A SURVEY OF RECENT ILLINOIS ETHICS LAW: PROFESSIONALISM IN PRACTICE

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I. INTRODUCTION

Professionalism should be a part of every Illinois lawyer's daily practice. It is not enough to memorize the Rules of Professional Responsibility. Creating a legal practice that reflects one's ethical duties and lives up to the high degree of professionalism required by an attorney is a daily task and one that cannot be accomplished without effort. The rules can be unclear and ethical dilemmas can be ambiguous.

However, in many situations there are no excuses; the rules and case law make clear what is required. There are rules that every attorney should know and ethical duties that should always be implemented. Most importantly there is help. If you have an ethical question, there are places to turn to find the answer. This article will highlight an attorney's ethical duties, the Rules of Professional Responsibility, and support and programs that are available. Incorporating this information into your daily practice will not only help you avoid future difficulties with clients and inevitably the ARDC, it will enable you to create a practice that promotes the very fundamentals of attorney professionalism.

II. ETHICS AND PROFESSIONALISM

Before delving too deeply into the rules and case law, it is essential to distinguish between ethics and professionalism. Attorney conduct in Illinois is governed by the Illinois Rules of Professional Conduct. These rules provide

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the "mandatory, minimum rules to which attorneys are expected to conform."[1] Essentially they "constitute a safe guide for professional conduct . . ."[2] While acting within the bounds of the Code may keep an attorney out of trouble; it does not necessarily make the attorney ethical. There are dishonest, untrustworthy individuals that do not break the law. To be truly ethical, one must live beyond the scope of the rules and instead live by "basic moral principles such as honesty, integrity and fairness."[3]

"Ethics" encompasses "the law of lawyering" and the rules which lawyers must follow to maintain their good standing before the bar.[4] Professionalism includes ethics but expands to also encompass our values as a profession such as competence, civility, integrity, and a commitment to justice and the public good.[5]

When creating the rules, the Illinois Supreme Court clearly intended to create ethical rules but also speak to a standard of professionalism. As the Preamble to the Rules states, "Lawyers . . . are responsible for the character, competence and integrity of the persons whom they assist in joining their profession; for assuring access to that system through the availability of competent legal counsel; for maintaining public confidence in the system of justice by acting competently and with loyalty to the best interests of their clients; by working to improve that system to meet the challenges of a rapidly changing society; and by defending the integrity of the judicial system against those who would corrupt, abuse or defraud it."[6]

Attorneys can advance lawyer professionalism by adhering to the ethical rules set forth by the Illinois Supreme Court. To understand what to do to practice within the rules, it is helpful to look at how they are commonly violated.

III. THE TWENTY MOST COMMON ETHICAL VIOLATIONS

According to the ARDC 2006 annual report,[7] the twenty most common ethical violations are:

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1. *In re* Vrdolyak, 560 N.E.2d 840, 845 (Ill. 1990).
2. *In re* Yamaguchi, 515 N.E.2d 1235, 1239 (Ill. 1987).
3. Commission on Professionalism of the Illinois Supreme Court, Professionalism CLE Guidelines, http://www.ilsccp.org/guidelines (last visited Feb. 22, 2008).
4. *Id.*
5. *Id.*
6. ILLINOIS RULES OF PROFESSIONAL CONDUCT [hereinafter IRPC], ILL. S. CT. R. ART. VIII PREAMBLE.
7. ARDC's 2006 Annual Report, http://www.iardc.org/2006AnnualReport.pdf (last visited Feb. 22, 2008).

1. Neglect;
2. Failing to communicate with the client, including failing to communicate the basis of a fee;
3. Fraudulent or deceptive activity, including lying to clients, knowing use of false evidence or making a misrepresentation to a tribunal or non-client;
4. Excessive or improper fees, including failing to refund unearned fees;
5. Improper trial conduct, including using means to embarrass, delay or burden another or suppressing evidence where there is a duty to reveal;
6. Improper management of client or third party funds, including commingling, conversion, failing to promptly pay litigation costs or client creditors or issuing NSF checks;
7. Filing frivolous or non-meritorious claims or pleadings;
8. Conduct prejudicial to the administration of justice, including conduct which is the subject of a contempt finding or court sanction;
9. Conflict of interest, including Rule 1.7: Concurrent conflicts, Rule 1.9: successive conflicts, Rule 1.8(a)-(e); (i): self-dealing conflicts, Rule 1.8 (f)-(h): improper agreement to limit liability/avoid disciplinary action, Rule 1.8 (i): improper acquisition of interest in client matter, and Rule 1.12: former judge or arbitrator;
10. Failing to properly withdraw from representation, including failing to return client files or documents;
11. Criminal activity, including criminal convictions, counseling illegal conduct or public corruption;
12. Failing to provide competent representation;
13. Not abiding by a client's decision concerning the representation or taking unauthorized action on the client's behalf;
14. Improper commercial speech, including inappropriate written or oral solicitation;
15. Practicing in a jurisdiction where not authorized;
16. Improper communications with a party known to be represented by counsel or unrepresented party;
17. Prosecutorial misconduct;
18. Failing to preserve client confidences or secrets;
19. Threatening criminal prosecution or disciplinary proceedings to gain advantage in a civil matter; and
20. Failing to supervise subordinates.[8]

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8. *Id.*

Each of these violations is due to the failure of an attorney to live up to his or her ethical duties. Clearly, one way to avoid a complaint with the ARDC is to avoid making the same mistakes as our colleagues. An attorney should regularly examine their duties not only to their clients but to the court, the legal profession, and themselves. These duties are well established through the Illinois Rules of Professional Conduct as well as case law and there is no excuse for not knowing these duties and putting them to use in our day to day practices.

The Illinois courts have addressed several of these areas in detail and provide guidance for issues that may arise during an attorney's practice. Likewise, the ISBA provides Advisory Opinions on Professional Conduct that provide well reasoned guidance on ethical issues although they do not carry the force of law. A look at the rules, the case law and ISBA opinions follows.

IV. THE ATTORNEY'S DUTIES

A. Duties to Clients

i. The Duty To Practice Competently

Rule 1.1 of the Illinois Rules of Professional Conduct requires lawyers to provide competent representation.[9] "Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation."[10] Attorneys are required to exercise the degree of competence and diligence that is normally used by lawyers under the same circumstances.[11]

If an attorney fails in this duty and neglects a client's case, his motive is irrelevant.[12] Neglect of an attorney's duties to his client can be sufficient to warrant discipline absent moral turpitude.[13] In *In Re Taylor* attorney Taylor failed to appear in court for a client's case, failed to institute a divorce action for a different client after accepting a retainer, and failed to respond to another client's repeated attempts to contact him after filing an appearance in her case.[14] The court found these actions showed a pattern of consistent neglect regardless of his motives and suspended Taylor for one year.[15]

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9. IRPC 1.1(a).
10. *Id.*
11. Cornell University Law School, American Legal Ethics Library, Illinois Legal Ethics, http://www.law.cornell.edu/ethics/il/narr/IL_NARR_1_01.HTM#1.1:100 (last visited Feb. 22, 2008).
12. *In re* Taylor, 363 N.E. 2d 845 (Ill. 1977).
13. *Id*. at 847.
14. *Id*. at 846.
15. *Id*. at 848.

The duty to practice competently is more than avoiding neglect as in Taylor. An attorney must know the area of the law well enough to competently represent their client. If they do not know that area of law, the attorney must obtain an association with another lawyer who is competent to provide the representation.[16]

Besides competence, an attorney must be diligent and provide the best possible services to her client. The ISBA Advisory Opinion 85–6 determined that a lawyer may not advise, prepare documents for, appear in court on behalf of, or otherwise act as an attorney for a pro se litigant and not appear in court on the litigant's behalf as his or her attorney.[17] Here, an attorney who represents debtors in Chapter 7 bankruptcy cases failed to appear in a court case and was found in contempt of court. The attorney then altered his practice so that he advised and prepared documents for his clients while they appeared in court pro se. The attorney continued to file motions and asked the court to keep him advised of changes in the status of the case, all the while not appearing in court on behalf of his or her clients. The Commission addressed the question: is it proper for an attorney to advise and act as an attorney for clients but not appear in court on their behalf?

This opinion was decided under the old Illinois Code of Professional Responsibility. However, the decision was affirmed under the new Illinois Rule of Professional Conduct in January of 1991. The relevant new rules are Rules 1.2(c) & (d), 1.16(d), 3.3(a)8 and 8.4(a)(5). The Commission opined that an attorney is bound by his or her duty to provide the best possible services to the client. The attorney's initial attempt to avoid appearing in court was done via an agreement with the client. The court ruled this improper. So, the Committee reasoned the court must have found the attorney's reasons for not appearing insufficient. Therefore, the attorney breached his duty to provide the best possible service. Further the attorney's later actions of having his or her client appear pro se fall short of an attorney's obligation. By agreeing to limited employment in that manner the attorney put his own needs ahead of the client's needs for adequate representation. To allow an attorney to practice in this fashion would be to allow a halfway practice of law.

This opinion should not be interpreted to mean that an attorney can never limit the scope of his employment. Pursuant to Rule 1.2(c), limiting the scope of employment is permissible so long as the client consents after disclosure.[18]

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16. IRPC 1.1(b).
17. Illinois State Bar Association [hereinafter ISBA] Advisory Opinion No. 85–6 (Dec. 6, 1985).
18. IRPC 1.2(c).

For your daily practice:

You can increase your competence by networking with colleagues that can assist you if need be. You need to insure that when representing a client, you know the specific area of law involved and if not, that you have the assistance of an attorney who is proficient in that area of law.

Use a reliable calendar system, and back up the process whether on paper or electronically. Never ignore client inquiries, and provide regular updates to avoid neglecting your cases. Remember, neglect of a case, even with benign motives, can warrant sanctions.

If limiting the scope of your representation, do so carefully and in writing. While limitation may be permissible, it cannot be done in such a way that it amounts to the halfway practice of law. Don't forget to have your client consent to limited representation after disclosure.

ii. The Duty of Loyalty

Pursuant to Rule 1.2 of the Illinois Rules of Professional Conduct, an attorney must abide by "the client's decisions concerning the objectives of the representation."[19] This includes the client's decisions whether or not to accept a settlement offer or plea agreement.[20]

The fiduciary duty is also part of the attorney's duty of loyalty. "The attorney-client relationship constitutes a fiduciary relationship as a matter of law."[21] As fiduciaries, attorneys must provide their clients, "the basic obligations of agency: loyalty and obedience."[22]

Part of loyalty requires attorneys to avoid conflicts of interests. In *In re Rosin* an attorney drafted an investment agreement between his client and a close personal and business friend of his who was also a primary shareholder of the business. The attorney knew his client was mentally ill and was under the influence of prescription drugs. The court found "Where an attorney exposes a client to risk of loss, jeopardizes the freedom or the pecuniary or privacy interests of a client, or otherwise abuses his or her relationship with a client, whether or not the attorney receives the intended advantage, the attorney has breached a duty owed to a client . . ."[23]

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19. IRPC 1.2(a).
20. *Id*.
21. *In re* Winthrop, 848 N.E.2d 961, 972 (Ill. 2006).
22. *Id*. (citing Horwitz v. Holbird & Root, 816 N.E.2d 272 (Ill. 2004)).
23. *In re* Lewis, 515 N.E.2d 96 (Ill. 1987)(citing *In re* Saladino, 375 N.E.2d 102 (Ill. 1978)).

If a potential for a conflict of interest arises, obtaining the client's consent after disclosure is advisable.[24] This applies to representation of a person with competing interests to the client as well as entering into business transactions with the client.[25]

An attorney with a potential conflict of interest with a client may continue to represent a client when the attorney reasonably believes the conflict does not adversely affect the representation and the client consents after disclosure of the conflict.[26] In ISBA Opinion No. 90–30, an attorney filed a lawsuit for debt collection on behalf of a client. The defendant's attorney responded by accusing the plaintiff's attorney of violating provisions of the Fair Debt Collection Practices Act. The defendant offered to release the attorney from any claims for violation of the FDCPA in exchange for a dismissal of the case with prejudice.

The question was whether an attorney with a clear interest in the case–the withdrawal of a potential cause of action against him–that is in conflict with the client's interest in getting the debt collected must withdraw. The Committee cited Rule 1.7 of the Illinois Rules of Professional Conduct, stating that the standard for whether representation is proper depends on whether the attorney reasonably believes the conflict will not affect representation and the client's consent after disclosure of the conflict. Here, the attorney clearly has an interest in the case (the withdrawal of a potential cause of action against him) that is in conflict with the client's interest in getting the debt collected. The Committee would not comment on whether such a belief by the attorney would be reasonable, but assuming both factors of Rule 1.7 are met, nothing prevents the attorney from continuing with the case. However, in such a case withdrawal would be permissible.

Conflicts can arise not just when an attorney's interests conflict with his client's but also when his or her partner's interests conflict with a client's.[27] In ISBA Advisory Opinion No. 90–34, the Commission determined that it is permissible for a city attorney prosecuting ordinance violations and a part-time public defender in the same county to form a partnership. However, neither may defend clients charged with ordinance violations nor charges initiated or investigated by the city's police department. In this opinion, Attorney A who has a private practice, serves as city attorney prosecuting city ordinances. The same attorney also defends criminal defendants in his private practice. Attorney B is also a private practitioner who contracts with the county as a

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24. *See* IRPC 1.7.
25. *See* IRPC 1.7 and 1.8.
26. ISBA Advisory Opinion No. 90–30 (May 15, 1991).
27. *Id*.

public defender. Neither attorney represents clients that are charged with ordinance violations or clients whose cases are investigated by city police. The Commission was asked if Attorneys A and B may form a partnership without violating the Illinois Rules of Professional Conduct. The Commission determined that both attorneys have managed to tread a fine line by limiting their practice. Rules 1.7 and 1.10 impose restrictions on both of these attorneys, but by limiting their clientele to the extent that they have, both attorneys have managed to avoid violation of the Rules. The key in this case is that neither attorney represents clients who are involved with the aspects of government that each attorney serves.

It is important for attorneys to keep in mind that a conflict of interest can result in the loss of a fee. In *King v. King*,[28] a divorce proceeding, the ex-wife filed for separate maintenance from her ex-husband. The lower court decreed separate maintenance and ordered the ex-husband to pay the ex-wife's attorney fees. The ex-husband claimed that because he briefly consulted with the ex-wife's attorney to discuss his marital problems before that attorney represented the ex-wife, there was a conflict of interest, and the attorney was not entitled to fees.

Under Illinois law, "[a]n attorney cannot recover from the party that he has wronged for legal services where he has represented adverse, conflicting, and antagonistic interests in the same litigation." Therefore, if the ex-husband's contact with the attorney was sufficient to invoke an attorney-client relationship, the attorney is not entitled to fees. The court found the ex-husband's statements showed that an attorney-client relationship arose to the extent that any communication between the ex-husband and the attorney would be privileged. Therefore, the attorney could not recover from the party he wronged for legal services where he represented adverse, conflicting, and antagonistic interests in the same litigation.

An attorney's duty of loyalty will persist even after he has been discharged.[29] In ISBA Opinion 94–14, the Commission determined that upon termination of representation an attorney must return all documents and property received from the client but may retain copies at the attorney's expense. Other parts of the files regarding attorney's representation of the client should be available for copying at the client's request and expense. Here, an attorney served as village attorney for 30 years. Upon retirement, the attorney turned over all active files to the new village attorney. The village asked for the inactive files as well. The files were in storage along with files from the attorney's private practice. The attorney considered this request

28. King v. King, 367 N.E.2d 1358 (Ill. App. Ct. 1977).
29. ISBA Ethics Opinion No. 94–14 (January, 1995).

onerous although the village offered to send an administrative assistant to retrieve the files. In this case, the village has discharged the attorney from representation. As such, under Rule 1.16(d) the attorney is required to return all client papers and property. The only circumstance in which an attorney may avoid this is when he or she is asserting a common law or statutory retaining lien. No facts in the case implied that there was such a lien. Therefore the village, as a former client is entitled to all the documents, active and inactive. The assistance of the administrative assistant from the village in this case would be impermissible. Because there are files in storage that come from other clients, allowing someone from the village access to them would be a violation of Rule 1.6. The Committee noted that while assistance from the village was not allowed, the attorney could charge the village for reasonable expenses in retrieving the documents.

For your daily practice:

Always listen to your clients, and follow their directions and decisions. Be sure to consider the client's interest first, and always place the client's interest above your own.

Conflict of interests is an area where you often begin having second thoughts or questions before the full conflict materializes. As you begin to question the representation, remember, when you start to ask "is there a conflict" you may already be in the middle of one. Avoid conflicts of interests by reading Rules 1.7, 1.8 and 1.9 and commit to memory what you can do to avoid conflicts. Often, consent after disclosure is enough to minimize the conflict particularly if you believe it will not adversely affect your representation.

Your duty will persist even once your attorney-client relationship has been terminated. You still must maintain client confidences and secrets and return all client papers and property.

iii. The Duty of Diligence

Rule 1.3 mandates an attorney to act promptly and diligently on his client's behalf.[30] A failure to do so may result in charges of neglect.[31] "(I)t is

30. IRPC 1.3.

31. Cornell University Law School, American Legal Ethics Library, Illinois Legal Ethics, http://www.law.cornell.edu/ethics/il/narr/IL_NARR_1_03.HTM#1.3:200. (Last reviewed February 22, 2008).

the duty of all lawyers to seek resolution of disputes at the least cost in time, expense and trauma to all parties and to the courts."[32]

Neglect is often just a small piece of the violation. Often instead of acknowledging their error and trying to make amends, attorneys attempt to cover up their mistakes. That is a bad idea. Courts do not look kindly upon attorneys who have deceived clients in an effort to cover-up their errors and tend to implement more severe sanctions under those scenarios.

In *In re Levin*,[33] an attorney was charged by the ARDC with neglect of legal matters and with misrepresentation, dishonesty and deceit. According to the record, on no fewer than six occasions the attorney neglected cases to an extent that was prejudicial to the client; the statute of limitations tolled and cases were dismissed with prejudice. Adding to his misdeeds, the attorney went on to make statements to each client that their affairs were being handled. The court found that while the attorney's statements did not rise to the level of fraud, they were misleading. The misleading statements, coupled with the pattern of neglect led the court to suspend the attorney's license for three years.

Similarly in *In re Mason*,[34] it was the attorney's cover-up of his error that was serious enough to warrant sanction. In *Mason*, an attorney represented a client in a claim involving an accident on a city bus. The attorney learned that the mass transit authority required a notice of claim to be filed within six months of the accident and that he had already missed the six month period. After discovering his error, the attorney fabricated a settlement offer from the mass transit authority in order to cover his mistake. The Administrator of the ARDC charged the attorney with two violations of the Rules of Conduct, first for neglect in missing the six month window with the transit authority, second for the attorney's actions in covering up his error.

On the first count, the court found that the attorney's failure to file the notice of claim did not rise to level of neglect prohibited by the Illinois Rules of Professional Conduct. According to the record, the attorney did not know about the six month policy and had spoken to several CTA representatives during the 6 month window and none of them mentioned it. This oversight was not serious enough to warrant disciplinary action, yet the court made a point of mentioning that its opinion was in no way indicative of whether the attorney's conduct was negligent so as to support a malpractice claim.

On the second count, the court determined that the attorney's cover-up of his error was misconduct serious enough to warrant sanction. The attorney

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32. IRPC, ILL. S. CT. R. ART. VIII PREAMBLE.
33. *In re* Levin, 463 N.E.2d 715 (Ill. 1984).
34. *In re* Mason, 522 N.E.2d 1233 (Ill. 1988).

admitted all the allegations of count II, and the court found that his conduct was fraudulent. However, rather than suspension or disbarment the court determined that censure was the appropriate disciplinary measure. The court based its decision on the nature and gravity of the misconduct, the attorney's candor during the disciplinary investigation, and the discipline imposed in analogous cases.

For your daily practice:

First, act promptly. Do your best to handle your client's situation expeditiously. If an error is made, don't lie to your clients or commit a fraud in an attempt to cover-up your error. This will lead to more trouble. Instead, make amends and fix the error. Clients would much rather hear that you have fixed a problem and moved the matter forward than to have silence followed by neglect of the matter.

iv. The Duty to Communicate with the Client

Under Rule 1.4 of the Illinois Rules of Professional Conduct, an attorney must keep his clients informed so that they may make intelligent decisions about their case.[35] This duty to communicate with a client is twofold.[36] One is to keep the client "reasonably informed about the status of their case."[37] This is an affirmative duty on the attorney to keep their clients informed so that the clients can make educated decisions about their cases.[38] The other piece of this duty is to promptly comply with a client's request for information.[39] This is also an affirmative duty that requires the attorney to respond promptly to client's questions and demands.[40] "While the lawyer's duty to communicate applies to all clients, from the more ignorant to the most sophisticated, compliance is particularly important for those clients who may be unfamiliar with the workings of our legal system."[41]

In *In re Smith*,[42] the ARDC filed a complaint alleging among other charges that the respondent attorney failed to communicate with his clients in violation of Rule 1.4. The court held that the duty extends beyond just

35. *See In re Smith*, 659 N.E.2d 896 (Ill. 1995).
36. *In re* Smith, 659 N.E.2d at 902 (Ill. 1995).
37. *Id*. (citing IRPC 1.4(a)).
38. *Id*.
39. *Id*. (citing 134 IRPC 1.4(a)).
40. *Id*.
41. *Id*.
42. *Id*.

keeping clients informed of their cases. The attorney is also obligated to respond to inquiries about the case from clients promptly. The testimony of several clients as to their repeated attempts to reach the attorney and to attorney's failure to return their phone calls was sufficient evidence to warrant sanctions.[43]

For your daily practice:

Ask the client early in the file what their preferred method of communication is, and use that method if possible. Make sure you inform you client regularly about the status of their case, and when a client calls return the phone call within a day or two. Send regular emails or letters even if you are just letting them know that nothing has happened.

Keep good phone log records and correspondence records so that if it is ever alleged that you did not live up to this duty, you can prove otherwise.

v. The Duty to Charge Reasonable Fees

An attorney's fees must be reasonable and must be adequately communicated to the client before beginning the representation.[44] Attorneys do have some leeway as to how they structure their fee agreements. Pursuant to ISBA Advisory Opinion No. 90–33, an agreement between an attorney and client that allows the attorney to charge reasonable additional costs and fees to the client if litigation is necessary to collect the original fee is permissible under the Rules. In this scenario, an attorney wanted to use a fee agreement for legal services with clients allowing the attorney to charge reasonable additional costs and fees to the client if litigation became necessary to collect the original fee. The Committee opined that as long as the fee is reasonable, it does not violate the Rules of Professional Conduct regarding attorney's fees. The Committee focused its opinion on the reasonableness of the fee rather than any sort of duty violation such an agreement might create. The only caveat to the Committee's approval of such a provision is that the attorney must take care so as not to come into conflict with Illinois statutes regarding perfecting attorney liens.[45]

Under certain circumstances, an attorney may charge his client for the overtime work of a secretary that was necessary to perform specific tasks on

43. *Id*.
44. IRPC 1.5.
45. ISBA Advisory Opinion No. 90–33 (May 5, 1990).

behalf of the client.[46] The charge for the secretary's work would be separate from the attorney's fee and appear on the bill as an expense. This issue had to be addressed because under a previous opinion, Opinion 85–9, the Committee stated that an attorney could not charge the client for the necessary expenses of a well equipped office. For example, a charge for local calls made by a secretary would be improper. However, in a case where a secretary had to work overtime for a specific task necessary for adequate representation of the client, and the need for overtime was not due to the attorney's procrastination or neglect, it would be an extra expense that would not violate the Rule 1.5 requirement for a "reasonable fee."[47]

"When assessing the reasonableness of fees, a trial court may consider . . . the nature of the case, the case's novelty and difficulty level, the skill and standing of the attorney, the degree of responsibility required, the usual and customary charges for similar work and the connection between the litigation and the fees charged."[48] Trial courts are given broad discretion when reviewing fees.[49] In *Richardson v. Haddon*, the court reviews an attorney's fee petition. The fee petition described activities on 58 separate dates and hourly charges for those activities. The attorney had been previously warned by the trial judge about submitting fee petitions that contained "items which take a disproportionate amount of time to perform."[50] The judge reduced the attorney's fees to the house minimum. The trial judge sent his written ruling to the ARDC. The attorney appealed. The case was remanded because the trial court did not state its reasons for specific reductions and instead denied the fee petition as a whole. However, the appellate court fully understood the trial court's frustration with the attorney and approved of the trial court's decision to report him to the ARDC.[51]

For your daily practice:

Keep your fees reasonable and make sure to communicate the fees in your engagement letter with your client, and keep a copy of that letter for your files.

First and foremost, keep meticulous time records. In *Richardson*, the court looked to the attorney to provide "detailed time records . . ." that were

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46. ISBA Advisory Opinion No. 91–6 (Oct. 25, 1991).
47. *Id*.
48. Richardson v. Haddon, 873 N.E.2d 570, (Ill. App. Ct. 2007).
49. *Id*.
50. *Id*. at 572.
51. *Id*. at 574.

"scrutinized for their reasonableness in the context of the case."[52] If you cannot avoid an ARDC complaint, proper record keeping may allow you to end the complaint at the beginning inquiry phase.

Richardson also highlighted the importance of not irritating a judge. Attorney Ring ignored the judge's prior warnings about his fee petitions and ended up with a report at the ARDC. Be warned, it is a trial courts duty to report attorney misconduct to the ARDC.[53]

vi. The Duty to Safeguard Client Funds

An attorney must keep a client's property separate from his own.[54] Commingling of funds is to be avoided. In *In re Bloom*,[55] an attorney sought review of a disciplinary recommendation that he be suspended from the practice of law for one year for failing to account for and commingling client funds. In this case, the attorney asserted that there was no evidence of any fraudulent or dishonest motives in his actions, yet the court found the attorney "received moneys belonging to his client, commingled them with his own, and failed to remit them to his client for a long period of time without any legitimate reason." The court found "[i]n such practice he was guilty of unethical conduct which tends to bring the bar into disrepute." This holding was without regard for any fraudulent intent or lack thereof on the part of the attorney. The attorney was suspended for one year.

Likewise, in *In re Lewis*, the court was unmoved by an attorneys lack of a dishonest motive.[56] Attorney Lewis was charged by the ARDC for nine counts of converting client funds. The respondent argued that his poor health was a mitigating factor. He argued that the conversions were a result of sloppy record keeping but not a dishonest motive.[57] The court was unmoved, "Commingling or converting a client's funds is a matter of tremendous concern as it puts the client's money at risk of depletion or loss to creditors of the attorney entrusted with its safekeeping." [58] Violation of that trust brings the entire legal profession into disrepute.[59] The attorney was given a three year suspension.

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52. *Id*. at 573.
53. *Id*. at 574.
54. IRPC 1.15(a).
55. *In re* Bloom, 234 N.E.2d 775 (Ill. 1968).
56. *In re* Lewis, 515 N.E.2d 96 (Ill. 1987).
57. *Id*. at 97.
58. *Id*. at 98.
59. *Id*.

Different rules apply to retainers. Pursuant to ISBA Advisory Opinion No. 703, Retainers paid to a lawyer are not "funds of the clients" under Rule 9–102(a) of the Illinois Supreme Court.[60] The Illinois State Bar Ethics Committee received several inquiries as to what funds were considered "client funds" under Supreme Court Rule 9–102. These questions stemmed from confusion about whether fees paid by clients as a retainer had to be segregated into a client trust account. The Committee noted that Rule 9–102 excluded advances paid to lawyers for "costs and expenses." The Committee explained that most prepaid fees are earned in a relatively short period of time over which the attorney familiarizes his or her self with the facts of the case and the relevant law. The Committee thus opined that Rule 9–102(a) does not apply to retainer fees in any form unless when paid, they are "expressly designated in writing to constitute security for fees to be earned." If that is the case they remain the client's funds until they are earned and should be treated as client funds.

The court in *In re Taylor* agreed holding that when an attorney is not given the client's money to hold for a specific purpose rather it was consideration given for expected legal fees, conversion of funds will not be found.[61]

Recently, the Illinois Supreme Court addressed the issue of retainers.[62] In *Dowling*, the court explicitly recognized advance payment retainers. In this case, Dowling obtained two judgments against Davis. Davis, in an effort to protect his assets, hired a law firm, Piper. Initially Piper was to handle the purchase of a home in Florida. Davis deposited money into Piper's trust account for the purchase. After the completion of the purchase of the Florida house, Davis authorized Piper to keep $100,000 as a retainer. Piper transferred that money into its general account and applied it to monthly bills for work performed for Davis.

The *Dowling* court recognized three types of retainers. A classic or general retainer "is paid by the client to the lawyer to secure the lawyer's availability during a specified period of time or for a specified matter."[63] It becomes the property of the lawyer immediately as it is earned when paid.[64] The second type of retainer is a security retainer where "the retainer remains the property of the client until the lawyer applies it to charges for services that are actually rendered."[65] It is the third type of retainer acknowledged by the

60. ISBA Advisory Opinion No. 703 (Nov. 24, 1980).
61. *In re* Taylor, 363 N.E. 2d 845 (Ill. 1977).
62. Dowling v. Chicago Options Assoc., Inc., 875 N.E.2d 1012 (Ill. 2007).
63. *Id*. at 1018.
64. *Id*.
65. *Id*.

court that is noteworthy; the advance payment retainer. Until *Dowling*, advance payment retainers had not been explicitly recognized in Illinois.[66]

An advance payment retainer "consists of a present payment to the lawyer in exchange for the commitment to provide legal services in the future."[67] These types of retainers should be used sparingly and only to accomplish a purpose that cannot be accomplished with a security retainer[68]. In the case at hand, the court found an advance payment retainer was appropriate because the client was hiring counsel to represent him against judgment creditors. If the funds remained the client's property, the creditors may be able to access them. If that were the case, it would be difficult for the client to hire counsel.[69]

The court set forth guidelines to properly set up a retainer agreement. First, regardless of the type of retainer the parties are agreeing to, the agreement should be in writing, and it should clearly define the type of retainer being paid.[70] The agreement should state whether the funds remain the property of the client or become the property of the attorney. For an advance payment retainer the agreement should also indicate where the funds will be deposited and how the lawyer will handle withdrawals for services rendered. Moreover, the agreement should clearly advise the client of his option to use a security retainer and that the choice of type of retainer is the client's alone. If the attorney will not represent the client with an advance payment retainer, this should also be stated in the agreement. Lastly, the advance payment retainer agreement must explain why that is the type of retainer being established and why it is recommended for the client.[71]

If the language of the agreement is ambiguous, the court will find that the agreement is for a security retainer.[72] The protection of the client's interests is the guiding principle and as such, generally retainers should be security retainers and the funds placed in a client trust account.[73] Keeping client's funds separate from the attorney's funds protects the client's retainer from the attorney's creditors. Additionally, commingling of funds is often the first step towards conversion of those funds. Lastly, if the funds are commingled and the attorney dies, the funds are at risk of being lost.[74]

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66. *Id.* at 1021.
67. *Id.* at 1019.
68. *Id*. at 1021.
69. *Id*.
70. *Id*. at 1022.
71. *Id*.
72. *Id*.
73. *Id*. at 1021.
74. *Id*.

For your daily practice:

Always keep your client's property separate from your own. Even if you inadvertently commingle a client's funds with your own absent any dishonest motives, you can be found in violation of the rules.

If you are accepting a retainer, put the retainer agreement in writing. Read the *Dowling* case, thoroughly and follow their guidelines on what needs to be included in a retainer agreement. If you make an error in the agreement, the court will conclude you were attempting to establish a security retainer, which means if you have commingled those funds you may face discipline.

vii. The Duty to Maintain Confidences

This is one of the more confusing duties an attorney must uphold. An attorney may not disclose a client's confidence or secret without the client's consent either during or after the attorney client relationship has been terminated.[75] There are a few exceptions to this. An attorney may disclose information where necessary to prevent death or serious bodily harm, to comply with a court order, if necessary to collect one's fee and to defend oneself against claims of misconduct.[76] It is important to note that the term confidence as defined in the Illinois Rules of Professional Conduct encompasses information protected by the attorney-client privilege and secrets refer to information that may be detrimental or embarrassing to the client that he has asked remain confidential.[77]

For your daily practice:

Keep more than just information covered by the attorney client privilege confidential. Anything the client tells you that he requests remain between the two of you must also be kept confidential.

B. Duty To The Court

Not only must attorneys meet the above referenced duties to their clients, as officers of the court, attorneys have an obligation to "defend . . . the integrity of the judicial system against those who would corrupt, abuse or

75. IRCP 1.6.
76. IRCP 1.6(b)(1)(2) and (3).
77. IRPC, ILL. S. CT. R. ART. VIII TERMINOLOGY.

defraud it."[78] Essentially attorneys are duty bound to uphold the rules the court enacts.[79] Additionally, a lawyer is mandated to assist the court with its understanding of the law in issue and the facts of the case and to "aid it in doing justice and arriving at correct conclusions."[80]

An attorney's conduct before a tribunal has been strictly dictated in Rule 3.3 of the IRPC. Generally, this rule mandates an attorney to act fairly with the court, with clients and witnesses and with other attorneys. Briefly, the rule states that a lawyer shall not provide false or misleading information to a tribunal and must tell the court material facts if necessary to avoid assisting the criminal or fraudulent activities of the client.[81] He may not offer or create false evidence.[82] An attorney cannot hide evidence or witnesses.[83]

Even helping a client to hide marital assists is a violation of this rule even if it requires disclosing privileged information. In ISBA Advisory Opinion No. 92–24, the Commission found that helping to hide marital assets from the court is assisting the client's fraudulent conduct and as such a rule violation.[84] A revelation is necessary in such a case even if it involves disclosing privileged information. In the facts of this opinion, attorney Able had privileged information that a client established an offshore account where the client hid significant assets from the court in a divorce proceeding. Able refused to help the client deceive the court. The client, without Able's knowledge, obtained alternate counsel, Cage. The client then negotiated a settlement agreement with his spouse's attorney based on the false assets. At the divorce hearing, the court accepted the settlement agreement and both parties signed a statement professing all assets had been disclosed. Later, Able learned of his client's deception but was directed by the client to remain silent. The Commission was asked if Able had a duty to report the conduct of either Cage or the spouse's attorney to the ARDC or a duty to report his client's fraud to the court.

The Commission stated that under Rule 3.3(a)(2) an attorney must take immediate remedial measures necessary to prevent the attorney from assisting the client in committing fraud before a tribunal. As Able was entered as the only attorney of record before the court, Able was appearing in a professional capacity before the tribunal even though he was not present at the actual

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78. IRPC, ILL. S. CT. R. ART. VIII PREAMBLE.
79. *In re* Himmel, 533 N.E.2d 790 (Ill. 1988).
80. *Winthrop*, 848 N.E.2d at 979; *In re* Braner, 504 N.E.2d 102 (Ill. 1987) (quoting People v. Beattie, 27 N.E. 1096 (Ill. 1981)).
81. IRPC 3.3(a)(1) and (2).
82. IRPC 3.3(a)(4) and (5).
83. IRPC 3.3(a)(13) and (14).
84. ISBA Advisory Opinion No. 94–24 (May 17, 1995).

hearing. Further an attorney's duties under Rule 3.3 are considered continuing duties that extend beyond the conclusion of a hearing. Therefore, because Able did not withdraw from representation of the client, Able is obligated to disclose the fraud to court. This is the only duty in this hypothetical that is mandatory. The attorney may, but is not required, to report the actions of Cage and the spouse's attorney who communicated with client directly even though they knew client was represented by Able.

Rule 3.3 is directly related to the issue of the Fair Administration of Justice. An oft cited concept that pursuant to Rule 8.4(a)(5) requires attorneys to avoid conduct that is prejudicial to the administration of justice.[85] "Lawyers owe a duty to assist the court in administering justice and in arriving at correct conclusions."[86] The *Smith* court noted that part of this duty is that attorneys must assist the court in the expeditious resolution of cases. "This includes the timely filing of the transcripts and documents that will form the necessary predicate to the court's entry of final judgment."[87] Because this duty is to the court, it is not limited "solely to acts taken on behalf of clients."[88]

An attorney also has an affirmative obligation not to mislead the court. In *People v. Simac*,[89] an attorney defending a client in traffic court had a law clerk that resembled the defendant sit next to him during trial in the defendant's customary seat. The attorney did not inform the court or nor opposing counsel of this switch. The prosecution's only witness, the officer at the scene of the accident, misidentified the person seated next to the defending attorney as the person who caused the accident. Based on this misidentification, the attorney was able to get a directed finding of not guilty based upon the misidentification. In addition, the court entered an order for contempt of court against the appellant for placing the witness in such a manner as to mislead the State's Attorney and the arresting officer.

In order for a contempt charge to be valid, the offending attorney's conduct must be willful. The attorney argued that he was merely testing the State's identification of witnesses, rather than trying to intentionally mislead the court. The court found that based on the imposters resemblance to the defendant, the intent was to mislead, not test and the attorney was fined.

However, acts such as aggressive negotiation tactics, may be found permissible where they are not made for the mere purpose of harassment.[90] In ISBA Advisory Opinion No. 93–19, the Commission determined that a

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85. IRPC 8.4(a)(5).
86. *Smith*, 659 N.E.2d at 904.
87. *Id*.
88. *Id*.
89. People v. Simac, 641 N.E.2d 416 (Ill. 1994).
90. ISBA Advisory Opinion No. 93–19 (Oct. 25, 1991).

settlement to sign a release and confidentiality agreement as an alternative to threatened media publicity if the defendant loses the case is not per se improper. In a medical malpractice case, the defendant, a doctor who believed he did not perform malpractice, received a settlement demand from the plaintiff's attorney. In the demand, the plaintiff's attorney made a statement implying that he would publicize the malpractice to a local television station should the case proceed to trial and the plaintiff prevail. The doctor, upset at the prospect of negative publicity, reconsidered his decision to go to trial.

In this case, did the plaintiff's attorney commit the crime of intimidation, and must the defendant's attorney report plaintiff's attorney's conduct to the ARDC? The Committee would not comment on whether a hypothetical situation would constitute a crime, it would only comment on whether the actions of the plaintiff's attorney would be an ethical violation if his or her conduct was NOT a crime. In this case, the Committee opined that as long as the plaintiff's attorney did not make any statements besides those of public record and any media coverage occurred after adjudication, the attorney's conduct did not violate the professional standard. The Committee felt that while such a threat was an aggressive negotiation tactic, it was not made for the mere purpose of harassment. Factors such as publicity and possibility of secondary suits often enter into consideration of whether to settle a case. So, nothing about this behavior violates the Rules of Professional Conduct. As such there is no cause for mandatory reporting.

Pursuant to Rule 1.2(d) an attorney cannot assist a client in criminal or fraudulent conduct. This extends beyond assisting a client with a crime. Purposefully filing claims in the wrong venue to take advantage of unrepresented defendants falls within this category and is seen as a rule violation.[91] In ISBA Opinion No. 86–10, the Commission was asked if it is improper for an attorney representing a creditor to routinely and purposefully file collection actions in the improper venue. Here, an attorney represented an agency that provided collections services throughout the state. When litigation was necessary to collect a debt the attorney routinely filed the action in the attorney's local venue even when the attorney knew venue to be improper. Most debtors were unrepresented and did not know to object to venue. Upon any objection to venue the attorney would voluntarily dismiss the cases or consent to a change of venue.

This opinion was decided under the old Illinois Code of Professional Responsibility. However, the decision was affirmed under the new Illinois Rule of Professional Conduct in January of 1991. The Committee stated that

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91. ISBA Advisory Opinion No. 86–10 (March 3, 1987).

intentionally filing collections against debtors in the wrong venue is a violation of the Rules of Professional Conduct. Under these facts, there were two possible scenarios for filing a complaint in the improper venue; both violate the Rules of Professional Conduct. The first scenario is that the attorney was including in his complaint an affirmative pleading that venue was proper. In that case, the attorney would be knowingly making a false statement of law or fact which is improper under the Rules 1.2(d) and 3.1. In Illinois such an affirmative pleading is not necessary. However, even absent the false pleading, the attorney was still knowingly violating the rules of civil procedure in a continual and habitual way.

Attorneys must disclose material facts to the court. In *Winthrop*, an attorney was charged with professional misconduct resulting from his representation of a 92-year-old woman for whom he drafted a will and a power of attorney.[92] Among many other charges, the attorney was charged with a violation of Rule 3.3(a)(2) in failing to disclose a material fact necessary to avoid fraud to a tribunal. This charge came about when the holder of the power of attorney, Nobani, had improperly appropriated a substantial amount of the client's assets with the attorney's knowledge.

The attorney maintained that he could not have violated this rule because Nobani was not his client. The court agreed that "Rule 3.3(a) (2) applies if an attorney fails to disclose the criminal or fraudulent act of a *client*"; the court could not apply the rule to that case, where the fact-finder reasonably found the evidence to be insufficient to show that respondent represented the perpetrator.[93] However, the court went on to state they in no way condone the attorney's conduct. Further, they reminded Winthrop, "a lawyer's high vocation is to correctly inform the court upon the law and the facts of the case and to aid it in doing justice and arriving at correct conclusions."[94]

The *Winthrop* court addressed many issues. While the court found that attorney Winthrop did not violate a rule when he failed to notify the court of a criminal act of a non-client. The court did find a rule violation where the attorney made a knowing misstatement of material fact to a third person.[95] The attorney had told a social services attorney that the banks refused to allow Nobani to withdraw any money all the while knowing that Nobani had in fact withdrawn money from at least one bank. The court cited rule 4.1(a) "In the course of representing a client a lawyer shall not make a statement of material fact or law to a third person which statement the lawyer knows or reasonably

92. *In re* Winthrop, 848 N.E.2d 961 (Ill. 2006).
93. *Id*. at 978.
94. *Id*. at 978–79.
95. *Id*. at 979.

should know is false."[96] The court found that this violation meant that Winthrop engaged in conduct involving dishonesty, deceit or misrepresentation and engaged in conduct that defeats the administration of justice and brings the legal profession into disrepute. Winthrop received a two year suspension.

For your daily practice:

An attorney's duties to the court are many, but the underlying premise is to "avoid conduct prejudicial to the administration of justice." To do this, you must:

1. Help the court understand the law at issue and the facts of the case so it can arrive at the correct conclusion.
2. Act fairly with the court, other attorneys, clients and witnesses.
3. Do not provide false or misleading information to the court, and disclose material facts to the court where necessary.

C. Duty to the Profession

i. Duty When Recommending Someone for Admission to the Bar

An attorney is mandated to use good judgment and honesty when recommending someone for admission to the bar.[97] As the Preamble emphasizes "The quality of the legal profession can be no better than that of its members."[98]

ii. Duty To Prevent the Unauthorized Practice of Law

In the same vein, an attorney is prohibited from helping a nonlawyer in the unauthorized practice of law.[99] By allowing a nonlawyer to use his name on tax valuation forms and appear before the tax board for oral arguments, the attorney aided in the unauthorized practice of law.[100] The court was mindful that this was widespread conduct of real estate brokers and even known by the tax board. Nonetheless, the court held "if by their nature acts require a

96. *Id*. at 979.
97. IRPC, ILL. S. CT. R. ART. VIII PREAMBLE.
98. *Id*.
99. *Yamaguchi*, 515 N.E.2d at 1239.
100. *Id*.

lawyer's training for their proper performance, it does not matter that there may have been widespread disregard of the requirement or that considerations of business expediency would be better served by a different rule."[101] This attorney received a six months suspension.

iii. Duty to Police Lawyer Misconduct

"The vigilance of the bar in preventing and, where required, reporting misconduct can be a formidable deterrent to such misconduct, and a key to maintaining public confidence in the integrity of the profession as a whole in the face of the egregious misconduct of a few."[102] The Preamble alludes to this duty but the Illinois Rules of Professional Responsibility includes Rule 8.3 specifically dedicated to a lawyer's responsibility to report another attorney's professional misconduct. Rule 8.3 states that where a lawyer has knowledge that is not protected as a confidence that another lawyer has engaged in misconduct, the lawyer must report the misconduct to a tribunal or other authority empowered to investigate.[103]

The Illinois Supreme Court has strictly interpreted this reporting duty and has imposed a one year suspension on an attorney solely for his failure to report another attorney's misconduct.[104] In this case, an attorney Casey misappropriated a client's settlement funds. Himmel was hired to recover the money. He negotiated a settlement with Casey where Himmel agreed not to file any criminal, civil or ARDC complaints in exchange for the return of his client's funds.[105]

Himmel argued this agreement was proper because his client directed him to enter into it. Additionally, he argued he was relieved of his responsibility to report the misconduct because he believed the client was going to file a complaint with the ARDC. He also argued that he learned about Casey's misconduct through privileged communications with his client.[106]

The Illinois Supreme Court held that an attorney is not relieved of his responsibility to report another attorney's misconduct even when his client directs him not to or when he believes a client is reporting the misbehaving attorney to the ARDC.[107] Additionally, the court determined the

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101. *Id*.
102. IRPC, ILL. S. CT. R. ART. VIII PREAMBLE.
103. IRPC 8.3.
104. *In re* Himmel, 533 N.E.2d 790 (Ill. 1988).
105. *Id*. at 792.
106. *Id*.
107. *Id.* at 792–93.

communication was not privileged because the client had discussed the case with third parties present.

The Court felt that Himmel's failure to report the attorney interfered with the ARDC investigation, "and thus with the administration of justice."[108] By failing to report the misconduct, Himmel essentially allowed the attorney to continue misappropriating the funds of other clients.[109] As such, this failure to report warranted a suspension from the practice of law for one year. Even though Himmel did not have a dishonest motive, the duty to report misconduct is absolute.[110] Illinois lawyers have an affirmative obligation to report unprivileged knowledge of another lawyer's fraudulent or deceitful conduct to the proper authorities.[111]

Since the *Himmel* decision, the ARDC receives approximately 500 reports each year. About 20% of these reports lead to the filing of formal disciplinary complaints.[112]

The Supreme Court elaborated on *Himmel* in *Skolnick v. Altheimer & Gray*.[113] In *Skolnick*, an attorney sought modification of a protective order so that she could report attorney misconduct to the ARDC. The protective order was entered by the trial court so that information supplied during discovery would remain confidential. During the discovery period, attorney Kass received records indicating that attorney Skolnick had engaged in fraudulent activity. Kass believed that the documents triggered her obligation under the Code and moved for a modification of the confidentiality provisions of the protective order so that she could meet her Himmel obligation. This obligation is so important that the court stated, "only the weightiest considerations of 'justice' could excuse a trial court's refusal to modify a protective order so that counsel could fulfill its absolute, ethical duties."[114]

The Court elaborated on the elements of the duty to report attorney misconduct. The court concluded that the "'knowledge' requirement of Model Rule 8.3 [which is similar to Illinois' Rule 8.3] requires 'more than a mere suspicion' but need not amount to 'absolute certainty'"[115] Where an attorney can reasonably infer that misconduct has occurred, the attorney possesses adequate knowledge to trigger the reporting requirement.[116]

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108. *Id*. at 795–96.
109. *Id*. at 796.
110. *Id.* at 794.
111. *Id*.
112. Ethics Inquiry Program FAQs, http://www.iardc.org/ethics_faq.html (last visited Feb. 22, 2008).
113. Skolnick v. Altheimer & Gray, 730 N.E. 2d 4 (Ill. 2000).
114. *Skolnick*, 730 N.E.2d at 17.
115. *Id*. (citing ANN. MODEL RULES OF PROF'L CONDUCT 555 (3d ed. 1996)).
116. *Id.* at 21.

At issue in this case was also whether the word tribunal as read in the rule means the trial court. The Court held that in Illinois only the Supreme Court has the authority to discipline attorneys. The Court has delegated that authority to investigate and prosecute claims of attorney misconduct to the ARDC but only the court may discipline an attorney found guilty of ethical misconduct. Thus, an attorney's responsibility to report is not discharged by reporting the misconduct to the trial court. The obligation is to report attorney misconduct directly to the ARDC.[117]

Attorneys are also obligated to report their own misconduct. Pursuant to Rule 8.3(d) of the Illinois Rules of Professional Conduct, if an attorney is disciplined by an organization other than the ARDC, he must report that to the ARDC.[118] Additionally, if he is convicted of a felony or misdemeanor, he must notify the ARDC within 30 days of the judgment.[119]

For your daily practice:

If you can reasonably infer that another attorney is engaging in misconduct, you must report that attorney to the ARDC or face discipline yourself.

III. THE MODEL RULES AND THE ILLINOIS RULES–COMPARED AND CONTRASTED

While attorneys in Illinois are bound by the Illinois Rules of Professional Responsibility, the Model Rules provide guidance as well. When creating our own set of Rules of Professional Conduct, Illinois adopted the majority of the Model Rules and also merged the pre-existing Illinois Code into our current set of Rules. What we end up with is a set of rules, generally more elaborate that the ABA Model Rules. It is these Rules that essentially create the previously discussed duties. An attorney attempting to make professionalism part of his every day thoughts and practices would be remiss in not looking at the ABA Model Rules in conjunction with the Illinois rules. Overall the ABA Model Rules and the Illinois Rules of Professional Conduct are very similar.

There are some general differences between the two sets of rules that are worth noting. Typically, where the model rules require the attorney to "know" the Illinois Rules use the standard to "know or reasonably should know." In both the Model Rules and Illinois rules "Knowingly," "known," or "knows"

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117. *Id*. at 23.
118. IRPC 8.3(d).
119. Ill. S. Ct. R. 761.

is defined as "actual knowledge of the fact in question."[120] The terminology section of the Illinois Rules explains "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." This adds a burden to most of the Illinois rules. Under the Model Rules, attorneys must have actual knowledge. In Illinois attorneys may be culpable for a rule violation even if they don't have actual knowledge. If a prudent and competent attorney would have had the knowledge, the attorney can be found in violation of the Illinois Rules.

In many cases, the Model Rules add a writing requirement. So for example in Model Rule 1.7, the attorney must obtain informed consent confirmed in writing to meet the disclosure requirements for a conflict of interest.[121] Contrast this with the Illinois Rule, wherein the attorney is only obligated to obtain the client's consent after disclosure.[122] With regards to disclosures, the Model Rules are more conservative and require a written component. This offers a measure of protection for the attorney and an attorney is probably well served to abide by the written requirement of the Model Rules even though unnecessary pursuant to the Illinois Rules.

Please note, for the following discussion I have omitted rules that are identical or substantially similar. I have also omitted a discussion of rules that were not adopted in Illinois. Attorneys practicing in Illinois should at least take the time to thoroughly read the Illinois Rules. Remember, "Ignorance of the Code is no excuse for attorney misconduct."[123]

PART ONE: THE CLIENT-LAWYER RELATIONSHIP

Rule 1 under both codes addresses the Client-Lawyer Relationship. Rule 1.1 is titled Competence. The rule in Illinois requires lawyers to provide competent representation, stating "competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation."[124] If a lawyer knows he is not competent on a certain subject, he needs the assistance of another lawyer who is competent.[125] However, if he obtains assistance from outside counsel, he must have his client's permission to do so.[126] Illinois Rule 1.1(a) is identical to the ABA Model Rule 1.1 on

120. *See* Model Rules of Professional Conduct [hereinafter MRPC], Rule 1.1, Terminology; IRPC, ILL. S. CT. R., ART. VIII TERMINOLOGY.
121. MRPC 1.7(b)(3).
122. IRPC 1.7(a)(2).
123. *In re Vrdolyak*, 421, 560 N.E.2d 840, 845 (Ill. 1990).
124. IRPC 1.1(a).
125. IRPC 1.1(b).
126. IRPC 1.1(c).

competence. The difference between the two sets of rules is Illinois' addition of 1.1(b) and 1.1(c). The addition of 1.1(b) and 1.1(c) serve to elaborate on what is competent representation and how a lawyer should handle a situation in which he has a client whose needs may be outside the scope of his knowledge.

Rule 1.2 is titled "Scope of Representation." This rule mandates an attorney to listen to his client and follow the client's decisions about his representation and what is to be accomplished.[127] Illinois included all of the Model Rule requirements but elaborated with additional details from the Illinois Code. Subsections (e), (f), (g), (h) and (i) are not in the Model Rules. These sections prohibit an attorney from threatening criminal charges or disciplinary action to obtain an advantage in a civil matter, filing suit simply to harass or injure another party, advancing a claim if he knows it's not supported by the law, failing to disclose information he is required by law to reveal, protecting a client who refuses to rectify a fraud he committed, failing to reveal a fraud committed by someone other the client, and assisting a client with something not permitted by the rules.[128]

The next rule where the Illinois Rules and the Model Rules substantially differ is Rule 1.5, regarding fees. Mode Rule 1.5(a) declares "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expense."[129] As opposed to Illinois, much briefer "[a] lawyers fees shall be reasonable."[130] The factors to be used to determine a reasonable fee are identical in both sets of rules and include items like the time and labor required,[131] customary fees for similar work,[132] and whether the fee is fixed or contingent.[133] See Rule 1.5 for a complete list of all the relevant factors.

Rule 1.5(b) requires an attorney to inform the client about the basis or rate of the fee within a reasonable time after the representation begins. The Model Rules adds that the basis of the fee be communicated to the client "preferably in writing."[134] Since the requirement is "preferable", it appears it is not a breach of the Model Rules to communicate with the client verbally regarding the fee structure. The Model Rules also add, "[a]ny changes in the

127. IRPC 1.2(a).
128. IRPC 1.2(e),(f)(1)-(3),(g),(h), and (i).
129. MRPC 1.5(a).
130. IRPC 1.5(a).
131. MRPC 1.5(a)(1); IRPC 1.5(a)(1).
132. MRPC 1.5(a)(3); IRPC 1.5(a)(3).
133. MRPC 1.5(a)(8); MRPC 1.5(a)(8).
134. MRPC 1.5(b).

basis of rate of the fee or expenses shall also be communicated to the client."[135] Regarding the communication of fees, the Model Rules are far more focused on the understanding of the fees involved with his or her representation.

Like Rule 1.5(b), in Rule 1.5(c) the Model Rules maintain their focus on the clients understanding of the fees, more than the Illinois rules. This rule deals with contingent fees and is basically similar in both sets. However, the Model Rule requires not only that a contingent fee should be explained to the client in writing, but that the writing shall be signed by the client. This signature requirement is not found in the Illinois Rules. Additionally, the Model Rules includes the following language that was not included in the Illinois Rules, "the agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party."[136]

Illinois added Rule 1.5(e) which addresses contingent fees for commercial accounts and insurance company subrogation claims. Model Rule 1.5(e) and Illinois Rule 1.5(f) both address when fee divisions between lawyers are permissible. Both Rules require the client to consent to a fee division in a signed writing.[137] The Illinois Rule elaborates on what the writing must disclose–that there will be a division of fees, how the division will be made and for what the other attorney is responsible, and the Illinois Rules also include a definition of economic benefit[138] which is missing from the Model Rules.

Rule 1.6 of the Model Rules and Illinois Rules are completely different. To begin with, in Illinois, an attorney may not disclose a client's confidence or secret without the client's consent.[139] "Confidence" denotes information protected by the lawyer-client privilege under applicable law.[140] "Secret" denotes information gained in the professional relationship, that the client has requested be held inviolate or the revelation of which would be embarrassing to or would likely be detrimental to the client.[141]

The Illinois Rules indicate a time frame, "a lawyer shall not . . . [disclose] during or after the termination of the professional relationship." The Model Rules remain silent on the issue of disclosure after the attorney-client relationship has been terminated. Both rules permit disclosure with client consent. Both rules allow disclosure to prevent death or serious bodily harm

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135. MRPC 1.5(b).
136. MRPC, 1.5(c).
137. MRPC 1.5(e); IRPC 1.5(f).
138. IRPC 1.5(i).
139. IRPC 1.6(a).
140. IRPC, ILL. S. CT. R. ART. VIII TERMINOLOGY.
141. *Id*.

or to comply with a court order. The Model Rules speak to permissible disclosure when the client is committing a crime or fraud and the attorney has unwittingly participated. The Illinois Rules focuses only on the intention of a client to commit a crime (the attorney's unwitting participation has been omitted). In Illinois, disclosure is also permissible if necessary to collect one's fee. Under both sets of rules disclosure is allowed to defend oneself against claims of misconduct. The Illinois Rules also address the Lawyers Assistance Programs and indicate that participant's disclosures fall under the protection of this rule.[142]

Rule 1.7 addresses "Conflict of Interests." Both sets of Rules prohibit an attorney from representing a client in a concurrent conflict of interest. Such a conflict exists when one client's representation is directly adverse to another client or if there is a risk that representation will be limited by the lawyer's responsibilities to another client. Both rules allow for representation in cases where the lawyer reasonably believes that he can provide competent representation to each client, and each affected client gives informed consent.[143] The Model Rules add that the attorney can provide the representation so long as it is not prohibited by law and it does not involve one client asserting a claim against another client.[144] The Illinois Rule adds subsection (c) which explains what the disclosure must include–the implications of common representation and the advantages and risks involved.[145]

With regards to Conflict of Interests for Current Clients, Rule 1.8, the Illinois Rules are significantly different than the Model Rules. The Model Rules prohibit transactions between attorneys and their current clients unless the terms are fair and reasonable and disclosed in writing,[146] the client has been directed in writing to obtain independent counsel,[147] and the client gives his informed consent in writing.[148] The Illinois rules prohibit such business transaction if the lawyer knows or reasonably should know that the lawyer and his clients interests may conflict or the client expects the lawyer to use his professional judgment to protect the client.[149] Illinois does not require written consent on the part of the client.[150]

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142. MRPC 1.6; IRPC 1.6.
143. MRPC 1.7(b); IRPC 1.7(a)(1)(2).
144. MRPC 1.7(b).
145. IRPC 1.7(c).
146. MRPC 1.8(a)(1).
147. MRPC 1.8(a)(2).
148. MRPC 1.8(a)(3).
149. IRPC 1.8(a)(1) and (2).
150. IRPC 1.8.

Many of subsections of this rule are substantially similar in both sets of rules. However in Illinois an attorney can't provide financial assistance with litigation unless the client remains ultimately liable.[151] Additionally, in Illinois there is a prohibition from negotiating an agreement limiting a client's right to file a claim with the ARDC.[152] Likewise the Model Rules have a few additions not found in Illinois. The Model Rules add subsection (j) which prohibits an attorney from having sexual relations with a client unless the sexual relationship preceded the attorney-client relationship.[153] The Model Rules also add subsection (k) which applies all the rules in this general rule to all members of a law firm; if it affects one lawyer, it affects them all.[154]

Rule 1.9 is titled "Conflict of Interest: Former Client." The Illinois Rules prohibit an attorney from representing a person with interests conflicting with the interests of a former client unless the former client consents after disclosure.[155] The Model Rules require "informed consent, confirmed in writing."[156]

The Model Rules adds subsection (b) which addresses when a lawyer leaves a firm. In such a case, the lawyer cannot represent someone in the same or substantially related matter when his prior law firm had represented someone with materially adverse interests.[157] Additionally, such representation is precluded if the lawyer has obtained information protected by Rule 1.6 and 1.9 unless the former client gives informed consent confirmed in writing.[158] The Illinois Rules do not speak to this issue. The remaining parts of the rules are substantially similar.

Rule 1.10 addresses imputed disqualification. The Illinois Rules and Model Rules are substantially similar in 1.10(a). A lawyer in a firm is prohibited from knowingly representing a client when any one of them practicing alone would be prohibited by the rules from doing so.[159] The difference lies in the Illinois standard "reasonably should know."[160] The addition or the phrase "reasonably should know" requires Illinois attorneys to exercise "reasonable prudence and competence" when making such a determination.

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151. IRPC 1.8(d)(1).
152. IRPC 1.8(h).
153. MRPC 1.8(j).
154. MRPC 1.8(k).
155. IRPC 1.9(a)(1).
156. MRPC 1.9(a).
157. MRPC 1.9(b).
158. MRPC 1.9(b)(2).
159. MRPC 1.10(a); IRPC 1.10(a).
160. IRPC 1.10(a).

In Illinois, subsection (b) addresses new lawyers to a firm.[161] This issue is not addressed in the Model Rules. The Model Rules add subsection (d) directing readers to Rule 1.11 with issues regarding special conflicts for current or former government lawyers.[162] The Illinois Rules add subsection (e) which addresses how to screen a law firm lawyer from a case to prevent a conflict when possible.[163] Any subsections not addressed are similar in both rules.

Rule 1.13 addresses the organization as client. Subsections (a) are identical in the Illinois and Model Rules.[164] Model Rules subsection (f) is same as Illinois subsection (d) and Model Rules (g) is same as Illinois subsection (e).[165] This rule is slightly different in the middle. Under the Model Rules, an attorney can reveal information otherwise protected under Rule 1.6 if the highest authority in the organization fails or refuses to take action to prevent a legal violation and the lawyer believes that the legal violation will result in substantial injury to the organization.[166] In Illinois, under the same circumstances, the lawyer may resign.[167]

The Model Rules prohibit a lawyer from disclosing information if he is defending a claim arising out of an alleged violation of law.[168] The Illinois Rules provide a description about how to proceed, if he has information that someone in the organization is violating the law which is likely to substantially injure the organization.[169] The Model Rules simply state that the lawyer shall refer the matter to the highest authority in the organization.[170]

Rule 1.14 addresses clients under a disability. The Model Rules and Illinois Rules are substantially similar. The difference lies in the inclusion in the Model Rules of subsection (c), which allows an attorney who is taking protective action for a client such as a Guardian ad Litem to reveal protected information to "the extent reasonably necessary to protect the client's interests."[171]

Rule 1.15 speaks to the issue of safekeeping property. Illinois sections (a) and (b) have identical counterparts in the Model Rules.[172] Illinois section

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161. IRPC 1.10(b).
162. MRPC 1.10(d).
163. IRPC 1.10(e).
164. MRPC 1.13(a); IRPC 1.13(a).
165. MRPC 1.13(f), (g); IRPC (d), (e).
166. MRPC 1.13(c)(1)(2).
167. IRPC 1.13(c).
168. MRPC 1.13(d).
169. IRPC 1.13(d).
170. MRPC 1.13(b).
171. MRPC 1.14(c).
172. MRPC 1.15(a),(d); IRPC 1.15(a),(b).

(c) has a substantially similar counterpart in the Model Rules.[173] The Model Rules permit lawyers to deposit their own funds in the trust account to pay bank service charges.[174] Lawyers can also deposit prepaid legal fees and expenses and withdraw those funds as the fees are earned or expenses incurred.[175]

Section (d) of the Illinois Rules requires attorneys to designate the Lawyers Trust Accounts (IOLTA) program as the beneficiary of all income derived from nominal or short-term account.[176] The IOLTA program was established so that any interest earned on these small and short term accounts can be used to sponsor non-profit legal aid organizations.[177] The rules specifically state that an attorney will not be accused of professional misconduct when using his judgment as to what is a nominal or short term fund.[178]

Interestingly, Justice Heiple wrote a dissent about the IOLTA program arguing that it is the equivalent of looting.[179] He argued that this program is essentially "the taking of private property for public use without just compensation."[180] Justice Heiple believed the fact that the money is taken with philanthropic goals in mind, does not give the court the authority to take interest earned on client funds and distribute those funds to other people.[181] As Justice Heiple stated, "[a]s income produced by clients' funds, this interest, however small, belongs to the clients, and its assignment by the state to others represents an unconstitutional taking of property."[182]

Section (g) of Rule 1.5 in Illinois refers to Real Estate Funds Accounts also known as REFAs. REFAS are segregated accounts used by real estate lawyers that allow them to "handle the receipt and disbursement of funds deposited but not collected."[183] This commonly arises in real estate closings where the attorney may have to accept and disseminate uncleared funds.[184] REFAs offer a solution for those situations allowing the attorney to act within

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173. MRPC 1.15(c); IRPC 1.15(c).
174. MRPC 1.15(b).
175. MRPC 1.15(c).
176. IRPC 1.15(d).
177. Cornell University Law School, American Legal Ethics Library, Illinois Legal Ethics, http://www.law.cornell.edu/ethics/il/ – *See* the Narrative for Rule 1.15 (last visited Feb. 22, 2008).
178. IRPC 1.15(d)(5).
179. IRPC 1.15 (Heiple, J., dissenting).
180. *Id*.
181. *Id*.
182. *Id*.
183. Cornell University Law School, American Legal Ethics Library, Illinois Legal Ethics, http://www.law.cornell.edu/ethics/il/ – *See* the Narrative for Rule 1.15 (last visited Feb. 22, 2008).
184. *Id*.

the confines of Rule 1.15 as long as he has previously established a REFA account.[185]

In order to meet the requirements of section (g), the attorney must be acting as a closing agent or must meet the "good-funds" requirements.[186] The good funds requirement is met where the lawyer directs the bank in writing to honor all disbursements up to a specified amount at least equal to the amount deposited in good funds.[187] The rule goes on to enumerate all the sources of "good funds."[188] The Model Rules do not speak to funds similar to the IOLTA or REFA.

Overall the feelings of both the Model Rule 1.16 and the Illinois Rule 1.16 are substantially similar although worded quite differently. The bottom line is that under both rules attorneys may withdraw if continued representation would yield a Rule violation, if the attorney is unable to continue representation due to a physical or mental impairment, if the lawyer is discharged, if the client is acting in an illegal manner or if the client is not paying his fees.[189] Illinois adds that withdrawal is permissible if the client is bringing the case to harass or maliciously injure someone.[190] Both require that attorneys comply with the law regarding the proper means to effectuate a withdrawal and refund any unearned fees that have been advanced.[191]

The subject of Part Two of the Model Rules and Illinois Rules is Counselors. The rules that Illinois adopted in this section are substantially similar to the Model Rules so this section will not be discussed herein.

PART THREE: COUNSELORS AS ADVOCATE

The subject of Part Three of the Model Rules and Illinois Rules concerns counselors as advocates. Under this section, the first rule where the Model Rules and the Illinois Rules substantially differ is Rule 3.3. The Illinois Rule is far more detailed. Both rules prohibit a lawyer from making a false statement of fact or law to a tribunal.[192] The Model Rules also require the lawyer to correct a false statement made before a tribunal.[193] They both require an attorney to disclose legal authority even where it is directly adverse

185. *Id*.
186. IRPC 1.15(g)(1),(2).
187. IRPC 1.15(g)(2).
188. IRPC 1.15(g)(2)(a)-(g).
189. IRPC 1.16(a)(1)-(4); MRPC 1.16(a)(1)-(3).
190. IRPC 1.16(a)(1).
191. IRPC 1.16(d),(e); MRPC(c),(d).
192. IRPC 3.3(a)(1), MRPC 3.3(a)(1).
193. MRPC 3.3(a)(1).

to his client's position.[194] Both rules prohibit an attorney from offering evidence he knows to be false.[195] In Illinois if the attorney offers evidence and later learns it's false, the rule requires the lawyer to take "reasonable remedial measures."[196] The Model Rules continues that remedial measures include disclosure to the tribunal if necessary.[197]

Both rules allow an attorney to refuse to offer evidence he reasonably believes is false.[198] Additionally, both rules require the lawyers, in ex parte proceedings, to inform the tribunal of all material facts he knows, even if they are adverse, so that the tribunal can make an informed decision.[199] The remaining sections found in the Illinois Rule are based on the Illinois Code of Professional Conduct.[200] For additional discussion of the Rule 3.3 requirements, see the section in this paper on the attorney's duty to the court.

Rule 3.4 is titled "Fairness to Opposing Party and Counsel." These rules are very similar except that the Model Rules have two additional subsections that were not adopted in Illinois. The Model Rules add that lawyers shall not make frivolous discovery requests or fail to comply with legal discovery requests in pre-trial proceedings.[201] The Model Rules also add that in a trial, a lawyer shall not allude to irrelevant matters, "assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused."[202] The drafters of the Illinois Rules rejected these subsections because the tribunal would be a better forum to address these issues.[203]

Illinois Rule 3.5 on "Impartiality and Decorum of the Tribunal" is far more in depth than its Model Rule counterpart, incorporating many aspects of the Illinois Code. The Model Rules prohibit an attorney from trying to influence or communicate ex parte with a judge, juror, or prospective juror.[204] Additionally, once the jury has been discharged, an attorney shall not

194. IRPC 3.3(a)(3); MRPC 3.3(a)(2).
195. IRPC 3.3(a)(4); MRPC 3.3(a)(3).
196. IRPC 3.3(a)(4).
197. MRPC 3.3(a)(3).
198. IRPC 3.3(c); MRPC 3.3(a)(3).
199. IRPC 3.3(d); MRPC 3.3(d).
200. Cornell University Law School, American Legal Ethics Library, Illinois Legal Ethics, http://www.law.cornell.edu/ethics/il/ – *See* the Narrative for Rule 3.3 (last visited Feb. 22, 2008).
201. MRPC 3.4(d).
202. MRPC 3.4(e).
203. Cornell University Law School, American Legal Ethics Library, Illinois Legal Ethics, http://www.law.cornell.edu/ethics/il/narr/IL_NARR_3.HTM#3.4:100 (last visited Feb. 22, 2008).
204. MRPC 3.5(a) and (b).

communicate with a juror or prospective juror if prohibited by law,[205] if the juror has made known he does not want to communicate[206] or the communication is a misrepresentation, coercion, duress or harassment.[207] Lastly, an attorney is prohibited from engaging in "conduct intended to disrupt a tribunal.[208]

The Illinois Rules start with the general notion that before a trial, a lawyer shall not communicate with anyone he knows is a member of the venire from which the jury will be selected.[209] Once the trial has begun, a lawyer shall not communicate with a juror.[210] Even if it is not his case, a lawyer is prohibited from talking with a juror regarding the case;[211] although, a lawyer is permitted to talk with members of the jury "in the course of official proceedings."[212] Communications to harass, embarrass or influence the jurors as well as "vexatious or harassing investigation" of the jurors are prohibited.[213] All the restrictions of Rule 3.5 apply to investigations of jurors families.[214] If a lawyer learns of improper conduct of a juror or his family, he is to reveal it promptly.[215] If a lawyer makes a gift to a judge or employee of a tribunal it must comply with the Code of Judicial Conduct.[216] A lawyer shall not communicate with the judge in a case the lawyer is trying unless it is during the course of official proceedings,[217] the communication is in writing and given to opposing counsel as well,[218] an oral communication is permissible if opposing counsel receives adequate notice,[219] or if otherwise permitted by law.[220]

Rule 3.6 regarding "Trial Publicity" is identical in both sets of rules except that the Illinois drafters added subsection (b). This subsection enumerates the subjects that would pose a serious threat to the fairness of a proceeding and as such should not be disseminated to the public. These

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205. MRPC 3.5(c)(1).
206. MRPC 3.5(c)(2).
207. MRPC 3.5(c)(3).
208. MRPC 3.5(d).
209. IRPC 3.5(a).
210. IRPC 3.5(b)(1).
211. IRPC 3.5(b)(2).
212. IRPC 3.5(c).
213. IRPC 3.5(d) and (e).
214. IRPC 3.5(f).
215. IRPC 3.5(g).
216. IRPC 3.5(h).
217. IRPC 3.5(i)(1).
218. IRPC 3.5(i)(2).
219. IRPC 3.5(i)(3).
220. IRPC 3.5(i)(4).

subjects include a witness's identity and expected testimony,[221] possibility of a guilty plea in a criminal case,[222] and one's opinion about guilt or innocence.[223] For a complete list, see Illinois Model Rule 3.6(b) located in the Appendix.

Rule 3.8 addresses the "Special Responsibilities of a Prosecutor." The Illinois Rules begin with the noble declaration, "[t]he duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict."[224] This broad statement is not included in the Model Rules: "[p]aragraph (a) of Rule 3.8 is intended to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably".[225]

The Illinois Rule continues with a broader inclusion of to whom this rule applies. In Illinois, this rule is directed to a public prosecutor or other government lawyer;[226] whereas the Model Rules are directed to prosecutors.[227] Both rules require the attorney to not prosecute a charge they know (and in Illinois reasonably should know) is not supported by probable cause.[228] Both require the disclosure of adverse and mitigating evidence.[229] Both prohibit extrajudicial statements if they would result in public condemnation of the accused or if they are forbidden under Illinois Rule 3.6.[230] However, the Model Rule adds that the prosecutor shall make sure the accused knows of his right to and how to obtain counsel.[231] Also, the Model Rules seek to prevent an unrepresented accused person from waiving pretrial rights.[232] Lastly, the Model Rule prohibits the subpoena of an attorney to present evidence about a past or present client unless the evidence is not protected by a privilege,[233] the evidence is essential to complete an ongoing investigation,[234] or there is no other way to get the information.[235]

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221. IRPC 3.6(b)(1).
222. IRPC 3.6(b)(2).
223. IRPC 3.6(b)(3).
224. IRPC 3.8(a).
225. IRPC Rule 3.8 Comm. Cmt.
226. IRPC 3.8(a).
227. MRPC 3.8(a).
228. MRPC 3.8(a); IRPC 3.8(b).
229. IRPC 3.8(c); MRPC 3.8(d).
230. MRPC 3.8(f); IRPC 3.8(d), (e).
231. MRPC 3.8(b).
232. MRPC 3.8(c).
233. MRPC 3.8(e)(i).
234. MRPC 3.8(e)(ii).
235. MRPC 3.8(e)(iii).

PART FOUR: TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

The subject of Part Four of the Model Rules and Illinois Rules is "Transactions With Persons Other Than Clients."

Rule 4.3 is the first rule in this section where the Illinois and Model Rules are different. This rule addresses dealing with unrepresented persons. Under both sets of rules an attorney must make sure the unrepresented party understands that the lawyer is not disinterested and must clarify his role if necessary.[236] The rules diverge with the Model Rules addition prohibiting the lawyer from giving legal advice to an unrepresented person except to tell them to get counsel.[237]

Like Rule 4.3, Rule 4.4 is substantially similar in both sets of rules. Rule 4.4 speaks to "Respect for Rights of Third Persons" and under both sets of rules prohibits lawyers from embarrassing, delaying or burdening a third person in the course of representation[238] The difference lies in the addition of subsection (b) in the Model Rules which requires a lawyer to notify the sender of a document that was sent to them in error.[239]

PART FIVE: LAW FIRMS AND ASSOCIATIONS

The subject of Part Five of the Model Rules and Illinois Rules is "Law Firms and Associations." The first rule in this section where the Illinois and Model Rules are different is Rule 5.5, concerning "Unauthorized Practice of Law." Section (a) of the Model Rule is encompassed in both section (a) and (b) of the Illinois rule.[240] Basically this portion sets forth the prohibition from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or to help someone else do so. At that point, the Illinois rule is complete. The Model Rules provides detailed explanations of when the lawyer is not admitted to the bar practice there.[241]

PART SIX: INFORMATION ABOUT LEGAL SERVICES

The subject of Part Six of the Model Rules and Illinois Rules is "Public Service." The rules that Illinois adopted in this section are substantially similar to the Model Rules so this section will not be discussed herein.

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236. IRPC 4.3; MRPC 4.3.
237. MRPC 4.3.
238. IRPC 4.4.
239. MRPC 4.4(b).
240. MRPC 5.5(a); IRPC 5.5(a), (b).
241. *See* MRPC 5.5(b),(c),(d).

PART SEVEN: INFORMATION ABOUT LEGAL SERVICES

The next Part in both sets of rules is Part 7, "Information About Legal Services." Rule 7.1 addresses "Communications Concerning a Lawyer's Services." Both sets of rules prohibit false or misleading statements about one's services, and both rules define a false or misleading statement as one that "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."[242] However, Illinois adds more to the definition of false or misleading by adding a statement is false or misleading if the statement creates an unjustified expectation or compares the lawyer's services to another lawyer's services.[243]

The Model Rules and Illinois Rules are similar with regards to Rule 7.2 "Advertising." In Illinois, a copy of all advertisement material must be kept for 3 years after its last dissemination.[244] The Model Rules have no such requirement. The Model Rules expressly permit reciprocal referral agreements so long as they are not exclusive and the client is told of the agreement.[245] The Illinois Rules do not speak to this issue.

Rule 7.3 addresses "Direct Contact with Prospective Clients." Both Illinois and the Model Rule prohibit a lawyer from soliciting a client if his main motive is pecuniary gain.[246] The exception is if the contact is a relative, friend or they have prior relationship.[247] Illinois extends the prohibition on solicitation if the lawyer knows or should know that the person solicited is not in a physical or mental state to exercise reasonable judgment in employing a lawyer.[248] Additionally, both sets of rules prohibit solicitation if the person has made it known he does not want to be solicited or solicitation involves coercion, duress or harassment.[249] Both sets of rules require that envelopes be labeled as advertising material when appropriate.[250] Illinois allows attorneys to utilize services for self promotion such as a charitable legal services organization or a bona fide political, social, civic, charitable, religious, fraternal, employee or trade organization promote the lawyer.[251]

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242. IRPC 7.1(a); MRPC 7.1.
243. IRPC 7.1(b), (c).
244. IRPC 7.2(a)(1).
245. MRPC 7.1(b)(4).
246. IRPC 7.3; MRPC 7.3(a).
247. IRPC 7.3(a)(1); MRPC 7.3(a)(2).
248. IRPC 7.3(b)(1).
249. IRPC 7.3(b)(2), (3); MRPC 7.3(b)(1), (2).
250. IRPC 7.3(a)(2); MRPC 7.3(c).
251. IRPC 7.3(a)(3).

Rule 7.4 addresses "Communication of Fields of Practice." Both sets of rules are concerned with an attorney accurately communicating his or her field of expertise. The Model Rule allow an attorney to communicate his field of expertise.[252] For example, if he is a patent attorney admitted by United States Patent and Trademark Office, he can use the designation "Patent Attorney."[253] Similarly, if he is engaged in Admiralty practice, he may use designation "Admiralty" or "Proctor in Admiralty."[254] Lastly, an attorney cannot state or imply he is certified as a specialist unless he is certified by an organization that is approved by state authority or the ABA and the name of the certifying organization is identified.[255]

In Illinois, a lawyer or firm can designate a specialty and describe legal matters they'll accept.[256] Just like in the Model Rules, an attorney admitted before United States Patent and Trademark office can use "Patents,'' "Patent Attorney,'' "Patent Lawyer,'' or "Registered Patent Attorney,''[257] or if in admiralty can use "Admiralty,'' "Proctor in Admiralty'' or "Admiralty Lawyer."[258] Unlike the Model Rules, the Illinois Rules also account for attorneys engaged in trademark practice, and they are allowed to use the terms "Trademarks,'' "Trademark Attorney'' or "Trademark Lawyer."[259] If the lawyer uses the term certified, specialist or expert, it must be truthful and verifiable and must state that the Illinois Supreme Court does not recognize such certifications for specialties in practice of law.[260]

PART EIGHT: BAR ADMISSION AND DISCIPLINARY MATTERS

Regarding Rule 8.1, "Bar Admission and Disciplinary Matters," the rules are identical with the exception of Illinois' addition of subsection (b). While the Model Rules do not address this issue at all, Illinois Rules require that a lawyer does not assist another's application for admission to the bar if he or she knows that person is unqualified.[261]

Rule 8.3 speaks to "Reporting Professional Misconduct." The Model Rule is simple. If a lawyer knows that another lawyer or judge has violated the

252. MRPC 7.4(a).
253. MRPC 7.4(b).
254. MRPC 7.4(c).
255. MRPC 7.4(d)(1), (2).
256. IRPC 7.4.
257. IRPC 7.4(b)(1).
258. IRPC 7.4(b)(3).
259. IRPC 7.4(b)(2).
260. IRPC 7.4(c)(1), (2).
261. IRPC 8.1(b).

Rules of Professional Conduct so as to raise questions as to their honesty, trustworthiness or fitness, the lawyer is to inform the appropriate professional authority.[262] The exception is if the disclosure would violate rule 1.6 or if the information was obtained when the lawyer or judge was attending a lawyers assistance program.[263] The Illinois Rules are far more detailed. To begin with, if a lawyer has knowledge, that another lawyer or judge has violated Rule 8.4(a)(3) or (4), the lawyer must report that knowledge. Rule 8.4(a)(3) addresses criminal acts reflecting honesty, trustworthiness or fitness,[264] and Rule 8.3(a)(4) addresses conduct involving dishonesty, fraud, deceit or misrepresentation.[265] Additionally, the Illinois Rules expressly command attorneys to cooperate with an investigative authority when asked about the conduct of lawyers or judges.[266] Lastly, the attorney must report to the ARDC if he has been disciplined by anybody other than ARDC.[267]

The Illinois Rules are far more detailed related to Rule 8.4 on Misconduct. The Model Rule is completely encompassed within the Illinois Rule but the Illinois Rule makes numerous additions. Both rules prohibit a lawyer from violating the rules,[268] from inducing or a helping another lawyer to violate the rules,[269] from committing a criminal act reflecting poorly on the lawyers honesty, trustworthiness or fitness,[270] from dishonest, fraudulent, deceitful or misrepresenting behavior,[271]inhibiting the administration of justice,[272] from indicating they can improperly influence a tribunal, legislative body, government agency or official,[273] and from helping a judge to violate the rules.[274]

With that the Model Rule is complete but the Illinois Rule continues on to prohibit a multitude of other potential misconduct by attorneys. Attorneys may not fail to repay an education loan in bad faith.[275] Additionally, attorneys may not discriminate based on race, sex, religion, national origin, disability,

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262. MRPC 8.3(a), (b).
263. MRPC 8.3(c).
264. IRCP 8.4(a)(3).
265. IRCP 8.3(a)(4).
266. IRPC 8.4(c).
267. IRPC 8.4(d).
268. IRPC 8.4(a)(1); MRPC 8.4(a).
269. IRPC 8.4(a)(2), MRPC 8.4(a).
270. IRPC 8.4(a)(3), MRPC 8.4(b).
271. IRPC 8.4(a)(4); MRPC 8.4(c).
272. IRPC 8.4(a)(5), MRPC 8.4(d) [Illinois elaborates on this subsection where the Model Rules remain silent. Illinois states that as part of this the lawyer cannot treat litigants, jurors, witnesses, lawyers or others in a discriminatory fashion.].
273. IRPC 8.4(a)(6); MRPC 8.4(e) [Model Rules has a knowingly helping standard].
274. IRPC 8.4(a)(7); MRPC 8.4(f).
275. IRPC 8.4(a)(8).

age, sexual orientation or socioeconomic status.[276] Further, the Illinois Rules include an entire subsection devoted to what lawyer who holds public offices shall not do.[277]

IV. STATE OF THE PRACTICE: A SUMMARY OF ETHICAL INVESTIGATIONS AND DISCIPLINARY MATTERS AFFECTING ILLINOIS ATTORNEYS

The attorney's duties and the rules that establish them are more meaningful when there is an understanding of the current state of the practice. Not much has changed in the past decade regarding the types of complaints that are made against attorneys. The ARDC's 2006 Annual Report shows that the most common complaint leveraged against attorneys for that year was neglect. Even ten years ago, this was the most common complaint.[278] Similarly failure to communicate with clients was the second most common complaint in both 1996 and 2006.[279] Not surprisingly fraudulent or dishonest activity by lawyers, incompetence, excessive fees, and improper handling of client or third party funds all ranked high in both 1996 and 2006.[280]

The attorney population registered in Illinois for 2006 was 81,146.[281] During 2006, the ARDC docketed 5,801 investigations, about a 4.6% decrease from 2005.[282] Those 5,801 investigations involved charges against 4,080 different attorneys, representing about 5% of all registered attorneys.[283] About 894 or 22% of the 4,080 attorneys were the subject of more than one investigation docketed in 2006.[284]

With multiple charges of misconduct sometimes brought against one attorney, there were approximately 8,516 charges brought, and investigated, against the 4,080 attorneys. The top six classifications of investigations accounted for the vast majority, about 75% of all investigations. Neglect of a matter accounted for 2,596, about 30%, of the charges. Next in line was failure to communicate with a client, representing 1,383 (16%) of the charges.

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276. IRPC 8.4(9)(a).
277. IRPC 8.4(b).
278. Mary Robinson, *Avoiding ARDC Anxiety: A Disciplinary* Primer, 84 Ill. B.J. 452, 453 (1996 reformatted 2001), http://www.iardc.org/article_avoidanxiety.html.
279. *Id*.
280. *Id*.
281. ApexCLE, State of The Practice 2008: A Review of Ethical and Professionalism Investigations in Illinois, http://www.apexcle.com/pages/staeofpractice (summarizing the ARDC 2006 Annual Report)(Jan. 12, 2008).
282. *Id*.
283. *Id*.
284. *Id*.

Fraudulent activity comprised 921 (11%) of the charges and excessive or improper fees rounded out the top four with 827 (10%) of the charges. Finally, at about 4% each, were improper trial conduct and improper management of client funds with 368 and 361 charges, respectively.[285]

The area of practice has a clear link to the number of investigations. The top areas of practice most likely to lead to a grievance of attorney misconduct are criminal law, domestic relations, tort, and real estate.[286] The majority of complaints are against sole practitioners or those that practice in small law firms and serve low to middle income clients.[287] The good news is that the number of investigations that result in actual filings with the Supreme Court is small. There were 1,319 investigations closed after just the initial review. Following an investigation, an additional 4,076 matters were closed.[288] This resulted in only 48 filings with the Supreme Court and 215 complaints or impairment petitions voted. Putting this in perspective, of the 81,146 registered attorneys, less than 0.003% had action beyond an investigation taken by the ARDC and only 32 were disbarred and 63 suspended.[289]

What should you do to avoid becoming one of the unfortunate few who has an ARDC complaint brought against them? First and foremost, attorneys should communicate clearly and update their clients regularly.[290] Attorneys are advised to maintain separate funds and accounts and resolve fee disputes when they arise even if that means refunding some of the fee.[291] Attorneys must get help with drug and alcohol problems as soon as possible.[292]

Lastly, attorneys must manage their offices proactively. This includes preserving phone messages, noting the substance of phone conversations for files, documenting time spent on cases in an organized manner as well as maintaining a system for monitoring case progress.[293] There are law office management programs available that can assist attorneys in setting up their office utilizing proper management procedures.[294]

If an attorney is unable to avoid the filing of a complaint, there are some things he or she can do to ease the investigative process. First and foremost,

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285. *Id*.
286. *Id*.
287. Robinson, *supra* note 278.
288. ApexCLE, *supra* note 281.
289. *Id*.
290. ApexCLE, ARDC Policies and Procedures, http://www.apexcle.com/pages/ARDCPolicies.
291. *Id*.
292. *Id*.
293. *See In re* Smith, 659 N.E.2d 896 (Ill. 1995)(Attorney Smith was suspended for neglect of client matters, failure to communicate with his clients and hindering the administration of justice where he did none of the above-noted office management activities).
294. ApexCLE, *supra* note 290.

respect the ARDC process and work with the ARDC.[295] Minimize the damage where possible and admit and recognize improper conduct. The Court is particularly concerned where an attorney shows an inability to recognize wrongfulness of his acts.[296] According to the Court, "[a]lthough an attorney can be tried only for the conduct charged against him, the failure to be candid and the giving of false testimony further demonstrates his unfitness to pursue the practice of law."[297]

In *In re Elizabeth Gorecki*, the court looked to the respondent's deceptive response to the ARDC and weighed that against her in determining appropriate sanctions. Her initial refusal to accept responsibility for her misdeeds was considered in evaluating her character. She received a four month suspension even though she did not commit a crime or take any money. Her misconduct was confined to misstatements she made, as Kane County State's Attorney, about the President of the Kane County Board indicating he could be bribed when she knew that was not true.[298]

Keep in mind that admissions made during ARDC proceedings may be admissible later in court. In *Moy v. Winsen NG*, the court admitted the transcripts of prior ARDC proceedings and used the statements made against interest against the defendant in its hearing.[299]

Often attorneys are unsure if they need to hire counsel when defending against an ARDC complaint. Obtaining competent counsel early in the process is recommended.[300] If the matter is simple and the attorney is comfortable with the ARDC process, hiring counsel may be unnecessary. However, there are some situations where an attorney should not even consider representing himself. They include defending against allegations that: the cause of action was lost, a default judgment entered or an appeal dismissed due to the attorney's negligence, the attorney entered into business transactions with the client and did not disclose properly or urge independent counsel for the client, the attorney was convicted of a criminal offense, the attorney mishandled or misappropriated funds, the attorney is accused of fraud, or fee matters, including billing fraud, excessive fees and inappropriate contingency arrangements.[301]

It is not uncommon for attorneys representing themselves to exacerbate their problems. It may be difficult to admit the obvious, acknowledge

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295. *Id*.
296. *In re* Lewis, 562 N.E.2d 198, 214 (Ill. 1990).
297. *Id*. at 211 (citing *In re* Harris, 443 N.E.2d 557, 561 (Ill. 1982).
298. *In re* Gorecki, 802 N.E.2d 1194 (Ill. 2003).
299. Moy v. Winsen NG, 864 N.E.2d 752 (Ill. App. Ct. 2007).
300. ApexCLE, *supra* note 290.
301. Robinson, *supra* note 278.

misconduct where necessary, and answer questions directly.[302] Representation familiar with the ARDC process can alleviate these problems and provide the attorney proper legal advice.[303] At the very least, "it would be wise to ask a trusted colleague to review a response to a disciplinary inquiry before it is submitted."[304]

Keep in mind, once lost it is very difficult to have a law license reinstated. Once disbarred on consent, an attorney must wait three years before he can file a petition for reinstatement. In a reinstatement hearing the petitioner has "the burden of proving by clear and convincing evidence that he should be reinstated to the practice of law."[305]

V. SUPPORT AND PROGRAMS TO ASSIST ATTORNEYS

Often an ethics issue arises and the Illinois Rules of Professional Conduct are not entirely clear as to how to proceed. After reviewing the Illinois Rules of Professional Conduct, an attorney can also look to the ABA Model Rules and their comments for guidance. Even after reviewing the rules, questions may still remain. If so, there are several areas both online and over the phone where attorneys can seek guidance.

VI. ASSISTANCE FROM THE ARDC

Attorneys can contact the Ethics Inquiry Program created by the ARDC. The Ethics Inquiry Program provides research assistance and guidance regarding ethics issues. They do not accept e-mails or faxes but can be reached via telephone.[306] The Commission will not keep a record of the caller's identity or the substance of the inquiry. The attorney can even remain anonymous and is urged to present the question hypothetically.[307]

Through this program, an Ethics attorney will hear the problem and assist in identifying the relevant Rules of Professional Conduct, case law or other sources to help resolve the issue.[308] Any information received through the Program is neither legal advice nor a binding advisory opinion.[309] It is legal

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302. *Id*.
303. *Id*.
304. *Id*.
305. *In re* Martinez-Fraticelli, 850 N. E. 2d 155, 165 (Ill. 2006).
306. Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois, Ethics Inquiry Program, http://www.iardc.org/ethics.html (last visited Apr. 1, 2008).
307. *Id*.
308. *Id*.
309. *Id*.

research assistance only and the attorney is ultimately responsible for his or her own final judgment. Both the fact that the inquiry has been made, and the response from the Ethics Inquiry attorneys, are not admissible in an attorney disciplinary proceeding.[310]

The goal of the Program is to help lawyers understand their professional obligations and assist them in resolving important issues in their practice.[311] The ARDC attorneys and paralegals that staff the program look to existing professional responsibility law, legal precedent, bar association ethics opinions, law review articles and practical guidelines to help attorneys answer their ethics queries.[312] The Program is also available to the general public if they have concerns about their attorney's behavior.[313] Note that utilizing this service does not satisfy any requirements to report attorney misconduct.[314]

The Ethics Inquiry Program is just one of a few services offered by the ARDC to assist attorneys in discerning the Rules requirements. On the ARDC website– www.iardc.org–there is a section on rules and decisions. Attorneys can use this link to research independently or simply keep abreast of recent rulings. The ARDC website also has a Publication section which includes the articles: *Avoiding ARDC Anxiety: A Disciplinary Primer*,[315] *Ten Ethics Questions From Young Lawyers*,[316] *Lawyer Admission and Regulation in Illinois*,[317] and the *Client Trust Account Handbook*.[318]

VII. ASSISTANCE FROM THE ILLINOIS STATE BAR ASSOCIATION AND CHICAGO BAR ASSOCIATION

The ARDC is not the only organization offering assistance to attorneys' in Illinois. Members of the ISBA have access to the ISBA Advisory Opinions on Professional Conduct.[319] The ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA and

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310. *Id*.
311. *Id*.
312. *Id*.
313. *Id*.
314. *Id*.
315. Robinson, *supra* note 278.
316. Mary F. Andreoni, *Ten Ethics Questions From Young Lawyers* (1998), http://www.iardc.org/article_tenethicsquestions.html.
317. Mary Robinson, *Lawyer Admission and Regulation in Illinois* (1997, revised 2001), http://www.iardc.org/article_cornell.html.
318. Attorney Registration & Disciplinary Commission of the Supreme Court of Illinois, *Client Trust Account Handbook* (2007), http://www.iardc.org/clienttrusthandbook_toc.html.
319. Illinois State Bar Association, ISBA Opinions on Professional Conduct, http://www.isba.org/ethicsopinions (last visited Apr. 1, 2008).

"express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation[s].[320] The Advisory Opinions are organized by subject and opinion number from 1982 to the present. Likewise, the Chicago Bar Association[321] maintains an ethics opinion area for its members.

VIII. THE LAWYERS' ASSISTANCE PROGRAM

The Illinois State Bar Association in conjunction with the Chicago Bar Association established The Lawyers' Assistance Program. The Lawyer's Assistance Program ("LAP") is a not-for-profit organization that works with Illinois legal professionals dealing with addiction issues or mental illness. The LAP provides educational, informational and referral, peer assistance and intervention services. The LAP's stated mission is: "to protect clients from impaired lawyers and judges, to help lawyers, judges, and law students get assistance for alcohol dependency, drug addiction, and mental health problems, and to educate the legal community about addiction and mental health issues."[322]

Acknowledging that ten to twenty percent of attorneys and judges suffer from alcohol and drug dependency or mental health problems and recognizing that these problems significantly impact a professional's performance, the LAP works to protect the public, improve the integrity and reputation of the legal profession and save the lives and practices of impaired attorneys.[323]

IX. ASSISTANCE FROM ADDITIONAL SCHOOLS AND ORGANIZATIONS

For further reference, the attorney can look to the American Legal Ethics Library maintained by Cornell University Law School.[324] This digital library contains both the codes setting standards for the professional conduct of lawyers as well as providing commentary on the law governing lawyers. It is organized on a state by state basis with contributions from law firms, individuals and legal scholars.[325] One of the most extensive collections of

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320. *Id*.

321. The Chicago Bar Association, Ethics Opinions, http://www.chicagobar.org (follow hyperlink "Ethics Opinions" under "CBA Services")(last visited Apr. 1, 2008).

322. Lawyers' Assistance Program, http://www.illinoislap.org (last visited Apr. 1, 2008).

323. *Id*.

324. Legal Information Institute, American Legal Ethics Library, W. Bradley Wendel ed., http://www.law.cornell.edu/ethics (last visited Apr. 1, 2008).

325. *Id*.

resources, books, links,[326] and information on ethics and professionalism is available at www.apexcle.com[327] including information on continuing legal education programs. The American Bar Association has devoted a large portion of its website to ethical issues in its Center For Professional Responsibility.[328] The ABA states that the Center promotes the "discussion and resolution of pressing issues of professional responsibility and fosters communication among diverse bar organizations and the various agencies that supervise and regulate the conduct of lawyers and judges."[329] It also provides an interesting list of Landmark Dates in Professional Responsibility.[330]

For the attorney seeking additional information on specific ethical issues associated with the use of technology by legal professionals, there is Legalethics.com[331] maintained by Professor David Hricik of Mercer University School of Law and Peter Krakaur. Mercer University School of Law also has the Center for Legal Ethics and Professionalism with additional information and web links.[332]

326. ApexCLE, ApexCLE Ethics and Professionalism Links, Resources and Bibliography Information, www.apexcle.com/pages/EthicsLinks (last visited Apr. 1, 2008).
327. ApexCLE, Illinois Attorney Ethics and Professionalism, www.apexcle.com/pages/EthicsLinks (last visited Apr. 1, 2008).
328. American Bar Association, Center for Professional Responsibility, http://www.abanet.org/cpr/home.html (last visited Apr. 1, 2008).
329. American Bar Association, Center for Professional Responsibility, *About the ABA Center for Professional Responsibility*, http://www.abanet.org/cpr/home.html (last visited Apr. 1, 2008).
330. *Id*. (under link "Landmark Dates in Professional Responsibility").
331. Legalethics.com Home Page, http://www.legalethics.com (last visited Apr. 1, 2008).
332. Center for Legal Ethics and Professionalism, http://www.law.mercer.edu/academics/centers/mclep (last visited Apr. 1, 2008).