THE NEW ILLINOIS RULES OF PROFESSIONAL CONDUCT

This paper serves as an introduction into the New Rules of Professional Conduct. It is neither intended to be an exhaustive review of the New Rules nor to serve as a substitute for a personal review of the New Rules and the accompanying Comments.

I. BACKGROUND


Virtually every jurisdiction reviewed its ethics rules in light of Ethics 2000. As of August, 2009, at least 42 states and the District of Columbia have either adopted new rules or substantially revised existing rules.

In September 1999, the ISBA established a Special Committee on Ethics 2000 to monitor the work of the Ethics 2000 Commission and consider recommendations for changes to the Illinois Rules. In November of 2002, the ISBA and the CBA formed a joint ISBA/CBA committee on Ethics 2000 to complete the mission of the original ISBA committee. The ISBA/CBA Joint Committee issued its revised final report in April 2004 and submitted it to the Illinois Supreme Court Committee on Professional Responsibility, which issued its own report in February 2007. The Illinois Supreme Court announced adoption of the new rules on July 1, 2009, effective January 1, 2010.


II. WHAT HAS CHANGED AND WHAT HASN’T CHANGED

The general organization, numbering and subjects covered track the current Illinois Rules and the 1983 version of the ABA Model Rules. Ethics experts will notice changes in language and placement of some provisions. To a great extent, the differences are not changes in substance but there are some substantive changes that need to be noted. Changes are noted below.
A. **Comments**

One of the most significant changes is the inclusion of Comments which all ethics commentators believe is a significant improvement over the Current Rules. The new Comments follow closely those of the Model Rules. The Comments provide Illinois lawyers a larger base of analysis and authority for their professional conduct. **While not authoritative, the Comments are instructive and could be critical to interpreting and applying the rules for lawyers, courts, and disciplinary agencies.** As stated in paragraph 21 of the Scope Section, the Comments are guides to interpretation. The penultimate sentence in paragraph 21, containing the phrase “and are instructive and not directive”, was added to ease the fears of some that a violation of the Comments could result in disciplinary action. **Nevertheless, since the New Rules establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.**

B. **Definition of Terms**

New Rule 1.0 contains definitions of terms used throughout the Rules. The Rules use the concept of “informed consent”, defined in Rule 1.0(e), rather than the less definite terms “consent after consultation” and “consent after disclosure” for client consents to conflict waivers and other matters.

The new Rules also consistently use an “actual knowledge” standard rather than the current “knows”, “knows or reasonably should know”, or some further variant of a knowledge standard. A person’s knowledge may still be inferred from the circumstances. Rule 1.0(f).

C. **Broader Scope for Client Confidentiality**

New Rule 1.6(a) protects all “information relating to the representation of the client” whatever the source rather than the more narrow categories of “confidences” and “secrets” in current Rule 1.6.

Current Rule 1.6(c) (2) already permits disclosure to prevent any client crime, including financial crimes such as mail fraud, wire fraud, or criminal violations of the securities laws. The new Rules include a unique Illinois provision, Comment 15A, which reminds lawyers who discover a client crime or fraud that they may make a “noisy withdrawal” by giving notice of withdrawal and disaffirming any opinion or other document prepared for the dishonest client, regardless of whether they make a disclosure permitted by Rule 1.6(b).

Current Rule 1.6(b) **requires** disclosure of information necessary to prevent a client act that would result in death or other serious bodily harm. **New Rule 1.6(c) mandates disclosure to prevent death or substantial bodily harm in all situations, through client act or otherwise.** New Rule 1.6(b) (4) adopts the Model Rule provision
permitting a lawyer to disclose confidential client information to secure legal advice about the lawyer’s compliance with the rules.

New Rule 1.13 contains an important new exception to confidentiality, defining the obligations of a lawyer for an organizational client who knows of misconduct by a constituent of the client. **New paragraph (b) now presumes the “up the ladder” reporting within the organization by lawyers as the proper course rather than one alternative.** New paragraph (c) permits a lawyer who has exhausted remedies within the organization and reasonably believes the misconduct is reasonably certain to cause substantial injury to the organization to disclose the confidential information outside the organization to the extent necessary to prevent the injury. **New Rule 1.13(c) limits the disclosure to instances of crime or fraud rather than permitting disclosure for any violation of the law.**

New Rule 1.14(c) addresses duties to a client under a disability. **The new Rule expressly permits disclosing information about the representation of a client with diminished capacity to the extent necessary to protect the client.**

D. **Conflicts of Interest**

Rule 1.7, the basic conflicts rule for current clients, has been rewritten. The relationship between “direct adversity” and “material limitation” under the Current Rule was often misunderstood. The New Rule does not change the substance of the Rule as properly interpreted, but provides simpler and more direct guidance. **New Rule 1.7(a)** defines a concurrent conflict of interest in plain terms: a conflict exists if the representation will be directly adverse to another client or there is a significant risk that the representation will be materially limited by other factors. New Rule 1.7(b) identifies the circumstances in which a lawyer may undertake the representation notwithstanding the conflict. **New Rule 1.7(b)(3) states that concurrent representation cannot take place, even with consent, where the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.**

New Rule 1.7 is illustrative of the utility of the comments which explain the rule and give examples of how it should apply. **In particular, Comment 5 addresses the thrust upon conflict situation; Comment 6 discusses direct adversity created in the cross-examination setting; Comment 11 discusses lawyers representing different clients in the same matter who are closely related by blood or marriage; Comments 14 – 17 discuss prohibited representations regardless of informed consents; Comments 18 and 29-33 discuss the conflicts implications of representing multiple clients and the steps to take when doing so (Joint Defense Agreement); Comment 21 discusses a client’s revocation of consent; Comment 22 discusses how to seek consent for conflicts that may arise in the future; Comment 25 helps define who is the client in class action litigation; and Comment 34 addresses issues that arise in representing constituents or affiliates of other entities and states that a lawyer who represents a corporation or other organization does not, by virtue of the**
representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.

New Rule 1.8 lists specific conflicts that can arise from a lawyer’s relationship with a client that go beyond providing legal services. The new Rule is a clear and complete statement of the lawyer’s obligations, consistent with the substance of the current rules but improved and clearer.

New Rule 1.8(a) mandates broader warnings and written disclosures and consent where lawyers enter into business transactions with clients. New paragraph (a) (1) requires that such transactions be “fair and reasonable” to the client and new paragraph (a) (2) requires that the client be informed that they may seek the advice of independent legal counsel and be given a reasonable opportunity to do so. New Rule 1.8(b) prohibits using information to the client’s detriment. New Rule 1.8(c) prohibits a lawyer from soliciting a substantial gift from a client and is not limited to preparing an instrument providing such a gift.

New Rule 1.8(g) prohibits a lawyer who represents two or more clients from making an aggregate settlement of the claims against them unless each gives informed consent, in a writing signed by the client.

New Rule 1.8(j), prohibiting initiation of a sexual relationship with a client, is a new topic for Illinois ethics Rules. Under Comment 19, when the client is an entity, the prohibition applies only to the officer or employee who supervises the entity’s legal affairs. The Rule does not prohibit a lawyer from having sexual relations with a client if the sexual relationship pre-existed the attorney-client relationship. This prohibition exists whether or not the relationship is consensual and regardless of the absence of prejudice to the client.

New Rule 1.8(k) imputes the prohibitions of Rule 1.8 (except those directed at client sexual relationships) to all lawyers in a firm with the personally prohibited lawyer.

Only modest language changes were made to the new Rule 1.9 dealing with former client conflicts although Rules 1.9 and 1.10 were rearranged to make a more complete statement of the duties to former clients. Again, the comments are useful, particularly Comments 2 and 3 which explain when a representation is “the same or a substantially related matter” as a prior representation.

Comment 3 to New Rule 1.9 (Former Clients) discusses the “substantially related” component of the new rule. Matters are “substantially related” if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by
the passage of time. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation. However, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

New Rule 1.10, which governs the imputation of conflicts of interest, does not impute conflicts based upon a “personal interest” (i.e., strong political belief). The new rule preserves screening of a lateral hire to prevent disqualification of the entire firm. The definition of “screened” in new Rule 1.10(e) improves on the rigid definition in current Rule 1.10(e) requiring the screened lawyer be barred from all contact with the client in the screened matter, even “ordinary course of business contact” with its employees or representatives on subjects unrelated to the screened matter.

New Rule 1.12 (former judges and arbitrators) now applies to mediators and other third-party neutrals.

New Rule 1.18 (Duties to Prospective Client) establishes clear guidelines for when a lawyer or his or her firm may represent a party in a matter adverse to another who consulted but did not engage the lawyer about the same or a substantially related matter. It also contains provisions to protect the prospective client’s confidential information. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a “prospective client” within the meaning of paragraph (a). A lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed will prohibit the lawyer from representing a different client in the matter.

Illinois continues its lack of a general requirement for confirmation of consents to be in writing departing from Model Rules 1.7, 1.9, 1.11, 1.12, and 1.18. However, consent must be confirmed in writing under Rule 1.5(c) (contingent fee agreement) and 1.5(e) (fee division). Consents must be confirmed in a writing signed by the client under Rules 1.8(a) (business transactions with clients) and Rule 1.8(g) (aggregate settlements for two or more clients). Indiana, Iowa, Kentucky, Missouri and Wisconsin now require conflict consents to be confirmed in writing.

E. Fees and Client Property

New Rule 1.5 is substantively similar to current Rule 1.5 with respect to a lawyer’s general obligations with respect to fees. It expands the rule to include expenses as well as fees, to require lawyers to communicate the scope of the representation and the fee rate or basis, and favors written disclosure of fee matters.

The new rule provides a clear and straightforward statement of the rules for division of fees, continuing with the In Re Storment approach under Illinois law. In Storment, the Supreme Court held that the “same legal responsibility” required for
division of fees refers only to potential financial responsibility for any malpractice against the recipient of the referral. The Model Rules approach is different. (Several or Joint).

New Rule 1.15(c) distinguishes fixed fees from the three kinds of retainers the court recognized in Dowling. The Dowling decision is now codified under new Rule 1.15(c) and describes in detail the advance payment retainer. Comments 3A – D explain advance payment retainers and confirm that traditional fixed or flat fee arrangements do not constitute advance payment retainers. The Rule states in relevant part that “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”. New Rule 1.15(c) also states that the advance payment retainer agreement be in writing signed by the client that uses the term “advance payment retainer” to describe the retainer and sets forth other required language in the writing.

New Rule 1.16 sets forth a clear statement of most of the basic obligations regarding withdrawal. Rule 1.16(b) (1) specifically allows withdrawal if it can be done without adversely affecting the client’s interests. The new rule also contains a general “withdrawal for good cause” provision.

New Rule 1.17 no longer requires a particular reason for the sale of a law practice and expands the permitted sellers and purchasers to include law firms, as well as sole proprietorships. The rule continues with its requirement that the entire practice be sold rather than a practice area. The new rule also allows sales in a “geographic area” in Illinois.

F. Duties as Advocate

New Rule 1.2(a) continues to require that a lawyer abide by a client’s decision whether to settle a matter.

New Rule 3.3(c) sets a time limit on a lawyer’s obligation to rectify improper conduct (until the conclusion of the proceeding), a matter left indefinite in the current rules.

Comment 3 to New Rule 3.4 provides specifics on permissible payments to a witness or prospective witness. Expenses paid to a witness or prospective witness may include reimbursement for reasonable charges for travel as well as out of pocket expenses for hotel, meals, child care and compensation for the reasonable value of time spent attending a deposition or hearing or in consulting with the lawyer. They may not be contingent on the content of the testimony or the outcome of the litigation.
New Rule 3.6 continues the current Illinois standard for restricting extrajudicial statements. New Rule 3.6(a) restricts statements that “would pose a serious and imminent threat to the fairness of a proceeding”.

New Rule 3.7 adopts the Model Rule formulation on the rules for a lawyer as a witness.

F. **Dealings with Nonclients**

New Rule 4.2 clarifies a lawyer’s obligations when dealing with a person other than a client. Comment 7 discusses which constituents of a represented organization are persons represented by counsel.

New Rule 4.4(b) states the obligations of counsel regarding inadvertently received email, facsimile, or other communication. The Rule requires only that the lawyer notify the sender, leaving issues of privilege and the ultimate disposition of the communication to other law.

New Rules 5.5 and 8.5 relate to practice across state lines. Under New Rule, 5.5(b), it is still the unauthorized practice of law for a non-admitted lawyer to establish an office or otherwise hold out to the public that he or she is admitted to practice in Illinois. In non-litigated matters, new Rule 5.5(c)(4) provides that a lawyer may render legal services on a “temporary basis” across state lines if such services “arise out of or are reasonably related to” the lawyer’s practice in the jurisdiction where he or she is admitted. New Rule 5.5(b) (2) continues to require lawyers from other states to seek authorization from the tribunal to appear in litigated matters.

New Rules 7.1 and 7.5, including the comments, continue the current rule on advertising and solicitation. New Rule 7.2 omits the current requirement that copies of all advertisements be kept for three years. New Rule 7.3(c) requires that every written, recorded or electronic communication from a lawyer soliciting business from a prospective client include the words “Advertising Material” on the outside envelope and at the beginning and ending of any recorded or electronic communication, unless the recipient is a lawyer or a member of the lawyer’s family, or a close personal or prior professional relationship with the lawyer exists. This requirement does not exist if the communication is sent in response to requests from potential clients or their spokespersons or sponsors. New Rule 7.4 retains the current prohibition against terms such as “specialist”, “expert”, and “certified”. For the first time, the rules explicitly govern electronic communication such as e-mail and websites.

New Rule 8.3 deals with reporting lawyer misconduct. The rule continues to mandate that misconduct be reported even if doing so requires disclosure of information otherwise protected by Rule 1.6, unless it is privileged or was learned through an approved lawyers’ assistance program or an intermediary program approved by a circuit court. Comment 3 limits the reporting obligation to those offenses that a self-
regulating profession must vigorously endeavor to protect. A report should be made to the Illinois ARDC unless some other agency is more appropriate in the circumstances.

New Rule 8.4 collects in one rule various prohibitions on lawyer conduct. Rules (a) – (f) track the Model Rules provisions while rules (g) – (k) preserve unique Illinois misconduct provisions stated currently in various rules.

For disciplinary purposes, new Rule 8.5(a) provides that a lawyer admitted in Illinois is subject to the disciplinary authority of Illinois, regardless where the lawyer’s conduct occurred. A lawyer not admitted in Illinois is also subject to Illinois’ disciplinary procedures if the lawyer provides or offers to provide any legal services in Illinois. Finally, a lawyer may be subject to the disciplinary authority of both Illinois and another jurisdiction for the same conduct. New Rule 8.5(b) gives choice of law rules for determining which state’s ethics rules apply to a lawyer’s conduct.

New Rule 2.4 defines the ethical obligations of a third party neutral.

New Rule 3.9 states responsibilities of a lawyer serving as an advocate in non-adjudicative proceedings such as legislative or administrative rulemaking proceedings.

The new Rules did not adopt the Model Rules for pro bono or “pay to play” practices. Rules 6.1 and 7.6. The absence of such a rule from the Illinois’ Rules should not be interpreted as limiting the responsibility of lawyers to render uncompensated service in the public interest as noted in paragraph 6B of the Preamble. However, New Rule 6.5 provides greater opportunities for lawyers to perform pro bono legal services through not-for-profit or court-annexed limited legal service programs. Pursuant the New Rule 6.5, lawyers will have more chances to assist people with short-term legal consultation without providing further representation.