possibility that the client whose lawyer also testifies may be at an advantage. Those risks are the same, whether the lawyer testifies for the client or for the adversary.⁸⁹

For this reason, the Joint Committee's recommendation was to adopt the current Model Rule, which very simply says that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, unless the testimony relates to an uncontested issue, to the nature and value of legal services rendered in the case, or if disqualification of the lawyer would bring substantial hardship on the client.⁹⁰

C. Candor and Conduct Before a Tribunal

To match the approach of the Model Rules, the title of Rule 3.3 has been changed from "Conduct Before a Tribunal" to "Candor Toward the Tribunal," and much of its content has been moved to Rule 3.4, a rule that is meant to be more about conduct itself. In addition, the new Rule 3.3 institutes a number of important changes. For example, it

86. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 4.2 cmt. 7.

87. *See id.* R. 3.7 (discussing the instances in which a lawyer may act as advocate at a trial in which the lawyer is likely to be a necessary witness).

88. ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 29 (discussing the distinctions between Model Rule 3.7 and the respective Illinois Rule relating to lawyers acting as witnesses).

89. *Id.*

90. MODEL RULES OF PROF'L CONDUCT R. 3.7 (2007–2008).

clarifies certain aspects of the lawyer's duty, including specifying when it is necessary to take corrective action and what such action might be. The new rule also provides that a lawyer may not refuse to offer testimony of a defendant in a criminal case that the lawyer merely believes, rather than knows, is false.⁹¹

More importantly, the rule places a time limit on the duty to take remedial action when an attorney realizes that he or she has offered material false evidence. The old rule stated that the duty was a continuing one, suggesting that it would apply regardless of the timing of the determination that material false evidence had been presented to a tribunal.⁹² The new rule follows the Model Rule approach, which extends the duty to take remedial action only until the end of the proceeding.⁹³

Another interesting change in this rule is the fact that it limits the duty to instances when the attorney has actual knowledge of the falsity of the information or evidence in question. Under the old rule, an attorney could have violated this rule if it was later determined that the attorney "should have known" that the evidence presented or the statement made to the tribunal was false. The new rule eliminates this possibility, making it easier for attorneys to understand their duty and instituting a more consistent standard with which the disciplinary authorities will evaluate attorneys' conduct.

Finally, another interesting change in Rule 3.3 refers to the duty of candor of the lawyer himself or herself toward the tribunal. The old rule stated that a lawyer had a duty not to make a false statement of material fact to the court.⁹⁴ In other words, according to the old rule, the lawyer would not have violated the rule if the lawyer made a false statement of fact to the court as long as the fact was not material. Given that the purpose of the rule is to assure candor as a matter of principle, however, the new rule eliminates the term "material" from this duty.⁹⁵ Under this new formulation, a lawyer would violate the rule by making any false statement, regardless of materiality.⁹⁶

91. *Id.* R. 3.3(a)(3) ("A lawyer may refuse to offer evidence, *other than the testimony of a defendant in a criminal matter*, that the lawyer reasonably believes is false." (emphasis added)).

92. REPEALED ILL. RULES OF PROF'L CONDUCT, *supra* note 15, R. 3.3(c). In support of this change, the ISBA/CBA Joint Committee Report stated that the time limit for the duty to disclose is "a matter left indefinite in the current Illinois rule, which could lead to a construction that the obligation exists forever." ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 25–26.

93. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 3.3(c).

94. REPEALED ILL. RULES OF PROF'L CONDUCT, *supra* note 15, R. 3.3(a)(1).

95. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 3.3(a)(1).

96. It is interesting to note, however, that the distinction between material false evidence and non-material false evidence is still relevant for the duty to take remedial action when the attorney

D. Responsibilities of a Prosecutor

Rule 3.8 of the Illinois Rules of Professional Conduct provides a list of duties that applies specifically to prosecutors, including a duty to seek justice, a duty to disclose exculpatory evidence, and a duty to refrain from making, and to prevent others from making, certain types of extrajudicial statements.⁹⁷ To these duties, the new rule adds a duty to protect an unrepresented accused's right to counsel.⁹⁸

More importantly, however, the new rule also adds a not entirely new—and controversial—statement regarding the authority of a prosecutor to subpoena other lawyers. The controversy over this subpoena provision could itself be the subject of a law review article,⁹⁹ but a short explanation should suffice to understand it. The practice of subpoenaing attorneys is used with increasing frequency by prosecutors seeking access to information about fees paid to criminal defense counsel to determine if the fees are subject to forfeiture. Defense attorneys try to resist the subpoenas to protect their clients' confidential information and have argued that the government abuses its authority in order to intimidate or retaliate against successful defense attorneys.¹⁰⁰

comes to know he or she has presented false evidence to the court. According to Rules 3.3(a)(1) and 3.3(a)(3), the lawyer has a duty to not knowingly make false statements of fact or to present false evidence, but only has a duty to take remedial action if the false statement or evidence is material. For a discussion of this "materiality requirement," see generally W. William Hodes, *Two Cheers for Lying (About Immaterial Matters)*, 5 PROF. LAW., May 1994, at 1, 3.

97. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 3.8. For a critique of the provision regarding extrajudicial statements, see generally Bernabe, *supra* note 19, at 727–29; Alberto Bernabe, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. CHI. L.J. 323 (2002).

98. Rule 3.8(b) states that a prosecutor shall "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 3.8(b).

99. See, e.g., Thomas Morgan, *An Introduction to the Debate Over Fee Forfeitures*, 36 EMORY L.J. 755, 758 (1987) (discussing the government's right to proceeds from criminal activities that were subsequently paid to attorneys in the form of retainers where the attorney had "notice" that the payments were made with funds that might be the product of illegal activity); Fred Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 918 (1992) (arguing that the Model Rules of Professional Conduct limit the ability of prosecutors to subpoena lawyers, and proposing that a "more appropriate remedy would focus on the two sources of the problem: lawyers' initial failure to inform clients about the limits of confidentiality and the subsequent secrecy in which the subpoenaed testimony takes place").

100. See, e.g., Steven Duke, *The Drug War on the Constitution*, CATO INST. (Oct. 5, 1999), <https://www.cato.org/realaudio/drugwar/papers/duke.html> (arguing that by subpoenaing defense lawyers, prosecutors have effectively "driven a wedge between client and attorney, creating a disqualifying conflict of interest at worst and mistrust of the lawyer at least"); see also William Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 840–41 (1988) (arguing that a prosecutor has no legitimate interest in increasing the likelihood of obtaining a conviction by creating restrictions on a defendant's right to counsel, and suggesting that sometimes the true motive is to

As approved in 1983, the original Model Rules did not contain a provision regulating the authority of prosecutors to subpoena lawyers. In 1990, however, the rules were amended to place limits on this practice by requiring judicial approval after an opportunity for an adversarial hearing before a subpoena could be issued.¹⁰¹ In 1991, the Illinois Supreme Court adopted this new version of the rule but abandoned it just one year later because of objections by prosecutors.¹⁰² The ABA also dropped the provision from its Model Rules in 1995 on the theory that it belonged in a rule of criminal procedure rather than in an ethics code.¹⁰³

As it stands, the ABA Model Rule holds that a prosecutor shall not subpoena a lawyer to present evidence about his or her clients or former clients unless the prosecutor reasonably believes that the information sought is not protected by privilege and is essential to the prosecution or investigation and there is no other feasible alternative to obtain the information.¹⁰⁴ Likewise, the new Illinois rule does not include the old requirement of judicial approval and opportunity for a hearing before a prosecutor can subpoena a lawyer to question him or her about current or past clients. The ISBA/CBA Joint Committee and the Supreme Court Committee on Professional Responsibility agreed to endorse the new rule arguing that the new provision is significantly different from the one rejected in 1992 because it limits prosecutorial subpoenas to situations where the information sought is essential, not privileged, and not accessible otherwise,¹⁰⁵ and that “removal of the court order/adversarial hearing requirement should make the rule more palatable for prosecutors.”¹⁰⁶

IV. A FEW BRAND NEW RULES

The new Illinois Rules of Professional Conduct include a number of brand new rules. For example, Rule 2.4 regulates the duties of a lawyer

deny the prospective defendant representation by the attorney of choice).

101. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 3.8–2, at 800.

102. ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 30–31.

103. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 3.8–2, at 802; *see also* Baylson v. Disciplinary Bd., 975 F.2d 102, 112–13 (3d Cir. 1992) (finding the rule exceeds a court’s local rulemaking authority); ANNOTATED MODEL RULES OF PROF’L CONDUCT 376, 794 (6th ed. 2007) (citing AM. BAR ASS’N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, at 511–12 (2006) [hereinafter AM. BAR ASS’N, A LEGISLATIVE HISTORY]) (discussing the ABA’s amendments to Rule 3.8(f)).

104. MODEL RULES OF PROF’L CONDUCT R. 3.8(e) (2007–2008).

105. ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 30–31; Supreme Court Comm. Report, *supra* note 3, Exhibit B, at 3.

106. ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 30.

as a third-party neutral,¹⁰⁷ and Rule 3.9 proscribes the duties of a lawyer serving as an advocate in non-adjudicative proceedings.¹⁰⁸ There is nothing particularly controversial about these new rules. There are, however, a few other new rules that merit some discussion.

A. Duties to Prospective Clients

The concept of a prospective client is not new, but only recently has it been regulated in rules of professional conduct.¹⁰⁹ To do so, the new Illinois rules have adopted ABA Model Rule 1.18.

The benefit of the new rule is apparent given the common problems that arise when attorneys meet with prospective clients. Assume, for example, that a prospective client asks a lawyer to consider taking on a case against one of the attorney's current clients. The attorney could not accept the new case because it would be a conflict of interest and thus promptly rejects the client's request. But, assume further that, during the consultation, the prospective client revealed confidential information that would be detrimental to the prospective client and beneficial to the current client. This situation, which is not uncommon, raises many questions, including: (1) whether the attorney can represent

107. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 2.4. In its report, the ISBA/CBA Committee explained the need for this new rule as follows:

This is a new rule. It is appropriate to promulgate such a rule in light of increased use of alternative dispute resolution mechanisms and lawyers' frequent participation in them as a neutral. The model rule sets generally reasonable standards and offers good guidance to lawyers.

In one respect, however, the rule leaves too much room for subsequent problems that could be easily avoided. M[odel] R[ule] 2.4(b) requires a lawyer serving as third-party neutral to inform unrepresented parties in every case that the lawyer is not representing them. However, it requires the lawyer to go on to explain the difference between a lawyer's role as a third-party neutral and a lawyer's role as one who represents a client only when the lawyer knows or reasonably should know that a party does not understand the lawyer's role. The Committee believes that a complete explanation is better in every case involving unrepresented parties, and proposes to revise M[odel] R[ule] 2.4(b) accordingly.

ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 25.

108. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 3.9.

109. A prospective client is "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship." 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 1.18(a) (establishing certain duties owed to a prospective client). The 1983 version of the Model Rules did not recognize duties to prospective clients, but did mention the idea in paragraph 17 of its Preamble saying that "there are some duties . . . that attach when the lawyer agrees to consider whether a client lawyer relationship shall be established." MODEL RULES OF PROF'L CONDUCT Pmb. (1983); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 90-358 (1990) (requiring that an attorney decline to represent a would-be client if the information imparted is critical to the representation of an existing or future client in the same or related matter).

the current client if the prospective client files the claim; (2) whether the attorney can disclose to the current client the information received during the consultation; (3) whether the attorney can use the information to the benefit of the current client; and (4) if the attorney is precluded from representing the current client against the prospective client, whether another attorney in the same firm can do so. Depending on how these questions are answered and how the duties to the different parties are defined, the same questions could have civil liability implications.

The newly adopted Rule 1.18 addresses these questions.¹¹⁰ Because prospective clients do have a legitimate interest in confidentiality,¹¹¹ the rule offers some protection while not automatically disqualifying the attorney or the attorney's firm from representing his or her current client. Thus, the rule states that a lawyer shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except if both the affected client and the prospective client have given informed consent or the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client, and the lawyer is timely screened from any participation in the matter and is apportioned no part of the fee.¹¹² Unlike the Model Rule, however, the Illinois rule does not require that consent be in writing or that the prospective client be informed of the adverse representation and the screening mechanisms.

One problem with this new rule, however, is that it is based on a determination of what could be "significantly harmful" to the prospective client.¹¹³ Thus, presumably, an attorney would not be

110. One issue not specifically addressed by the rule relates to the question of whether an attorney has a duty to advise about, or help in, getting new representation for the prospective client. The rule also does not address its possible implications regarding tort liability, which is understandable given that the rule is not designed to deal with those issues.

111. Rule 1.18(b) states the well-settled proposition that information learned from a prospective client is confidential and that the attorney has a duty to protect it just as much as any other confidential information provided by a former client. AM. BAR ASS'N, A LEGISLATIVE HISTORY, *supra* note 103, at 381. In fact, this principle had already been expressed by the ABA Committee on Professional Responsibility in a Formal Ethics Opinion in which it concluded that information given to a lawyer by a prospective client is protected from disclosure under Model Rule 1.6 even if the lawyer does not undertake the representation. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 90-358 (1990).

112. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 1.18.

113. *Id.*

disqualified from representing a client against a former prospective client if the information received from the latter was merely harmful. The problem is, of course, that there is no clear way to determine the difference between significantly harmful information and just plain harmful information. In fact, in the context of a motion to disqualify, it would be difficult for a court to make that determination without knowing what the information is in the first place or without knowing the theory of the case, which arguably makes the information relevant and harmful.¹¹⁴

It should be noted that the new rule may have a significant impact on solo practitioners who are at a disadvantage because they may be precluded from representing their current clients against prospective clients as they will not be able to establish a screening mechanism. Thus, solo practitioners have to be extremely careful when interviewing prospective clients to avoid getting disqualified from representing current clients.

B. Conflict of Interest Based on Sexual Relations with Clients

The new Illinois rules adopted ABA Model Rule 1.8(j), which states that a lawyer shall not have sexual relations with a client, regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client, unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.¹¹⁵ However, even if a lawyer is prohibited from representing a client because of a sexual relationship, the rules do not preclude other lawyers in the same firm from representing the client.¹¹⁶

The comment to the new rule also clarifies how the rule should be applied in cases where the client is an entity. It is interesting to note that this was one of the issues about which the ISBA/CBA Joint Committee and the Supreme Court Committee on Professional Responsibility disagreed. The ISBA/CBA Report took the position that the rule should not apply when the client is an organization.¹¹⁷ Conversely, the Supreme Court Committee on Professional

114. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.18-1, at 644.

115. MODEL RULES OF PROF'L CONDUCT R. 1.8(j) & cmt. 17 (2007-2008).

116. *Id.* R. 1.8(k).

117. The ISBA/CBA Committee Report states:

Comment [19] to M[odel] R[ule] 1.8, dealing with the application of M[odel] R[ule] 1.8(j) to organizational clients, goes too far. . . . There is no record of abuse in such situations, and [the] representatives [of organizational clients] do not need the protection that other clients in vulnerable positions may require.

ISBA/CBA JOINT COMM. REPORT, *supra* note 3, at 17.

Responsibility took the position that the new Illinois rules should adopt the original language in the comment to the ABA Model Rules that states the rule “prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters.”¹¹⁸ The latter approach prevailed.

The new rule is based on sound policy: a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer’s fiduciary role in violation of the lawyer’s basic ethical obligation not to use the client’s trust to the client’s disadvantage.¹¹⁹ The attorney’s emotional involvement can also affect his or her independent judgment and create a risk that the representation would be materially affected, which, in and of itself, would be a violation of the rules.¹²⁰ Finally, the relationship could also make it unlikely that the client could give adequate informed consent to the possible conflict and could create a significant danger of harm to the client’s interests.¹²¹

As enacted, however, the rule raises some issues that need attention. For example, there is some concern that state intervention in this matter might be an impermissible intrusion on privacy, or that disgruntled

118. MODEL RULES OF PROF’L CONDUCT R. 1.8(j) cmt. 19 (2007–2008).

119. *Id.* R. 1.8(j) cmt. 17; *see also* *People v. Good*, 893 P.2d 101, 103 (Colo. 1995) (“Because the lawyer stands in a fiduciary relationship with the client, an unsolicited sexual advance by the lawyer debases the essence of the lawyer-client relationship.”); *In re Rinella*, 677 N.E.2d 909, 915 (Ill. 1997) (finding the attorney’s sexual relationships with clients were overreaching where attorney took advantage of his position and led client to believe their interests would be harmed if they refused to comply). The ABA Standing Committee on Professional Responsibility had expressed this view already in 1992 in Formal Opinion 92-364. ABA Comm. on Prof’l Responsibility, Formal Op. 92-364 (1992). In response to this opinion, several states explicitly adopted rules to regulate sexual relations between attorneys and clients. Kathleen Maher, *Sex With Clients: The Progeny of ABA Opinion 92-364*, 12 PROF. LAW., Winter 2001, at 20, 20 n.4 (mentioning the rules in Florida, Iowa, Minnesota, New York, North Carolina, Oregon, West Virginia, Utah, Washington, and Wisconsin, with California having already adopted a similar rule in 1987).

120. *See* MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2007–2008) (“[A] lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”); *id.* R. 2.1 (stating that “a lawyer shall exercise independent professional judgment” when representing a client). Several courts have held that engaging in a sexual relationship threatens a lawyer’s ability to exercise independent professional judgment. *Matter of Grimm*, 674 N.E.2d 551, 554 (Ind. 1996) (concluding the attorney engaged in misconduct by having a sexual relationship with the client); *In re Ashy*, 721 So. 2d 859, 864 (La. 1999) (“A sexual relationship between lawyer and client may involve unfair exploitation of the lawyer’s fiduciary position”); *In re Halverson*, 998 P.2d 833, 840–41 (Wash. 2000) (discussing the unreasonableness of an attorney’s sexual relationship with a marriage dissolution client).

121. MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. 17 (2007–2008).

clients will abuse the rule.¹²² More importantly, there is some concern about whether—at least in some circumstances—the rule will be ineffective. Assume, for example, that an attorney in a large law firm begins a relationship with an important long-standing firm client. At that point, the lawyer would not be allowed to represent the client, but other lawyers in the firm could continue the representation. The rule does not state, however, that the disqualified lawyer must be screened from the representation. This means that the lawyer, although not participating in the representation, could have access to information about the case. Under such circumstances, it is worth wondering how much independent judgment a lawyer would feel free to exercise knowing he or she represents the sexual partner of a colleague in the firm, particularly if the lawyer assigned to represent the client is a subordinate of the lawyer involved with the client. Imagine the pressure on an associate if he knows he represents the sexual partner of a supervising partner of the firm, particularly if the partner is not officially screened.

On the other hand, amending the rule to impute the conflict on other members of the firm does not solve the problem either. In such a case, the options are also problematic. The options for the attorney involved in the sexual relationship would be to quit the firm or to stop the relationship. The firm's options would be to fire the lawyer or to terminate the representation of the client. The client's options would be to fire the law firm or end the relationship. None of these options would be very attractive to the people involved: neither the client nor the law firm would want to terminate their long-standing relationship, the lawyer would not want to quit his or her job, the lawyer and client presumably would not want to end their personal relationship, the client would not want to see his or her personal friend get fired, and the firm would not want to fire a valued member of the firm. The situation would be such that there is a real chance the rule would simply be ignored. In other words, problems arise regardless of whether the rule imputes the conflict to the firm.

In addition, the proposed rule does not apply if the sexual relationship between the attorney and the client already existed when the client-lawyer relationship began.¹²³ According to the comment to the rule, the

122. See, e.g., *Suppressed v. Suppressed*, 565 N.E.2d 101, 105–07 (Ill. App. Ct. 1990). In this case, the court denied a cause of action for damages based on an allegation that an attorney breached a duty to the client by engaging in sexual relations because “[t]he potential for abuse would be too great” and could “have a grave potential to be used for blackmail by unscrupulous persons seeking unjust enrichment.” *Id.* at 106 n.3.

123. MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (2007–2008). If the relationship existed

issues “relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship,”¹²⁴ and thus, the attorney is simply reminded of the duty to avoid conflicts that might materially limit the representation. Although it is understandable, this aspect of the rule seems inconsistent with the policy that suggests a specific rule is needed in the first place. If it is the personal relationship that creates the undesirable circumstances that call into question the independent judgment of the attorney, whether the sexual relationship predates the professional relationship does not quite eliminate the problem.

V. REGULATION OF OTHER SPECIFIC ASPECTS OF THE PRACTICE OF LAW

A. Advertising and Solicitation

The newly adopted Rules of Professional Conduct attempt to update the regulation of advertising and solicitation in the profession by recognizing new forms of media available to lawyers to advertise their services. Perhaps more could have been done in this area, but there is no question that the new rules are an improvement over the old ones.

Whereas the old rules still made references to lawyers reaching their clients by telegraph, for example, the new ones mention electronic communication (a vague reference to e-mail and websites). Other than these references, however, the new rules do not really introduce substantial change. The interpretation of whether issues involving the use of e-mail or websites will be analogized to regular mail, for example, is left to the courts.

There are, however, two important changes in the new rules worthy of note. First, the new rules eliminate the old rules' requirement that lawyers keep copies of ads for a certain period of time.¹²⁵ Second, the new rules prescribe the exact language that must be used on letters sent to solicit clients.¹²⁶

before the professional relationship, the exploitation of the fiduciary duties and the possibility of client dependency are diminished. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.8–11, at 439 (citing Att’y Grievance Comm’n of Md. v. Culver, 849 A.2d 423, 439 (Md. 2004); MODEL RULES OF PROF’L CONDUCT R. 1.8(j) cmt. 18 (2007–2008)).

124. MODEL RULES OF PROF’L CONDUCT R. 1.8(j) & cmt. 18 (2007–2008).

125. Old Rule 7.2(a)(1) required that a copy or recording of the advertisement or written communication be kept for three years after its last dissemination along with a record of when and where it was used. REPEALED ILL. RULES OF PROF’L CONDUCT, *supra* note 15, R. 7.2(a)(1).

126. Old Rule 7.3(a)(2) stated that communications letters or advertising circulars sent to prospective clients (and their envelopes) had to be labeled “as advertising material.” *Id.* R. 7.3(a)(2). Given the way this rule was phrased, many lawyers felt free to choose the words they

B. Multijurisdictional Practice and Disciplinary Authority

It is not uncommon for Illinois lawyers to travel to jurisdictions where they are not admitted to provide legal services, whether by taking depositions, attending meetings, preparing documents, conducting interviews, or, when given special permission to do so, by making limited appearances in judicial proceedings. For the same reason, it is not uncommon for lawyers not admitted in Illinois to come to Illinois to perform similar tasks. This multijurisdictional aspect of legal practice had not been regulated formally by rules of professional conduct until now with the adoption of the new Rule 5.5.

Newly adopted Rule 5.5 creates an exception to the general notion that an attorney is banned from providing legal services in a jurisdiction where he or she is not admitted.¹²⁷ It provides, among other things, that as long as a lawyer is currently admitted in a United States jurisdiction¹²⁸ and is not disbarred or suspended in any jurisdiction in which he or she is admitted, the lawyer may provide legal services on a temporary basis in Illinois if the services:

- (1) are undertaken in association with a lawyer who is admitted to practice in Illinois and who actively participates in the matter; (2) are [] reasonably related to a pending or potential proceeding before a tribunal, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are [] reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding [], if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; (4) [] arise out of[,] or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; [(5)] are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or [(6)] are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.¹²⁹

used to identify the documents as advertising materials. The new rule, in contrast, requires that the communication include the words "Advertising Material." 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 7.3(c).

127. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 5.5 & cmt. 15.

128. Paragraph 7 of the comment to Rule 5.5 defines "a United States jurisdiction" as a state, the District of Columbia, or any territory or commonwealth of the United States. *See id.* R. 5.5 cmt. 7 (defining terms pertaining to Rule 5.5(c), regarding who can practice law on a temporary basis, and Rule 5.5(d), regarding who can provide legal services in another jurisdiction).

129. *Id.* R. 5.5(c)-(d).

Although this rule regulates the practice of law in Illinois by attorneys not admitted in Illinois, it is important for Illinois lawyers to be aware of it and its interpretation by the courts because most other jurisdictions have adopted similar rules. Thus, an Illinois attorney who happens to go to another jurisdiction to provide legal services should make an effort to understand that jurisdiction's version of Rule 5.5.

In addition, the newly adopted Rule 8.5 provides that a lawyer is subject to the rules of the jurisdiction where he or she is admitted regardless of where the lawyer's misconduct takes place, and that lawyers who are not admitted to practice in a particular jurisdiction can be subject to the rules of that jurisdiction if they provide services there. For these reasons, every Illinois attorney needs to be aware that when providing services in a jurisdiction other than Illinois, he or she is subject to that jurisdiction's rules even if the attorney is not admitted there.

Because of this, a lawyer is also subject to sanctions in both jurisdictions. The disciplinary authority of the state where the attorney is not admitted can impose a sanction and then inform the equivalent agency in the state where the attorney is admitted, which will typically impose the same or a similar sanction. This type of "reciprocal discipline" has, in fact, become a very common practice among jurisdictions.

In addition, Rule 8.5 provides guidance on what rules should apply when disciplinary authorities are trying to evaluate conduct in the context of multijurisdictional practice.¹³⁰ For most cases, this rule essentially defers to the jurisdiction where the attorney's conduct takes place (as opposed to applying the rules from the attorney's home jurisdiction).¹³¹

VI. POSSIBLE FUTURE CHANGES TO THE RULES

A. In-house Lawyers

As stated in the previous section, newly adopted Rule 5.5(d) recognizes that an attorney who is not admitted in Illinois should be allowed to work in Illinois as in-house counsel for an entity client¹³² as long as, among other things, the attorney is admitted in another United

130. *Id.* R. 8.5.

131. *Id.*

132. Paragraph 16 of the comment to Rule 5.5 states that section (d)(1) of the rule "applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer." *Id.* R. 5.5 cmt. 16.

States jurisdiction and is not disbarred or suspended from practice in any jurisdiction.¹³³

This sounds perfectly reasonable, but a recent development in the application of a similar rule in another jurisdiction suggests there might be a need to revise the new Illinois rule. Paragraph seven of the comment to the rule states that “[t]he word admitted” in paragraph (c) “contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.”¹³⁴ Yet, the comment does not state the same for in-house lawyers who are covered by Rule 5.5(d).

This discrepancy suggests that an attorney can practice law as in-house counsel for an entity client in Illinois even if he or she is not currently on “active status” in any other jurisdiction. It can be argued that this is not a problem because in-house lawyers are lawyers only insofar as they work for their employer entity and are not going to provide or try to sell their legal services to the public. Yet, there is one serious problem with this interpretation.

The problem is exemplified by an order issued recently by a federal court magistrate in a trademark infringement claim by Gucci America, Inc. (“Gucci”) against Guess?, Inc. (“Guess”). In this case, Guess sought discovery of Gucci’s communications with its in-house counsel, who, although licensed to practice in California, had changed his bar membership to inactive status. Gucci claimed the communications were protected by the attorney-client privilege but the magistrate disagreed,

133. Rule 5.5(d) states:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: (1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Id. R. 5.5(d).

134. It is important to understand that being admitted and in good standing is not the same as being on active status. Typically, being in good standing means that an attorney is up to date on his or her bar dues regardless of whether he or she actually practices law. In some states, attorneys who do not practice law can continue to be members of the bar—and in good standing—by paying dues but registering as inactive or, in some cases, as retired. In California, for example, inactive bar membership is provided to attorneys who choose not to practice law in the state for a variety of reasons including retirement, appointment to the bench, or transfer to another state. *See Gucci Am., Inc. v. Guess?, Inc.*, No. 09-4373, 2010 WL 2720079, at *6 (S.D.N.Y. June 29, 2010) (finding that attorney-client privilege does not extend to attorneys who are not currently licensed to practice law in a particular state, even though they may remain inactive members in that state’s bar association), *order set aside by Gucci Am., Inc. v. Guess?, Inc.*, No. 09-4373, 2011 WL 9375 (S.D.N.Y. Jan. 3, 2011).

concluding that because the lawyer did not possess a bar membership that authorized him to practice law, Gucci's communications with him were not protected by the privilege.¹³⁵

In his order, the magistrate stated that Gucci could not "cloak itself under a veil of ignorance"¹³⁶ to avoid handing over communications with its former chief in-house counsel to a competitor. The court held that Gucci could not justify its "mistaken belief" as the company "was plainly in a position to confirm the extent of [the in-house counsel's] qualifications as a legal professional and failed to do so."¹³⁷

Thus it would be safer to conclude that Rule 5.5(d) does require that a lawyer be not only "admitted" but also "active" in another jurisdiction as 5.5(c) requires, even though the comment to the rule only specifically mentions this in relation to section (c). If that were the case, though, then it would be an even better idea to amend the comment to reflect it.

In addition, lawyers who are not admitted in Illinois but who work in Illinois as in-house counsel can request a "limited license" to practice law in Illinois if they comply with the requirements of Supreme Court Rule 716. Among other things, this rule requires that the attorney prove that he or she is in good standing in the other jurisdictions where he or she has been admitted. Being in good standing, however, is different than being active. In many jurisdictions, an attorney can be in good standing because he or she continues to pay bar dues but be on inactive status or even be registered as retired. Thus, in the end, it is possible that Illinois could be licensing attorneys to practice (however limited the license might be) even though the attorneys are inactive in all other jurisdictions in which they are admitted to practice.¹³⁸

B. Unbundling of Legal Services

Newly adopted Rule 1.2(c) allows a lawyer to limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.¹³⁹ This rule allows a lawyer to

135. *Id.* at *5-7.

136. *Id.* at *8.

137. *Id.* at *7. This view is also supported by the fact that paragraph seven of the comment to Rule 5.5 appears to place the responsibility on the client-employer to assess the lawyer's qualifications. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 5.5 cmt. 7. On the other hand, as the magistrate in *Gucci* pointed out, a client who reasonably believes that an individual is an attorney is entitled to the benefits of the privilege as long as the client's bona fide belief in counsel's qualifications is reasonable. *Gucci*, 2010 WL 2720079, at *7.

138. Illinois does not require out-of-state attorneys who work as in-house counsel in Illinois to register as such. They can ask for temporary licenses to practice law in Illinois if they follow the requirements in Supreme Court Rule 716, but it is not required.

139. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 1.2(c).

agree to provide distinct limited services to clients who, for whatever reason, do not want the attorney to represent them in all aspects of a legal matter. This practice has come to be known as “unbundling” of legal services. Typical examples of this type of practice include the practice of preparing documents for a client but not representing the client in the proceedings for which the documents are relevant. Rule 1.2(c) clearly allows this type of piecemeal provision of legal services.

In fact, the practice of unbundling legal services is not new but has become more common in recent years because a growing number of clients want to avoid having to pay legal fees by representing themselves.¹⁴⁰ Regardless of whether attorneys are also more willing to help these clients because of their concern to support the needs of those who cannot afford legal services or whether they are just trying to secure some income in circumstances where they would otherwise not receive any, the fact is that attorneys are increasingly providing limited—or “unbundled”—services to clients.

This development has generated an interesting debate when the limited services relate to the preparation of documents to be filed in court. Specifically, the debate centers on the question of whether attorneys should be required to identify themselves as having helped the client prepare the documents or whether they can remain as anonymous “ghostwriters.”¹⁴¹

In Illinois, the newly adopted Rule of Professional Conduct 6.5 recognizes a limited exception to the application of conflicts of interest rules to allow attorneys the flexibility to provide limited services.¹⁴² Moreover, the Illinois Supreme Court is currently considering amending its rules to regulate the practice of limited representation in court and

140. See N.Y. CNTY. LAWYERS' ASS'N COMM. ON PROF'L ETHICS, OPINION 742, at 1 (2010) [hereinafter NYCLA OPINION 742], available at http://www.nycla.org/siteFiles/Publications/Publications1348_0.pdf (affirming that as the number of pro se litigants continues to rise, attorneys have adapted their services to accommodate the trend to unbundle legal services); see also J. Timothy Eaton & David Holtermann, *Expanding Access to Justice: Limited Scope Representation is Here*, 24 CBA REC., Apr. 2010, at 36, 37 (opining that Illinois now allows limited-scope representation because it sought to address Illinois' growing population of pro se litigants—people who are representing themselves in legal proceedings, often out of economic necessity).

141. The New York County Lawyers Association's Committee on Professional Ethics recently issued an opinion concluding that attorneys who prepare documents for litigants as part of unbundled legal services do not need to provide notice to the court of their participation in the preparation of the documents. NYCLA OPINION 742, *supra* note 140, at 1. For a critique of this opinion, see Scott Greenfield, *Who you gonna call? Ghost lawyer!*, SIMPLE JUSTICE (May 5, 2010, 8:49 AM), <http://blog.simplejustice.us/2010/05/05/who-you-gonna-call-ghost-lawyer.aspx?ref=rss>.

142. 2010 ILL. RULES OF PROF'L CONDUCT, *supra* note 17, R. 6.5.

the ghostwriting of documents.¹⁴³ More importantly, the Court is considering an amendment to Rule 13 of the Rules of the Supreme Court of Illinois to allow attorneys to make limited appearances in court proceedings on behalf of self-represented litigants.¹⁴⁴

As to the notion of ghostwriting, the proposed amendment to Supreme Court Rule 137 would allow an attorney to prepare a pleading for a pro se litigant but would require a notation to that effect and the disclosure of the attorney's name, the name of his or her firm, and its contact information. This notation, however, would not constitute a signature for purposes of Rule 11 of the Rules of Civil Procedure, which holds that the attorney's signature in a document serves as the attorney's own assertion that the pleadings are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.¹⁴⁵

C. *The Problem of the Document that is Sent to an Attorney by Mistake*

Newly adopted Illinois Rule 4.4(b) holds that a lawyer who receives a document on the representation of a client that the lawyer knows was inadvertently sent shall promptly notify the sender.¹⁴⁶ It is interesting to note that the rule does not impose a duty to return the document or to refrain from reading it. Instead, the comment to the rule states that unless there is applicable law that requires the lawyer to return the document, the decision to return it is a matter of professional judgment and personal choice.¹⁴⁷

143. *Proposal to Facilitate Limited Representation in Illinois Courts*, ILL. LEGAL ADVOC. 1, <http://files.illinoislegaladvocate.org/uploads/7347LTF%20Limited%20Scope%20Representation%20Proposal.pdf> (last visited Feb. 15, 2011).

144. *Id.* at 3 (“The amendment requires an attorney making a limited appearance to enter into a written agreement with the party, which provides disclosure regarding the limited scope of the representation and protects attorneys from the expectation that their representation in a matter before the court will be ongoing. The amendment also requires the use of the form Notice of Limited Appearance appended to the rule. This is intended to promote consistency in the filing of limited appearances and to make the notices easily recognizable to judges and court personnel. To clarify the limited representation attorney’s role in the case, the form notice requires the attorney to identify the scope of the representation with specificity.”).

145. The Rules of Professional Conduct mirror this duty in Rules 3.1 and 4.4(a).

146. This is a slightly different version of Model Rule 4.4(b), which holds the same thing but imposes the same duty if the attorney “should have known” that the document was sent by mistake. See MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2007–2008) (requiring notification to sender where attorney “knows or reasonably should know” that the document was sent inadvertently).

147. *Id.* R. 4.4(b) cmt. 3. The Comment also suggests that whether the disclosure eliminates the privileged status of the document depends on the law of evidence. It should be noted that there is support for the proposition that if the evidentiary privilege is lost, the receiving attorney can take advantage of the mistake. In fact, some would argue that if the privilege is lost by the

This is a new addition to the rules in Illinois, and it can already be improved by taking the opportunity to address issues that arise out of the practice of transmitting digital documents, because this practice increases the risk of inadvertent disclosure of confidential information.¹⁴⁸ Other jurisdictions are split over the issue. In a formal opinion, the ABA Committee on Professional Responsibility has concluded that there is no prohibition against a lawyer's reviewing and using embedded information in electronic documents.¹⁴⁹ This view has also been adopted by the State Bar Associations of Maryland and Vermont.¹⁵⁰ The Bar of the District of Columbia, the West Virginia Bar Association, the Pennsylvania Bar Association, and the Colorado Bar Association have concluded that metadata mining should be permissible in some circumstances.¹⁵¹ The ABA's opinion, however, has been criticized, and several states have adopted different views.¹⁵² In fact, at least six bar associations have concluded that it is generally unethical to review a document's metadata unless the sending party has expressly permitted it.¹⁵³

Whether the duties (and the consequences for their violation) should fall on the sender of the document, on the recipient, or on both of them, is a complex topic and its importance will increase even more as the electronic distribution of digital documents becomes more common. It thus seems like a good idea to consider it as part of the next step in the process of modernizing our state's Rules of Professional Conduct.

inadvertent disclosure, the lawyer who receives the information not only can, but *should*, read and use the information to his or her client's advantage. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, § 60 cmt. m (2000) ("If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives.").

148. See David Hricik, *Mining for Metadata: Is it Ethical to Take Intentional Advantage of Other People's Failures?*, 8 N.C. J. L. & TECH. 231, 235-46 (2007) (arguing that the transmission of embedded data should be considered inadvertent conduct and that opposing attorneys who actively search for embedded data are engaging in dishonest conduct); Andrew Perlman, *The Legal Ethics of Metadata Mining*, 43 AKRON L. REV. 785, 787-94 (2010) (positing that flat bans on metadata mining are problematic and that metadata mining is like any other inadvertent disclosure, which should be reviewable if the court has permitted viewing of inadvertent disclosures).

149. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006).

150. Perlman, *supra* note 148, at 789.

151. *Id.* at 790 (listing bar associations that argue that metadata should be treated like any other inadvertent disclosure, and noting that unless the receiving attorney actually knows the metadata was inadvertently sent, reviewing such data should be permissible).

152. Hricik, *supra* note 148, at 238-42; John Levin, *Legal Ethics: What to do with Metadata*, 21 CBA REC., June-July 2007, at 68, 68 (arguing that New York and Alabama have a better approach to the problem).

153. See Perlman, *supra* note 148, at 788-89 (citing opinions from New York, Alabama, Arizona, Florida, Maine, and New Hampshire).

VII. CONCLUSION

In January 2010, Illinois' new Rules of Professional Conduct entered into effect. Since then, these new rules have become the source of law for the state's disciplinary system while also providing guidance for questions of disqualification in litigation and for the standard of care of conduct in malpractice cases. With the adoption of the new rules, largely based on the ABA's Model Rules of Professional Conduct, Illinois has joined twenty-eight states and the District of Columbia, which have adopted new rules or made revisions to their existing rules since 2004. Needless to say, it is extremely important for all lawyers in the state to have a good understanding of the new rules. For that purpose, this article has attempted to provide a summary of the more significant aspects of the new rules.