

**Young Lawyers Section  
The Chicago Bar Association**

**Young Lawyers' Professional Responsibility Guide**

**Introduction**

The 2006 Annual Report published by the Illinois Attorney Registration and Disciplinary Commission (“ARDC”) noted that 16% of disciplinary cases filed that year were against lawyers who had been licensed less than ten years. At the base of any law practice is professional responsibility. Ultimately our integrity coupled with our knowledge of the rules of our profession is one of our greatest assets as an attorney. Sometimes the Rules are difficult and require some research to properly navigate. This book is meant to assist you in finding direction to some of the quandaries you might face.

**Disclaimer**

This guide is intended as a reference tool only and does not represent legal advice with respect to specific cases. Readers are reminded that the content and interpretation of the Rules of Professional Conduct are subject to change, and that the interpretations presented in this guide are not binding on either the Attorney Registration and Disciplinary Commission or any court. Neither the Chicago Bar Association, its Young Lawyers Section, the authors or editors of this guide, or their employers assume any liability arising out of its use.

**Acknowledgments**

The following persons wrote, edited or otherwise provided generous assistance with the compilation of this book. The Young Lawyer’s Section wishes to thank them for their hard work and kind assistance.

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## Part I

### Conversion and Commingling

#### **Scenario:**

Robert Dayton was a sole practitioner. When he opened his practice he set up two checking accounts one titled “Robert Dayton Client Fund Account” and one titled “Robert Dayton, Attorney At Law Operating Account.” In addition Robert had a personal account at the same bank. Robert’s practice included some personal injury work. Whenever he received a settlement check he deposited it in the client fund account and, after the check cleared, he drew a check from that account for disbursement to his client. Then he removed his fee from the account and placed it in his business account. After about fifteen years of practice Robert ran into financial difficulties. He fell behind on his rent and was evicted. His former landlord was attempting to have his bank accounts garnished for past due rent. At the same time Robert settled a case for \$75,000 of which \$25,000 would be his. Robert’s client was out of the country and unavailable. Robert needed \$50,000.00 fast, so he removed \$50,000 from his client fund account and placed it in his personal account where he used it to pay a few personal debts.

#### **Applicable Rules:**

- Conversion (no specific rule number) and Rule 1.15 of the Illinois Rules of Professional Responsibility which states:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

#### **Interpretation:**

Conversion, often combined with commingling, are serious and common problems. Conversion is not governed by a specific rule number. The Court has developed a definition of conversion from the common tort law as follows: the unapproved permanent or transient deprivation of property from its rightful owner. In re Rosin, 156 Ill. 2d 202, 204, 620 N.E.2d 368, 370 (1993), citing In re Thebus, 108 Ill. 2d 255, 259, 483 N.E.2d 1258 (1985), quoting Union Stock Yard & Transit Co. v. Mallory, Son & Zimmerman Co., 157 Ill. 554, 563, 41 N.E. 888 (1895).

The Court has noted that direct evidence of a fraudulent motive is not necessary to impose discipline. In re Bloom, 39 Ill. 2d 250, 254, 234 N.E.2d 775, 777 (1968), citing In re Abbamonto, 19 Ill. 2d 93, 98, 166 N.E.2d 62, 64 (1960). Much conversion is not the result of intentional taking but, is instead, the result of poor bookkeeping practices. For example, a client provides a filing fee on Monday. The attorney dutifully deposits it in his client trust account that day, at a time when the account already has a large sum of money being held for other clients. On Tuesday, the attorney writes a check for the filing fee although the client's check has not yet cleared. Ultimately the client's check is returned for insufficient funds. Even though the attorney had no intention of converting the funds, the funds were converted because that check for filing fees comes from funds actually belonging to other clients. The Court has taken notice of a difference between conversion with and without intent. Specifically, the Court has stated conversion occurring absent fraudulent intent is a mitigating factor to be considered in determining the sanction to be imposed. In re Timpone, 157 Ill. 2d 178, 195, 623 N.E.2d 300, 307 (1993).

The Supreme Court has looked upon all conversions as serious violations of the Rules of Professional Conduct. The Court has said, "Conversion of a client's funds, with or without a 'dishonest motive,' simply cannot be countenanced." In re Stillo, 68 Ill. 2d 49, 54, 268 N.E.2d 897, 899 (1977), quoting People ex rel. Black v. Smith, 290 Ill.2d 289, 268 N.E.2d 897 (1919). The Court has imposed sanctions ranging from censure for a first offense with notable mitigation to disbarment for intentional conversion of large sums of money without mitigating circumstances. See In re Young, 488 N.E.2d 1014, 111 Ill. 2d 98 (1986); In re McLennon, 443 N.E.2d 553, 93 Ill. 2d 215 (1982); In re Clayter, 78 Ill. 2d 276, 399 N.E.2d 1218 (1980); In re Woldman, 98 Ill. 2d 248, 456 N.E.2d 35 (1983) and In re Feldman, 431 N.E.2d 388, 89 Ill. 2d 7 (1982).

The Court addressed the issue of commingling in In re Clayter. In Clayter, the attorney was representing a client in the sale of her house and, in that capacity, was given \$1,000 in earnest money to hold which he deposited in an account named "Noel Realty." In re Clayter, 78 Ill. 2d 276, 279, 399 N.E.2d 1318, 1319 (1980). The Noel account was a business account used for the operations of an apartment complex in which the attorney was a partner. Id. Clayter went on to use these funds and later replaced them and held them in cash in a safe in his house. Id. The Court found clear establishment of commingling and noted that commingling endangers client funds as they could be subject (among other things) to conversion by operation of law due to a garnishment, or could become the assets of an estate in the event of the death of the attorney. Id. at 280, 1320. Therefore, the Court stated, it is essential that client money be held in a manner defeating any doubt that it is being held for benefit of another and does not belong to the attorney personally. Id. at 281, 1320. The attorney in Clayter was censured. Id. at 282, 1321.

The Court has also found that conversion and commingling by subordinates is not necessarily imparted to the attorney. In In re Vrdolyak, 137 Ill. 2d 407, 560 N.E.2d 840 (1990), the attorney's office manager deposited funds in the firm's operating account after she was told by a secretary the funds were "for costs." Id. at 426, 848. The court found that while there is authority for the idea that a sole shareholder of a law firm is personally responsible for the acts of a nonprofessional employee in his office, Vrdolyak's connection to the error was, at most, tenuous. Id. The Court found that there was no reason the attorney should have known of the misdirected funds and noted that once the error was brought to his attention he made full

restitution. Id. Finally, the Court noted that an attorney who delegates work to others can only be subject to discipline for conduct he or she authorizes, has knowledge of, or has reason to know. Id., citing In re Weston, 92 Ill. 2d 431, 437, 442 N.E.2d 236 (1982) and In re Ashbach, 13 Ill. 2d 411, 415, 150 N.E.2d 119 (1958). If the attorney knew or should have known, however, a sanction will be imposed. In the case of In re Waddy the attorney was alleged to have failed to properly supervise an employee whom he had recommended as a guardian of an estate (a violation of Rule 5.3 of the Rules of Professional Conduct, which spells out the responsibilities of an attorney with respect to non-lawyer assistants). In re Waddy, 95 CH 686, M.R. 13084 (January 30, 1997). This failure to supervise resulted in conversion by that employee from the estate. Id. The Court ordered Waddy suspended for ninety days and until he made restitution as well as other conditions. Id.

### Neglect

#### **Scenario:**

Easily Preoccupied is a sole practitioner with a small general practice. Easily Preoccupied has several cases pending in court, and has several new clients for whom he has to file lawsuits or appeals.

In mid-November, Flu season hits the Preoccupieds' household with a vengeance and his work schedule for the next six weeks is shot as he and his wife take turns staying home with the kids and running to the doctor. As a result, Easily Preoccupied fails to file a motion to vacate an order on behalf of his client, Divorcee, within the 30-day deadline required by statute. During the six weeks that his kids were sick, Easily Preoccupied also misses several court dates scheduled on his other clients' matters and fails to file a personal injury claim on behalf of New Client within the statute of limitations.

When Easily Preoccupied discovers that he blew the deadline in Divorcee's case, he drops all of his other cases and puts all of his energy into trying to correct his mistake. He forgets to inform his other clients that he had missed their court dates and inform them of their new court dates. Then when New Client calls to check on the status of her case, Easily Preoccupied tells her not to worry and informs her that he had timely filed her claim.

Because Easily Preoccupied is so consumed with correcting his mistake with Divorcee's motion to vacate, he once again fails to appear in court for his other clients' matters, causing them to be dismissed for want of prosecution. When Easily Preoccupied is unsuccessful in obtaining a motion to vacate on Divorcee's behalf, and once he discovers that he blew the statute of limitations in New Client's case, and that several other clients' matters have been dismissed for want of prosecution, Easily Preoccupied becomes frightened and stops returning his clients' phone calls regarding the status of their cases.

When Easily Preoccupied's clients discover that that their cases have been dismissed, they each file requests for investigations into Easily Preoccupied's conduct with the ARDC. New Client complains to the ARDC that Easily Preoccupied allowed the statute of limitations in her case to expire before filing her claim, and that Easily Preoccupied misrepresented to her that he had filed

her claim when she called his for a status update. Divorcee also complains to the ARDC regarding Easily Preoccupied's failure to timely file a motion to vacate on her behalf.

### **Applicable Rules:**

- Rule 1.3 of the Illinois Rules of Professional Conduct states: a lawyer shall act with reasonable diligence and promptness in representing a client.
- Rule 3.2 of the Illinois Rules of Professional Conduct states: A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.
- Rule 1.4 (a) of the Illinois Rules of Professional Conduct states: A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

### **Interpretation:**

Easily Preoccupied may have violated Rules 1.3 and 3.2 by 1) missing his client's court dates, 2) failing to file Divorcee's motion to vacate by the deadline, and 3) by failing to file New Client's personal injury claim within the statute of limitations. He may also have violated Rule 1.4(a) by failing to return his clients' phone calls.

Rules 1.3 and 3.2 of the Illinois Rules address the same underlying misconduct: unreasonable delay in client matters. Rule 1.3 directs lawyers to "act with reasonable diligence and promptness in representing" their clients. The commentary to the American Bar Association ("ABA") Model Rule 1.3 of Professional Conduct, which is substantially similar to the Illinois Rule 1.3, recognizes that "even when the client's interests are not affected in substance... unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." The commentary also states, "[p]erhaps no professional shortcoming is more widely resented than procrastination." See In re Douglas Wayne Smith, 168 Ill. 2d 269, 659 N.E.2d 896 (1995).

The duty of "reasonable diligence and prompt action" set forth in Rule 1.3 is buttressed by Rule 3.2, which directs lawyers to "make reasonable efforts to expedite litigation consistent with the interests of the client." The commentary to the ABA's Model Rules notes that it is especially important that attorneys take all reasonable steps to ensure that client matters are handled expeditiously, inasmuch as "[d]ilatory practices bring the administration of justice into disrepute." One aspect of the duty to assist the administration of justice requires lawyers engaged in litigation to aid the court in the expeditious consideration and disposal of cases. People v. Buckley, 164 Ill. App. 3d 407, 517 N.E.2d 1114 (1987).

It should be noted that an attorney ought to pay close attention to any **unusual circumstance** that might impact on the statute of limitations analysis. For example, does the injury involve a government entity? Did the injury occur in an unusual setting such as on a cruise ship or an international air flight? The fact that it is an unusual circumstance will not preclude a finding of malpractice.

An attorney should verify that he or she has the correct date by checking the statute every time. Missed deadlines occur when attorneys become complacent and assume they know the answer. An attorney may be surprised by what he or she discovers with a little research.

Under Illinois Rule 1.4(a), a lawyer has a two-part duty to communicate with clients in order to keep them “reasonably informed about the status” of their cases, and to “promptly comply” with their requests for information. The first part of Rule 1.4(a) imposes an affirmative duty on lawyers to take the necessary steps to keep the client informed about their case, so the client can make intelligent choices as to the direction of the litigation. This duty to inform falls upon the lawyer, not the client. In addition, the second part of Rule 1.4(a) imposes a duty upon counsel to respond to client questions and demands for information by responding “promptly” to questions and demands. While the lawyer’s duty to communicate applies to all clients, from the most ignorant to the most sophisticated, compliance is particularly important for those clients who may be unfamiliar with the workings of our legal system.

### **Client’s Instructions - Requirement to Follow**

#### **Scenario:**

An attorney representing a client in a personal injury matter received an offer from the defendant and conveyed the offer to the client. The client agreed to accept the settlement and the plaintiff’s attorney informed the defendant’s attorney that his client had accepted the offer. Sometime after the acceptance, the client notified the attorney that he changed his mind and decided to refuse the offer. Plaintiff’s attorney, using a power of attorney signed by the client, executed the release and endorsed the settlement draft. Plaintiff’s attorney placed the funds in an interest bearing account. Once the client was informed of the attorney’s actions, he filed a complaint with the ARDC.<sup>1</sup>

#### **Applicable Rules:**

Rule 1.2(a) of the Illinois Rules of Professional Conduct states that a lawyer shall abide by a client’s decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after disclosure by the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 8.4(a)(4) of the Illinois Rules of Professional Conduct states that an attorney shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

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<sup>1</sup> Scenario reprinted with permission of Anne Thar, General Counsel, ISBA Mutual Insurance Company from articles published in the Illinois Bar Journal, “The High Price of Putting Things Off,” Vol. 85, August 1997, “Ruining a Beautiful Friendship: Friends and Family as Clients,” Vol 85, December 1997, and “Statute of Limitations Boo-boos,” Vol 86, February 1998.

## **Interpretation:**

The attorney's conduct in disregarding his client's instructions and his unauthorized signing of the client's name to various documents, including the release and settlement draft, is improper under the Illinois Rules of Professional Conduct. The bottom line in this situation is that an attorney cannot circumvent the expressed wishes of the client. See In re Dombrowski, 71 Ill. 2d 445, 376 N.E.2d 1007 (1978).

## **Referral of Client Matters and Fee Splitting**

### **Scenario:**

Attorney A represents Client in a personal injury matter. Attorney A does not normally handle litigation matters. When Attorney A realizes that Client's case is going to trial, Attorney A hires Attorney B to handle the litigation aspects of Client's case. Attorney A and Attorney B agree to split all attorneys' fees fifty-fifty. Attorney A does not obtain Client's consent to hire Attorney B or to split fees with Attorney B.

### **Applicable Rules:**

- Rule 1.4(b) of the Illinois Rules of Professional Conduct states that an attorney shall explain a matter to the extent reasonably necessary to permit the client to make an informed decisions regarding the representation.
- Rules 1.5(f) and (g) of the Illinois Rules of Professional Conduct (Fees) state as follows:
  - (f) Except as provided in Rule 1.5(j), a lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm, unless the client consents to employment of the other lawyer by signing a writing which discloses:
    - (1) that a division of fees will be made;
    - (2) the basis upon which the division will be made, including the economic benefit to be received by the other lawyer as a result of the division; and
    - (3) the responsibility to be assumed by the other lawyer for performance of the legal services in question.
  - (g) A division of fees shall be made in proportion to the services performed and responsibility assumed by each lawyer, except where the primary service performed by one lawyer is the referral of the client to another lawyer and
    - (1) the receiving lawyer discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit, and

(2) the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer.

### **Interpretation:**

Attorney A has likely violated Rule 1.4(b) by failing to explain to his client that he did not handle litigation matters and that he would need to hire another attorney should the case go to trial. This information would be reasonably necessary to permit his client to make an informed decision about whether or not to hire Attorney A, and also permit him to make an informed decision about whether or not he wanted Attorney B, or another attorney, to handle the litigation aspects of his case.

Attorney A has also violated Rule 1.5(f) by failing to obtain his client's written consent to employ Attorney B, failing to advise his client as to the responsibilities assumed by each lawyer, and failing to advise his client as to the division of fees and the basis of the division of fees.

It should be noted that the mere receipt of a referral fee does not by itself make an entity an insurer or otherwise responsible for the conduct of the lawyer to whom the matter is referred. Only where the referring entity is a lawyer can such a responsibility arise under Rule 1.5.

The rule governing the receipt of referral fees by a non-lawyer referring entity is Rule 7.2(b). That rule recognizes lawyer referral services and permits lawyers to "pay the usual charges of a not-for-profit lawyer referral service or other legal service organization." While Rule 7.2(b) allows lawyer referral services to collect referral fees, it does not, however, impose any duty or responsibility upon the lawyer or referral service or legal service organization to monitor or maintain responsibility for the legal services ultimately rendered by the lawyer receiving the referral. Thus, the mere taking of a referral fee as a referring agency under Rule 7.2(b), rather than as a referring lawyer under Rule 1.5, will not suffice to make the referring agency an insurer or otherwise vicariously accountable for the actions of the attorney to whom the matter is referred.

## **Conflicts of Interest**

### **Scenarios:**

#### **Direct Conflict**

Joe Kramer, a longtime client of yours, comes to you and asks you to represent him and his friend Brian in the sale of Brian's house to Joe. Joe and Brian tell you they want you to represent both of them to save on attorneys fees because they agree on all of the relevant issues and presume that it will be a friendly transaction.

#### **Materially Limited By Conflict**

Joe also tells you he wants you to prepare a prenuptial agreement for him and his fiancé, Mary. Mary has been married before and has some concerns about protecting her family inheritance and some of her real estate investments. Joe recently graduated from law school and has a

significant amount of debt. He tells you he does not want any portion of Mary's inheritance or her real estate investments and that he wants you to draft the agreement to protect her interests to ease her anxiety about getting remarried.

### **Multiple Clients**

Mike and his two brothers, Paul and Bill arrive at your office to discuss the formation of a new business which they would like to call "Kramer, Inc." They would like you to create the corporation by filing the Articles of Incorporation, drafting the ByLaws, and preparing a shareholders' agreement that restricts each brother's right to transfer the stock to anyone outside of the Kramer family.

During the discussion you learn that Kramer, Inc. is being formed to purchase a 200 acre parcel of land. Kramer, Inc. will then subdivide the property and develop a planned community of single family homes, townhouses and two 18 hole golf courses. The overall cost of the property is \$60 million. Mike and Paul will each invest \$3 million and Bill will invest \$5 million. The balance of the purchase price will be obtained through a nonrecourse loan secured by the property. The brothers have already agreed that each will be a shareholder (each holding a number of shares consistent with their investment), and each will be a Director on the Corporation's Board, but only Mike and Paul will be Officers of the Corporation since Bill does not reside in the United States and has interests apart from this transaction.

### **Former Clients and Imputed Disqualification**

Fiona comes into your office and asks you to represent, Carlos, her fiancé, who is incarcerated and engaged in litigation over his criminal matter. You successfully get Carlos released on bond and Fiona and Carlos get married immediately upon his release. The pressure of the impending criminal litigation weighs on Carlos and he absconds. Fiona comes to you and asks you to represent her in her divorce from Carlos. You tell her that you can not represent her because it would be a conflict, but your partner, Peter, can.

Carlos reappears in time for his criminal proceeding and you are able to get all of the charges dismissed and conclude your representation of Carlos. You take Carlos out to lunch to celebrate his acquittal and he asks you to represent him in the sale of his motorcycle to his friend Rick. A few months later Rick comes to you and tells you how impressed he was with your representation of Carlos and wants you to represent him in a breach of warranty claim against Carlos. You tell Rick you can not represent him because it would be a conflict, but that your associate, James, can.

### **Applicable Rules:**

- Rule 1.7 of the Illinois Rules of Professional Conduct which states:
  - (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
    - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after disclosure.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after disclosure.

(c) when representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

- Rule 1.9 of the Illinois Rules of Professional Conduct which states:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) represents another person in the same or a substantially related matter in which that person's interest are materially adverse to the interests of the former client, unless the former client consents after disclosure; or

(2) use information relating to the representation to the disadvantage of of the former client, unless:

A) such use is permitted by Rule 1.6; or

B) the information has become generally known.

- Rule 1.10 (a) of the Illinois Rules of Professional Conduct which states that no lawyer associated with a firm shall represent a client when the lawyer knows or reasonably should know that another lawyer associated with that firm would be prohibited from doing so by Rules 1.7, 1.8(c) or 1.9.

### **Interpretation:**

#### **Direct Conflict – Rule 1.7 (a)**

Attorneys are precluded from representing conflicting interests in a transaction. The Illinois Supreme Court has disciplined attorneys for representing both the buyer and seller in a real estate transaction. See In re Murzyn, 05 CH 73, M.R. 21436 (March 19, 2007); In re McGaughey, 96 CH 68, M.R. 12215 (March 26, 1996). Although Joe and Brian are friends and expect to agree on all the terms of the transaction, they will necessarily have adverse interests that will need to be protected and advocated for as the buyer and seller in the sale of Brian's house to Joe.

### **Materially Limited By Conflict – Rule 1.7(b)**

An attorney is precluded from representing both parties in preparing a prenuptial agreement if it is apparent their interests are adverse because they have conflicting objectives as to what the agreement should accomplish. See In re Heldrich, 02 CH 26, M.R. 19630 (November 17, 2004).

If Joe and Mary are in agreement as to the objectives of the prenuptial agreement, you still must determine whether your responsibilities to Joe will adversely affect your ability to represent Mary. You might determine that Joe should have an interest in Mary's inheritance and real estate investments in order to protect his financial future, which would materially limit your ability to represent Mary. If you determine that your responsibilities to Joe will not materially limit your representation of Mary, and reasonably believe you can accomplish both Mary and Joe's objectives in drafting the prenuptial agreement, you still must explain to Mary and Joe the ramifications of representing them both in the matter and get their consent before you could proceed in the representation.

### **Multiple Clients Rule – 1.7(c)**

Mike and his two brothers, Paul and Bill, arrive at your office to discuss the formation of a new business which they would like to call "Kramer, Inc." They would like you to create the corporation by filing the Articles of Incorporation, drafting the ByLaws, and preparing a shareholders' agreement that restricts each brother's right to transfer the stock to anyone outside of the Kramer family.

During the discussion you learn that Kramer, Inc. is being formed to purchase a 200 acre parcel of land. Kramer, Inc. will then subdivide the property and develop a planned community of single family homes, townhouses and two 18 hole golf courses. The overall cost of the property is \$60 million. Joe and Paul will each invest \$3 million and Bill will invest \$5 million. The balance of the purchase price will be obtained through a nonrecourse loan secured by the property. The brothers have already agreed that each will be a shareholder (each holding a number of shares consistent with their investment), and each will be a Director on the Corporation's Board, but only Joe and Paul will be Officers of the Corporation since Bill does not reside in the United States and has interests apart from this transaction.

In this situation, there are three clients, the brothers, Mike, Paul and Bill. Again, it is important to recognize that Rule 1.7 does not prohibit the representation of multiple clients to the same transactions so long as the attorney does not believe that the representation of any individual client will be adversely affected by the attorney's relationship with the other clients, and that each client consents to such representation. An attorney who is asked to represent multiple clients regarding related matters should consider at the outset whether the representation involves or may involve impermissible conflicts. As the attorney proceeds with the representation, the attorney must keep in mind that a conflict may develop into one that precludes the attorney from continuing to represent one or more of the clients.

For example, under the given scenario, Bill, while contributing the greatest amount of cash to the Corporation, runs the risk of being the minority shareholder. He can be consistently out-voted by the combined voting power of Mike and Paul. Similarly, Bill also runs the risk of not

obtaining a favorable return on his investment. As Officers of the Corporation, Mike and Paul will be able to receive a salary from the Corporation, and the Corporation will pay for many of their business-related expenses. As a result, Mike and Paul could receive a great deal of income at the “expense” of the shareholders. Furthermore, since Mike and Paul represent a majority of the Corporation’s Board of Directors, they will be able to determine their salaries as Officers of the Corporation; therefore, Kramer, Inc. may not have sufficient profits that could be distributed to the shareholders in the form of a dividend. As a result, Bill may not obtain a very favorable return on his investment while Mike and Paul may earn substantial salaries.

Some conflicts may be so serious that the informed consent of the parties is insufficient to allow the attorney to undertake or continue the representation. An attorney may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. To continue the example, if after learning from the attorney about the problems presented above, they ask the attorney to alter the terms of the by-laws such that all decisions must be approved by 75% of the stock entitled to vote and that all Board decisions be unanimous, the modification will affect the rights of Mike and Paul as shareholders, Officers and Directors as well as increase the risk of shareholder deadlock to the Corporation. It is crucial to the multiple representation of shareholders to a corporation that each be informed of the issues that may adversely affect their interests as well as benefit other shareholders.

#### **Former Clients and Imputed Disqualification – Rules 1.9, 1.10(a)**

An attorney is precluded from representing a person whose interests are directly adverse to another client. Fiona’s interests in the divorce proceedings are directly adverse to Carlos’s interests and Carlos is your client. Your conflict is imputed to your partner, Peter. Therefore, Peter cannot represent Fiona either.

An attorney is also precluded from representing a person in the same or substantially related matter that the attorney represented a former client in if the individual’s interests are materially adverse to the interests of the former client. Rick’s interest in a breach of warranty claim against Carlos clearly conflicts with Carlos’s interests. Your conflict is also imputed to your associate, James. Therefore, James cannot represent Rick either.

## Entering into Business Transactions with Clients

### **Scenario:**

Attorney represents Client in a dissolution of marriage proceeding. As part of the divorce, Client and Husband need to sell their marital home. Attorney offers to purchase the home from client and offers to draft the contract to purchase the home. Attorney drafts the contract without getting an appraisal of the home and drafts the contract as an installment contract for payment to Client over a period of 20 years. Attorney does not advise client to seek the advice of independent counsel. After Attorney purchases the home, she has it appraised, and it is valued at triple the value Attorney paid for the home. Attorney then sells the home at the appraised value, and makes a significant profit.

### **Applicable Rule:**

- Rule 1.8 of the Illinois Rules of Professional Conduct which states:
  - (a) Unless the client has consented after disclosure, a lawyer shall not enter into a business transaction with the client if:
    - (1) the lawyer knows or reasonably should know that the lawyer and the client have or may have conflicting interests therein; or
    - (2) the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client.

### **Interpretation:**

As a general rule, all transactions between client and lawyer should be fair and reasonable. To ensure fairness, it is highly recommended that the review of the business transaction in which the attorney has a financial interest be done by an independent counsel. Further, the attorney agent must provide full written disclosure of the agent's financial interest and obtain the client's consent in writing. The burden is on the attorney agent to ensure that his client fully understands the situation and any potential conflicts which may arise during the transaction. The written disclosure must be provided at the outset of the transaction.

## Withdrawal from Representation

### **Scenarios:**

#### **When an Attorney May Withdraw**

You are representing Mary in her divorce proceedings against her husband, Charles. The couple has two children and the custody aspect of the case has become very contentious.

Mary signed a fee agreement when you agreed to represent her, but she has not paid her last two bills. In addition, she has not returned any of your calls for the past two weeks. The last time you saw her was a month ago in court when she showed up looking disheveled and acting

erratically. She continually spoke out loudly while the judge was speaking to insult Charles and call him names.

### **When an Attorney Must Withdraw**

Mary calls you a week later and instructs you to allege that Charles has physically injured the children when he has gotten angry at them and to coach her children to testify in support of this allegation. Mary tells you that to her knowledge Charles has never injured either child, but that he does not deserve to see the children and that this allegation, although untrue, will ensure that she gets custody of the children. She abruptly hangs up on you when you begin to question her about this instruction.

### **How to Withdraw**

You decide to stop working on Mary's case because of her erratic behavior, the fact that she has not paid your last two bills or returned any of your phone calls for the past two weeks, and because you do not want to comply with her instruction to make serious allegations against Charles that are untrue. You do not show up to her court hearing the following day because it would be a waste of your time and you do not call Mary to tell her because you are angry that she hung up on you. You also do not return Mary's tax returns and other personal documents to her.

### **Applicable Rule:**

- Rule 1.16 of the Illinois Rules of Professional Conduct states:
  - (a) A lawyer representing a client before a tribunal shall withdraw from employment (with permission of the tribunal if such permission is required), and a lawyer representing a client in other matters shall withdraw from employment if:
    - (1) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person;
    - (2) the lawyer knows or reasonably should know that such continued employment will result in a violation of these Rules;
    - (3) the lawyer's mental or physical condition renders it unreasonably difficult for the lawyer to carry out the employment effectively; or
    - (4) the lawyer is discharged by the client.
  - (b) Except as required in Rule 1.16(a), a lawyer shall not request permission to withdraw in matters pending before a tribunal, and shall not withdraw in other matters, unless such request or such withdrawal is because:
    - (1) the client:

(A) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law;

(B) seeks to pursue an illegal course of conduct;

(C) insists that the lawyer pursue a course of conduct that is illegal or prohibited by these Rules;

(D) by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;

(E) insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer although not prohibited by these Rules; or

(F) substantially fails to fulfill an agreement or obligation to the lawyer as to expenses or fees;

(2) the lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;

(3) the client consents to termination of the lawyer's employment after disclosure; or

(4) the lawyer reasonably believes that a tribunal will, in a proceeding pending before the tribunal, find the existence of other good cause for withdrawal.

(c) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(d) In any event, a lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(e) A lawyer who withdraws from employment shall refund promptly any part of an advance that has not been earned.

### **Interpretation:**

If conflicts arise like those described above, an attorney may be placed in a position where he or she must withdraw from representation. This process can be fraught with problems. Perhaps the most important factor to keep in mind before withdrawing from representing a client is that it cannot be done on a whim. After the formation of a lawyer/client relationship, the lawyer's wishes must become secondary to the best interests of your client. Rule 1.16 of the Illinois Rules

of Professional Conduct, which governs the severing of a lawyer/client relationship, provides an array of circumstances in which a lawyer can or shall withdraw. However, the Rule restricts a lawyer's ability to withdraw, by allowing it to happen only under certain circumstances, and in compliance with certain conditions and procedures.

An attorney should be careful when forming a lawyer/client relationship because you may be "stuck" in spite of your own inclinations or interests. For example, even the filing of an ARDC complaint against a lawyer by a client in an ongoing representation does not necessarily sever the ties between lawyer and client:

Lawyers often ask what their duties are with respect to ongoing representation of clients who have filed ARDC complaints. The fact that the complaint was filed does not automatically require a lawyer to withdraw from representing the client. [See, for example, People v. Carroll, 260 Ill. App. 3d 319, 631 N.E.2d 1155 (1992).] On the other hand, the particulars of a given complaint may mandate or at least strongly advise withdrawal. In such cases, lawyers should be careful to honor the dictates of Rule 1.16 concerning notice to the client, accomplishing withdrawal to avoid prejudice to the client's rights, securing permission of the tribunal when an appearance has been filed, and refunding any unearned portion of a fee paid prior to the withdrawal. Robinson, "Avoiding ARDC Anxiety: A Disciplinary Primer," 84 Illinois Bar Journal, 9 (September 1996).

An important point to remember is that once withdrawal is an option or becomes mandatory under Rule 1.16, it must be done in accordance with procedure, and any rules applicable to the circumstances, and in accordance with the rules of the jurisdiction in which the case is being handled.

### **When an Attorney May Withdraw**

If a client substantially fails to fulfill an agreement or an obligation to a lawyer as to expenses or fees, a lawyer may withdraw from the case, if the rules governing withdrawal are complied with.

### **When an Attorney Must Withdraw**

A lawyer must withdraw when he or she knows, or reasonably should know, that a client is bringing an action, conducting a defense, or asserting a position, to harass or maliciously injure someone. Likewise, a lawyer must withdraw when a client insists on a claim or a defense not warranted under existing law, and which cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.

Additionally, a lawyer must withdraw if dismissed by a client, or if a mental or physical condition makes it unreasonably difficult for a lawyer to carry out representation effectively.

A lawyer shall also withdraw if the lawyer knows or should know that continuing the representation violates one or more of the Illinois Rules of Professional Conduct. Keep in mind

that if a conflict makes it imperative that one withdraw from representing a client in any litigation or transactional matter, it is imperative that the withdrawal be accomplished in a way that does not compromise the client's interests.

### **How to Withdraw**

Rule 1.16 requires that an attorney shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the client.

A lawyer must abide by the rules of a tribunal when withdrawing from representation, including gaining the permission of the tribunal where a case is pending in order to withdraw. For instance, a lawyer practicing in the Circuit Court of Cook County would need to follow Supreme Court Rule 13, as well as Cook County Rule 1.4 (b). In attempting to withdraw from a case in federal court in the Northern District of Illinois, it would be essential to follow Local General Rule 83.17. Other jurisdictional areas may have their own rules, so always search the local rules of any tribunal before attempting to withdraw from a case. These rules, including Rule 1.16, are concerned with notice to parties so as not to compromise the parties' interests. They also apprise the court of what is transpiring and assure that a party has time to retain other counsel.

A lawyer must also promptly return all papers and property to which a client is entitled before withdrawing from a matter in order to avoid prejudice to the client. See, In re Leavy, 04 CH 16, M.R. 21260 (January 12, 2007); In re Gainer, 94 CH 353, M.R. 10180 (June 23, 1994). In some circumstances, a retaining lien can be asserted against a client's property if a fee is owed. A common law retaining lien was first recognized in Illinois in Sanders v. Seelye, 128 Ill. 631, 21 N.E. 601 (1889). This lien gives the attorney a right to retain the client's property including papers, money, and securities, received from the client in the course of the attorney's professional employment when there is a fee dispute between the attorney and the client. The attorney can remain in possession of the client's property until the fee dispute is resolved or until the client posts adequate security for payment. See Twin Sewer and Water Inc., 308 Ill.App.3d at 667, 720 N.E.2d at 640; Lucky-Goldstar Int'l (America) Inc. v. Int'l Mfg. Sales Co., Inc., 636 F.Supp. 1059, 1061 (N.D. Ill. 1986). There are several factors that an attorney should weigh in determining whether to invoke a retaining lien including whether the fee is reasonable. Lucky-Goldstar Int'l, 636 F.Supp. at 1063. Other jurisdictions have stated that a valid retaining lien attaches only when a fee is due, owing and reasonable, and that it is improper for an attorney to retain a client file after his or her representation is terminated without notifying the client of the amount owed. See Britton and Gray, P.C. v. Shelton, 69 P.3d 1210, 1215 (2003); In re White, 328 S.C. 88,93, 492 S.E.2d 82, 85 (1997). There is also an Illinois statutory lien (770 ILCS 5/1), also known as a "charging lien," which attaches only to the proceeds recovered by the attorney through professional services. There are explicit requirements in the statute that must be complied with in order to create this type of lien.

## **Failure to Reduce a Contingent Fee Agreement to Writing**

### **Scenario:**

Fred Paperwhite is a sole practitioner who concentrates primarily in real estate and family law. Paperwhite's neighbor, Joe Clumsy, slips and falls on crumbling city sidewalk. Clumsy asks Paperwhite to represent him in a suit against the city. Paperwhite explains to Clumsy that he does not have much experience in such cases but assures him he will study the law and pursue the case. When Clumsy asks about Paperwhite's fee, he tells him that such cases are usually handled on a contingent fee basis and that, if Clumsy agrees, Paperwhite will take 25% of any recovery. Paperwhite never reduces this agreement to writing and Clumsy does not request that he do so. Clumsy agrees and Paperwhite pursues the case. Ultimately, the case settles for \$10,000. When Paperwhite tells Clumsy that his fee will be \$2,500, Clumsy tells him he thought the agreement was for 20% of the recovery. Clumsy then reports Paperwhite to the ARDC.

### **Applicable Rule:**

- Rule 1.5(c) of the Illinois Rules of Professional Conduct states:

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution of marriage or upon the amount of maintenance or support, or property settlement thereof, provided, however, that the prohibition set forth in Rule 1.5(d)(1) shall not extend to representation in matters subsequent to final judgments in such cases;

(2) a contingent fee for representing a defendant in a criminal case.

### **Interpretation:**

This rule is straightforward and is often violated in conjunction with other misconduct. An example of such a violation can be found in In re Cohen. In Cohen, the attorney was charged with a variety of misconduct in addition to failing to reduce a contingent fee to writing. In relation to the 1.5(c) violation, the attorney was alleged to have been the executor of an estate.

Following the death, the widow, contacted Cohen and asked him to ensure that she receive from the estate money she had loaned her late husband in connection with some real estate. She was concerned about the recovery because her husband's former wife was to receive some of the money from the sale of that property. Cohen agreed to represent the widow and filed a \$10,539.17 claim against the estate. The court approved the claim and Cohen deducted a \$2,500 legal fee before remitting the balance to the widow. Cohen stated that the fee was an oral contingent fee that he arrived at "emotionally" and without regard to the rule requiring that such fee arrangements be in writing. The widow testified she never discussed attorney fees with Cohen until after she received the check and when she questioned him he said he would send the \$2,500 to her later (though he never did). In re Cohen, 93 CH 458, M.R. 12516 (May 28, 1996). Cohen was suspended for a period of two years.

In In re Tepper the attorney was charged, among other things, with failing to reduce a contingent fee agreement to writing. The Review Board of the ARDC stated that Tepper had agreed to take a personal injury case for a one-third contingency fee and that the client was aware of this fee schedule. The Review Board stated that, "[apparently]" Tepper mailed a fee agreement to his client to be signed and returned, but she never received the document and no agreement was ever signed. Tepper acknowledged his wrongdoing with respect to that client. The Illinois Supreme Court ordered Tepper suspended for a period of 15 months, stayed in its entirety, and placed him on probation for that period subject to conditions. In re Tepper, 96 CH 543, M.R. 14596 (March 23, 1998).

The requirements of this rule are not a difficult one to fulfill. The Tepper case exemplifies how imperative it is that an attorney keep a well organized filing system and ensures that all items reflecting representation agreements are signed by his or her client. The Cohen case, however, is a better example of the perils of disregarding the rules of professional conduct. In addition to the failure to reduce the fee to writing, Cohen was also found to have charged an excessive fee and to have overreached.

### **Physical Relationships with Clients**

Recently, the Illinois Supreme Court forged a new area of disciplinary law in Illinois in reference to physical relationships with clients. The Court did not, however, promulgate a rule on such activity as has been done in other states.

#### **Applicable Rule:**

- No rule exists in Illinois specifically prohibiting this sort of conduct. See below.

#### **Interpretation:**

This is a new and developing area of disciplinary law. The seminal Illinois case in this area is In re Richard Rinella. In that case Rinella was accused of engaging in sexual acts with two of his own clients as well as one client represented by another member of his firm. In re Richard Rinella, 175 Ill. 2d 504, 677 N.E.2d 909, 910-911 (1997). In his answer, Rinella denied each of these allegations. Rinella's two clients asserted they acquiesced to Rinella's advances out of fear that their cases would in some way be harmed if they did not capitulate. Id. In addition to the physical relationship, Rinella falsely told the Inquiry Board that such a relationship did not exist

during the representation. Id. The Hearing Board found, and the Review Board agreed, that Rinella violated the following rules of the Code of Professional Responsibility (the forerunner to the Illinois Rules of Professional Conduct): engaging in conduct prejudicial to the administration of justice; using client confidences for his own advantage; failing to withdraw from representation when his professional judgment may have been affected by his personal interest; and failing to represent his clients with undivided fidelity. Id. at 914. In addition, Rinella was found to have violated various rules under the Illinois Rules of Professional Conduct in connection with his false testimony. Id. The Court agreed with these findings and stated that Rinella's sexual relations with all three women was created solely due to the legal representation. Id. at 915. The Court rejected Rinella's contention that he should not be subject to sanction because there was no evidence that his representation of the clients suffered. Id. In response, the Court noted that one client testified that Rinella refused to consult with her after a court appearance because she had failed to bring a camera with her as he requested (for purposes of taking unclothed pictures). The Court added that even absent this the conduct would be sanctionable as it presented a risk of damaging the client's interests. Id. citing In re Lewis, 118 Ill. 2d 357, 362-63, 515 N.E.2d 96 (1987). The Court ordered Rinella suspended for a period of three years and until further order of the Court. In re Richard Anthony Rinella, 175 Ill. 2d 504, 677 N.E.2d 909, 916 (1997).

Given the Court's observation that Rinella did not have a prior relationship with any of the clients at issue, it would appear that the court **might** take a different view if the attorney in question was acquainted with the client prior to representation.

For other cases involving physical relationships with clients, see also In re Scott Robert Erwin, 04 CH 111 (January 19, 2007), In re Wade Franklin Morris, 02 CH 48, M.R. 20753 (March 21, 2006), and In re John Dysart Landry, 95 CH 446, M.R. 14025 (November 25, 1997).

For those who practice in other jurisdictions it is important to note that some states have rules promulgated to specifically prohibit such activities between attorneys and clients. For examples see Rule 1.8(j) of the Indiana Rules of Professional Conduct and Rule 3-120 of the California Rules of Professional Conduct.

It is also important to note that a physical relationship not required, and that Illinois lawyers have been disciplined for sexual harassment not involving physical contact. (See e.g. In re Gerald Fishman, 01 CH 109, M.R. 19462 (September 24, 2004).

### **Duty to Report the Misconduct of other Attorneys**

#### **Scenario:**

You and two other associates at your law firm, Jan and Jenny, have been friends since law school. All three of you go to lunch together at least once a week. One week when Jan is unable to join you, Jenny confides to you that she suspects Jan is stealing from the law firm because Jan would not let her look at her expense reports when Jenny needed an example of how to fill one out.

A few months later, you complain to Jan that you never seem to have enough spending money because most of your paycheck goes to your student loan debt. Jan confides to you that because

the firm does not require a receipt for any expense under \$10, she always adds one or two false expenses that are under \$10 to her expense reports when she travels for depositions for a little extra spending money. When you get back to the office, she shows you some of the expense reports she has prepared with false entries and encourages you to do the same.

### **Applicable Rule:**

- Rule 8.3 of the Illinois Rules of Professional Conduct requires as follows:
  - (a) A lawyer possessing knowledge not otherwise protected as a confidence by these rules or by law that another lawyer has committed a violation of Rule 8.4(a)(3) or (a)(4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.
  - (b) A lawyer possessing knowledge not otherwise protected as a confidence by these rules or by law that a judge has committed a violation of the Code of Judicial Conduct which raises a question as to the judge's fitness for office shall inform the appropriate authority.
  - (c) Upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges, a lawyer possessing information not otherwise protected as a confidence by these Rules or by law concerning another lawyer or a judge shall reveal fully such information.
  - (d) A lawyer who has been disciplined as a result of a lawyer disciplinary action brought before any body other than the Illinois Attorney Registration and Disciplinary Commission shall report that fact to the Commission.

### **Interpretation:**

Attorneys have an absolute duty to report unprivileged knowledge of another attorney's misconduct to the ARDC when that misconduct involves dishonesty, fraud, deceit or misrepresentation or constitutes a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. Skolnick v. Altheimer & Gray, 191 Ill.2d 214, 226-230, 730 N.E. 2d 4 (2000).

This Rule is sometimes referred to as the "Himmel Rule" based on the case of In re Himmel, 125 Ill. 2d 531, 533 N.E.2d 790 (1988). In that case, Himmel represented a client who had previously been represented by an attorney who converted her settlement funds. The client retained Himmel to collect the converted funds from her previous attorney. The client also instructed Himmel not to report the attorney's professional misconduct to the ARDC.

The attorney's unethical behavior was eventually revealed, the ARDC brought charges against Himmel for his violation of Rule 8.3(a) by failing to report the attorney's misconduct and he was suspended from the practice of law for one year. Id. at 545.

The Court specifically rejected Himmel's argument that his knowledge of the misconduct was privileged because it was information provided to him by his client in confidence. Id. at 542. In

support of this rejection, the Court noted that there was no indication that the information was imparted in confidence and specifically noted that the situation was discussed in the presence of the client's mother and fiancée, and that the information was imparted to the attorney's insurance company and to the attorney himself. Id.

The Court also rejected Himmel's argument that he was following his client's instructions by not reporting the attorney's misconduct and stated that a lawyer "is duty-bound to uphold the rules in the Code [of Professional Responsibility]" and "may not choose to circumvent the [ethical] rules by simply asserting that his client asked him to do so." Id. at 539.

Under Rule 8.3 and the decision in Himmel, not all misconduct need be reported; rather, only criminal acts reflecting on an attorney's fitness or trustworthiness and activities reflecting dishonesty, fraud, deceit or misrepresentation need be reported. Some of the areas that would fall into these categories are conversion (as seen in Himmel) and criminal conduct including theft and obstruction of justice. However, neglect or a speeding ticket need not be reported. Naturally this does not mean that attorneys are prohibited from reporting other misconduct.

Additionally, an attorney must have knowledge of another attorney's misconduct that is "more than a mere suspicion" in order to trigger the reporting duty, although it need not amount to "absolute certainty". Skolnick, 191 Ill.2d at 227-8. Knowledge under the Rules is defined as "actual knowledge of the fact in question." See Illinois Rules of Professional Conduct, Terminology.

Attorneys can be subject to professional discipline for asserting reckless and unsupportable charges against other attorneys. See In re Rothman, 00 CH 52, M.R. 17963 (March 22, 2002). Rule 1.2(e) of the Illinois Rules of Professional Conduct reads: A lawyer shall not present, participate in presenting or threaten to present criminal charges or professional disciplinary actions to obtain an advantage in a civil matter.

When Jenny confides in you that she thinks Jan is stealing from the firm, you do not possess actual knowledge of Jan's misconduct. The only information you possess is based on hearsay. See Ten Ethics Questions from Young Lawyers By Mary F. Andreoni, Administrative Counsel, ARDC (CBA Record - March 1998) citing Sukowicz, T. The Himmel Duty: Observations by an ARDC Lawyer, CBA Record (Nov. 1997). Jenny's knowledge of Jan's misconduct also appears to be mere suspicion rather than actual knowledge. Jan's failure to show Jenny her expense reports is not sufficient to trigger Jenny's reporting duty.

However, when Jan tells you that she has been falsifying her expense reports and shows the reports to you, you have actual knowledge that Jan is stealing from the firm, and must report the conduct to the ARDC.

## Unauthorized Practice of Law

### Scenarios:

1. You have just been hired, straight out of law school, as new associate in a big law firm. Although you have passed the bar examination, you have not yet attended the ceremony and taken your oath as an attorney. A partner at your law firm assigns you a large stack of files to handle, one of which is scheduled for a deposition one month prior to your swearing in ceremony. When you inform the partner that you are not yet licensed to practice law and ask if he intends handle the deposition, he says “the ceremony is a mere formality. You have already passed the bar exam, so you are licensed as far as I am concerned.” He then informs you that he expects you to handle the deposition on your own, despite the fact that it is scheduled prior to your swearing in ceremony.

2. Suspended Attorney was suspended from the practice of law in Illinois for one year. During the period of suspension, Suspended Attorney agreed to represent Byron Buyer in the purchase his first home. Suspended Attorney counseled Byron Buyer regarding the real estate transaction, scheduled the closing, and prepared or caused to be prepared documents for use in the closing. On the date of closing, Suspended Attorney met with the parties to the real estate transaction and completed the closing of the transaction. Suspended Attorney received a legal fee of \$350 for his representation of Byron Buyer.

### Applicable Rule:

- Rule 5.5 of the Illinois Rules of Professional Conduct states that:

A lawyer shall not:

(a) practice law in a jurisdiction where do so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

### Interpretation:

Neither the new admittee in scenario one, nor the suspended attorney in scenario two, are licensed to practice law in Illinois. With respect to the new admittee, 705 ILCS 205/1 states that “[n]o person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State.” Because the new admittee has not taken the oath and obtained a license at the swearing in ceremony, (s)he is not licensed to practice law. Similarly, Suspended Attorney in scenario two has been suspended from the practice of law in this State for one year, and is therefore not licensed to practice law during that year. It should also be noted that persons who register as inactive pursuant to Supreme Court Rule 756(a)(5) or retired pursuant to Supreme Court Rule 756(a)(6), or persons who have been removed from the master roll of attorneys for failing to register, are not licensed to practice law until they have registered as active.

The Illinois Supreme Court has consistently held, “the practice of law encompasses not only court appearances, but also services rendered out of court and includes the giving of any advice or rendering of any services requiring the use of legal knowledge.” In re Howard, 188 Ill. 2d 423, 721 N.E.2d 1126 (1999). Therefore, the new admittee and the lawyer in the scenarios above (assuming the new admittee in scenario one handled the deposition) would have engaged in the unauthorized practice of law regardless of the fact that neither of them appeared in court.

Engaging in the unauthorized practice of law is a serious offense because it gives the impression that our system of attorney discipline is ineffective and that the public is not being protected from unethical attorneys. Sanctions for the unauthorized practice of law entail lengthy suspensions. In re Hoberg, 95 CH 82, M.R. 11745 (December 1, 1995).

### **Dishonesty**

#### **Scenario:**

Bruce is an elementary school teacher and was involved in a car accident on his way home from school. He asks you to represent him in a personal injury suit against the other driver regarding injuries he sustained in the accident. Bruce is married to Sheila, but he and Sheila had separated prior to the accident and are going through divorce proceedings. Sheila is a patent attorney and makes substantially more money than Bruce. You secure a settlement of Bruce’s claim from the driver’s insurance company. Although you do not believe Bruce’s wife has any interest in the settlement, the insurance company’s policy is to include the spouse on the release form and settlement check. You receive the release and check from the insurance company made out to both Bruce and Sheila. You call Bruce and ask him to bring Sheila to your office, but when Bruce arrives, he tells you that he did not bring Sheila because she has no interest in the lawsuit. Bruce signs his name to the release and check and then forges Sheila’s signature to the release and check. Although you are uncomfortable with the false signature, you endorse the check, cash it at the bank, and give Bruce the client’s share because you know Bruce needs the money.

#### **Applicable Rule:**

- Rule 8.4(a)(4) of the Illinois Rules of Professional Conduct states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation

#### **Interpretation:**

Attorneys have a fundamental obligation of honesty. See In re Armentrout, 99 Ill.2d 242, 251, 457 N.E.2d 1262; In re Lamberis, 93 Ill.2d 222, 228, 443 N.E.2d 547 (1982). Conduct involving dishonesty is prohibited, even if the attorney has no intent to commit fraud and the conduct does not cause any harm. It appears that Sheila has no interest in the settlement funds and that you are not acting to defraud her. However, knowingly endorsing a settlement check that contains a false signature is improper. See In re Levy, 115 Ill.2d 395, 504 N.E.2d 107 (1987).

## **Part II**

### **Programs offered by the Attorney Registration and Disciplinary Commission**

#### **Ethics Inquiry Program**

The ARDC established the Ethics Inquiry Program in 1995. This program is designed to assist attorneys and the public with general questions about an attorney's professional responsibilities and attorney disciplinary case law. The service is free of charge. The program is staffed by experienced attorneys and paralegals employed by the ARDC. The program provides research assistance and guidance regarding ethics issues and the Illinois Rules of Professional Conduct. The program does not provide legal advice or binding advisory opinions. The program does not maintain records of specific inquiries and callers may remain anonymous. Neither the fact that an inquiry has been made nor the substance of the inquiry or any response is admissible in any attorney disciplinary proceeding. All questions should be presented in a hypothetical form.

Calls to the Ethics Inquiry Program do not fulfill an attorney's duty to report professional misconduct. See Attorney's Duty to Report the Misconduct of other Attorneys above.

To make an ethics inquiry telephone 312/565-2600 or 800/826-8625 and ask for an Ethics Inquiry Counsel.

#### **Illinois Professional Responsibility Institute Professionalism Seminar**

The Illinois Professional Responsibility Institute Professionalism Seminar is offered three times a year in Chicago (from 8:30 a.m. to 4:00 p.m.). The seminar is free of charge and covers issues such as: Setting up an effective law practice (File, Calendar and Conflict Systems, Advertising, Proper Handling of Client Funds, Office Sharing and Partnership Issues, Supervision of Employees); Running a Law Practice without Running into Trouble (Communicating with Clients, Fee Agreements and Collection Issues, Avoiding Conflicts, Competence, Issues of Confidentiality and Terminating Employment); and The Lawyer's Duties to the Courts, the Profession and the Community (Duty to Courts, Obligation of Good Faith, Relationship with Other Attorneys and Other Parties, Obligation to Profession and Community and Stress Management).

Participation in this course is often a requirement of a disciplinary sanction and those persons are given priority in registration. However, other participants are welcome on a space-available basis.

For further information or to register call or write: Mary F. Andreoni, Administrative Counsel, ARDC, 130 E. Randolph Dr., Suite 1500, Chicago, Illinois 60601-6219 (312) 565-2600 or (800) 826-8625.

## **Client Protection Program**

The client protection program was established to provide reimbursement to clients who have lost money due to the dishonest conduct of an attorney admitted to practice law in the State of Illinois. The program is exclusively funded by the annual registration fees paid by Illinois attorneys and is administered by the Commissioners of the ARDC appointed by the Supreme Court of Illinois. The program is designed to reimburse clients who have no other source to look to for such compensation. The maximum reimbursement is \$25,000 for each loss. Covered losses include: losses due to intentional dishonesty by an attorney; losses incurred due to an attorney wrongfully taking, using or withholding a client's money or property; and losses sustained while the attorney was acting in a fiduciary capacity related to the practice of law (e.g. trustee, guardian, etc.). Additionally, the attorney must have been disciplined by the Supreme Court of Illinois (e.g. disbarred, suspended, placed on probation, censured) or dead and the complainant must have made reasonable efforts to pursue any civil remedies. Non-covered losses include: loss due to malpractice or negligence rather than intentional dishonesty; claims involving fee disputes or personal loans to an attorney; claims for lost interest or profits, consequential damages or costs of recovery; dishonest conduct occurring prior to January 1, 1984; and claims not filed within three years of the discovery of the loss. Claims are not recoverable if the claimant is the spouse, child, parent, grandparent, sibling, partner or associate of the attorney alleged to have caused the loss or where the loss can be reimbursed through another source such as an insurance policy or surety bond.

Claims are handled as follows: after a claim is filed an acknowledgment letter is sent to the complainant which identifies the case number and advises the claimant what to expect during the investigation. If the attorney in question has already been disciplined by the Supreme Court of Illinois or is deceased an investigation is instituted. The investigation consists of sending a copy of the claim application to the attorney and asking him or her to respond. Further investigation might be undertaken such as reviewing court files and bank records. If the attorney has not been disciplined or in the event civil or criminal proceedings are pending against him or her the investigation might be deferred until those proceedings are completed. When the investigation is completed a report and recommendation is prepared and submitted to the Commission and a decision is made. Copies of the report and the Commission's decision are sent to the complainant and the involved attorney.

Either the attorney or the complainant may request reconsideration of the Commission's decision. In that case the claim is assigned to a review panel consisting of two attorneys and a non-attorney. An informal hearing might be held by the review panel and the panel will prepare its own report for consideration by the Commission who then makes a final decision on the claim. The complaint and the attorney are notified of the final decision.

For more information on the Client Protection Program, or to receive a claim form contact the ARDC at 312/565-2600 or 800/ 826-8625.

## **Publication Available from the Attorney Registration and Disciplinary Commission**

The ARDC offers a Client Trust Account Handbook, a Guide to Creating and Maintaining Client Trust Accounts for Illinois Attorneys. This publication addresses issues such as: when an IOLTA account is necessary, where you deposit fee advances and filing costs, and what kind of records you should keep.

The ARDC offers a book reflecting up to date admissions, registration, professional responsibility and discipline of attorneys rules and the Code of Judicial Conduct. This publication is reprinted each time the rules change.

Each of these books is available free of charge from the ARDC. For more information please telephone the ARDC at (312) 565-2600 or (800) 826-8625.

## **Other Programs**

### **Lawyers' Assistance Program, Inc.**

Lawyers' Assistance Program, Inc. is a not-for-profit organization that assists Illinois lawyers, judges, law students, and their families with alcohol abuse, drug dependency, or mental health problems by providing services that include education, information and referral, peer assistance, and intervention. LAP was originally created in 1980 by the ISBA and the CBA and is currently funded by \$7 of every lawyer's annual registration fees. The Illinois Supreme Court appoints a 14-member Board of Directors responsible for financial and program oversight.

LAP's mission is three-fold:

- To protect clients from impaired lawyers and judges
- To help lawyers, judges, and law students get assistance for alcohol dependency, drug addiction, and mental health problems
- To educate the legal community about addiction and mental health issues.

LAP not only helps to save the lives and practices of impaired attorneys, it also contributes to the protection of the public, the continued improvement of the integrity and reputation of the legal profession, and, because assistance to an impaired lawyer often prevents future ethical violations, the reduction of disciplinary actions against impaired attorneys.

For more information please visit [www.illinoislap.org](http://www.illinoislap.org) and contact LAP at 312/726-6607 or, for Hot Line Assistance, call 800/LAP-1233.

## **Law Practice Management Program**

The Law Practice Management Program was established in 1991. This program is now a committee at the CBA called “ARDC Mentor and Law Practice Management Committee.” It was developed due to the apparent problem surrounding attorneys who lacked office management or organizational skills. The ARDC estimates that one-third of the complaints it receives deal with this subject. In response to this problem, The Chicago Bar Association developed this program, modeled after a Cook County Bar Association program, to assist lawyers having difficulty managing their offices.

The committee helps these lawyers improve their practice, and helps the public that these lawyers serve. If an attorney has been brought before the ARDC on several charges stemming from poor office management, the ARDC may contract the committee Coordinator and request that the program work with this attorney. The ARDC can make the referral after a formal charge, or at a less formal stage through a staff attorney. The program does not accept requests for assistance directly from attorneys themselves. At times, an attorney works with the program as a condition of certain decisions rendered by the Inquiry Board pursuant to Commission Rule 108. The Board will defer a prosecution pending compliance with the program. Finally, the Illinois Supreme Court has issued probationary orders against attorneys, which require participation in the Law Practice Management Program.

After the program coordinator speaks with the attorney needing assistance, the coordinator will match that attorney with a volunteer “attorney-advisor.” This advisor meets regularly with the ARDC referred attorney to offer advice on managing his or her law practice. The ARDC referred attorney may need assistance in telephone practices, case management, financial management, or employee supervision. Other assistance may require a volunteer career counselor, accountant, or psychotherapist.

The attorney-advisor meets with the ARDC referred attorney initially and then will meet once a month thereafter for as long as necessary. The attorney-advisor does not offer any legal advice regarding cases or clients, and does not represent the lawyers before the ARDC. Nor does the attorney-advisor obtain knowledge of any privileged matters.

The committee is always seeking additional mentors who have both the experience and desire to aid colleagues in need. Mentors should have at least eight years of law experience. Interested attorneys should contact Gawain Charlton-Perrin at (312) 822-2033.

## **Ethics Opinions**

Several Bar Associations offer ethics opinions. For more information you may contact:

Chicago Bar Association:	312/554-2060
Illinois Bar Association:	800/252-8908
American Bar Association:	312/988-5323

## **Fee Disputes**

Absent an allegation of a violation of the Illinois Rules of Professional Responsibility the Attorney Registration and Disciplinary Commission does not become involved in most attorney-client fee disputes. The Chicago Bar Association does offer some assistance through the Fee Dispute Committee which may be contacted at (312) 554-2000.