ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION
of the
SUPREME COURT OF ILLINOIS
www.iardc.org

One Prudential Plaza
130 East Randolph Drive, Suite 1500
Chicago, IL 60601-6219
(312) 565-2600 (800) 826-8625
Fax (312) 565-2320

3161 West White Oaks Drive, Suite 301
Springfield, IL 62704
(217) 546-3523 (800) 252-8048
Fax (217) 546-3785

Chicago
July 28, 2017

Jan B. Zekich
Secretary to the Rules Committee
222 North LaSalle Street, 13th Floor
Chicago, Illinois 60601

Re: Proposal 17-04
ISBA Rule 769 Proposal

Dear Ms. Zekich:

The ARDC appreciates the Rules Committee's request for ARDC to review and provide its recommendation regarding Rules Committee Proposal 17-04, an ISBA proposal to amend the comment to Supreme Court Rule 769 (Maintenance of Records). The ISBA proposal would delete the current comment to Supreme Court Rule 769 and replace it with a comment providing that attorneys could use "...industry standard technology that has a reasonable likelihood of providing necessary access capabilities to records for at least seven years."

1. ARDC's Recommendation

The ARDC met on June 9, 2017, and discussed the proposal. The ARDC has great respect for the ISBA and its ongoing efforts to provide education and guidance to lawyers in areas of professional responsibility, including technology. Often, the ISBA and the ARDC collaborate on seminars and other educational efforts. Nonetheless, after careful review, the ARDC wishes to point out concerns with the amended comment proposed by the ISBA. The ARDC believes that the proposed comment might conflict with certain rules and comments of the Illinois Rules of Professional Conduct (IRPCs) and with the provisions of Rule 769.

2. Rule 769 and its Comment

The Supreme Court adopted Rule 769 on April 20, 1989, upon recommendation of its *ad hoc* "Rule 764 Committee." The committee's report is attached as Exhibit A. The Court's charge to the committee arose from disbarment proceedings captioned as *In re Berry and Gore*, 1985PR00043, M.R. 352, federal rulings that found that Messrs. Berry and Gore had a valid Fifth Amendment privilege against creating and producing certain law firm records, and a recognition that access to such law firm records is necessary to protect the public from unscrupulous attorneys who had been disciplined (Exhibit A, at pages 3 - 4). The purpose of the Committee's Rule 769 proposal was to implement a required recordkeeping rule that would limit the validity of an attorney's claim of privilege against self-incrimination to avoid producing law firm records (Exhibit A, at pages 12-14).

Rule 769, as adopted in 1989, requires an attorney to maintain certain practice-related records. Paragraph (1) requires maintenance of records of the client identity and whereabouts and whether the representation is ongoing or concluded. Those records are critical to the effective and ethical operation of a law office, including conflict screening, managing client matters, and succession planning. Paragraph (2) requires maintenance of practice-related financial records for seven years, which also supports the efficient management of a firm, including the handling of client funds.

Effective April 1, 2003, on recommendation of the ARDC, the Court amended Rule 769 and adopted the comment. The amendment allows maintenance of records as "originals, copies or computer generated images." The Comment states, in part: "This amendment gives attorneys the option of maintaining records in forms that save space and reduce cost without increasing the risk of premature destruction." The Comment also provides certain examples of storage media that could then meet the seven year retention requirement applicable to documents required by paragraph 2 and those that would not. The ARDC agrees with the ISBA that those examples are outdated and no longer provide useful guidance.

3. IRPC Recordkeeping Requirements

Long after the 2003 amendment of Rule 769 and the adoption of its comment, the Court amended the IRPCs to provide up-to-date guidance to lawyers about use of technology. Generally, the IRPCs only require that an attorney make reasonable efforts to utilize technology. The rules and their comments also provide guidance to lawyers in the use of technology. These principles would appear to apply to the use of technology in the maintenance of documents required by Rule 769, except to the extent to which those principles may be found to conflict with more specific terms of Rule 769. Existing IRPC requirements are described below and are referred to hereinafter as "IRPC Recordkeeping Requirements."

Rule 1.1 (Competence), Comment 8, amended October 15, 2015, eff. January 16, 2016, provides that an attorney "...should keep abreast of ...the benefits and risks associated with relevant technology." More specifically, Rule 1.6(e) (Confidentiality) provides that an "attorney shall make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to ..." information made confidential by that rule.

Comment 18 provides that such inadvertent or unauthorized access or disclosure does not constitute a violation of Rule 1.6(e) "...if the lawyer has made reasonable efforts to prevent the access or disclosure." Comment 18 provides list several factors to be considered:

> Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

Comment 17 provides additional guidance to assist attorneys in taking reasonable caution to protect the transmission of information protected by Rule 1.6(e).

Rule 5.3 (Responsibilities regarding Nonlawyer Assistance) and its Comment 2 (Nonlawyers Outside the Firm), amended October 15, 2015, eff. January 16, 2016, require that a lawyer make reasonable efforts to make ensure that the services of an outside provider, such as an Internet-based service to store documents, are provided in a manner compatible with the lawyer's professional obligations.

For client trust account records, Rule 1.15(a), adopted July 1, 2009, eff. January 1, 2010, provides in relevant parts, that "records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced, and the records are readily accessible to the lawyer."

4. The ISBA's Technology Guidance

The ARDC recognizes and shares the concern of the ISBA regarding the challenges of lawyers in selecting storage media (from paper-based to cloud-based systems), as balanced by the opportunities and savings in electronic storage systems, including cloud-based services (ISBA Opinion No. 16-06, October 2016, page 2). In that opinion, due to rapid changes in technology, the ISBA declines "to provide specific requirements for lawyers when choosing and utilizing an outside provider for cloud-based services (Opinion No. 16-06, page 2). Rather, the ISBA advises lawyers to conduct due diligence in selecting a provider, identifying seven reasonable inquiries and practices that a lawyer might undertake to that due diligence requirement (Id.). ISBA Opinion No. 16-06 concludes, at page 4: "A lawyer may use cloud based services to store confidential client information provided that the attorney uses reasonable care to ensure that client confidentiality is protected and client data is secure."

In January 2017, a **Law Pulse** article in the *ISBA Journal*, *ISBA ethics opinion oks storing Client Information in the Cloud,* authored by Matthew Hector, refers to Opinion No. 16-06 and provides additional detail regarding the vetting process required in selecting a cloud-based storage solution. Mr. Hector predicted that cloud-based technology "...will eventually become a standard..." (Page 2). He cautioned, however: "Until the cloud is as normal as email, attorneys should take extra care when choosing and working with a cloud-services provider." (Id.) In sum, Opinion No. 16-06 and the **Law Pulse** article rely upon the current "reasonableness" requirements of the IRPCs.

5. The ARDC's Concerns

The ARDC recognizes that the existing comment to Rule 769 and indeed the rule itself would benefit from amendment, to either update its terminology or to defer to IRPC Recordkeeping Requirements. The ARDC is concerned that certain aspects of the ISBA proposal may conflict with the existing IRPC Recordkeeping Requirements and may not provide sufficient practical guidance for Illinois lawyers.

a. Proposed Comment may Conflict with IRPC Recordkeeping Requirements

The proposed comment conflicts with certain IRPC Recordkeeping Requirements. As noted in Section 3 above, Rules 1.1, 1.6, and 5.3 require generally that a lawyer keep abreast of the benefits and risks associated with technology and make reasonable efforts to use technology in a way that complies with the IRPCs. Thus, the Court's standard is reasonableness. As a matter of professional responsibility, no Illinois lawyer can be held to a more exacting standard.

The ISBA's proposed comment would depart from reasonableness standard and present the profession with a different standard: an "industry standard" test. Under the ISBA's proposal, an attorney may use "industry standard technology" that has "a reasonable likelihood" of providing necessary access capabilities to records for at least seven years. The ISBA proposal does not however, define "industry standard." Critically, it does not even define the industry whose standard would apply.

As noted in Section 4 above ("ISBA Technology Guidance"), recent ISBA ethics guidance declines to provide specific cloud storage guidance as technology is changing rapidly. The "reasonable likelihood" document access standard is not found in the IRPC or Rule 769. Rather, the rule and its current comment require maintenance of those documents without such a "reasonable likelihood" access standard. Rule 769 serves important policy and practical purposes, as stated in Section 2 above ("Rule 769 and its Comment"). A lawyer's failure to maintain these records could defeat the public protection goals of the required recordkeeping. The failure to maintain these records could impair the ability of an attorney to identify clients, to manage the representation of those clients, and to avoid conflicts of interest.

In contrast, IRPC Recordkeeping Requirements do provide practical guidance and protection for Illinois lawyers. Comment 8 to Rule 1.1 provides that a lawyer should keep abreast of technological advances and use reasonable efforts to protect confidential information. Rule 1.6(e) provides that a lawyer must make reasonable efforts to prevent improper disclosure of confidential information. Comment 18 to Rule 1.6 provides substantial guidance to attorneys and includes the statement that "The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure." In sum, the ISBA proposal would substitute an undefined industry-standard and "reasonable likelihood" test, which do not appear consistent with the Court's existing reasonable effort test.

The ARDC is not voicing these concerns to maintain a basis to discipline a lawyer. A comment does not form a basis for discipline (IRPC, Scope, par. 21). Indeed, Rule 769 itself is a procedural rule and, standing alone, would not be a basis for discipline. *In re Karavidas*, 2013 IL 115767, par. 79.

b. Proposed Comment May Conflict with Rule 769

The scope of the proposed comment may be read to apply to records beyond those required by the Rule 769. The proposed comment begins with the statement that "...this rule addresses the obligations of attorneys and their ability to use digital media or other electronic forms to store their records." In fact, Rule 769 and its existing comments relate only to the limited records required under Rule 769, not all practice-related records, such as client files. Maintenance of records of a law office is already governed by the reasonableness standard as provided in Rules 1.1, 1.6, 5.3, and 1.15, as noted above. It is unclear whether the comment is intended to related records, such as client files. The comment does not indicate clearly that its reach is limited to records required by Rule 769. Ambiguity might arise from providing guidance in a comment to a procedural rule that might conflict IRPC Recordkeeping Requirements.

In a recent ethics opinion, the ISBA recognized the limited scope of records required by Rule 769. ISBA Professional Conduct Advisory Opinion No. 17-02, issued in March 2017, states that Rule 1.15(a) provides requirements for maintenance of complete trust account records and notes further that Rule 769 defines two additional categories of records that must be maintained. Indeed, Rule 1.15(a)(2) already provides that "Records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced, and the records are readily accessible to the lawyer."

The proposed comment does not take into account the separate retention requirement for client identity and matter status records under Rule 769(1). The comment would allow industry standard technology that would have a reasonable likelihood of providing access to a required record for seven years. While the retention period for financial records required under Rule 769(2) is limited to seven years, Rule 769(1) does not limit retention of client identity and matter status records by any time period. The reason for the indefinite retention period is due to the nature of those records. For example, those records may be needed for conflict analysis many years after the representation of that client has ended.

Conclusion

The ARDC applauds the ISBA for its concern for guidance to members of the profession. Nonetheless, the ARDC respectfully presents these comments in response to request of the Rules Committee. The ARDC stands ready to assist in preparation of amendments to Rule 769 and its comment, as may be necessary.

Very truly yours,

Jerome Larkin
Administrator

20620

Exhibit A

BAKER & McKENZIE
ATTORNEYS AT LAW
PRUDENTIAL PLAZA
CHICAGO, ILLINOIS 60601
TELEPHONE (312) 861-8000
CABLE: ABOGADO · TELEX: 25-4425

AMSTERDAM
BANGKOK
BOGOTÁ
BRUSSELS
BUENOS AIRES
CARACAS
FRANKFURT
GENEVA
HONG KONG
LONDON
MADRID
MANILA
MELBOURNE
MEXICO CITY
MIAMI

MILAN
NEW YORK
PARIS
RIO DE JANEIRO
ROME
SAN FRANCISCO
SAO PAULO
SINGAPORE
SYDNEY
TAIPEI
TOKYO
TORONTO
WASHINGTON, D. C.
ZURICH

MICHEL A. COCCIA
(312) 861-2810

April 18, 1988

The Honorable
Thomas J. Moran
Chief Justice
Illinois Supreme Court
838 N. Western Avenue
P. O. Box 432
Lake Forest, Illinois 60045

RE: Rule 764 Committee

My dear Chief Justice:

On behalf of your Rule 764 Committee, I am pleased to submit the enclosed report for the Court's review and comments. We present this report to you in the following sections to facilitate your easy and unburdened access:

1) Background. This section provides you with a summary of our Committee's activities from formation through submission of this final report.

2) Proposed Illinois Supreme Court Rule 764. "Duties of a Disciplined Attorney and Attorney Affiliated with the Disciplined Attorney"

3) Proposed Illinois Supreme Court Rule 769. "Maintenance of Records."

4) Proposed Illinois Supreme Court Rule 775. "Appointment of Receiver in Certain Cases."

5) Committee's Comments Regarding the Application of Rules 764, 769, and 775. These observations are submitted to facilitate the interpretation of the several rules noted above.

Proposed Rules 764, 769, and 775 are presented with our recommendation for your adoption. In our opinion these Rules will be of direct aid to the Court and its Agency, The Attorney Registration & Disciplinary Commission, in the implementation of its disciplinary responsibilities.

We are grateful to the court for having had the opportunity to serve it in this matter. We hope that our work product will be of assistance to the Court in discharging its responsibilities in this very difficult area.

We wish to acknowledge the untiring effort of each member of the Committee and their dedication to facilitate the procedure through which the disciplinary process in Illinois may be implemented. We feel that the Bar is entitled to know what will be expected of it in the event of discipline, and the rules are clear and unambiguous to this end.

We wish to recognize the generous efforts of the Administration and senior members of the Attorney Registration & Disciplinary Commission, who gave the Committee much valuable direction and assistance, provided us with research resources, drafting talents, and, above all, the guidance that comes from their vast

experience. The individuals include Mr. Carl Rolewick, Administrator; Mr. John C. O'Malley, Deputy Administrator; Mr. Jerome Larkin, Assistant Administrator; Ms. Deborah Kennedy, Senior Counsel; and Mr. Robert A. Merrick, Senior Counsel.

Please let us know if we can be of further service.

Very truly yours,

Michel A. Coccia, on behalf of:

Howard Braverman
David Gibbons
John Jiganti
Watts Johnson
Sidney Karasik
Donald Schiller
Martin Silverman

MAC/krl
A:Pers.575

cc: Hon. Daniel P. Ward
Hon. Howard C. Ryan)
Hon. William G. Clark
Hon. Ben Miller) Separate copies sent to respective offices.
Hon. Joseph F. Cunningham)

Members of Rule 764 Committee

Members of the Attorney Registration & Disciplinary Commission

BACKGROUND

On or about October 15, 1985, and under instructions from then Chief Justice William Clark, the then-President of the Illinois State Bar Association, appointed Donald C. Schiller, the current President of that organization, and Michel A. Coccia to a four-member joint committee with the Chicago Bar Association.

The then-President of the Chicago Bar Association appointed Mr. John Jiganti, the current President of that organization, and Mr. David Gibbons of the firm of Chadwell, Kayser, as the Chicago Bar Association's counterparts to the Rule 764 Committee.

The initial purpose of this Committee was to review Rule 764 of the Illinois Supreme Court, and to make recommendations seeking its improvement for the purpose of facilitating its implementation.

The Committee held its organizational meeting on November 4, 1985. It was at that time that the Committee concluded that the Court's purposes would be better served if the Committee would invite Mr. Martin Silverman, the then-General Counsel to the Chicago Bar Association, and Mr. Howard Braverman, the then-General Counsel to the Illinois State Bar Association, to join it in its declared purpose. Happily both honored the Committee with their acceptance, and have continued to serve ably and responsibly.

The second meeting of the Committee was held on November 25, 1985. Mr. Carl Rolewick and Mr. John O'Malley of the ARDC were invited to join the Committee at that time for the purpose of informing it of the experience of the Court and of the Commission with Rule 764, and to help frame the issues that should be included in the necessary revision of Rule 764.

At the November 25, 1985, meeting it was learned that a similar Supreme Court subcommittee existed, made up of Mr. Watts Johnson and Mr. Sidney Karasik, whose mandate was approximately the same as our own. Both Committees deemed it best to merge the two committees to bring about a better-reasoned rule for the Court's consideration. The Committees did in fact merge, and have been honored to have the expertise, support and cooperation of these two gentlemen throughout our deliberations.

On or about December 16, 1985, the Committee received a letter from Mr. John C. O'Malley, the Deputy Administrator of the Attorney Registration & Disciplinary Commission, advising it that the Chief Justice had authorized him to forward the Commission's proposed revisions to Supreme Court Rule 764 and 770, then pending before the Court. The same letter included a separate proposed rule which related to "unavailable attorneys," which subject the Committee took upon itself to include as part of its original undertaking on behalf of the Court.

Thereafter many meetings were held. Various subcommittee appointments were made in an effort to draft a revision to Supreme Court Rule 764, which would correct the inadequacies in the existing rule. It was also your Committee's purpose to seek to strengthen the Court's hand in dealing with the problems attendant to the implementation of its responsibilities to the clients of disciplined attorneys, as well as mandating the responsibilities of the disciplined attorneys in discharging their responsibility to the Supreme Court, the Illinois Bar, the client, and the public.

Drafts and redrafts of a revised Rule were drawn, reviewed, with additional changes recommended, and further studies made, all resulting in the draft proposal of our recommendation of a revised Rule 764. The draft was submitted to the Chief Justice on August 6, 1987, soliciting the Court's comments.

On December 3, 1987, the Supreme Court invited the Rule 764 Committee to join with it in conference to review the Committee's recommendations. The Committee met with the Court on December 15, 1987. A full exchange of ideas took place resulting in the Committee's obtaining a better feel for the wishes of the Court on Rule 764 issues, as well as being assigned new matters which the Court asked it to look into, all of which had as a common denominator, the issues framed in recent disciplinary proceedings

of Berry & Gore (85 CH 43; M.R. 352; and Bruce R. Berry and Richard Gore v. Thomas J. Monahan, Director, Cook County Department of Corrections and Neil F. Hartigan, Attorney General of the State of Illinois, 87 C 1328). This case highlighted the inadequacies of the existing rule.

Having obtained direction from the Court, the Committee undertook to study certain of the problems which the Court faces in the implementation of its duties regarding the disciplining of its lawyers. These problems, and our analysis thereof, which gave rise to the rules recommended elsewhere in this presentation can be summarized as follows.

Problem 1

To propose a revision to existing Rule 764 in order to make it more effective in assisting the Court in implementing its responsibilities to the Client, Public, the Bench, and the Bar, as the same regard a Respondent in a disciplinary proceeding, a disciplined lawyer, and attorneys affiliated with disciplined attorneys.

It was your Committee's intention in drafting the necessary revisions to Rule 764 that it make certain that they would be as strong as necessary in order to give the Court the necessary power to deal with the worst discipline/compliance/scenario in a responsible manner. It was also our purpose to devise a Rule which would provide the Court with the ability to use all, or if appropriate, something less than the full force of the Rule in order to implement its disciplinary responsibilities as it would

deem appropriate, either on its own motion, or upon the motion of the Administrator, or that of the Respondent.

Our proposed Rule 764 represents a total revision of the existing rule.

The Committee also submits its Commentary and observations regarding the use and implementation of Rule 764, and indeed in support of recommended Rules 769 and 775. This commentary appears elsewhere in these materials.

> Problem 2: To study and remedy, if possible, the debilitating effect of the Fifth Amendment and its privilege against self-incrimination in the process of implementing Proposed Rule 764, 769, and 775, as well as the Court's responsibilities in the enforcement of discipline arising thereunder.

The second problem addressed by the Committee was that of the effect of the application of the Fifth Amendment and its privilege against self-incrimination, as the same could be invoked by a respondent in a disciplinary matter, a disciplined attorney, a disabled attorney, or that attorney's legal representatives, as well as those of a disappeared attorney, in their effort to assist the Court in the enforcement of one, more, or all of the several provisions of the proposed Revised Rule 764, 769, and 775. This problem arose in the disciplinary matter of Berry and Gore (85 CH 43; M.R. 352; and Bruce S. Berry

and Richard Gore v. Thomas J. Monahan, Director, Cook County Department of Corrections, and Neil F. Hartigan, Attorney General of the State of Illinois, 87 C 1328), and, although it was addressed by the Court at that time, at least in part, it left the Court with the desire to better identify the problem and to find a reasonable and acceptable solution thereto.

The result of the Committee's efforts in this area is covered in Proposed Rule 769. Commentary regarding Rule 769 appears elsewhere in these materials.

> Problem 3: To address the Court's concern regarding the protection of the clients, as well as the attorneys or their legal representatives, who are disabled, who have disappeared, or who are deceased.

Given the foregoing mandate, sub-committees were appointed within the whole committee. Due to the vast experience the Attorney Registration & Disciplinary Commission members possessed in this area, we called upon their aid and advice to better direct our efforts. This was accomplished and the several sub-committee reports were reviewed and distilled through subsequent meetings of the whole.

The result of the Committee's study of this problem is contained in Proposed Rule 775, together with supporting commentary, and found elsewhere in these materials.

Several meetings and exchanges took place thereafter up to and including the meeting of March 21, 1988, at which time reports were filed, agreement reached on the several issues, and arrangement made for the submission of a full report to the entire Court.

We respectfully submit this presentation for your easy review of the subject and await your further recommendation and direction. In doing so, we wish to point out that which is obvious, namely that it is impossible to provide a rule to cover each conceivable problem or incident which may arise in dealing with these several matters. In the proposed rules, both new and revised, the Court is given much leeway to apply its own judgment throughout the implementation process. We feel that as a result thereof, there is no need for an all-inclusive rule.

In sum, we believe that the Court, with the aid of these rules, will be able to resolve most all of the questions arising out of such matters in the vast majority of those causes that it is called upon to deal with. The remaining few cases that may not respond to a cure as provided by these proposed revised and new rules, hopefully, can be addressed simply through the application of The Rule of Reason.

The entire committee is grateful to the court for the opportunity to serve. It is our hope that we have been of some

assistance to it in the handling of these serious problems.

The Committee is indebted to the several members of the Attorney Registration & Disciplinary Commission, who gave freely of their time to assist us in defining the issues and in the resolution thereof.

A:pers.559

REVISED RULE 764

Duties of a Disciplined Attorney and
Attorneys Affiliated with Disciplined Attorney

Rule 764:

An attorney who is disbarred, disbarred on consent, or suspended for six months or more, shall comply with each of the following requirements. Compliance with each requirement shall be a condition to the reinstatement of the disciplined attorney. Failure to comply shall constitute contempt of Court.

Any and all attorneys who are affiliated with the disciplined attorney as a partner or associate shall take reasonable action necessary to insure that the disciplined attorney complies with the provisions of paragraphs (a), (b), (c), (d), and (e) below. Within 35 days of the effective date of the order of discipline, each affiliated attorney or a representative thereof shall file with the clerk and serve upon the Administrator a certification setting forth in detail the actions taken to insure compliance with paragraphs (a), (b), (c), (d), and (e) below.

(a) Maintenance of Records. The disciplined attorney shall maintain:

(1) Files, documents, and other records relating to any matter which was the subject of a

disciplinary investigation or proceeding;

(2) Files, documents, and other records relating to any and all terminated matters in which the disciplined attorney represented a client at any time prior to the imposition of discipline;

(3) Files, documents, and other records of pending matters in which the disciplined attorney had some responsibility on the date of, or represented a client during the year prior to, the imposition of discipline;

(4) All financial records related to the disciplined attorney's practice of law during the five years preceding the imposition of discipline, including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns and tax reports; and

(5) All records related to compliance with this rule.

(b) Withdrawal from Law Office and Removal of Indicia as Lawyer. Upon entry of the final order of discipline, the disciplined attorney shall not maintain a presence or occupy an office where the practice of law is conducted. The disciplined attorney shall take such action necessary to cause the removal of any indicia of the disciplined attorney as lawyer, counsellor at

law, legal assistant, legal clerk, or similar title.

(c) Notification to Clients. Within 21 days after the entry of the final order of discipline, the disciplined attorney shall notify, by certified mail, return receipt requested, all clients whom the disciplined attorney represented on the date of the imposition of discipline, of the following:

(1) The action taken by the Court;

(2) That the disciplined attorney may not continue to represent them during the period of discipline;

(3) That they have the right to retain another attorney; and

(4) That their files, documents, and other records are available to them, designating the place where they are available.

(d) List of Clients. Within 21 days after the effective date of an order of discipline, the disciplined attorney shall file with the Clerk of the Court and serve upon the Administrator an alphabetical list of the names, addresses, telephone numbers and file numbers of all clients whom the disciplined attorney represented on the date of, or during the year prior to, the imposition of discipline. At the same time, the disciplined attorney shall serve upon the Administrator a copy of each notification served pursuant to subparagraph (c) above.

(e) Notification to Courts. Within 21 days of the effective date of the order of discipline, the disciplined attorney shall file a notice before the court in all pending matters in which the disciplined attorney is counsel of record and request withdrawal of his appearance. The notice shall advise the court of the action taken by the Supreme Court. The notice shall be served upon the disciplined attorney's former client and all other parties who have entered an appearance.

(f) Notification to Others. Within 21 days of the effective date of the order of discipline, the disciplined attorney shall, by certified mail, return receipt requested, notify the following of the action taken by the Court and his inability, during the period of discipline, to practice law in the State of Illinois:

(1) All attorneys with whom the disciplined attorney was associated in the practice of law on the effective date of the order of discipline;

(2) All attorneys of record in matters in which the disciplined attorney represented a client on the effective date of the order of discipline;

(3) All parties not represented by an attorney in matters in which the disciplined attorney represented a client on the effective date of the order of discipline;

(4) All other jurisdictions in which the disciplined attorney is licensed to practice law;

(5) All governmental agencies before which the disciplined attorney is entitled to represent a person;

(g) Affidavit of Disciplined Attorney. Within 35 days after the effective date of an order of discipline, the disciplined attorney shall file with the Clerk of the Court and serve upon the Administrator an affidavit stating:

(1) The action the disciplined attorney has taken to comply with the order of discipline;

(2) The action the disciplined attorney has taken to comply with this rule;

(3) The arrangements made to maintain the files and other records specified in paragraph (a) above;

(4) The address and telephone number at which subsequent communications may be directed to him; and

(5) The identity and address of all other state, federal, and administrative jurisdictions to which the disciplined attorney is admitted to practice law.

(h) Compensation arising from former law practice. Provided that the disciplined attorney complies with the provisions of this rule, the disciplined attorney may receive compensation on a quantum meruit basis for legal services rendered prior to the effective date of the order of discipline.

The disciplined attorney may not receive any compensation related to the referral of a legal matter to an attorney or attributed to the "good will" of his former law office.

(1) Matters in which legal proceedings instituted. The disciplined attorney shall not receive any compensation regarding a matter in which a legal proceeding was instituted at any time prior to the imposition of discipline without first receiving approval of the tribunal;

(2) Other aspects of former law office. The disciplined attorney shall not receive any compensation related to any agreement, sale, assignment or transfer of any aspect of the disciplined attorney's former law office without first receiving the approval of the Supreme Court. Prior to entering into any such transaction, the disciplined attorney shall file a petition in the Supreme Court and serve a copy upon the Administrator. The petition shall disclose fully the transaction contemplated, shall attach any and all related proposed agreements and documents, and shall request approval of the transaction. The Administrator shall answer or otherwise plead to the petition within 28 days of service of the petition on the Administrator. If the Court determines that an evidentiary hearing is necessary, it may refer the matter to the Circuit Court for hearing.

(i) Change of Address or Telephone Number. Within 35 days of any change of the disciplined attorney's address or telephone number during the period of discipline, the disciplined attorney shall notify the Administrator of the change.

(j) Modification of Requirements. On its own motion or at the request of the Administrator or respondent, the Court may modify any of the above requirements.

A:pers.486

RULE 769

Maintenance of Records

Rule 769:

It shall be the duty of every attorney to maintain the following:

(1) records which identify the name and last known address of each of the attorney's clients and which reflect whether the representation of the client is ongoing or concluded; and

(2) all financial records related to the attorney's practice, for a period of not less than ten years, including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns and tax reports.

* * * * * * *

A:pers.574

RULE 775

Appointment of Receiver in Certain Cases

Rule 775:

(a) Appointment of Receiver. Where it comes to the attention of the Circuit Court in any judicial circuit from any source, that a lawyer in the circuit is unable properly to discharge his responsibilities to his clients due to disability, disappearance or death, and that no partner, associate, executor or other responsible party capable of conducting the lawyers's affairs is known to exist, then, upon such showing, the presiding judge in the judicial circuit in which the lawyer maintained his practice, or the Supreme Court, may appoint an attorney from the same judicial circuit to serve as a Receiver to perform certain duties hereafter enumerated. Notice of such appointment shall be made promptly to the Administrator of the Attorney Registration and Disciplinary Commission either at its Chicago or Springfield office, as appropriate. A copy of said notice shall be served on the affected attorney at his or her last known residence.

(b) Duties of the Receiver. As expeditiously as possible the Receiver shall take custody of and make an inventory of the lawyer's files, notify the lawyer's clients in all pending cases as to the lawyer's disability, or inability to continue legal representation, and recommend prompt substitution of attorneys, take appropriate steps to sequester client funds of the lawyer,

and to take whatever other action is indicated to protect the interests of the attorney, his clients, or other affected parties. A copy of the appointing Order shall be served on the affected attorney at his or her last known residence address.

(1) The attorney appointed to serve as Receiver shall be designated from among members of the Bar from the same judicial circuit who are not representing any party who is adverse to any known client of the disabled, absent or deceased lawyer, and who have no adverse interest, or relationship with that lawyer or his estate which would affect the Receiver's ability to perform the duties above enumerated.

(2) An attorney appointed as Receiver may decline the appointment for personal or professional reasons. If no available members of the Bar from the same judicial circuit can properly serve as Receiver as a result of personal or professional obligations, the Administrator of the Attorney Registration and Disciplinary Commission shall be appointed to serve as Receiver.

(3) Any objections by, or on behalf of the disabled, absent, or deceased lawyer, or any other interested party to the appointment of or conduct by the Receiver shall be raised and heard in the appointing court prior to or during

the pendency of the receivership.

(c) Effect of Appointment of Receiver. Where appropriate, a Receiver appointed by the Court pursuant to this Rule, may apply to the Court for a stay of any applicable statute of limitation, or limitation on time for appeal, or to vacate or obtain relief from any judgment, for a period not to exceed 60 days. An application to the Court setting forth reasons for such application shall constitute a pleading sufficient to toll any limitations period. For good cause shown, such stay may be extended for an additional 30 days.

(d) The Liability of Receiver. A receiver appointed pursuant to this Rule shall:

(1) Not be regarded as having an attorney-client relationship with the clients of the disabled, absent or deceased lawyer, except that the Receiver shall be bound by the obligations of confidentiality imposed by the Code of Professional Responsibility with respect to information acquired as Receiver;

(2) Have no liability to the clients of the disabled, absent or deceased lawyer except for injury to such clients caused by intentional, willful or gross neglect of duties as Receiver; and

(3) Except as herein provided, be immune to separate suit brought by or on behalf of the disabled, absent, or deceased lawyer.

(e) Compensation of the Receiver.

(1) The Receiver shall normally serve without compensation.

(2) On application by the Receiver, with notice to the Administrator of the Attorney Registration and Disciplinary Commission, and upon showing by the Receiver that the nature of the receivership was extraordinary and that failure to award compensation would work substantial hardship on the Receiver, the Court may award reasonable compensation to the Receiver to be paid out of the Disciplinary Fund, or any other fund that may be designated by the Supreme Court. In such event, compensation shall be awarded only to the extent that the efforts of the Receiver have exceeded those normally required in an amount to be determined by the Court.

(f) Termination of Receivership. Upon completion of the Receiver's duties as above enumerated, he shall file with the appointing court a final report with a copy thereof served upon the Administrator of the Attorney Registration and Disciplinary Commission.

A:pers.562

COMMITTEE'S COMMENTS REGARDING ILLINOIS SUPREME COURT RULES 764, 769, AND 775

Introduction

Rule 764 has been fully revised in an effort to clarify the obligations of a disciplined attorney, and those attorneys with whom the disciplined attorney was affiliated prior to the imposition of discipline. The rule does not purport to identify every consequence or responsibility relating to or arising out of the judgment of discipline. [In cases of suspension or disbarment, the discipline may constitute a disability which terminates any attorney-client relationship.]

The rule is intended to be flexible. It extends to all attorneys whose discipline is a six-month suspension or greater.

Attention is called to the fact that the rule imposes an affirmative obligation not only on the disciplined attorney, but also on any attorney who is affiliated as a partner or associate to insure compliance with the rule.

Rule 764(a)
Maintenance of Records

Paragraph (a) requires that the disciplined attorney and affiliated attorneys shall maintain records related to the disciplined attorneys's misconduct, his practice, and compliance with this rule. [The record maintenance requirement is intended to insure access by the Administrator to any and all records which might be required in further proceedings, such as a contempt proceeding or a reinstatement proceeding.]

The Committee is clear in its view that all attorneys who are affiliated with the disciplined attorney in any reasonable manner, shall take reasonable action necessary to insure that the disciplined attorney complies with all provisions of the rule.

This statement is simple and clear cut. But then, for example, what is to be done in the case of an attorney or attorneys who is or who are affiliated with the disciplined attorney in a law firm made up, for example, of five or more attorneys? What is the responsibility of the affiliated lawyers to notify the clients? Who is the client? Which clients are to be notified, the entire roster?

Assume for example that senior partner A brings in client Z. Assume further that the project is a large one, and partner A calls in junior partner B and associate C, and gives them a special assignment within the framework of the entire mandate, asking the associate to assist partner B in resolving the problem, and to draft the necessary report. Assume that Associate C is now disbarred for an entirely unrelated matter arising out of a totally different firm-client relationship.

Problem: Is there a duty on the firm to notify client Z of associate C's disbarment for reasons totally unrelated to Client Z?

The rule mandates that the attorneys affiliated with the disciplined attorney have the duty to make certain that the disciplined attorney complies with each provision of the rule. But does this mean that client Z in our example must be notified? If not, must any client of the firm be notified? Probably not. It would seem more reasonable that those clients which are being serviced directly by Associate C as the responsible or controlling attorney would be the ones who should be advised and be protected. The protection which must be offered is to make certain that C's clients are given a reasonable opportunity to choose representation of a lawyer of their own choice to make up

the loss of Attorney C. In most cases, the balance of the partners or the attorneys associated with the disciplined attorney could well fill the void. But the matter is not simple or clear cut. Given the foregoing, the Committee believes that the Rule of Reason must control.

Members of the firm are responsible for the disciplined lawyer who may not have any clients of his own, or who may have a peripheral involvement with any and all clients of the firm. In the question of a small law firm, it is much easier for its members to see to it that the disciplined colleague does comply with the rule, but with a larger law firm, whose burden is it to make the disciplined lawyer take the responsibility for disclosure? What disclosure need be made given the protection the affiliated lawyers could provide the Client, given the disciplined attorney's disability? We respectfully suggest once again that the Rule of Reason apply.

It may well be possible that the problem is not to be found in a large law firm attempting to comply with this rule. It is believed that the large firm will be able to handle the problem through its own infrastructure. On the other hand, it is believed the problem will be more acute and less easily solved amongst those lawyers closely affiliated in an office-sharing arrangement. Possibly one lawyer handles real estate, while the other handles personal injury, and the client keeps moving

between them. Is it the person who brought the client into the house who is the affiliated lawyer in this example, and who has the responsibility under the Rule? Or is it the attorney who is doing the work for the client that is the affiliated attorney and accordingly has the burden to comply with the rule? Which one is responsible?

In a law firm made up of two or more lawyers, which is large enough that it requires someone acting in a management responsibility for the group, the Court should go directly to that management body and seek to impose upon them the obligation of caring for the implementation of this rule.

The purpose of the rule is to protect the clients. If the disbarred attorney has notified his employers; has addressed his responsibilities under the proposed Rule; has stated that he was disbarred or otherwise disciplined; has stated that he did not represent any clients other than as a member of the firm; and has attested that he complied with proposed Rule 764; and that he could be reached at a definite address, if necessary; the Committee does not believe that the Administrator would or should challenge the Respondent or the affiliated attorneys. It would seem that such compliance as suggested in the foregoing hypothetical situation is the expending of a reasonable effort to protect the clients, and the law firm should be allowed to continue to represent the client in a normal manner.

A further example:

Assume a Respondent/Lawyer for a sizeable law firm has been disbarred. The firm discharges the attorney. He has now moved to another state and is associated with a prestigious law firm, but has not divulged his disbarment to his new employer. Can the Illinois Supreme Court maintain any jurisdiction over the out-of-state firm, at least to the extent of considering it as the disciplined attorney's affiliated lawyers?

There is no good way for the Court to obtain jurisdiction over the current non-resident affiliated attorney, or to force compliance. The Committee notes, however, that when the Respondent files his affidavit under paragraph 764(g), which deals with his compliance under proposed Rule 764, the Administrator can object thereto, move to compel performance under the rules, or seek such other relief as would be appropriate. Once again the Rule of Reason as well as the Rule of Law would apply in resolving this question.

The rule has for its purpose to place primary responsibility on the disciplined attorney. The rule, although it requires him to perform several specific functions, once discipline has been awarded, is not necessarily amenable to abuse, as reasonable compliance is possible, and reinstatement can always be measured by the disciplined attorney's cooperation and degree of performance under the proposed rule.

It is difficult for this Committee to envision all the possibilities in which problems of enforcement of the Rule could arise. We feel that the Court and the Administrator should not only be free to look to the managing body and/or partners of the disciplined attorney's firm for the implementation of its rules, but the Court must be equally responsible in allowing that firm's managing body to petition the Court for relief as it deems appropriate in order to efficiently and fairly bring about the reasonable implementation of the proposed rule as quickly as possible. We can go no further with this problem. The Rule of Reason, though far from precise, should make certain that justice and fairness triumph.

The requirement that the disciplined attorney maintain records regarding his practice is to insure availability and access to records in cases where the misconduct proved is only a portion of a greater scheme. Such records may be crucial to a determination

of the amount of restitution, a condition to reinstatement. See In re Berkley, 96 Ill. 2d 404, 451 N.E.2d 848 (1983).

Rule 764 (b)

Withdrawal from Law Office and Removal of Indicia as Lawyer

Paragraph (b) requires that the disciplined and affiliated attorneys take the necessary action to insure that the disciplined attorney not hold himself out as a lawyer in violation of the judgment of discipline. This paragraph prohibits the disciplined lawyer from maintaining a presence in a law office. Such presence would create too great a likelihood that the public would view the disciplined attorney as authorized to practice law. See In re Kuta, 427 N.E.2d 136, 140 (1981).

Rule 764 (c), (d), and (e)

(c) Notification to Clients
(d) List of Clients
(e) Notification to Courts

Paragraphs (c), (d), and (e) impose upon the disciplined and affiliated attorneys the duty to produce a list of clients, and to notify those clients, as well as the courts, of the discipline, and the consequent inability of the disciplined attorney to continue representation of the clients. The clients and the Court have an interest in knowing of the disability of

the lawyer. The client has a right to select another lawyer. The committee expects that the issue of whether a client is a client of the disciplined lawyer or of an affiliated lawyer may be a difficult one, but one that can be resolved under the Rule of Reason.

Rule 764 (f)
Notification to Others

Paragraph (f) requires that the disciplined lawyer notify others who may otherwise have no reason to believe that the Respondent is not authorized to practice law, of the discipline handed down against him. The committee expects that many of the notice requirements under sub-paragraph (e) may well serve this purpose. We must note, however, that the responsibility to do so exists, continues, and belongs to the Respondent and affiliated attorneys.

Rule 764 (g)
Affidavit of Disciplined Attorney

Paragraph (g) requires the disciplined attorney to file an affidavit of compliance with this rule. Strict enforcement of this rule is necessary in order to give the Court the ability to protect the clients, the public, the Bar, and the Bench.

Rule 764 (h)

Compensation Arising from Former Law Practice

Paragraph (h) relates to the disciplined attorney's right to compensation from his former law practice. A disciplined attorney may receive a fee for services rendered prior to discipline on a quantum meruit basis. The disciplined attorney may not receive compensation for the "sale" of "good will" or "his practice." (O'Hara v. Ahlgren, et al., 511 NE 2d 879.) As the disciplined attorney has become unable to represent his clients, they are entitled to seek other counsel. [Since disciplined attorneys could not remain responsible for discharging legal matters within the meaning of Rule 2-107(a)(2) of the Illinois Code of Professional Responsibility, the disciplined attorney would not be entitled to a referral fee even if the disciplined attorney were to claim entitlement to a fee under the foregoing rule.]

Paragraph (h) also imposes upon a disciplined lawyer the obligation to seek judicial approval prior to receiving compensation for services rendered in any matter pending before a tribunal, and judicial approval from the Supreme Court for the sale of any aspect of the practice. These provisions are designed to give the court an opportunity to determine whether improper payments are being disguised as legitimate compensation.

Rule 764 (i)

Change of Address or Telephone Number

Paragraph (i) imposes upon a disciplined lawyer the obligation to notify the administrator of address changes.

Rule 764 (j)

Modification of Requirements

Under paragraph (j), the court may modify any of the requirements of the rule. It may relieve a disciplined attorney of an obligation under the rule or may extend the requirements to an attorney disciplined for less than six months. The court has the authority to enforce proposed Rule 764 through its contempt power. As in instances of violation of other rules of the court, the Administrator would file his report and would seek a rule to show cause why the Respondent should not be held in contempt. In this way, violations of proposed Rule 764 may be immediately brought to the attention of the court.

RULE 769

Maintenance of Records

The Illinois Supreme Court, and its agency, the Attorney Registration and Disciplinary Commission, has a duty to police the legal profession in Illinois. To this end, a respondent in a disciplinary proceeding, a disciplined attorney, as well as a disabled attorney, and the legal representatives of an attorney that has disappeared and those of a deceased attorney, have the obligation to cooperate with this Court and its agency to assist it in discharging their responsibility. The obligation requires that the attorneys in question comply with all the Supreme Court Rules governing their performance, particularly, but not in limitation to fulfilling this Court's orders issued in the implementation of Revised Rule 764. The Court and its administrator in the discharge of its duty, will be in need of various records, client lists, financial records of all kinds, including without limitation: bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns, tax reports, and matters of like kind.

The involved attorneys, may on the other hand, and for their own reasons, seek to preclude, or to otherwise limit the court in its effort to obtain the necessary documentation needed to protect the clients or to otherwise discharge its duty in policing the bar. The effort most employed to block the court or its agency from obtaining the necessary materials to accomplish its purpose, including those records contemplated to be kept under Revised Rule 764, is to invoke the Fifth Amendment privilege against self-incrimination.

It is, of course, obvious to all that any such involved attorney inherently possesses this privilege against self-incrimination and has a right to invoke the process necessary to seek to perfect this claimed privilege, and more importantly to determine its validity under any given circumstance. There are limitations, however, in asserting a valid claim for privilege. This Court has set forth the particular process that must be employed by any such claimant of the privilege in determining its validity. In Re Zisook, 88 Ill. 2d 321 p. 333, 334.

We can therefore state that the Illinois Supreme Court and its agency, the Attorney Registration and Disciplinary Commission, at the very least, can challenge and contest each claim asserted to a valid privilege, under the authority and procedures outlined in Zisook.

Given that the purpose of the records maintenance required and set forth in Rule 764 is to protect the client's interest in their files, or other property, which may be in the possession or control of the respondent in disciplinary matters, of the disciplined attorney, of the disabled attorney, and of the legal representatives of the disappeared or deceased attorney, it is recommended to the Court that it adopt a separate rule that will govern all attorneys. This rule will be a pre-discipline, required-record keeping rule, to assist the court in the discharge of its duty to protect the client's interests, and to further limit the claim of validity of a disciplined attorney's privilege against self-incrimination as found in the Fifth Amendment. This is the purpose of Rule 769.

We believe that the court, armed with Rule 769, together with Zisook, will be able to deal with the most difficult of Fifth Amendment claims of privilege asserted by respondents in discipline, disciplined attorneys, disabled attorneys, and the legal representatives of an attorney that has disappeared, and those of the deceased attorney, as well as to assist itself in the resolution of the clients' rights left unattended due to the attorney's disability, disappearance, or death.

RULE 775

Appointment of Receiver in Certain Cases

In the past, situations have arisen where, due to physical or mental disorders or death of an attorney, the affairs of the client have been neglected, mishandled, or ill-served. In such cases the Court has been obliged to intervene on an ad hoc basis. For example, In re: Byram, Sup. Ct. No. M.R. 2037, Byram abandoned his law practice. The DuPage County Bar Association took possession of Byram's files, and, pursuant to the petition of the Administrator of the Attorney Registration & Disciplinary commission, the files were provided to the Administrator for the purpose of inventory and notification to Byram's clients.

On the other hand, In re: Grauer, Sup. Ct. No. M.R. 4535, Administrator's No. 87 CH 271, the Court denied the Administrator's request to take possession of Grauer's client files following Grauer's hospitalization for psychiatric reasons. The Court expressed concern that in light of a disciplinary matter involving Grauer pending under Supreme Court Rule 753, the Administrator might be perceived as using the opportunity to gather additional evidence of misconduct. In Grauer, the Court accordingly recognized that in some circumstances a conflict of interest may arise if the Administrator were empowered to take possession of an attorney's client files for protection of

client interests, when those files might contain information indicative of professional misconduct by the attorney.

The purpose of Rule 775 is to systematize the handling of such cases in an orderly way for the protection of the client, the affected lawyer, his opponents, or any other interested party.

The rule requires the application of reason and care to resolve the problem.

A:pers.568