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Application of the Illinois Consumer Fraud Act to the Attorney-Client Relationship

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CASE NOTES

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by Andrew Geier

I. INTRODUCTION

Many states have passed consumer fraud acts to protect consumers from fraudulent or deceptive practices by merchants.[1] Claims under these statutes are typically filed by purchasers of such items as consumer products, automobiles, or repair services.[2] Occasionally, a consumer will bring suit against his or her attorney under a consumer fraud act alleging the attorney's misconduct in the practice of law.[3] Unfortunately, the number of consumers bringing these types of suits against their attorneys is increasing.[4] Courts in Illinois have generally struck down claims involving attorney conduct when brought under Illinois' Consumer Fraud Act on the grounds that the practice of law is not included within the scope of the statute.[5] Recently, however, an Illinois appellate court diverted from these prior decisions when it found that a plaintiff stated a valid claim for attorney misconduct under Illinois' Consumer Fraud Act.[6] That court reasoned that because the plaintiff's claim was based on an attorney's fraudulent billing practices, it did not directly relate to the lawyer's professional training, and was therefore a "business aspect" of the practice of law and covered by Illinois' Consumer Fraud Act.[7] The Illinois Supreme Court heard the case on appeal where it decided, by a five-to-one margin, that the Illinois' Consumer Fraud Act does not govern the attorney-client relationship; the Supreme Court alone regulates lawyer conduct.[8]

Part II of this Note will examine the Illinois Consumer Fraud Act[9] as well as rules governing lawyer conduct and discipline in the state.[10] Part II also will compare alternative theories of attorney liability for fraudulent or deceptive practices.[11] Finally, Part II will trace the development of Illinois appellate court decisions leading up to the supreme court's decision in *Cripe v. Leiter* where it held that the attorney-client relationship is not governed by Illinois' Consumer Fraud Act.[12] Part III of this Note explores, in detail, the

reasoning of the majority and dissent in *Cripe*.[13] Part IV analyzes the supreme court's decision in light of the preceding appellate court decisions, and concludes that the supreme court reached the correct result based on tenets of statutory construction and the existing regulatory scheme governing lawyer conduct.[14] Part V looks at the impact that the Illinois Supreme Court's decision in *Cripe* will have on consumers and attorneys.[15]

II. BACKGROUND

A. Illinois Consumer Fraud Act

Generally, the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act" or "Act") prohibits unfair or deceptive competition or practices when used in any trade or commerce.[16] The Illinois legislature drafted the Act to protect consumers and businesses from exploitation by unscrupulous people or businesses that use such unfair practices for their gain.[17] Consequently, the statute employs broad language to afford consumers this protection.[18] In fact, the protection provided by Illinois' Consumer Fraud Act is generally regarded as being even broader than traditional common law actions of fraud or negligent misrepresentation.[19]

As a result, consumers who believe they have been victimized by fraud will generally turn to a state's consumer fraud act as their first source for relief.[20] This is primarily due to the types of damage awards available.[21] Under the Act, a successful plaintiff may recover economic and punitive damages from the defendant or may obtain injunctive relief.[22] In addition, a court may award attorneys' fees and court costs under the Act.[23] Although attorney's fees and court costs are awarded at the judge's discretion, most judges award the prevailing plaintiffs these amounts because of the small dollar amounts often involved in consumer disputes.[24] Awards of costs and fees provide the consumer with an incentive to bring a meritous suit he or she might not otherwise have brought for fear of losing money on attorneys' fees.[25]

B. Regulation of Attorney Conduct

The Illinois Supreme Court is the traditional regulator of attorney conduct.[26] The supreme court has the exclusive power to control admission to the bar in Illinois and to discipline any unprofessional conduct of attorneys who are already admitted.[27] Accordingly, the supreme court has created a comprehensive system to regulate attorneys and punish attorney misconduct.[28] This includes the adoption of the Illinois Rules of Professional Conduct, the appointment of an Attorney Registration and Disciplinary Commission (ARDC), and the creation of a procedural framework to assist the ARDC.[29] There are now a variety of sources for regulation of attorney conduct, including the Illinois Rules of Professional Conduct, the Rules of the ARDC, ARDC Supreme Court Rules, and Bar Admission

Rules.[30]

Attorney billing practices are also governed by the supreme court's regulatory power.[31] In addition, the attorney billing practice is an area that has become increasingly subject to scrutiny by clients who believe that their attorney's bill was unreasonable.[32] While fraudulent billing is apparently a common problem among attorneys,[33] there are a limited amount of court decisions concerning ethics in billing.[34] When an attorney's fraudulent billing practices have been proven, however, courts have demonstrated a willingness to impose sanctions on the attorney.[35] In many cases, the reasonableness of the fee charged is of primary importance, and is the key element that the attorney must prove.[36] Therefore, although arguably a commercial aspect of the practice of law, attorney billing practices are nonetheless a controversial and important part of a lawyer's practice and are thoroughly regulated by the Illinois Supreme Court.

C. Attorney Liability: Consumer Protection Statutes or Common Law Theories

A plaintiff, if allowed a choice, would probably prefer to sue his allegedly dishonest or unscrupulous attorney under a state's consumer protection statute than under a common-law theory such as legal malpractice.[37] This is because a state's consumer protection statute is generally a much more plaintiff-friendly cause of action than a common-law theory of fraud or legal malpractice.[38] Under a consumer protection statute the plaintiff typically carries a lighter burden of proof.[39] A plaintiff bringing suit under a typical consumer fraud statute will not have to prove the underlying claim.[40] For instance, a plaintiff bringing suit against an attorney under a consumer fraud statute based on the attorney's mishandling of a medical malpractice claim, would not need to prove that the underlying malpractice claim would have been successful.[41] Rather, the plaintiff need only prove that the attorney acted unconscionably according to the consumer fraud statute, which is typically much easier to establish.[42] Another reason that consumer fraud acts are more attractive to plaintiffs is, as discussed above, that punitive damages and attorneys' fees are generally more readily available under these statutes than under common law causes of action.[43]

D. Attorney Liability Under the Illinois Consumer Fraud Act

Although nationally few courts have considered consumer fraud complaints against lawyers, some Illinois courts have addressed this issue.[44] In *Frahm v. Urkovich*,[45] the plaintiffs sued the defendant attorney under the Illinois Consumer Fraud Act for damages they incurred as a result of the attorney's misrepresentation and withholding of certain facts relevant to a real estate transaction.[46] The court found that the Act was inapplicable

because the plaintiffs did not fall within the class of "consumers" the statute was designed to protect.[47] The court explained that interpreting the Act as applying to the provision of legal services "would necessarily equate the practice of law with an ordinary commercial enterprise, a proposition for which [it found] no support in case law or public policy."[48] The court concluded therefore that the terms "trade or commerce" as used in the Act were not meant to include "the actual practice of law," rather they were only intended to include those unfair practices that affect consumers generally.[49]

In two subsequent decisions, Illinois appellate courts agreed with the holding in *Frahm*, and determined that the Act did not apply to the provision of legal services. In *Guess v. Brophy*,[50] the court briefly commented on the applicability of the Consumer Fraud Act to attorney conduct, stating "we are confident that the legislature did not intend to include the furnishing of legal services to clients within the Act."[51] In *Lurz v. Panek*,[52] the court addressed the issue at greater length. In *Lurz*, the plaintiff sued the attorneys who had represented him and obtained a judgment in his favor.[53] The plaintiff's Consumer Fraud Act claim was based on the attorney's misconduct in disbursing the judgment to him.[54] He sought damages under Illinois' Consumer Fraud Act arguing that his claim involved the business or "entrepreneurial" aspects of the practice of law, and it therefore fell within the scope of the Act.[55] The *Lurz* court disagreed, however, and, relying on the precedent set in *Frahm*, concluded that the defendant's conduct did not fall within the scope of the Act.[56]

III. DISCUSSION

A. Cripe v. Leiter

In *Cripe v. Leiter*,[57] the Illinois Supreme Court, in a case of first impression, considered whether the Illinois Consumer Fraud Act applied to an attorney who allegedly overbilled his client.[58] In the prior proceedings, the circuit court, based on the *Frahm* decision, dismissed the plaintiff's Consumer Fraud Act claim ruling that the Act covers neither the provision of legal services nor the billing for those services.[59] The appellate court, however, reversed the judgment of the circuit court.[60] The appellate court agreed with the plaintiff's assertion that the alleged overbilling by the defendant did not involve the actual practice of law, but rather fell within the commercial aspects of the practice of law and was therefore subject to regulation under Illinois' Consumer Fraud Act.[61] The appellate court concluded that the legal profession should not be given a blanket exemption from the Act, stating that "business aspects" of the practice of law are subject to the Consumer Fraud Act.[62]

In *Cripe*, the defendant, Thomas Leiter, was an attorney who was retained by Roberta Schmitz to represent her in the transfer of two

trusts.[63] Shortly thereafter, the plaintiff, Mrs. Schmitz's daughter, filed a petition for appointment of guardian based on Mrs. Schmitz's incapacity.[64] Mrs. Schmitz was found to be incapacitated, and the plaintiff was appointed as her guardian.[65] The plaintiff, in her capacity as Mrs. Schmitz's guardian, filed suit against Leiter, alleging that Leiter overcharged her mother $40,000.00 in legal fees, and that the fees charged were "outrageously excessive and unreasonable and bear no relationship to the actual time spent by... Leiter in representing Mrs. Schmitz."[66]

The Illinois Supreme Court considered only the Consumer Fraud Act counts of the plaintiff's complaint when it heard Leiter's appeal.[67] In his defense, Leiter argued that the Consumer Fraud Act did not apply to any claims arising out of the provision of legal services, and that his allegedly excessive bill was a part of those services.[68] The plaintiff countered that only claims arising from the practice of law are exempt from the Act and that Leiter's billing for his legal services was a business aspect of the legal profession so it should be subject to the Act.[69] The supreme court, with one Justice dissenting, held that, "where allegations of misconduct arise from a defendant's conduct in his or her capacity as an attorney representing a client, the Consumer Fraud Act does not apply."[70] It went on to state that an attorney's billing of the client for the attorney's legal services is part of his representation of that client, and therefore the Illinois Consumer Fraud Act is inapplicable.[71]

B. Majority Opinion

The majority considered several issues in reaching its conclusion. It first noted that the Illinois Consumer Fraud Act does not contain any language that expressly includes or excludes attorneys from its scope.[72] However, according to the majority, the case law[73] on the subject clearly indicated that consumer fraud acts do not apply to claims that arise from "the actual practice of law."[74] The question was therefore whether billing for legal services constituted the practice of law, and, if not, should be exempt from the Act.[75] Based on an historical analysis of the supreme court's regulation of attorneys, the majority concluded that the legislature did not intend the Consumer Fraud Act to apply to any aspect of the practice of law, including attorney billing practices.[76]

Next, the majority noted that, unlike the merchant-consumer relationship, the attorney-client relationship is already heavily regulated.[77] It explained that the supreme court has extensive powers over attorney conduct including the power to punish "an attorney who engages in fraud, dishonesty, deceit, or misrepresentation."[78] The supreme court's regulatory powers also include the area of attorneys' fees as provided by Rule 1.5 of the Rules of Professional Conduct.[79] Specifically, the court may discipline and sanction attorneys who charge or collect excessive fees in violation of the rules.[80] Further, the

majority explained, there is an existing client protection program sponsored by the ARDC that was created to reimburse a client for losses he or she incurred in the course of the attorney-client relationship.[81] The majority concluded that, given the already extensive regulation of the attorney-client relationship, had the Illinois legislature intended the Consumer Fraud Act to apply to the attorney-client relationship, it would have expressly stated so.[82]

Third, the majority noted that its decision was consistent with prior appellate court decisions beginning with *Frahm v. Urkovich*.[83] It explained that the Consumer Fraud Act had been amended many times since the *Frahm*, *Guess*, and *Lurz* decisions, and that the legislature was presumably aware of these decisions interpreting the Act.[84] Therefore, if the legislature had intended that the Act apply to the attorney-client relationship, it would have amended it to include language expressly encompassing the conduct of attorneys when dealing with their clients.[85]

Finally, the majority rejected the plaintiff's distinction between a "business aspect" of the practice of law and the practice of law in general.[86] It stated that "an attorney's billing for legal services cannot be separated from the attorney-client relationship."[87] Further, the court noted that the attorney-client relationship is fiduciary in nature and the attorney's position as a fiduciary prevents him from charging his client fees that are excessive.[88] This fiduciary relationship is unlike the merchant-consumer relationship where the merchant does not owe the consumer a duty not to charge excessive fees or prices.[89] Consequently, according to the majority, overcharging a client is more than a business aspect of the practice of law, it is a breach of fiduciary duty for which the attorney may be subject to sanction.[90]

C. Dissenting Opinion

The dissent argued that the defendant's alleged billing fraud should fall within the purview of Illinois' Consumer Fraud Act.[91] In his dissent, Justice Harrison, the only dissenting Justice, stated that as a matter of statutory construction, "the best indication of the legislature's intent is the language it employed in drafting the law."[92] He stated that the language of the Act "clearly and unambiguously" embraced the overbilling with which the defendant was charged and therefore the plaintiff should be entitled to any remedies available under the Act.[93] Justice Harrison stated that if attorneys were intended to be excluded from the scope of the Consumer Fraud Act, they would have been included among the other occupations that were expressly excluded by the language of the statute.[94] The failure of the legislature to specifically exclude attorneys, while listing other excluded occupations, indicated that attorneys' fraudulent acts were meant to fall within the scope of the Act.[95]

Justice Harrison also argued that, as

a practical matter, application of the principles embodied by the Consumer Fraud Act to the practice of law would have only beneficial effects on the practice of law.[96] He stated that there was no harm in holding attorneys to the standards of honesty and fair dealing to which other business people must adhere.[97] In addition, Justice Harrison believed that although attorney conduct was traditionally regulated by the supreme court, the text of Illinois' Consumer Fraud Act provided for any duplicative or conflicting regulation by exempting fraudulent acts that were already being regulated by government authority.[98] This, he believed, would protect attorney conduct that, while actionable under the Consumer Fraud Act, was permissible under supreme court rules.[99] In this case, however, the defendant's overbilling was not permissible under the Illinois Rules of Professional Conduct.[100] Therefore, he believed that the defendant should be subject to sanction under both the Rules of Professional Conduct and the Illinois Consumer Fraud Act.[101]

IV. ANALYSIS

As the supreme court properly decided, the Illinois Consumer Fraud Act should not be applied to the attorney-client relationship. This is true for a number of reasons.
First, the Illinois Supreme Court's decision in *Cripe* was consistent with prior appellate court decisions interpreting the Consumer Fraud Act's application to attorney conduct. The *Frahm*, *Guess*, and *Lurz* courts, in a series of decisions dating back fifteen years, had determined that the Illinois Consumer Fraud Act does not apply to attorneys engaged in the practice of law.[102] For instance, in dismissing the plaintiff's consumer fraud claim, the *Frahm* court stated:

> In essence, plaintiffs seek a broad interpretation of the [Consumer Fraud] Act which would impose statutory liability for misconduct amounting to professional malpractice. We do not believe, however, that even the most liberal statutory interpretation indicates the application of this consumer protection statute to the conduct of an attorney engaged in the actual practice of law...[103]

The *Cripe* court agreed with the sound reasoning of the appellate courts in reaching its decision, and went on to reject any distinction between a "business aspect" of the practice of law, and the "actual practice of law."[104]

Second, the attorney-client relationship, unlike the merchant-consumer relationship, is already heavily regulated.[105] The legislature, recognizing that the Consumer Fraud Act might overlap with other regulatory schemes, exempted from its scope any "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States."[106] Although the attorney-client relationship is not expressly exempted by the Act, it arguably includes the

types of "actions or transactions" referenced in this provision since attorney conduct is regulated by the supreme court through the ARDC.[107] Moreover, as the majority in *Cripe* noted, Rule 1.5 of the Illinois Rules of Professional Conduct expressly regulates the area of attorneys' fees.[108] Therefore, a distinction between a "business aspect" of the practice of law and the actual practice of law is unnecessary, since an attorney is already subject to sanction for charging an unreasonable fee.

Third, the attorney-client relationship, unlike the merchant-consumer relationship, is fiduciary in nature.[109] An attorney's breach of his fiduciary duty to the client, including a breach caused by excessive billing, subjects the attorney to sanction by the supreme court.[110] The ordinary merchant is not guided by a fiduciary responsibility to his customer; rather, a state's consumer protection statute provides the source of guidance for the merchant in his relationship with a consumer. Because of the attorney's fiduciary obligation to his client, specifically his duty not to charge excessive fees, an attorney's bill is more than simply a business aspect of the practice of law.[111] It is an inseparable part of the attorney-client relationship.

Finally, the language of the statute was not meant to apply to attorney conduct. As stated above, the inapplicability of Illinois' Consumer Fraud Act to attorney conduct is evident because of its exemption for actions or transactions that are already regulated.[112] The Act's inapplicability is further evidenced by the legislature's failure to amend the Act following the *Frahm*, *Guess*, and *Lurz* decisions. The legislature, in amending the Act, did not incorporate any specific reference to the conduct of attorneys toward their clients. Therefore, it is assumed that the legislature wanted the Act to be interpreted as it had been interpreted in the past.[113] As the majority in *Cripe* stated, "[t]he legislature's failure to alter the Act in response to these appellate court holdings provides... support for our conclusion that the legislature did not intend the Act to apply to claims arising out of the attorney-client relationship."[114]

V. IMPACT

Although prior appellate decisions had called into question the applicability of the Illinois Consumer Fraud Act to attorney conduct, the supreme court's decision in *Cripe* effectively closed the door on Illinois plaintiffs looking to bring suit against their attorneys for acts arising out the attorney's practice of law. Probably the most important impact of the supreme court's holding will be to limit a dissatisfied client's ability to recover costs, attorney's fees, and punitive damages from his attorney.[115] As discussed above, these types of awards were important to dissatisfied plaintiffs because they are more readily available under the Illinois Consumer Fraud Act than under a traditional legal malpractice claim.[116] The court's decision that the Act did not apply to

the attorney-client relationship effectively eliminated this option for Illinois plaintiffs. Plaintiffs may still bring suit against an attorneys for dishonest or fraudulent conduct on more traditional grounds such as fraud or legal malpractice.[117] Unfortunately for plaintiffs, however, costs, attorneys' fees, and punitive damages may be difficult or impossible to get under these theories.[118]

VI. CONCLUSION

In summary, the Illinois Supreme Court remains the sole regulator of attorney conduct in Illinois. Illinois' Consumer Fraud Act is not applicable to the attorney-client relationship when the plaintiff's claim arises out of the attorney's practice of law. An attorney's billing practices are a part of the attorney's practice of law, and therefore the Act is equally inapplicable to a claim of overbilling. Accordingly, Illinois plaintiffs who believe that they were defrauded or deceived at the hands of their attorney may not turn to the Consumer Fraud Act for redress, but must instead look to common law theories such as fraud or legal malpractice for a remedy.

Endnotes

1 *See* Edward X. Clinton, Jr., *Do Businesses Have Standing To Sue Under State Consumer Fraud Statutes?*, 20 S. ILL. U. L.J. 385, 385 (1996) [hereinafter Clinton, Do Businesses Have Standing].

2 *See id.*

3 *See*, e.g., Frahm v. Urkovich, 447 N.E.2d 1007 (Ill. App. Ct. 1983) (alleging that an attorney's misrepresentation caused the plaintiffs to lose their investment on a real estate deal).

4 *See* Clinton, *Do Businesses Have Standing*, *supra* note 1 at 385.

5 *See, e.g., Frahm*, 447 N.E.2d 1007, 1011 (Ill. App. Ct. 1983); Guess v. Brophy, 517 N.E.2d 693, 696 (Ill. App. Ct. 1987); Lurz v. Panek, 527 N.E.2d 663, 670 (Ill. App. Ct. 1988).

6 *See* Cripe v. Leiter, 683 N.E.2d 514, 516 (Ill. App. Ct. 1997); see also infra Part III. A.

7 *See Cripe*, 683 N.E.2d at 516.

8 *See* Cripe v. Leiter, 703 N.E.2d 100, 107 (Ill. 1998).

9 *See infra* Part II. A.

10 *See infra* Part II. B.

11 *See infra* Part II. C.

12 *See infra* Part II. D.

13 *See infra* Part III. A-C.

14 *See infra* Part IV.

15 *See infra* Part V.

16 *See* Edward X. Clinton, Jr., *Recent Decisions Under the Illinois Consumer Fraud and Deceptive Business Practices Act*, 7 DEPAUL BUS. L.J. 351, 351 (1995) [hereinafter Clinton, Recent Decisions]. The Illinois Consumer Fraud Act makes certain conduct unlawful:

> unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment suppression or omission of any material fact, with intent that others

rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the .Uniform Deceptive Trade Practices Act,' approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.

815 ILL. COMP. STAT. 505/2 (West 1991). The phrase "trade or commerce" is defined as "the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State." 815 ILL. COMP. STAT. 505/1(f) (West 1993).

[17] *See* Clinton, *Recent Decisions, supra* note 16 at 351.

[18] *See* Clinton, *Do Businesses Have Standing, supra* note 1 at 385.

[19] *See* Paul Meyer, *Illinois Real Estate Brokers: The Duties of Disclosure and Accuracy*, 23 LOY. U. CHI. L.J. 241, 260 (1992). The statutory language prohibits any "deception" or "false promise," encompassing more conduct than would the traditional common law actions. *See id.*

[20] *See* John Gibeaut, *Shopping Bad Apples Around*, A.B.A. J., January 1999, at 34.

[21] *See id.*

[22] *See* 815 ILL. COMP. STAT. 505/10(a) (West 1993). The plaintiff can recover actual or economic damages if an award of these amounts is supported by the evidence. *See id.; see also* Clinton, *Recent Decisions, supra* note 16 at 360. This means, for example, that a plaintiff who proves that a merchant has overcharged him for a consumer good may recover the amount that he was overcharged. *See* Clinton, *Recent Decisions, supra* note 16 at 360. To recover punitive damages, however, the plaintiff must show that the defendant's acts were "willful and wanton." *See id.* Clinton discusses cases where Illinois courts have awarded punitive damages for such conduct. *See id.* For instance, in one case, a plumber threatened to rip out the work he had completed and turn the water to the home off when the plaintiff asked if her husband could review the plumber's bill. See Ekl v. Knecht, 585 N.E.2d 156, 160 (Ill. App. Ct. 1991). The court described the plumber's conduct as evil and reprehensible and affirmed the lower court's award of punitive damages. *See id.* at 164.

[23] *See* 815 ILL. COMP. STAT. 505/10a(c) (West 1993).

[24] *See* Clinton, *Recent Decisions, supra* note 16 at 361. While the most common scenario involves an award of fees to the plaintiffs, a defendant may also receive such an award. *See id.* at 363. This is not as common, however, and the courts do not have a standard for determining when the defendant should receive these amounts. *See id.* Some courts have stated that the defendant should only receive fees and costs when the plaintiff exhibits bad faith. *See id.*

[25] *See* Clinton, *Do Businesses Have Standing, supra* note 1 at 386.

[26] *See* Brazen v. Finley, 519 N.E.2d 898, 902 (Ill. 1988).

[27] *See id.* (holding that a circuit court rule "improperly intrud[ed] into the exclusive rulemaking and disciplinary authority invested in the supreme court.").

[28] *See id.*

[29] *See id.*

[30] *See* Jean McKnight, *Researching Legal Ethics in Illinois*, 86 ILL. B.J. 509, 509 (1998).

[31] *See* ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.5 (West 1998). Rule 1.5 provides, in pertinent part:

> A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent. *Id.*

[32] *See* Douglas R. Richmond, *Professional Responsibility and the Bottom Line: The Ethics of Billing*, 20 S. ILL. U. L.J. 261, 261 (1996). Richmond explains that the client-counselor relationship is disappearing and that some clients will now "routinely proscribe certain billing practices, audit their attorney's bills, and demand reductions of fees that they believe to be unreasonable." *Id. See also*, Debra Baker, *You Charged How Much?*, A.B.A. J., February 1999, at 20 (discussing the evolving practice by many insurance companies of hiring independent auditors to review their legal bills).

[33] *See* Richmond, *supra* note 32 at 263 (citing a limited 1990 survey in which nearly all attorneys who responded reported some deceptive practices in their billing).

[34] *See id.* at 264. The decisions that have been reported are more recent which may suggest that clients are increasingly scrutinizing their bills possibly because of a lack of trust on the part of a client. *See id.* at 264-65. The American Bar Association Standing Committee on Ethics and Professional Responsibility in 1993 acknowledged "the discouraging public opinion of the legal profession" due to "the billing practices of some of its members." *See id.* at 274 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 379 (1993)).

[35] For example, in Illinois, attorneys have received suspensions of six months for taking grossly unreasonable fees (see 94 Ill Atty. Reg. & Disc. Comm. SH 632) and one year for engaging in dishonest and fraudulent conduct and charging excessive fees (see 93 Ill Atty. Reg. & Disc. Comm. CH 597).

[36] *See* David P. Pasulka, *An Illinois Attorney's Guide to Fee Dispute Cases*, 84 ILL. B.J. 622, 622 (1996). "Reasonableness" is determined according to Illinois Rule of Professional Conduct 1.5 and case law that has developed a standard for fees. *See id.*

[37] *See* Gibeaut, *supra* note 20 at 34.

[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] *See id.* (discussing Latham v. Castillo, 972 S.W.2d 66 (Tex. 1998)).

[42] *See id.* A criticism of the Texas Supreme Court's holding in *Latham v. Castillo* has been that the decision may "create a gold rush to the courthouse among dissatisfied clients who want to sue their lawyers even if their original cases were worthless..." *Id.* at 35. Another criticism is that the decision singles out lawyers for "brutish treatment" in that they will have to "face the wrath of lay juries." *Id.*

[43] *See supra* notes 11-15 and accompanying text.

[44] *See supra* note 5.

[45] 447 N.E.2d 1007 (Ill. App. Ct. 1983).

[46] *See id.* at 1008.

[47] *See id.* at 1009.

[48] *Id.* at 1010. The court rejected the plaintiff's reliance on the United States Supreme Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), where the Supreme Court held that the legal profession was subject to antitrust laws. See id. The court noted that even the *Goldfarb* Court stated that the practice of law is "not interchangeable with other business activity." *See id.* (quoting *Goldfarb*, 421 U.S. at 788-89).

[49] *See id.* at 1011.

[50] Guess v. Brophy, 517 N.E.2d 693 (Ill. App. Ct. 1987).

[51] *Id.* at 696.

[52] 527 N.E.2d 663 (Ill. App. Ct. 1988).

[53] *See id.* at 665-66.

[54] *See id.*

[55] *See id.* at 669. The plaintiff distinguished between "the actual practice of law" and the "entrepreneurial" aspects of the profession. *See id.* In doing so, the plaintiff relied on a Washington Supreme Court decision, *Short v. Demopolis*, 691 P.2d 163 (Wash. 1984), in which that court made a similar distinction. *See id.* The Washington Supreme Court in *Short* ruled that the state's consumer protection statute applied to certain "entrepreneurial aspects of the practice of law" which included "how the price of legal services is determined, billed, and collected. . . ." *Short*, 691 P.2d at 168. Other jurisdictions have have reached differing conclusions in their consideration of this issue. *See, e.g.*, Rousseau v. Eshleman, 519 A.2d 243, 245 (N.H. 1986) (holding that the practice of law is exempt from New Hampshire's consumer protection statute); Vort v. Hollander, 607 A.2d 1339, 1342 (N.J. Super. Ct. App. Div. 1992) (holding that the New Jersey consumer protection statute does not apply to attorney's services); *but see* Heslin v. Connecticut Law Clinic, 461 A.2d 938, 943 (Conn. 1983) (holding that the Connecticut Unfair Trade Practices Act did not provide lawyers with a blanket exemption and did not "totally exclude all conduct of the profession of law"); Latham v. Castillo, 972 S.W.2d 66, 69 (Tex. 1998) (finding that Texas' Deceptive Trade Practices Act can apply to an attorneys' misrepresentations to his client).

[56] *See Lurz*, 527 N.E.2d at 670.

[57] 703 N.E.2d 100 (Ill. 1998).

[58] *See Cripe*, 703 N.E.2d at 101.

[59] *See Cripe*, 683 N.E.2d 514, 515 (Ill. App. Ct. 1997).

[60] *See id.* at 516.

[61] *See id.* The appellate court relied on a federal district court's interpretation in *Gadson v Newman*, in which the *Gadson* court stated, "[w]e... interpret *Frahm* to mean that 'practice of law' exception includes activities directly related to the lawyer's professional training or where the lawyer is already subject to regulation from his or her professional organizations." *See id.* (quoting Gadson v. Newman, 807 F.Supp. 1412, 1417 (C.D. Ill. 1992)). The *Gadson* court went on to state that the determination of a fee schedule was not "the practice of law," but was a "business aspect" of the law which was subject to regulation. *See id.* (quoting *Gadson*, 807 F.Supp. at 1417).

[62] *See id.* The appellate court followed the Gadson court's reasoning in reaching its conclusion. *See id.* The appellate court also noted that, "[a]lthough the Act specifically excludes agents of the media and real estate

brokers from its provisions, it does not provide an exemption for the legal profession." *See id.* (citation omitted).

[63] *See Cripe*, 703 N.E.2d at 102.

[64] *See id.* Mrs. Schmitz retained Leiter to defend her in the guardianship proceeding. *See id.*

[65] *See id.* The original petition was dismissed and Mrs. Cripe was appointed guardian in a subsequent hearing. *See id.*

[66] *Id.* The plaintiff's complaint made six allegations: (1) violation of the Consumer Fraud Act; (2) common law fraud; (3) breach of fiduciary duty; (4) legal malpractice; (5) constructive fraud; and (6) violation of the Consumer Fraud Act by the Leiter Group, which was the firm in which Leiter was partner. *See id.* at 102-03.

[67] *See id.* at 102.

[68] *See id.* at 103.

[69] *See id.*

[70] *See id.* at 107.

[71] *See id.*

[72] *See id.* at 105 (comparing the Illinois Consumer Fraud Act with similar acts from other jurisdictions and noting that none contain express reference to the legal profession).

[73] The majority examined Illinois appellate court decisions as well as decisions of courts in other jurisdictions that have considered the issue. *See id.* at 104.

[74] *See id* at 105. The plaintiff conceded that the Act does not apply to the "actual practice of law." See id. The plaintiff, however, distinguished between the practice of law and "business aspects" of that practice. *See id.*

[75] *See id.*

[76] *See id.* at 106.

[77] *See id.*

[78] *Id.*

[79] *See id.* at 105-06 (citing Illinois Rules of Professional Conduct, Rule 1.5, 134 Ill.2d R. 1.5(a)). *See also* McKnight, supra note 30.

[80] *See Cripe*, 703 N.E.2d at 106.

[81] *See id.*

[82] *See id.* The court stated that, absent the legislature's clear intent to the contrary, it would not regulate the attorney-client relationship through the Consumer Fraud Act. See id.

[83] *See id.*; see also Frahm v. Urkovich discussed supra in Part II.D.

[84] *See Cripe*, 703 N.E.2d at 106.

[85] *See id.* The majority stated that, when amending a statute, "the legislature is presumed to know the construction the statute has been given and, by re-enactment, is assumed to have intended for the new statute to have the same effect." See id. (quoting Susler v. Country Mutual Insurance Co., 591 N.E.2d 427, 429 (Ill. 1992). The court stated that the legislature's failure to modify the language of the Consumer Fraud Act so that it specifically referred to the attorney-client relationship evidenced its intent that the Act not apply to that relationship. See id. at 106-07.

[86] *See id.* at 107.

[87] *Id.*

[88] *See id.*

[89] *See id.*

[90] *See id.* The majority stated that "because of that fiduciary relationship, the attorney's fees are subject to scrutiny and regulation not applicable to the fees for most commercial regulation." *See id.*

[91] *See id.* at 108 (Harrison, J., dissenting).

[92] *Id.* at 107 (Harrison, J., dissenting).

[93] *See id.* at 108 (Harrison, J., dissenting). Justice Harrison argued that the majority need not resort to any tools of statutory interpretation beyond the plain language of the Act because the Act's language is unambiguous. *See id.* at 107. Accordingly, he stated that the only way that the majority could hold that the defendant's overbilling did not fall within the scope of the Act would be to hold that "the legislature did not mean what the language of the statute says." *Id.* at 108.

[94] *See id.* at 108 (Harrison, J., dissenting). The Act provides: "Nothing in this Act shall apply to the following...[a]cts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station. . . . The communication of any false, misleading or deceptive information, provided by... a real estate salesman or broker." 815 ILL. COMP. STAT. 505/10b (West 1993).

95 *See Cripe*, 703 N.E.2d at 108 (Harrison, J., dissenting). The dissent referred to the principle of statutory construction expressio unius est exclusio alterius, which means that the legislature's expression of certain exclusions in the Act is the exclusion of all others. *See id.*

[96] *See id.* at 108 (Harrison, J., dissenting).

[97] *See id.* (Harrison, J., dissenting).

[98] *See id.* (Harrison, J., dissenting) (citing 815 ILL. COMP. STAT. 505/10b(1) (West 1992) which provides, in pertinent part that "nothing in the Act shall apply to [a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States. . . .").

[99] *See id.* (Harrison, J., dissenting).

[100] *See id.* (Harrison, J., dissenting).

[101] *See id.* (Harrison, J., dissenting). Justice Harrison stated that,

> [a]lthough the attorneys involved might ultimately be subject to discipline, that is no reason to deny plaintiff her right to bring a statutory damage action against them. If what the attorneys did constituted a crime, we would surely not say that they are exempt from prosecution merely because they are subject to disbarment by us. The same principle applies here. *Id.*

[102] *See* Frahm v. Urkovich, 447 N.E.2d 1007 (Ill. App. Ct. 1983); Guess v. Brophy, 517 N.E.2d 693 (Ill. App. Ct. 1987); Lurz v. Panek, 527 N.E.2d 663 (Ill. App. Ct. 1988).

[103] *Frahm*, 447 N.E.2d at 1009.

[104] *See Cripe*, 703 N.E.2d at 107.

[105] *See id.* at 106.

[106] 815 ILL. COMP. STAT. 505/10b (West 1992).

[107] The New Hampshire Supreme Court, in *Rousseau v. Eshleman*, acknowledged that the state's consumer protection statute did not contain any language expressly exempting "law, medicine, or other learned professions from its reach." Rousseau v. Eshleman, 519 A.2d 243, 245 (N.H. 1986). However, that court interpreted statutory language that exempted "[t]rade or commerce otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of this state or of the United States" to refer to the New Hampshire Supreme Court's professional conduct committee. See id. The court therefore decided that attorneys were exempted from the state's consumer protection statute. *See id.*

[108] See ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.5 (West 1998).

[109] *See Cripe*, 703 N.E.2d at 107.

[110] *See id.*

[111] *See id.*

[112] *See* 815 ILL. COMP. STAT. . 505/10b(1) (West 1992).

[113] *See Cripe*, 703 N.E.2d at 106 (citing Sulser v. Country Mut. Ins. Co., 591 N.E.2d 427, 429 (Ill. 1992)).

[114] *Id.* at 106-07.

[115] *See Gibeaut, supra* note 20 at 34.

[116] *See supra* Part II.A.

[117] *See supra* Part II.A.

[118] *See Gibeaut, supra* note 20 at 35.