Assembly

June 16, 2012

Information Items
Professional Ethics

ILLINOIS STATE BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

Opinion No. 12-01
January 2012

Subject: Threatening Criminal Prosecution

Digest: Where a lawyer has filed suit to recover on an NSF check for a client, the lawyer cannot present or participate in presenting criminal charges to obtain an advantage in the civil aspects of the NSF check matter.

References: Illinois Rule of Professional Conduct 8.4(g)

ISBA Professional Conduct Advisory Opinion Nos. 550, 142

In re Lewelling; 296 Or. 702, 678 P.2d 1229 (Or. En Banc. 1984)

720 ILCS 5/32-1

FACTS

A lawyer represents a client who wants to collect on an NSF check. The lawyer files suit, but finds that the sheriff cannot get service on the defendant.

QUESTIONS

1. Can the lawyer send the check back to the client and advise the client of his/her right to file a criminal complaint?
2. Can the lawyer send the check to the State's Attorney and ask, on behalf of the client, that a criminal complaint be issued?

OPINION

Rule 8.4 (g) of the Illinois Rules of Professional Conduct provides that "It is professional misconduct for a lawyer to present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter."

A similar prohibition was contained in the predecessor Rules of Professional Conduct.

ISBA Opinion No. 550 (1976) states that "it is professionally improper for a lawyer to threaten the possible presentment of criminal charges to collect 'insufficient funds' checks for a client." ISBA Opinion No. 142 (1956) provides that advising a debtor that the indebtedness will be taken up with the State's Attorney's Office is unethical and unprofessional.

Under the facts as indicated, where the lawyer has filed suit and service has not been obtained, the lawyer can send the check back to the client and advise the client that he/she may press criminal charges on his/her own if he/she chooses. The lawyer, however, cannot properly "participate in presenting" such charges to obtain any advantage in the civil aspects of the NSF check matter.

The harm here is not the filing of a criminal complaint by the client, but the lawyer's participation in that act to gain advantage in the civil matter.

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of a society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of the process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

In re Lewelling, 296 Or. 702, 678, P.2d 1229, at 1231 (Or. En Banc. 1984) quoting EC 7-21 (Attorney suspended for 60 days for presenting or threatening to present criminal charges solely to obtain an advantage in a civil matter.)

The lawyer should also advise his or her client not to threaten criminal charges in order to obtain payment of the NSF check because the Illinois Criminal Code makes it an offense to receive consideration in return for a promise not to prosecute or aid in the prosecution of an offender. This is known as "compounding a crime." See 720 IlCS 5/32-1

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-02
January 2012

Subject: Fees and Expenses

Digest: It is improper for an estate planning attorney to charge a fee calculated solely as a percentage of the value of the estate.

References: Illinois Rule of Professional Conduct 1.5(a);

In re Estate of Weeks, 409 Ill. App. 3d 1101, 950 N.E.2d 280 (4th Dist. 2011);

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975);

Estate of Painter, 567 P.2d 820 (Colo. 1977);

In re Estate of Platt, 586 So.2d 328 (Fl. 1991).

FACTS

An attorney handling a decedent's probate estate becomes aware that the attorney who prepared the decedent's estate planning based his fee solely on a percentage of the assets in the estate. The inquiring attorney believes the estate planning work to have been properly performed, but that the hourly charges for the estate planning services would have been far less than the percentage fee charged.

QUESTION

Is an estate planning attorney's charging of a percentage fee materially exceeding the hourly fee proper?

OPINIONS

Several court decisions, including one recently decided in Illinois, have concluded that a probate attorney's charging of a fee based solely on a percentage of an estate's value is improper, and does not satisfy the benchmark requirement that a fee be "reasonable."

To this effect, in *Estate of Painter,* 567 P.2d 820 (Colo. 1977), the court held that a fee to probate counsel based upon a percentage of the value of the estate being probated was improper when viewed against a rule requiring that a fee be reasonable.

Similarly, the Florida court in *In re Estate of Platt,* 586 So.2d 328 (Fl. 1991), held that it was improper to determine the fees of a probate attorney solely according to a percentage of the value of the estate when the relevant statute provided, as does ours, that a number of factors be considered in determining the reasonableness of a fee. The Court reflected that although the size of the probate estate is a factor which may be considered in determining reasonableness, it is not properly to be used as the sole controlling factor.

Most recently, the Illinois Appellate Court for the Fourth District reached a similar conclusion *In re Estate of Weeks,* 409 Ill. App. 3d 1101, 950 N.E.2d 280, (4th Dist 2011). There, the decedent's probate attorney sought to charge a fee in the amount of 3% of the value of the probate estate, claiming that such a percentage fee was his customary charge for an estate of the size involved and that it was also the customary charge in neighboring counties for probating an estate of that size.

The trial court held that the application of such a percentage fee was not "reasonable" under governing sections of the Probate Act which provide, as does our Rule 1.5 (a), various factors to be considered in determining the reasonableness of a fee. *Weeks,* 409 Ill. App. 3d at 1109. In so concluding, the trial court went so far as to compare the use of a percentage fee to an improper reliance on a fee schedule as was precluded in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975).

The Appellate Court in *Weeks* reached a similar conclusion, stating that reasonable fees must be determined on a case by case basis, and that the trial court properly applied the various factors set forth in the Probate Act, rather than a percentage fee based on the estate's assets, in determining a reasonable fee. Among the factors which the court stated are proper for consideration are the size of the estate, the work involved, the skill evidenced by the work, the time expended, the success of the effort involved, and the efficiency with which the estate was administered. The Court went on to the state that "the most important factor is the amount of time spent on the estate," and concluded its analysis by stating:

> "This court concluded almost three decades ago '[i]t is now well-established that fees may not be determined on the basis of fee schedules, and that "[c]learly, an award of fees in this case should have been based on the time spent by petitioners, the complexity of the work they performed, and their ability. We conclude that this is what the trial Court did."

As did the Probate Act discussed in *Weeks,* Rule 1.5 (a) recites no less than eight (8) factors to be considered in determining the reasonableness of a fee, several of which may be relevant to the rendering of estate planning services. Such factors include, in addition to the time and labor expended, the following considerations:

(1) the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly;

(2) the fee customarily charged in the locality for similar legal services;
(3) the amount involved and the results obtained;
(4) the nature and length of the professional relationship with the client; and
(5) the experience, reputation and ability of the lawyer performing the service

Moreover, the Comment to Rule 1.5 recognizes that even the considerations listed in Rule 1.5(a) are not exclusive, and that such Rule requires that the lawyer's fees be reasonable 'under the circumstances." RPC 1.5, Comment [1].

Accordingly, under the precedent and pursuant to Rule 1.5(a), the estate planning attorney's having charged solely on the basis of a percentage of the size of the estate, without consideration of the time expended or the other factors recited by Rule 1.5(a), is unreasonable and improper. On the other hand, however, we are not wholly in accord with the Court's implication in *Weeks* that the time spent on the matter is in all instances the most important factor to be considered, to the exclusion of other factors which may be deserving of greater emphasis in any given instance. Rather, consideration of all of the factors recited in Rule 1.5(a), and giving to each of their proper weight on a case by case basis, is necessary to arrive at a determination of reasonableness consistent with the dictates of *Weeks*.

In so concluding, we are also cognizant of the fact that each of the cases which we have cited, including *Weeks*, involved the propriety of a percentage fee in the probate of an estate, not in the planning of an estate. It does not seem to us, however, that this distinction would warrant a result more favorable to an estate planner. To the contrary, if a probate attorney, whose task would seemingly involve more uncertainty and unpredictability than that of an estate planner, cannot charge on a percentage basis, we see no reason why an estate planner should be allowed to do so.

Accordingly, while our opinion is not based solely on the fact, as posited by the inquiring attorney, that the estate planner's percentage fee substantially exceeded what would have been an hourly fee, we are of the view that an estate planner's charging of a percentage fee based solely on the size of the estate without regard to the time expended and the other considerations recited in Rule 1.5(a), is in appropriate.

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-03
January 2012

Subject: Advertising and Solicitation; Confidentiality; Referral Fees and Arrangements

Digest: A lawyer may participate in a networking group with other service professionals which refers clients to one another if: (a) the reciprocal referrals are not exclusive; (b) the lawyer requests prior consent from the client to give his or her name to someone in the networking group, although the better practice might be for the lawyer to give the name of the other "professional" to the client; (c) the client is informed of the existence of the referral agreement between the lawyer and the non-lawyer professional; and (d) the referral arrangement does not interfere with the lawyer's professional judgment as to making the referral or providing substantive legal services.

References: Illinois Rules of Professional Conduct 1.6(a), 2.1, 5.4, 7.1, 7.2, 7.3;

ISBA Professional Conduct Advisory Opinion No. 97-01;

ABA Formal Opinion No. 09-455;

New York Rules of Professional Conduct 7.1(b)(2).

FACTS

A group of business and professional people in a community has organized a not-for-profit organization open to members who are interested in "networking" to obtain business contacts. Members attend weekly meetings to describe to each other the services their business offers and to exchange the names and telephone numbers of persons with whom the members have had contact and who might be in need of the services of other members. It is contemplated that members who receive the names and telephone numbers of leads from other members will then contact those leads. There is an initiation fee and a monthly fee to remain a member. The funds collected are allocated each week to a different member of the organization to advertise that member's business in a local newspaper or journal.

QUESTION

A lawyer interested in joining the "networking" group has inquired whether participation in its activities would violate the Illinois Rules of Professional Conduct ("RPC's").

OPINION

The lawyer may participate in the networking group, albeit with certain restrictions to ensure the lawyer complies with the RPC's.

With respect to the networking group itself, RPC 7.2(b) provides as follows:

> A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:
>
> (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
>
> (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service;
>
> (3) pay for a law practice in accordance with Rule 1.17; and
>
> (4) refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
>
> > (i) the reciprocal referral agreement is not exclusive, and
> >
> > (ii) the client is informed of the existence and nature of the agreement.

Comment 8 to RPC 7.2 provides that while a lawyer "may agree to refer clients to another lawyer or nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer," this arrangement "must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services." This Comment references RPC 2.1, which requires a lawyer to "exercise independent professional judgment" as well as RPC 5.4, which bars a lawyer from allowing a person who recommends his or her services to "direct or regulate the lawyer's professional judgment in rendering such legal services."

A further consideration is whether the lawyer breaches RPC 1.6(a) if the lawyer were to provide his or her client's name and telephone number to another lawyer or to a nonlawyer professional member of the networking group. With some exceptions that do not apply to the fact scenario, RPC 1.6(a), which governs "Confidentiality of Information," provides, in pertinent part, that a "lawyer shall not reveal information relating to the representation of a client." Comment 1 to RPC 1.6 states that the Rule

"governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of a client." Although the RPC's do not specifically address whether a client's identity is considered "confidential information," it appears from other ethics opinions that this is so.

For example, ABA Formal Opinion 09-455 considered the disclosure of client identities for conflicts purposes. Citing the definition of information covered by Model Rule 1.6(a), which is "all information relating to the representation, whatever its source," ABA Formal Opinion 09-455 then opined that that "*the persons* and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent" (Emphasis added). See also RPC 1.6, Comment [3]. Further, with respect to client referrals, ISBA Advisory Opinion 97-01 (1997) concluded that a lawyer may give the names of his clients to a bank as potential customers for banking services, but must first obtain consent of his or her clients to do so. *See also* Rule 7.1(b)(2) of the New York Rules of Professional Conduct (noting that an advertisement may include information as to "names of clients regularly represented, provided that the client has given prior written consent"). Accordingly, an attorney should consider his or her client's identity to be confidential information which cannot be disclosed without the client's consent.

Thus, the lawyer's participation in the networking group in question is permissible under RPC 7.2(b)(4) and RPC 1.6 provided that: (a) the reciprocal referrals are not exclusive; (b) the lawyer requests prior consent from the client to give his or her name to someone in the networking group, although the better practice might be for the lawyer to give the name of the other "professional" to the client; (c) the client is informed of the existence of the referral agreement between the lawyer and the non-lawyer professional; and (d) the referral arrangement does not interfere with the lawyer's professional judgment as to making the referral or providing substantive legal services.

With respect to initiation fees and monthly fees paid by the lawyer for membership in the networking group, those funds are used to advertise a different member's business in a local newspaper or journal each week. Because those funds will be used to pay the lawyer's "reasonable costs of advertisements or communications," as permitted by RPC 7.2(b), this does not violate the rule that a lawyer "shall not give anything of value to a person for recommending the lawyer's services." The advertisements should comply with RPC 7.1, in that they should not be false or misleading.

In regard to contacting potential clients to whom the lawyer is referred by other members of the networking group, RPC 7.3(a) is relevant and provides as follows:

> A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
>
> (1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

RPC 7.3(c), however, does permit a "lawyer to solicit professional employment from a perspective client known to be in need of legal services in a particular matter" if the words "Advertising Material" appear on the outside of the envelope or at the beginning or ending of a recorded or electronic communication, unless the recipient of the communication is a person specified in RPC 7.3(a)(1) or (a)(2).

Accordingly, to the extent that the networking group contemplates that the lawyer will contact directly by phone, in person, or by real-time electronic contact, the potential clients to whom the lawyer is referred, such contact would violate RPC 7.3(a). It would, however, be permissible for the lawyer to contact the potential client by mail or by recorded or electronic communication, provided the words "Advertising Material" appear on the envelope or communication as provided by RPC 7.3(c). Accordingly, the lawyer participating in the networking group should obtain the mailing and email address for the potential client, rather than just the client's phone number.

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-04
January 2012

Subject: Advertising and Solicitation

Digest: Labeling communications to solicit professional employment as "promotional" materials does not comply with requirements of the Illinois Rules of Professional Conduct to label such materials as "Advertising Material."

References: Illinois Rules of Professional Conduct 7.2 and 7.3(c);

In the Matter of Benkie, 892 N.E.2d 1237 (Ind. 2008);

ABA Formal Opinion 10-457.

FACTS

Several firms have placed the legend "promotional materials" on firm brochures and other marketing papers that they distribute to other lawyers and non-lawyers.

QUESTION

The inquirer asks whether the legend "promotional materials" complies with the requirements of Rule 7.3(c).

OPINION

Rule 7.3(c) provides , in relevant part, that:

> "Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, …"

We are of the view that the labeling of the communications to solicit professional employment in question as "promotional materials" does not comply with the requirements of this Rule. While the terms "advertising" and "promotional" may be similar, we believe RPC 7.3's specific use of the term "Advertising Material," highlighted by quotation marks, is a clear indication of the mandatory nature of the use of that specific term. See *In the Matter of Benkie*, 892 N.E.2d 1237 (Ind. 2008)(use of the term "Legal Advertisement" did not satisfy "Advertising Material" requirement). Accordingly, we believe that only the labeling of firm brochures and the like as "Advertising Material" when used as a means of solicitation complies with the requisites of Rule 7.3.

While firm brochures (and their modern counterpart, the internet website) are clearly regulated communications under the RPC, and thus subject to prohibitions on false or misleading statements, it should be noted that the labeling requirements of Rule 7.3(c), only apply to communications employed in the direct written, recorded or electronic solicitation of prospective clients known to be in need of legal services. Communications sent in response to requests from potential clients and general announcements do not require the special labeling. RPC 7.3, Comment [7]. Further, nothing in this opinion is intended to imply that firm brochures (or websites) generally are required to be labeled as "Advertising Material." (For a discussion of issues relating to firm websites, see ABA Formal Opinion 10-457.) In addition, the non-solicitation provisions of Rule 7.3 in its entirety are directed only to contacts with certain lay persons, not to contacts with other attorneys or persons with whom the lawyer has a family, close personal, or prior professional relationship. Thus, to the extent that the marketing materials referenced in this inquiry are directed to lawyers, (or other exempted individuals), no requirement exists that they be labeled in any fashion under Rule 7.3(c).

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-05
January 2012

Subject: Prospective Client; Conflict of Interest

Digest: It would be improper for a lawyer to represent a person adverse to a prospective client who had previously consulted with the lawyer in the same matter and disclosed significantly harmful information during the consultation absent both persons' informed consent.

References: Illinois Rule of Professional Conduct 1.18;

King v. King, 52 Ill.App.3d 749, 367 N.E.2d 1358 (4th Dist. 1977);

In re the Marriage of Newton, ___ Ill.App.3d ___, 955 N.E.2d 572 (1st Dist. 2011).

FACTS

Wife makes an appointment to see Attorney concerning a contemplated divorce. At Attorney's request, Wife fills out a "marital information sheet" giving certain biographical information for Attorney's use in preparing a petition for dissolution of marriage. A conference ensues at which time Wife and Attorney discuss Attorney's hourly rates, some of the biographical information provided, and the fact that Husband is having an affair with another woman. Attorney explains the law regarding her rights, including advice concerning support, visitation, maintenance and property rights. The consultation ends without a commitment to employ Attorney for further services.

One month later, Husband comes to see Attorney with the express purpose of hiring him as his attorney in the marital action involving Wife. The Attorney consults with Husband and learns that Wife, following her earlier discussion with the Attorney, hired another attorney to represent her. The Wife, through the other attorney, has now filed divorce proceedings against Husband. Issues with respect to child custody, financial and other matters will be contested.

QUESTION

Can Attorney represent Husband in view of the fact that Wife never indicated to Attorney that she wanted to hire him and, in fact, hired another attorney?

OPINION

Whether or not Wife indicated to Attorney that she wanted to hire Attorney, or in fact hired another lawyer, is not dispositive of the ethical issue presented by the above factual scenario. *King v. King*, 52 Ill.App.3d 749, 367 N.E.2d 1358 (4th Dist. 1977). Also not dispositive is the analysis, employed in *King*, of whether an attorney-client relationship arose between the prospective client and the lawyer. Under Illinois' 2010 RPC, the question presented in this inquiry requires an analysis under new RPC 1.18 ("Duties to Prospective Client").

Under RPC 1.18(a), Wife is considered to be a "prospective client." RPC 1.18(c)("A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.") RPC 1.18(b), (c), and (d) further set forth the duties owed to these "prospective clients." The duties include restrictions on a lawyer's representation of persons adverse to a prospective client as well as prohibitions on the use of any information learned during an initial consultation.

The analysis of whether Attorney can represent Husband after previously consulting with Wife begins with RPC 1.18(c). This Rule establishes that it is a conflict of interest for a lawyer to represent a person with interests "materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in that matter." RPC 1.18(c). In the fact scenario presented above, the marital proceedings between Wife and Husband are clearly the same matter. In addition, as Husband and Wife are opposing parties in a contested divorce we believe their interests are materially adverse as well.

However, the analysis of what may be "significantly harmful" information to Wife (as a prospective client) may not be so clear. Neither the Rule nor its Comments provide any guidance on what constitutes the potentially disqualifying "significantly harmful" information. (Importantly, the Comments to the Rule do note that a lawyer may want to limit his or her initial consultation with a prospective client only to information sufficient to determine whether a conflict of interest may exist and also may condition conversations with a prospective client on that person's agreement, as long as its informed, that no information disclosed during the consultation will prohibit the lawyer from representing an adverse party. See RPC 1.18 Comment [3], [4], and [5].) Although no detailed facts are included in the inquiry, it appears that biographical information sufficient to prepare a petition for dissolution, knowledge about the Husband's affair, and information allowing Attorney to provide advice on a number of marital issues would likely fall within the realm of information that "could be significantly harmful." *Cf. In re the Marriage of Newton*, ___ Ill.App.3d ___, 955 N.E.2d 572 (1st Dist. 2011)(Attorney-client relationship formed after lawyer met with person for 1.5 to 2 hours and discussed information and issues related to marriage and impending divorce). Nevertheless, this is a very fact specific question. If significantly harmful information was received, Attorney would be prohibited from representing Husband (subject to exceptions noted below). RPC 1.18(c) also makes it clear that the conflict would be imputed to all members of Attorney's firm.

Notwithstanding the existence of a conflict under RPC 1.18(c), two exceptions are available that might allow the representation to proceed. These exceptions apply even if significantly harmful information has been conveyed to the lawyer. Although facts to establish either exception are not provided in the inquiry, the exceptions are worth noting. First, under RPC 1.18(d)(1), the representation would be permissible if both the affected client and the prospective client give their informed consent to the representation. (Lawyers should take special note that "informed consent" is now a defined term at RPC 1.0(e). The definition imposes significant obligations on the lawyer to disclose to the client: all the facts and circumstances related to the particular situation; exploration of the material advantages and disadvantages of the action; and a discussion of available options and alternatives. See RPC 1.0, Comments [6] and [7].) Second, under RPC 1.18(d)(2), a partner of the lawyer receiving the information could represent a party adverse to a prospective client as long as: (1) the lawyer involved in the consultation was timely screened from the representation; and (2) the lawyer took reasonable measures to avoid exposure to disqualifying information.

Finally, regardless of whether RPC 1.18(c) or (d) would allow Attorney to represent Husband, Attorney owes Wife a duty under RPC 1.18(b) not to "use or reveal information" learned in the initial meeting with Wife. However, this duty can be waived if the Wife gives informed consent to its use or the information has become generally know. See RPC 1.9(c) and RPC 1.9 Comment [8].

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-06
January 2012

Subject: Client Files; Law Firms

Digest: A lawyer must maintain records that identify the name and last known address of each client, and reflect whether the client's representation is active or concluded, for an indefinite period of time. A lawyer must keep complete records of trust account funds and other property of clients or third parties held by the lawyer and must preserve such records for at least seven years after termination of the representation. A lawyer must also maintain all financial records related to the lawyer's practice for not less than seven years. For other materials, if appropriate steps are taken to return or preserve actual client property or items with intrinsic value, then it is generally permissible for a legal services program to dispose of routine case file materials five years after case closing. Other considerations, such as administrative expense and the six-year Illinois statute of repose, suggest a general retention period for most lawyers of at least seven years. Any method of disposal must protect the confidentiality of client information.

References: Illinois Rules of Professional Conduct 1.4, 1.6, 1.15, and 1.16;

ISBA Professional Conduct Advisory Opinion 94-13;

Illinois Supreme Court Rule 769;

735 ILCS 5/13-214.3(c);

Restatement Third, The Law Governing Lawyers § 46 (2000);

Arizona Ethics Opinion 08-02 (December 2008);

West Virginia Ethics Opinion 2002-01 (March 2002).

FACTS

The inquiring legal services program has been existence for more than 35 years. Its staff and volunteer lawyers provide low or no-cost legal services to low-income persons in 65 Illinois counties. The program's annual case load averages more than 20,000.

The program retains case files and "conflict cards" for a period of five years after case closing. It permanently or indefinitely retains original documents (deeds, wills); documents in pending guardianship files; files which are or may be the subject of a pending or anticipated complaint, lawsuit or investigation; case-related materials which may have value as a part of the program's archives; money on deposit in the program's office or client trust accounts; and materials relating to open, active cases that are related to another case of a client's matter currently pending in the office.

The program routinely offers to return all materials furnished by clients to the program prior to the destruction of case files. If no materials were furnished, no offer is made. Storage costs are a major expense to the program. It believes that it can dispose of routine case file materials not described above five years after case closing without any adverse affect to the program's clients.

QUESTIONS

1. May the program routinely destroy "conflict cards" five years after case closing?

2. May the program routinely destroy case files five years after case closing?

OPINION

Although it is clear that a lawyer is required to preserve and protect the funds and other property of clients or third persons in the lawyer's possession, and there are explicit directives regarding the maintenance and preservation of financial records regarding a lawyer's practice, there is little guidance with respect to a lawyer's duty to preserve those portions of a lawyer's file that are neither client property nor financial records.

The Illinois Rules of Professional Conduct and the Illinois Supreme Court Rules provide specific guidance regarding preservation of client property and certain lawyer records. With respect to client funds and other property, Illinois Rule 1.15(a) requires:

> (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 deposited in one or more separate and identifiable interest- or dividend- bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third party. … Other, tangible property shall be identified as such and appropriately safeguarded. Complete records of client trust 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.

Rule 1.15(a)(1) through (8) lists specific requirements for the maintenance of "complete records" of trust accounts, including the retention of: receipt and disbursement journals, account ledgers, checkbook registers and bank statements, client retainer and compensation agreements, and copies of all bills and rendered to clients for legal fees and expenses.

Illinois Rule 1.16(d) further provides:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as … surrendering papers and property to the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Supreme Court Rule 769 defines two categories of lawyer records that must be kept as originals, copies, or computer-generated images. Paragraph (1) requires a lawyer to maintain records that identify the name and last known address of each client and reflect whether the representation of the client is ongoing or concluded. In contrast to Rule 1.15(a) and paragraph (2) of Supreme Court Rule 769, discussed below, paragraph (1) makes no reference to any period of time. It therefore appears that the client information described in paragraph (1) should be preserved indefinitely.

Paragraph (2) of Supreme Court Rule 769 requires that all financial records related to a lawyer's practice be maintained for a period of not less than seven years. Financial records are defined to include bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns, and tax reports.

The Committee Comment to Supreme Court Rule 769 notes that the 2003 amendment to the rule gives lawyers the option of maintaining records in forms that save space and reduce cost without increasing the risk of premature destruction. The comment also advises on appropriate types of electronic storage media: "For example, CDs and DVDs have a normal life exceeding seven years, so an attorney might use them to maintain financial records. At present, however, floppy disks, tapes, hard drives, zip drives, and other magnetic media have insufficient normal life to meet the requirements of this rule."

Aside from the rules discussed above, there appear to be no other Illinois professional conduct or court rules regarding the preservation of lawyer files or records. The *Restatement Third, The Law Governing Lawyers* § 46(1) (2000) provides that a lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client. Comment *b* to § 46 notes that a law firm need not preserve client documents indefinitely and may destroy documents that are outdated or no longer of consequence.

ISBA Opinion 94-13 (January 1995) reviewed in detail a lawyer's duty to return to clients or to provide access by clients or former clients to various categories of materials normally maintained in a lawyer's file. Because there are various types of

materials (like lawyer notes, drafts, research memoranda, and internal administrative documents) that a lawyer need not provide either copies or access to the client, there appears to be no reason to require retention of such materials after the materials are no longer of use to the representation.

Applying these rules and principles to the questions presented by the inquiring legal services program, the program should not routinely destroy the "conflict cards" five years after case closing because those records appear to reflect client information covered by Supreme Court Rule 769(1) that must be retained indefinitely. However, if the information required by Rule 769(1) is collected and preserved in some other acceptable form, then there is no reason to retain the actual "conflict cards" beyond five years after a matter is closed.

With respect to case files, given that the program retains original deeds, wills, and other documents with intrinsic value indefinitely and offers to return any materials furnished by clients, the program need not retain the rest of the case files more than five years after closing if those materials are no longer useful to the clients' representation. Designation by the Supreme Court of seven years as the minimum retention period for specific materials, including a detailed list of materials to be maintained with regard to client trust funds and other property held by a lawyer and the financial records of a law practice, suggests that a shorter period should be sufficient for routine materials. Thus, if the program has kept clients reasonably informed about the status of their matters in compliance with Rule 1.4(a), then the rest of the case files generally may be discarded after five years after closing.

There appears to be no consensus on the minimum period for retention of lawyer file materials no longer needed for a client's representation, but at least two other state bar opinions agree that five years after the conclusion of a matter is a reasonable option. See Arizona Opinion 08-02 (December 2008) and West Virginia Opinion 2002-01 (March 2002).

Although disposal of routine case file materials not covered by Rule 1.15(a) or Supreme Court Rule 769 five years after conclusion of a matter is generally permissible, other considerations suggest that a longer period might be advisable. One consideration is cost. For many lawyers, separating the records that must be maintained for at least seven years from those that may be discarded after five years would require additional administrative effort and expense that could exceed any saving in storage costs. Another consideration is the availability of a lawyer's file in the event of a claim against the lawyer. Given that the statute of repose for professional liability claims against lawyers, 735 ILCS 5/13-214.3(c), is six years, retaining files for some reasonable period beyond six years seems prudent. A general retention period of at least seven years after termination of the representation would comply with two of the Supreme Court's three record-keeping rules and keep a lawyer's file available in the event of a claim.

Finally, disposal of any part of a lawyer's file must be done in a manner that protects the confidentiality of all information relating to the client's representation, consistent with the lawyer's duty under Illinois Rule 1.6. Comment [16] to Rule 1.6 observes that a lawyer must act competently to safeguard information relating to the

representation of a client against inadvertent or unauthorized disclosure by the lawyer or others participating in the representation of the client or who are subject to the lawyer's supervision. Hence, the program must assure that its method of disposing of case files preserves the confidentiality of its clients' information.

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-07
January 2012

Subject: Court Obligations

Digest: Attorney does not have an obligation under R.P.C. Rule 3.3 to tell the court that the unrepresented adversary has a defense based on a written agreement that the attorney's client signed with the adversary and which the attorney now believes in good faith is unenforceable.

References: Illinois Rules of Professional Conduct, Rule 3.3

FACTS

Attorneys representing party A in litigation against unrepresented party B is aware that the two parties entered into a written agreement that would constitute a potential defense in favor of B, but the attorney has a good faith belief that the agreement is unenforceable. Client A did not consult with the attorney before entering into the agreement.

QUESTIONS

Must attorney advise the court of the agreement and potential defense?

OPINIONS

Rule 3.3 requires attorneys to exercise candor in dealing with the courts. For example, subsection (a)(1) provides that a lawyer "shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel," and sub-section (a)(3) prohibits a lawyer from knowingly offering false evidence. Together these sections require candor in dealing with the court.

As comment 2 observes, while a lawyer has a duty to present a client's case with "persuasive force," that duty is qualified by the lawyer's duty of candor to the tribunal. The comment goes on to say that the lawyer "must not allow the tribunal to be misled by false statements of law or fact which the lawyer knows to be false."

In the situation at hand, the lawyer is aware that the signed agreement between the lawyer's client and the unrepresented party constitutes a potential defense to the lawyer's client's claim; however, the lawyer also has good faith belief that the agreement is unenforceable. Under these circumstances the lawyer need not advise the court of the potential defense. Rule 3.3 (a) (2) provides that a lawyer shall not knowingly fail to disclose legal authority known to the lawyer to be directly adverse to the position of the client or offer evidence that is false. In the case at hand, the attorney has a good faith belief that the contract is unenforceable. This good faith belief supports the conclusion that the lawyer's failure to disclose the existence of the agreement does not contravene Rule 3.3.

Moreover, sub-section (a)(2) prohibits a lawyer from failing to disclose "legal authority" which is adverse to his or her client's position. The rule does not require the lawyer to disclose facts which are contrary to the client's position. Such disclosure, of course, would be an onerous burden in litigation, since a lawyer would generally be aware of "facts" contrary to his or her client's position. Here, the existence of an agreement which might exonerate the adversary is a fact which his not required to be disclosed by the lawyer. The lawyer, of course, could be in violation of sub-sections (a)(1) or (a)(3) if her or she makes false statements about the agreement or its existence.

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-08
March 2012

Subject: Confidentiality; Government Attorneys

Digest: Child sex abuse is "substantial bodily injury" for purposes of the Illinois Rules of Professional Conduct, so an Illinois lawyer must reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain child sex abuse. Whether an Illinois lawyer has a duty to report suspected child sex abuse under a federal statute is a question of law beyond the competence of the Committee.

References: Illinois Rule of Professional Conduct 1.6

ISBA Opinion 12-03 (January 2012)

Restatement Third, The Law Governing Lawyers § 66 (2000)

Balla v. Gambro, Inc., 145 Ill.2d 492, 584 N.E.2d 104 (1991)

42 U.S.C. § 13031

FACTS

The inquiring lawyer, admitted in Illinois, works as a civilian lawyer providing legal assistance to military personnel and their families at a federal military facility. A divorce client has disclosed to the lawyer that the client's spouse had committed various infidelities, including soliciting sex from minors. When the lawyer advised the client to report the matter to law enforcement authorities, the client expressed a strong reluctance to do so. The client also claimed to lack proof of any actual sexual assault of minors although some of the spouse's emails that the client claimed to have seen, which the lawyer has not seen, indicated that the spouse was interested in meeting children for sex. The lawyer asks whether there is a duty under the Illinois Rules of Professional Conduct or federal law to report this situation to the appropriate law enforcement authorities.

OPINION

This inquiry raises issues of a lawyer's duty to reveal information to prevent abuse of a minor. The general rule governing client confidentiality is Illinois Rule 1.6, which provides in relevant part:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);
>
> …
>
> (6) to comply with other law or a court order.
>
> (c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

As explained in Comment [3] to Rule 1.6, the rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." See, *e.g.*, ISBA Opinion 12-03 (January 2012) (identity of lawyer's client protected). Comment [3] also explains that a lawyer may not disclose protected information except as authorized by the Rules or other law. Paragraph (b) of the rule lists six situations where disclosure of client information by the lawyer may be permitted, but is not required. Paragraph (b)(1) permits disclosure to the extent the lawyer reasonably believes necessary to prevent the lawyer's client from committing certain crimes. Because paragraph (b)(1) applies only to situations where the lawyer's client is the potential perpetrator, it would not appear relevant to the situation presented, where the client's spouse is the person who may intend a criminal act.

Paragraph (b)(6) permits disclosure to the extent the lawyer reasonably believes necessary to comply with "other law" or a court order. Comment [12] to Rule 1.6 explains that whether such other law supersedes Rule 1.6 is a question of law beyond the scope of the rules. The Comment further explains that when disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4 (lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). If, however, the other law requires disclosure, then paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

There is a federal statute, 42 U.S.C. § 13031, concerning child abuse reporting. Paragraph (a) of § 13031 requires a person engaged in a professional capacity on federal land or in a federal facility who "learns of facts that give reason to suspect that a child has suffered an incident of child abuse" to report promptly to designated authorities. Whether this statute applies to the Illinois lawyer in the situation presented is a question

of law beyond the competence of this Committee. However, if § 13031 applies and requires a report, then the inquiring lawyer would be permitted by Rule 1.6(b)(6) to make the disclosures required to comply with the statute.

The other potentially relevant provision of Rule 1.6 is paragraph (c), which directs that a lawyer "shall" reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm. In contrast to the permissive disclosures under paragraph (b), the duty to disclose under paragraph (c) to prevent reasonably certain death or substantial bodily injury is mandatory. And this duty is neither excused nor negated by the client's wishes or instructions. See *Balla v. Gambro, Inc.*, 145 Ill.2d 492, 502, 584 N.E.2d 104, 109 (1991) (in-house lawyer "had no choice but to report to the FDA" employer's plan to distribute defective dialysis machines). At least twelve other states have a similar mandatory disclosure rule. See Arizona Rule 1.6(b); Connecticut Rule 1.6(b); Florida Rule 4-1.6(b)(2); Iowa Rule 32:1.6(c); Nevada Rule 1.6(c); New Jersey Rule 1.6(b)(1); North Dakota Rule 1.6(b); Tennessee Rule 1.6(c)(1); Texas Rule 1.05(e); Vermont Rule 1.6(b)(1); Washington Rule 1.6(b)(1); and Wisconsin Rule 20:1.6(b).

Also in contrast to paragraph (b)(1), paragraph (c) does not limit disclosure to acts of the lawyer's client. Thus, in the situation presented, the fact that the potential perpetrator is the client's spouse rather than the client would not relieve the lawyer of the duty to disclose an otherwise reportable threat of death or substantial bodily harm. Whether there is a reportable threat will usually depend upon the specific circumstances because paragraph (c) requires that the lawyer "reasonably believes" that the disclosure is "necessary" to prevent "reasonably certain" death or substantial bodily injury. In the situation presented, it is not clear whether the spouse's alleged interest in meeting children for sex is a realistic threat to any particular child or merely a prurient fantasy. For there to be a mandatory duty to disclose, the threat must meet the tests of paragraph (c). It should also be noted that paragraph (c) applies only to future harm rather than past conduct.

Finally, it seems clear that child sex abuse should be regarded as "substantial bodily harm" for purposes of Rule 1.6(c). By definition, sex acts with minors are nonconsensual; and such activity likely involves violence and intimidation. Comment *c* to § 66 of *Restatement Third, The Law Governing Lawyers* (2000), includes "child sexual abuse" in the definition of "serious bodily harm" for purposes of § 66, which permits a lawyer to use or disclose confidential client information when the lawyer reasonably believes necessary to prevent reasonably certain death or serious bodily harm to a person.

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-09
March 2012

Subject: Unauthorized Practice of Law; Multijurisdictional Practice; Law Firms

Digest: A lawyer not admitted in Illinois may not primarily practice in this state, physically or through a virtual office, even if the co-owner of the law firm is a lawyer, licensed in Illinois, who has direct supervision of the non-admitted lawyer on matters involving Illinois clients.

References: Illinois Rules of Professional Conduct 5.5, 7.1, 8.5(a)

ABA Report of the Commission on Multijurisdictional Practice (2002)

Illinois Supreme Court Rule 721(a)(4)

Ohio Sup. Ct., Bd. of Comm'rs on Grievances & Discipline, Opinion 2011-2

FACTS

Two attorneys wish to establish a law practice owned 50/50 between them. One is licensed only in Illinois, one is licensed only in State X.

Both live and primarily work in Illinois. However, the attorney licensed in State X makes frequent visits to State X for networking and to cultivate a client base there. The attorneys agree that the Illinois-licensed attorney will have direct supervision and ultimate authority over matters involving Illinois clients, although the State X-licensed attorney will interact with Illinois clients and dispense legal advice to them from time to time.

The Illinois-licensed attorney will sign all pleadings in Illinois courts, make all Illinois court appearances, and conduct any Illinois real estate closings personally. The State X-licensed attorney will engage in networking and market himself in Illinois as an attorney, but will take precautions to ensure that potential clients do not get the impression that he is licensed in Illinois. All letterheads and business cards will clearly

and correctly indicate the jurisdictions in which each attorney is licensed to practice. Both attorneys agree to make sure, at the time any client is acquired, that the client understands that the State X-licensed attorney is not licensed in Illinois. Retainer agreements will contain bold-type disclosures to this effect.

QUESTIONS

Is the State-X licensed attorney in the above scenario engaged in the unauthorized practice of law for purposes of Rule of Professional Conduct 5.5 or any other restrictions?

Also, if the practice were to have a virtual office and the lawyers' states of bar admission were made clear in correspondence, would there be ethical concerns?

OPINIONS

RPC 5.5 addresses the topics of unauthorized practice of law and multijurisdictional practice, and provides definitive guidance in answering the first question posed. Paragraph (b) of the rule is the provision applicable to that inquiry:

> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> > (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
> > (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Under the facts provided, the State X lawyer would work primarily in Illinois, which means that he would have a systematic and continuous presence (presumably including an office) in Illinois for the practice of law, in violation of paragraph (b)(1). The fact that the state of admission is accurately displayed does not vitiate that violation, as Rule 5.5(b)(1) prohibits the systematic and continuous presence, independent of the lawyer's representation as to his bar admission. Rule 5.5(b)(2) serves as a specific example of the general prohibition, in RPC 7.1, against making "a false or misleading communication." Lawyers engaged in allowable multijurisdictional practice should not state or imply that they are generally admitted in locations outside of their actual jurisdictions of admission.

Paragraph (b)(1) does allow for exceptions, and several safe harbors are established by paragraph (c) (temporary practice in discrete matters) and paragraph (d) (house counsel and federal practice). None of those exceptions apply to the proposed law practice, nor is there any other law in Illinois that would permit it. Despite the fact that the Illinois lawyer will personally attend court and real estate closings and will supervise the State X lawyer, the latter will still be practicing law in Illinois systematically and continuously.

The promulgation of Rule 5.5 was intended to reflect the realities of multijurisdictional practice by clarifying the circumstances under which it would be allowed, but it was not intended to modify the familiar understanding among American lawyers "...that they may not open a permanent office in a state where they are not licensed...." American Bar Association, Report of the Commission on Multijurisdictional Practice, Introduction and Overview, p. 13 (August 2002). While multijurisdictional law practices are allowable and not uncommon, it is expected that lawyers in such arrangements will practice primarily in their respective states of admission. See Ill. Sup. Ct. R. 721(a)(4)(non-admitted shareholders of professional service corporations, etc., not permitted to practice law in Illinois).

The Committee concludes that the State X lawyer would be acting in violation of Rule 5.5(b) should he work primarily in Illinois. Such a lawyer would be subject to discipline not only in State X, but also in Illinois, inasmuch as RPC 8.5(a) (as amended effective January 1, 2010, to account for multijurisdictional practice) provides, in part, as follows: **"**A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." And the Illinois lawyer would be subject to discipline for participating in the arrangement, as Rule 5.5(a) forbids assisting another in unauthorized practice.

The second question seeks the Committee's view on the same set of facts, except that the firm would have a virtual office from which the firm's correspondence would identify the lawyers' respective states of admission. The advent of the virtual law office, or online legal practice, has raised several ethical challenges, including concerns about the unauthorized practice of law. Such issues can and should be analyzed under the framework of the Rules of Professional Conduct. See, e.g., Ohio Sup. Ct., Bd. of Comm'rs on Grievances & Discipline, Op. 2011-2 (October 7, 2011).

In the context of a virtual law office involving lawyers from different states, each lawyer should take care that any out-of-state practice is not systematic and continuous**.** The proposed practice involves a lawyer from State X who wishes to practice regularly in Illinois, whether through a physical presence or a virtual presence. "Presence may be systematic and continuous even if the lawyer is not physically present here." RPC 5.5, Comment [4]. So even if the virtual office were not based in Illinois, the fact that the State X lawyer would do work for Illinois clients and would seek legal work in Illinois establishes a systematic and continuous presence. As noted in the Ohio ethics opinion cited above, concerning a law firm located outside of Ohio and advertising on the internet, "'Systematic and continuous' presence includes both physical and virtual presence in Ohio." Ohio Op. 2011-2, p. 8.

Because the State X lawyer wishes to practice regularly in Illinois, the Committee is of the opinion that Rule 5.5(b) bars the proposed practice, regardless of whether the lawyer's presence in Illinois is physical or virtual. Additionally, because the Illinois lawyer would be part and parcel of the project, he or she would be subject to discipline under Rule 5.5(a) for assisting the State X lawyer.

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ILLINOIS STATE BAR ASSOCIATION

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-09
March 2012

Subject: Unauthorized Practice of Law; Multijurisdictional Practice; Law Firms

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Under the facts provided, the State X lawyer would work primarily in Illinois, which means that he would have a systematic and continuous presence (presumably including an office) in Illinois for the practice of law, in violation of paragraph (b)(1). The fact that the state of admission is accurately displayed does not vitiate that violation, as Rule 5.5(b)(1) prohibits the systematic and continuous presence, independent of the lawyer's representation as to his bar admission. Rule 5.5(b)(2) serves as a specific example of the general prohibition, in RPC 7.1, against making "a false or misleading communication." Lawyers engaged in allowable multijurisdictional practice should not state or imply that they are generally admitted in locations outside of their actual jurisdictions of admission.

Paragraph (b)(1) does allow for exceptions, and several safe harbors are established by paragraph (c) (temporary practice in discrete matters) and paragraph (d) (house counsel and federal practice). None of those exceptions apply to the proposed law practice, nor is there any other law in Illinois that would permit it. Despite the fact that the Illinois lawyer will personally attend court and real estate closings and will supervise the State X lawyer, the latter will still be practicing law in Illinois systematically and continuously.

The promulgation of Rule 5.5 was intended to reflect the realities of multijurisdictional practice by clarifying the circumstances under which it would be allowed, but it was not intended to modify the familiar understanding among American lawyers "...that they may not open a permanent office in a state where they are not licensed...." American Bar Association, Report of the Commission on Multijurisdictional Practice, Introduction and Overview, p. 13 (August 2002). While multijurisdictional law practices are allowable and not uncommon, it is expected that lawyers in such arrangements will practice primarily in their respective states of admission. See Ill. Sup. Ct. R. 721(a)(4)(non-admitted shareholders of professional service corporations, etc., not permitted to practice law in Illinois).

The Committee concludes that the State X lawyer would be acting in violation of Rule 5.5(b) should he work primarily in Illinois. Such a lawyer would be subject to discipline not only in State X, but also in Illinois, inasmuch as RPC 8.5(a) (as amended effective January 1, 2010, to account for multijurisdictional practice) provides, in part, as follows: **"**A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." And the Illinois lawyer would be subject to discipline for participating in the arrangement, as Rule 5.5(a) forbids assisting another in unauthorized practice.

The second question seeks the Committee's view on the same set of facts, except that the firm would have a virtual office from which the firm's correspondence would identify the lawyers' respective states of admission. The advent of the virtual law office, or online legal practice, has raised several ethical challenges, including concerns about the unauthorized practice of law. Such issues can and should be analyzed under the framework of the Rules of Professional Conduct. See, e.g., Ohio Sup. Ct., Bd. of Comm'rs on Grievances & Discipline, Op. 2011-2 (October 7, 2011).

In the context of a virtual law office involving lawyers from different states, each lawyer should take care that any out-of-state practice is not systematic and continuous**.** The proposed practice involves a lawyer from State X who wishes to practice regularly in Illinois, whether through a physical presence or a virtual presence. "Presence may be systematic and continuous even if the lawyer is not physically present here." RPC 5.5, Comment [4]. So even if the virtual office were not based in Illinois, the fact that the State X lawyer would do work for Illinois clients and would seek legal work in Illinois establishes a systematic and continuous presence. As noted in the Ohio ethics opinion cited above, concerning a law firm located outside of Ohio and advertising on the internet, "'Systematic and continuous' presence includes both physical and virtual presence in Ohio." Ohio Op. 2011-2, p. 8.

Because the State X lawyer wishes to practice regularly in Illinois, the Committee is of the opinion that Rule 5.5(b) bars the proposed practice, regardless of whether the lawyer's presence in Illinois is physical or virtual. Additionally, because the Illinois lawyer would be part and parcel of the project, he or she would be subject to discipline under Rule 5.5(a) for assisting the State X lawyer.

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ILLINOIS STATE BAR ASSOCIATION

ISBA Professional Conduct Advisory Opinion

Opinion No. 12-10
March 2012

Subject: Withdrawal from Representation; Impaired Client; Confidentiality

Digest: It would be professionally proper for a lawyer to request permission of the Court to withdraw if the client's actions or conduct is rendering the lawyer's fulfillment of employment difficult or is demanding action which in the lawyer's judgment is contrary to the law. Under the facts presented, it would be professionally proper for a lawyer to seek the establishment of guardianship for a client when the information upon which the lawyer acts was learned by the lawyer through the confidential relationship

References: Illinois Rules of Professional Conduct 1.16, 1.14, 1.6

Kelly R. Peck, Ethical Issues in Representing Elderly Clients with Diminished Capacity, 99 Ill. Bar J. 572 (2011)

ABA Annotated Mode Rules of Professional Conduct, 7th Edition (2011)

FACTS

The inquiring lawyer represents a client in a divorce proceeding. He has obtained what he feels to be a favorable settlement. The client has a history of psychiatric problems and is irrational in discussions with the lawyer. The client has consented to the proposed Judgment and Agreement and now refuses to sign. The lawyer does not believe the client is capable of making decisions in her own best interest.

The client has also begun to demand nearly impossible tasks of the lawyer. For example, though the client has no funds to pay for future litigation, the client wants full custody of the 17-year old child who moved in with the spouse and who refuses to live with the client. (The Committee presumes that issues of custody are addressed in the proposed Judgment and Decree.)

The lawyer inquires whether he is able to withdraw from representation in the divorce proceedings. He also inquires whether he is able to suggest that the Court

determine whether a guardian need be appointed without breaching the confidentiality between the lawyer and a client.

OPINION

Rule 1.16(b) (4) allows withdrawal of a lawyer if the client "insists on taking action that the lawyer considers repugnant or which with the lawyer has a fundamental disagreement." Rule 1.16(b) (6) allows withdrawal by a lawyer if "the representation… has been rendered unreasonably difficult by the client." If a lawyer believes withdrawal is advisable, the lawyer must seek the permission of the tribunal or comply with applicable law pursuant to 1.16(c). Additionally, upon termination of the representation, the lawyer must take steps to protect the interests of the client, including giving reasonable notice, time to employ other counsel, returning papers and property to which the client is entitled, and returning unearned fees to the client pursuant to 1.16(d).

Lastly, the question arises as to whether or not the lawyer may request the Court, when he asks permission to withdraw, to determine if guardianship is proper. Rule 1.6 provides that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out representation, or the disclosure is permitted under the Rule. However, Rule 1.14 provides specific guidance with respect to a client with diminished capacity. Specifically Rule 1.14(b) provides "when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." Although information relating to the representation of the client is protect by Rule 1.6, Pursuant to Rule 1.14(c), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interest.

Comments to Rule 1.14 state the obvious: "The lawyer's position in such cases is an unavoidably difficult one." Any lawyer encountering this type of a factual situation should carefully review the factors set forth in the comments to Rule 1.14. However, under the facts presented, it would be professionally proper for a lawyer to seek the establishment of a guardianship for a client even when the information upon which the lawyer acts was learned by the lawyer through the confidential relationship.
