



New Illinois Legal Ethics Rules Navigating the Sweeping Changes to the Professional Conduct Code

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

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The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

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ILLINOIS ATTORNEYS TAKE NOTE:
REVISED RULES OF PROFESSIONAL
CONDUCT & ETHICAL
OBLIGATIONS

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OVERVIEW

□ Introduction

- Speakers – Chad Main and Jeremy Glenn of Meckler Bulger Tilson Marick & Pearson
- Overview of the 2010 Revisions to Illinois Rules of Professional Conduct
 - Practice What They Preach - The Attorney-Client Relationship and Confidentiality
 - The Dollars and Sense of Illinois Ethics Rules

CONFIDENTIALITY - - RULE 1.6

- General Rule:

- “A lawyer shall not reveal information relating to the representation of a client. . . .”
 - Exceptions
 - Client consent
 - Permissive and Mandatory Disclosures

CONFIDENTIALITY RULE - - 1.6

□ Permissive Disclosure

- To prevent crimes other than death or substantial bodily harm
- To prevent fraud that is “reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client used the lawyer’s services”
- To secure advice about compliance with ethical rules
- Client puts at issue in claim against lawyer
- Comply with law or court order

CONFIDENTIALITY RULE - - 1.6

- Mandatory Disclosure
 - To prevent act that will cause death or substantial bodily harm
 - No requirement that client be cause of harm

CONFIDENTIALITY RULE - - 1.13

(Entity as Client)

- Must refer matter to “higher authority” if lawyer knows that an officer or employee is engaged in action:
 - that is a violation of the entity’s legal obligation, a crime, or fraud;
 - imputable to corporation;
 - likely to result in “substantial injury” to entity

CONFIDENTIALITY RULE - - 1.13

(Entity as Client)

- “May” disclose wrongful act if “higher authority” fails to act

DUTIES OWED TO PROSPECTIVE CLIENTS - - RULE 1.18

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) 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 as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (1) both the affected client and the prospective client have given informed consent, or
 - (2) 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 that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

MULTIJURISDICTONAL PRACTICE - - RULE 5.5

- Out of state lawyer can provide legal services on a temporary basis if:
 - Undertaken with local counsel
 - Obtains pro hac vice approval (can perform preliminary legal services if “reasonably expect” to be admitted for case)
 - ADR related
 - In-house counsel

SALE OF LAW PRACTICE - - RULE 1.17

Permitted Sale Conditions

- (a) The seller **ceases to engage** in the private practice of law in **geographic area**;
 - (b) The **entire practice** is sold;
 - (c) The seller gives **written notice** to each of the seller's clients regarding:
 - (1) the proposed sale;
 - (2) the client's right to retain other counsel or to take possession of the file;
and
 - (3) the fact that the client's consent to the transfer of the client's files **will be presumed** if the client does not take any action or does not otherwise object within ninety (90) days of receipt.
- If a client cannot be given notice, transfer **only upon entry of an order**.
- (d) The fees charged clients **shall not be increased** by reason of the sale.

SALE OF LAW PRACTICE - - RULE 1.17 Comments

- [3] Seller can go to staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.
- [4] It is advisable for the parties' agreement to define the geographic area.
- [6] The purchasers are required to undertake all client matters in the practice, subject to client consent, but excuses conflict of interest.
- [7]..Providing the purchaser access to client-specific information relating to the representation and to the file requires client consent.

SAFEKEEPING PROPERTY - - RULE 1.15

- (c) A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. **Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the lawyer.** An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term "advance payment retainer" to describe the retainer, and states the following:
- (1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;
 - (2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;
 - (3) the manner in which the retainer will be applied for services rendered and expenses incurred;
 - (4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;
 - (5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.

SAFEKEEPING PROPERTY - - RULE 1.15

Comments

- *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007).
 - **Advance payment retainers**
 - Limited circumstances - property of lawyer upon payment.
 - May not be deposited into a client trust account.
 - Must be in a written agreement signed by the client that contains the elements listed in Rule 1.15(c).
 - **Security retainers**
 - Secures payment for future services and expense
 - Must be deposited in a client trust account
 - Remain the property of the client until applied for services rendered or expenses incurred.
- Any written retainer agreement should clearly define the kind of retainer being paid.
- If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.

REASONABLE FEES - - RULE 1.5

- ❑ A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.
- ❑ Eight Non-Exclusive Factors to be considered in determining the reasonableness of a fee
- ❑ SHALL BE COMMUNICATED, unless and except for...

REASONABLE FEES - - Rule 1.5 Comments

- Expenses

- Services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

- Beware Impermissible Incentives

- An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.
- For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client.

Advertising - - The 7 Series of Professional Conduct

- Rule 7.1
 - NO false or misleading communication about the lawyer or the lawyer's services.
 - A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.
 - “Achievements” may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients
 - Unsubstantiated “comparison” of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.
 - Disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

Advertising Ethics Continued

- Rule 7.2
 - Adds language permitting advertising through “written, recorded or electronic communication”
 - Comments: Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public.
 - Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.

Advertising Ethics Continued

- Rule 7.3
 - Prohibits in-person, live telephone or real-time electronic contact to solicit business unless contacting a lawyer or family, close personal or prior professional relationship
 - Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

CONCLUSION

- ❑ Be Sensitive to New and Revised Rules
- ❑ Study the Comments to the Rules
- ❑ Gray Areas
- ❑ Continually Monitor Practices and Conduct

QUESTIONS