Struggling To Do Right: Clients With Diminished Capacity

JAMES J. GROGAN, ARDC
ISBA 4th Annual Elder Law Bootcamp, APRIL 27, 2017
John Cuneo looks on as Hopalong opens the Frontier Town with a bang.

From Gutenberg to the Cuneo Press.
each of us in the presence of the Testatrix; and that each of us believed the Testatrix to be of sound mind and memory at the time of signing.
In re Myers, M.R. 16808, 98 CH 6

The Lawyer...

“[F]ound himself in a legal and ethical dilemma and resolved it in favor of his client and without regard to his personal interests. For this he cannot be disciplined......

-Hearing Board Report
More Hearing Board Report in M.R. 16808, 98 CH 6

In signing a false affidavit concerning his client’s testamentary capacity, the Hearing Board held that the Lawyer put:

“his client’s interests above his own” & “appropriately resolved an unusual legal and actual dilemma in favor of his client at risk to his own interests.”

The Review Board Report in M.R. 16808, 98 CH 6

“We also disagree with the Hearing Board statement that [the Lawyer] used the "best and safest" way to protect his client's interests and had no other "risk-free" alternative. The lack of a "risk-free" alternative does not justify misconduct... [he] violated the Rules of Professional Conduct and the fact that he may have believed that these violations were necessary to protect his client from fraud does not justify his actions.”
TOPICS

- MCLE Rule Change and an Anti-Discrimination Proposal;
- Two National Regulatory Trends;
- Select Facts & Figures;
- Three Key IRPC to Know Regarding Client Capacity;
- In re Karavidas; &
- A Pending Case of Note & PMBR.
An MCLE Rule Change (eff. July 1, 2017)

Under Amended Supreme Court Rule 794(d), all Illinois lawyers will be required to complete one hour of diversity and inclusion CLE and one hour of mental health and substance abuse CLE as part of their Professional Responsibility CLE requirement. The amendment does not affect the total number of hours required to fulfill the professional responsibility requirement, which remains at six, or the total number of CLE credits required in each two-year reporting period, which remains at 30. Lawyers may alternatively continue to fulfill the required six hours of Professional Responsibility CLE by completing the Illinois Supreme Court Commission on Professionalism’s Lawyer-to-Lawyer Mentoring Program, as set forth in Illinois Supreme Court Rule 795(d)(11).
(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.
ISBA Assembly OKs futures report, approves UBE and collaborative law proposals

At its December 10 meeting, the ISBA Assembly approved the recommendations of the ISBA Task Force on the Future of Legal Services, voted to support adoption of the Uniform Bar Exam in Illinois, and endorsed legislation and an ethics rule change to expressly authorize collaborative process. The Assembly also voted to oppose adoption of ABA Model Rule 9.4(g), an anti-discrimination provision that critics regard as too subjective.

Futures report. The futures task force grew out of concern about the creation of court-licensed nonlawyer legal service providers, also known as LLLTs, in Washington state (for more, see the September 2015 Illinois Bar Journal cover story). The task force recommends against the adoption of an LLLT program in Illinois.

The group also studied broader challenges to the profession, including the rise of internet-based legal service providers, the impact of technology on legal practice, and the increasing number of self-represented litigants. The task force recommends that the ISBA create a consumer-oriented lawyer directory, provide technology and practice-management education and resources to members, and establish a standing committee on the future of legal services, among other measures. The report and recommendations will be the subject of the January 2017 Illinois Bar Journal cover story.

The Assembly voted overwhelmingly to oppose adoption of the rule in Illinois.
Justice
Mary Ann McMorrow
1992-2006

IRPC Rule 8.4(a)(5)
1993-2001

(a) A lawyer shall not:
* * *

(5) engage in conduct that is prejudicial to the administration of justice. In relation thereto, a lawyer shall not engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex, religion, or national origin. This subsection does not preclude legitimate advocacy when these or similar factors are issues in the proceeding.
Bias Against Women Found In State Courts

July 24, 1990 | By Sharman Stein.

The Illinois judicial system is permeated with institutionalized bias against women, jeopardizing their right to fair treatment in cases involving divorce, domestic violence and sexual assault, a panel of judges, lawyers and professors charged in a report released Monday.

The 46-member Illinois Task Force on Gender Bias in the Courts, set up two years ago with the encouragement of the Illinois Supreme Court, also found persistent bias against female lawyers. The task force was organized by the Illinois Bar Association, the Chicago Bar Association and the Women's Bar Association of Illinois.

The 420-page report was based on extensive surveys, public hearings and interviews with thousands of judges, people undergoing divorce, advocates for sexual assault victims and agencies that serve victims of domestic violence.

IRPC Rule 8.4(a)(5)
2001-2009

a) A lawyer shall not:
*   *   *

(5) engage in conduct that is prejudicial to the administration of justice. In relation thereto, a lawyer shall not engage in adverse discriminatory treatment of litigants, jurors, witnesses, lawyers, and others, based on race, sex, religion, or national origin, disability, age, sexual orientation or socioeconomic status. This subsection does not preclude legitimate advocacy when these or similar factors are issues in the proceeding.
ICPR 8.4(j) formerly 8.4(a)(9)
It is professional misconduct for a lawyer to...

...violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer’s fitness as a lawyer...

Attorney Paul Weiss disbarred by Illinois Supreme Court over sexual misconduct charges

Lawyer accused of exposing himself, improper touching is disbarred

In re Paul M. Weiss,
M.R. 27547, 2008PR00116 (Nov. 17, 2015)
Two National Trends

-NO. 1-

Miami, Feb. 2017

The Public & the Profession are Interacting more with AVVO & Other On-Line Service Providers & Thus Ethics Regulators will have to Deal with Such Providers.
will for me and my wife

About 65,800,000 results (1.27 seconds)

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Ad www.legalzoom.com/last-will

LegalZoom Can Help You Ease the Burden on Your Loved Ones. Start a Will Today.

“A+ Rating” – Better Business Bureau

Will God Bring My Ex-Wife Back? - Truthsaves

You train the best athletes...
A Last Will is a great start to your estate plan.

We offer the next steps after a Last Will as part of our Estate Plan Bundle. Save time, money, and protect your family and loved ones with this special offer.

Estate Plan Bundle with Attorney Advice

- A year of attorney advice, to discuss, review, and confirm your estate plan with an independent attorney. Make any updates for a year for free.
- A Last will, to state who gets your assets when you pass away and to name guardians for your minor children.
- A Living will, so you can specify instructions about life support and medical care.
- A Power of attorney, to name someone to handle your financial and legal affairs if you can't.

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- Only a last will, to state who gets your assets when you pass away and to name guardians for your minor children.

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IRPC 5.4

PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer...

The Supreme Court of Ohio
BOARD OF PROFESSIONAL CONDUCT
480 North Front Street, 4th Floor, Columbus, Ohio 43215
Telephone: 614.317.3535
www.supremecourt.ohio.gov

OPINION 2016-3
Issued June 3, 2016

Lawyer Participation in Referral Services

SYLLABUS: A lawyer should carefully evaluate a lawyer referral service, or similar online model, to ensure that it complies with the Rules of Professional Conduct and the ethical requirements of the lawyer. Where the service meets all of the elements of a lawyer referral service, a participating lawyer must ensure that the service complies with Gen Bar R. XVI, in order for the lawyer to comply with the Rules of Professional Conduct. A lawyer's participation in an online, nonlawyer-owned legal referral service, where the lawyer is required to pay a "marketing fee" to a nonlawyer for each service completed for a client, is unethical. A lawyer must ensure that the lawyer referral service does not interfere with the lawyer's independent professional judgment under Prof.Cond.R. 5.1. A lawyer is responsible for the conduct of the nonlawyers of the service (Prof.Cond.R. 5.3), as well as the advertising and marketing provided by the service on the lawyer's behalf. Prof.Cond.R. 7.1, 7.2, 7.3. Additionally, a fee structure that is tied specifically to individual client representations that a lawyer completes or to the percentage of a fee is not permissible, unless the lawyer referral service is registered with the Supreme Court of Ohio. Prof.Cond.R. 1.3, Gen Bar R. XVI.

QUESTION: A lawyer seeks guidance regarding whether a particular business model involving online lawyer referrals is permissible under the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio. The proposed business model is an online referral service that matches a prospective client with a lawyer for a particular legal service. Although the client chooses the lawyer, the company defines the type of legal services offered, the scope of the representation, the fees charged, and other
How it works

What is Avvo Legal Services?

Avvo Legal Services is a range of fixed-fee, limited-scope legal services determined by Avvo and fulfilled by local attorneys. Avvo defines the services and prices. Attorneys choose which services they would like to offer in their geographical area. Local clients purchase legal services, choose the attorney they want to work with, and pay the full price of the service up front. The chosen attorney then completes the service for the client and is paid the full legal fee. As a separate transaction, the chosen attorney pays a per-service marketing fee for the completed, paid service. Attorney participation is governed by the Avvo Legal Services Terms.

Ethics

Should I be concerned about fee-splitting?

No. Avvo always sends you 100% of the client's payment to the account you've chosen for deposits—probably your client trust account. As a separate transaction, you will pay a per-service marketing fee from your operating account. As a completely separate transaction, you will pay a per-service marketing fee.
No. 2

Misconduct Decisions Involving ‘Lawyer Review’ Web Sites Appear to be on the Rise.

San Diego 2016
In re John Richard Gaertner, Jr.,

John R Gaertner

Practice areas:
- Family, Divorce and separation
- Child custody, Child support
- Domestic violence

Reviews: ★★★★★ out of 13 reviews

Avvo Rating: 5.0 out of 10

John R Gaertner’s response: “In my 24 years as an attorney, I have never encountered a client such as this client. I have been an assistant city attorney, a Deputy County Attorney in a major felony division, a criminal defense attorney representing clients charged with serious felony charges and a family law attorney for over a decade. Most clients have reasonable expectations, understand the process when the process is explained to them, can be reasoned with, and pay their fees when they are due as per the fee agreement. This client was very difficult. After I was retained, my firm immediately filed a Notice of Appearance and a Request for Mediation (required by the current court order). A mediation date was secured the very day the mediation request was filed. My firm thoroughly reviewed the recent case file and from notes that were taken at the initial meeting with the client, a Petition to Modify Legal Decision Making Authority, Parenting Time and Child Support was drafted. The draft was sent to the client and reviewed. Any additions, corrections, etc... requested by the client were made and the final draft prepared. The Petition was filed with the court shortly after the Petition for Mediation. All pleadings filed from my office are professionally prepared, legally sound and persuasive. The court set a resolution management conference on a date that conflicted with a previously scheduled trip I had with my daughter to California. The client was explained why the court date needed to be re-scheduled. The court eventually re-scheduled the resolution management conference in mid July 2015. My client requested that I file a Motion to Accelerate, which I did and within three (3) days the court granted the motion and re-scheduled the court date to June 3, 2015. After two months of working on this case, the client was sent a bill and immediately questioned nearly every charge that was included in the bill. The changes were reasonable and necessary in my representation of this client. When the client refused to pay the amount owed and the replenishment, pursuant to the terms of the fee agreement, I withdrew as counsel in this matter. I behaved professionally and ethically throughout my representation of this client. The dispute between Father and Mother in this case began thirteen (13) years ago. After my client refused to pay her bill, I carefully reviewed the entire history of this case from its inception and discovered that I was the FIFTH attorney that my client had hired. All previous attorneys had either filed Motions to Withdraw or were fired by my client. Family law attorneys do their best to address and try to assist client’s in extremely volatile family conflicts. The process is sometimes frustrating and clients have taken their frustrations out on their attorneys. This client has now retained her SIXTH attorney to assist her in this case.”
## Preliminary Stats for 2016 ARDC Annual Report

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Complaints</th>
<th>% of Growth</th>
<th>Investigations</th>
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<tr>
<td>2017</td>
<td>5,470</td>
<td>-3%</td>
<td>1,544</td>
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<td>5,470</td>
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<td>5,648</td>
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<td>1,442</td>
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<td>5%</td>
<td>1,466</td>
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<tr>
<td>2013</td>
<td>6,128</td>
<td>3%</td>
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<td>2012</td>
<td>6,468</td>
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<td>1,393</td>
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<tr>
<td>2011</td>
<td>6,897</td>
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<td>1,393</td>
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<td>7,468</td>
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<tr>
<td>2006</td>
<td>10,598</td>
<td>11%</td>
<td>1,247</td>
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</table>

*Totals are higher than number of complaints filed because a complaint may be based on more than one investigation.*
# More Preliminary Stats for 2016

<table>
<thead>
<tr>
<th>Year</th>
<th>Matters Filed</th>
<th>Matters Concluded</th>
<th>Matters Filed</th>
<th>Matters Concluded</th>
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<td>93</td>
<td>149</td>
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<td>2016</td>
<td>86</td>
<td>130</td>
<td>112</td>
<td>29</td>
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<tr>
<td>2017</td>
<td>73</td>
<td>21</td>
<td>22</td>
<td>104</td>
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</tbody>
</table>

83.....Lowest Since 1988

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**Illinois Client Protection Program Claims**

$3,096,168
Illinois CPP Award Experience
Increase in Award Averages

<table>
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<tr>
<th>Time Period</th>
<th>Total Claims Paid</th>
<th>Average Annual Claims Paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003-2012</td>
<td>$8,405,597</td>
<td>$840,559</td>
</tr>
<tr>
<td>2013-2016</td>
<td>$8,901,488</td>
<td>$2,225,372</td>
</tr>
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</table>

Client Competency
THREE KEY IRPC PROVISIONS “3-C’S”

- IRPC 1.1: Competence;
- IRPC 1.8: Conflict of Interest: Current Clients: Specific Rules; &
- IRPC 1.14: Client with Diminished Capacity.

1. IRPC 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
• For over thirty years, Stanislaw and Krystyna own a Craftsman-era bungalow in Park Ridge;

• One day, Komlo approached a Chicago Lawyer to assist Komlo in selling that bungalow;

• Komlo tells Lawyer that the Couple are in Poland. Komlo provides lawyer with photocopies of sales contract for $600,000 and POA which purportedly gave Komlo right to convey property;

• Lawyer never sees original documents;
• POA identifies Stanislaw and Krystyna as owners, but only contains Krystyna’s purported signature;
• Couple not in Poland, happily living in the bungalow unaware of the events that were transpiring;
• Lawyer never attempts contact couple to confirm intent to sell property;
• At closing, Lawyer prepared handwritten deed on behalf of couple, signed by Komlo and notarized by Lawyer;
• Lawyer receives legal fee of $650 and title examiner fee of $902.50;

• Title Co. issues 2 checks: 1 for $150,000 to a 3rd-party and 1 for $342,362.73 to the Couple. Komlo obtains the Couple’s check;
• A few days after closing, Couple receive permit from Park Ridge in the mail. They go to City Hall and find out their home was sold;
• Lawyer’s name on the permit app. They call him;
• Lawyer does not cooperate with Couple, so they hire attorney;
• Couple’s attorney contacts title company. Title Co. places stop order on two checks;
• ARDC formally charges Lawyer with misconduct;
• After trial, Hearing Board concludes A/C relationship existed between Couple and Lawyer and that he was incompetent in his representation of them;
• Board finds no evidence that Lawyer knew that a fraudulent act had been committed, or was about to be committed, by Komlo, although Panel acknowledged irregularities in POA.

Lawyer suspended by Supreme Court for five months.

In re Gauza,
M.R. 26225, 2008PR00098
(Ill. Dec. 11, 2013)
2. IRPC 1.8(c) CONFLICT

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer…is related to the client….
• Lawyer drafts testamentary documents for elderly client, a long-time social acquaintance;
• Lawyer gives himself specific bequest of $75g;
• After client dies, Lyric Opera, another specific beneficiary, threatens to sue alleging undue influence;
• There were $300g in specific bequests; estate had value of $240g-$260g, thus requiring pro rata reduction of specific bequests and nothing for residuary beneficiaries;
• ARDC notified;

More Opera.........

• Lawyer reduces gift by amount of estate shortfall so that all specific beneficiaries get amount promised them in documentation;
• Lawyer censured by the Court;

3. IRPC 1.14 CLIENT CAPACITY

IRPC 1.14

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, THE LAWYER SHALL, AS FAR AS REASONABLY POSSIBLE, MAINTAIN A NORMAL CLIENT-LAWYER RELATIONSHIP with the client.
IRPC 1.14 Comment 1

...a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. For example... some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.
(b) 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.
IRPC 1.14 Comment 5

Examples of Protective Measures:

1. Consulting with family members;
2. Using a reconsideration period to permit clarification or improvement of circumstances;
3. Using voluntary surrogate decision-making tools, i.e., durable POA;
4. Consulting with support groups, professional services, adult-protective agencies;
5. Consulting with other individuals/entities that have the ability to protect the client; or
6. Seeking guidance from an appropriate diagnostician.

EMERGENCY LEGAL ASSISTANCE

...where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter...(Comment 9)
IRPC 1.14(c)

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), 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 interests.

In re 90 CH 180,
[W]e conclude that the law does not impose upon an attorney the duty to ascertain mental capacity or incapacity with the techniques employed by trained professional medical personnel or even long time close friends, associates, or family when dealing with a client not otherwise known to be mentally disabled.

-ARDC Hearing Board
In re 90 CH 180

The Mistreatment of Elderly Clients
Two Examples
Mistreatment—Example One

- Lawyer represents elderly client suffering from dementia and other ailments;
- Client had successful career as fabric buyer and dress designer;
- Never married nor had any children;
- Lawyer depletes entire estate, taking ~$187,000 in purported fees for managing her care before her death and, after her death, taking ~$464,000 more;
- Lawyer disbarred.

In re Donald L.F. Metzger, M.R. 26210, 2010PR00115 (Ill. Sept. 25, 2013)

Mistreatment—Example Two

- Elderly woman named Laverne consults Lawyer about deceased husband’s estate;
- Lawyer says she can recover more than $350,000 on various claims she might have even though estate relatively modest;
- Laverne hires Lawyer;
- 28 months later, the only money Lawyer has secured, despite charging Laverne $49g in fees, was a $10g widow’s award;
- Estate offers to settle claims for $20g, one-third of the estate’s value. Laverne wants to take offer, tells Lawyer to accept;
More of Laverne’s Plight

• Lawyer insists that she continue litigation;
• Laverne tells Lawyer she no longer needs his services;
• Lawyer refuses to allow her to discharge him;
• Lawyer files guardianship petition and seeks to have himself appointed as client’s guardian. Circuit Court finds no evidence that Laverne ever needed a guardian and dismisses petition;
• Lawyer charged with engaging in a prohibited conflict of interest; &
• Lawyer suspended—later ordered permanently retired by Supreme Court.

In re Patterson, M.R. 26129, 2008PR00074 (Ill. Sept. 25, 2013)

On Constructive Fraud

“...[W]e conclude that respondent’s conduct was constructive fraud, and that the scope of [the ethics code] encompasses constructive fraud. Constructive fraud does not require as an element that the actor have a dishonest purpose or an intent to deceive, and constructive fraud can be inferred from the parties’ relationship and the circumstances.”

In re William J. Gerard, 132 Ill.2d 507, 528 548 N.E.2d 1051, 1058 (Ill. 1989)
MISUNDERSTOOD
DISCIPLINARY
PRECEDENT

ILLINOIS OFFICIAL REPORTS
Supreme Court

In re Karavidas, 2013 IL 115767

Caption in Supreme Court:
In re THEODORE GEORGE KARAVIDAS, Attorney-Respondent.

Docket No. 115767

Filed November 15, 2013
The Karavidas Holding...

...professional discipline may be imposed only upon a showing by clear and convincing evidence that the respondent attorney has violated one or more of the Rules of Professional Conduct. Mere bad behavior that does not violate one of the Rules is insufficient...

When an attorney is accused of engaging in certain conduct, but that accusation is not tethered to an alleged violation of a specific Rule of Professional Conduct, it creates the risk that discipline might be imposed for conduct that does not violate professional norms.
2014 IL 117696

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

(Docket No. 117696)

In re JOHN P. EDMONDS, Attorney, Respondent.


2014 IL 117696

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

(Docket No. 117696)

In re JOHN P. EDMONDS, Attorney, Respondent.


!DANGER!

BEWARE
CONDUCT
INVOLVING
BENIGN
FRAUD
AN EXAMPLE

- Lawyer prepares will for elderly client in poor health;
- Lawyer drafts will and brings to client for execution. He was the only witness to the will;
- After returning to his office, he affixes signature of a purported 2nd witness to will and has secretary notarize;
- After client dies a month later, Lawyer agrees to represent executor;
- Lawyer files invalid will in probate court;
- After a judge schedules a hearing for proof of the will, Lawyer reveals what happened;
- Judge rules will invalid-Lawyer suspended.


A Pending Case
In re M.R. 28652, 2015PR00001
Facts of the Pending Case

- A man named Stanislaw walks into lawyer’s neighborhood Chicago office;
- Lawyer never met man before;
- Meeting takes 15 minutes;
- Man relates that he has childhood friend, Jan, who is in hospital. Jan wants to give Stanislaw Jan’s home and wants Stanislaw to be Jan’s POA;
- Stanislaw says Jan wants Stanislaw to have authority to withdraw funds on Jan’s accounts at PNC Bank;

More Facts

- Lawyer drafts POA and a quitclaim deed;
- Lawyer accepts fee of between $200-$300;
- Lawyer never made an effort to determine where Jan hospitalized, why Jan was hospitalized, whether Jan wanted to give his home away, whether Jan wanted Stanislaw to be his POA, or whether Jan was competent to make any decisions;
- Stanislaw uses POA to empty Jan’s bank accounts and take over his home.
Aggravating Facts

- Jan’s caretaker contacts CCPGO;
- CCPGO discovers that Jan was incompetent, suffered from dementia, and was hospitalized due to a stroke at time that Lawyer created documents;
- CCPGO files lawsuit, able to get home returned, but unable to recover Jan’s $133,000 in savings;
- Subsequently, CCPGO obtains $80,000 malpractice judgment against lawyer.

ARDC Proceeding

- Lawyer charged with various IRPC violations in connection with drafting POA and quitclaim;
- ARDC Hg.Bd. dismisses case, concluding Lawyer owed no duties to Jan. Dissent opines that Jan was 3rd-party beneficiary of Lawyer’s attorney-client relationship with Stanislaw;
- Administrator appeals;
- ARDC Rvw.Bd. majority reverses, finds Jan was an intended 3rd-party beneficiary, at least as to POA, that Lawyer failed to determine whether Jan actually wanted Stanislaw to be his agent and was competent to do so, and that Lawyer did not competently represent Jan’s interests; and
- Majority recommends reprimand and Administrator files PLE.
The instant petition is an unusual one, in that the Administrator agrees with the misconduct findings made by the Review Board panel majority and does not believe that its recommendation of a reprimand is necessarily outside the range of appropriate discipline.

The Administrator has filed this petition because he seeks to place before this Court the important issue raised by this case, which is the scope of an attorney’s obligations to an intended third-party beneficiary of the attorney’s relationship with his client.

Administrator’s PLE filed in In re M.R. 28652, 2015PR00001

…Had the Administrator not filed this petition, the case would have ended with the imposition of a reprimand by the Review Board, and it is important to have precedent from this Court on the issue presented.

Administrator’s PLE filed in In re M.R. 28652, 2015PR00001
Beginning in 2018, Illinois attorneys in private practice who do not have malpractice insurance must complete a four-hour interactive online self-assessment regarding the operation of their law firms. This self-assessment will require lawyers to demonstrate that they have reviewed the operations of their firms based upon both lawyer ethics rules and best business practices. The program will be administered by the Attorney Registration and Disciplinary Commission (ARDC), the Illinois Supreme Court agency that regulates lawyers.

Following a lawyer’s self-assessment, the ARDC will provide the lawyer with a list of resources to improve their practices that are identified during the self-assessment process. All information gathered in a lawyer’s online self-assessment is confidential, although the ARDC may report data on the aggregate.
### Practice Size and Setting for Lawyers with an Active Status License and Currently Practicing Law

<table>
<thead>
<tr>
<th>Practice Size*</th>
<th>Number Responding to Practice Category</th>
<th>Practice Size % of Total Engaged in Active Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solo</td>
<td>13,555</td>
<td>19.8%</td>
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<tr>
<td>Other</td>
<td>2,054</td>
<td>3.0%</td>
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<td>Non-profit</td>
<td>1,330</td>
<td>1.9%</td>
</tr>
<tr>
<td>Academic</td>
<td>941</td>
<td>1.4%</td>
</tr>
</tbody>
</table>

*Preliminary figures taken from the 88,317 responses to the law practice size question for the 2016 registration year from lawyers with an Active status license and who indicated that they are currently practicing law.
### Private Practice, Solo Size: Malpractice Insurance

<table>
<thead>
<tr>
<th># of Attorneys</th>
<th>Malpractice Insurance</th>
</tr>
</thead>
<tbody>
<tr>
<td>5,588</td>
<td>No</td>
</tr>
<tr>
<td>13,555</td>
<td>Total</td>
</tr>
</tbody>
</table>

**41% HAVE NO MALPRACTICE INSURANCE**

### Private Practice, Solo Size: Succession Plan

<table>
<thead>
<tr>
<th># of Attorneys</th>
<th>Succession Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td>10,463</td>
<td>No</td>
</tr>
<tr>
<td>2,167</td>
<td>Yes</td>
</tr>
<tr>
<td>13,555</td>
<td>Total</td>
</tr>
</tbody>
</table>

**77% HAVE NO SUCCESSION PLAN**
Do you or your firm have a written business succession plan?

What is a succession plan?
A succession plan involves leaving written instructions designating another lawyer to temporarily assume the responsibilities of your practice and notify clients in the event that you become disabled or die.

Why do you need a succession plan?
If you unexpectedly become incapacitated or die, a successor will protect your clients and the value of your practice. Some solo practitioners have instituted the “buddy” system whereby two lawyers agree to act as successors for each other in the event of disability or death. Is this enough? Should it be in writing? Do others know about it?

To learn more about succession planning, including some form succession plans published by other states, go to the ABA website at: http://www.americanbar.org/groups/professional_responsibility/resources/lawyers/transition/successionplanning.html as well as the ARDC publication, The Basic Steps to Ethically Closing a Law Practice (Oct. 2012) on the ARDC website at http://www.arcde.org/Closing_a_Law_Practice.pdf.

Coming this Fall the ARDC will sponsor a webinar on succession planning. Check the ARDC website (www.arcde.org) for more details in the coming weeks.

HOFSTRA LAW REVIEW
[Vol. 42:233 2013]

THE CASE FOR PROACTIVE MANAGEMENT-BASED REGULATION TO IMPROVE PROFESSIONAL SELF-REGULATION FOR U.S. LAWYERS

Ted Schneyer*

4/19/2017
PMBR concepts have been adopted in New South Wales and Nova Scotia.
ELEMENT 3 – ENSURING THAT CONFIDENTIALITY REQUIREMENTS ARE MET

OBJECTIVE – You keep the affairs of clients confidential unless disclosure is required or permitted by law, or the client consents.

<table>
<thead>
<tr>
<th>INDICATORS OF ELEMENT</th>
<th>Self-Assessment Scale</th>
<th>Resources</th>
</tr>
</thead>
<tbody>
<tr>
<td>You have a written confidentiality and privacy policy.</td>
<td>1 2 3 4 5 N/A</td>
<td>LIANS / Confidentiality Agreement – General</td>
</tr>
<tr>
<td>Considerations:</td>
<td></td>
<td>LIANS / Confidentiality Agreement – Service Provider</td>
</tr>
<tr>
<td>• You provide education on the importance of confidentiality.</td>
<td></td>
<td>Nova Scotia Barristers’ Society / Code of Professional Conduct [Rule 3.3: Confidentiality]</td>
</tr>
<tr>
<td>• You provide education on the potential consequences of a breach of confidentiality.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Employees sign a confidentiality letter or agreement.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• You have confidentiality requirements (including agreements) for third parties (such as landlords, contractors, bookkeepers, computer service providers, cleaners, interns, volunteers, family members) who may access physical space or computers, tablets and smart phones</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• You ensure that all third parties (such as landlords, contractors, bookkeepers, computer service providers, cleaners, interns, volunteers, family members) who may access physical space or computers, tablets and smart phones protect confidentiality of information obtained</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• You protect confidentiality in office areas entered by persons not employed by or associated with the entity.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

NOBC
NATIONAL ORGANIZATION OF BAR COUNSEL

2016 Mid-Year Meeting

Imagining a New Model of Regulation – Proactive Management Based Regulation

Thursday, February 4, 2016
9:00 am – 10:30 am

Moderator:
William D. Slease (NM)

Panelists:
Mark A. Armitage (MI)
James C. Coyle (CO)
Susan Fortney (Texas A&M School of Law – TX)
Jerry Larkin (IL)
Darrel Pink (Nova Scotia Barristers’ Society)

The traditional approach to attorney regulation in the U.S. is chiefly reactive. Rules of Professional Conduct are established, and lawyers are subject to discipline if their conduct fails to comply. Several states and provinces are developing complementary approaches to the traditional model that will hopefully protect the public and reduce client complaints against their attorneys.

Many have already heard the term “Proactive Management Based Regulation” or “PMBR”. Such programs tend to focus on the responsibility of law firm management to implement policies, programs and systems – in short, an “ethical infrastructure” – designed to prevent misconduct and unsatisfactory service.
Amended Rule 756(e)(2)
Amendments of January 25, 2017

(2) Every other year, beginning with registration for 2018, each lawyer who discloses pursuant to paragraph (e)(1) that he or she does not have malpractice insurance and who is engaged in the private practice of law shall complete a self-assessment of the operation of his or her law practice or shall obtain malpractice insurance and report that fact, as a requirement of registering in the year following. The lawyer shall conduct the self-assessment in an interactive online educational program provided by the Administrator regarding professional responsibility requirements for the operation of a law firm. The self-assessment shall require that the lawyer demonstrate an engagement in learning about those requirements and that the lawyer assess his or her law firm operations based upon those requirements. The self-assessment shall be designed to allow the lawyer to earn four hours of MCLE professional responsibility credit and to provide the lawyer with results of the self-assessment and resources for the lawyer to use to address any issues raised by the self-assessment. All information related to the self-assessment shall be confidential, except for the fact of completion of the self-assessment, whether the information is in the possession of the Administrator or the lawyer. Neither the Administrator nor the lawyer may offer this information into evidence in a disciplinary proceeding. The Administrator may report self-assessment data publicly in the aggregate.

PMBR

• Beginning in 2018, private practitioners who do not have malpractice insurance must complete a 4-hour interactive, online self-assessment regarding the operation of their law firm;

• There is no cost to take the CLE accredited course;

• Lawyers can take the assessment at various times and in various increments as long as the 4-hour course is completed at the time of 2019 registration;
More PMBR

- Private practitioners who do not have malpractice insurance or do not complete the self-assessment will not be able to register to practice law in 2019;
- Self-assessment will require lawyers to demonstrate that they have reviewed the operations of their firm based upon lawyer ethics rules and best business practices;
- PMBR has not been adopted to sell malpractice insurance, but rather to require attorneys to think, review and minimize the risks associated with a law practice;

Still More PMBR

- Self-assessments are confidential and not discoverable; &
- Lawyers who are not in private practice (e.g., government lawyers, corporate in-house counsel, public defenders and prosecutors) do not have to take the self-assessment course unless such lawyers also represent private clients
QUESTIONS?