A PRACTICAL ROAD MAP TO THE NEW ILLINOIS ETHICS RULES*

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On July 1, 2009, the Supreme Court of the State of Illinois entered an order replacing Illinois's Rules of Professional Conduct effective January 1, 2010.[1]

Illinois's new rules[2] move closer to the ABA Model Rules[3] than the old version.[4] For the first time, the rules also include comments, which provide insight into the black-letter rules themselves, and substantive guidance in some situations where the rules are silent.

Unfortunately, it can be very difficult to summarize ethics rules changes in a helpful way. Simply listing the changes rule by rule does not provide useful guidance, because some of the word changes do not make a substantive difference. Providing too much detail can obscure the significant changes, while providing too little detail can leave lawyers puzzled.

Two factors make it even more difficult to summarize the new Illinois ethics rules. First, as explained above, the Illinois rules now include comments. Most of them are not worth mentioning because they simply repeat the black-letter rule or do not provide significantly useful guidance. On the other hand, Illinois practitioners should learn about the important comments.

Second, the new rules' adoption of more of the ABA Model Rules approach creates a complication. Illinois lawyers must learn for the first time about the ABA Model Rules that will govern their conduct. At the same time, they should know about unique Illinois rules that their Supreme

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* In 2003, McGuireWoods merged with the 100 year old Chicago based firm of Ross & Hardies. Unfortunately, mergers like this frequently extinguish the names of great law firms. I dedicate this article with admiration and gratitude to the law firm of Ross & Hardies, and all of the lawyers who practiced there.

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1. ILL. RULES OF PROF'L CONDUCT, ILL. S. CT. R. art. VIII (2010).
2. ILL. RULES OF PROF'L CONDUCT (2010).
3. MODEL CODE OF PROF'L CONDUCT (2009).
4. ILL. RULES OF PROF'L CONDUCT (repealed 2009).

Court decided to retain despite differing from the ABA Model Rules. Some of these unique Illinois provisions have been moved to other places, so any summary should remind Illinois lawyers that the provisions still exist in another place.

This short summary of Illinois's new ethics rules tries to provide a practical roadmap for Illinois lawyers. It groups the discussion by topic rather than by rule, with cross-references that make it more likely that Illinois lawyers will find what they need. This summary highlights both Illinois's adoption of the ABA Model Rules approach (when that represents a change) as well as the retention of unique Illinois provisions.

I. KEY SECTIONS OF THE NEW RULES

Although Illinois practitioners should review all of the new rules to identify the changes and the variations from the ABA Model Rules that will most affect them, the following list of 21 key rules includes those that seem the most important:

1. Scope of Confidentiality Duty. The new rules expand the scope of lawyers' confidentiality duties to include any "information relating to the representation of a client," rather that just client "confidences" or "secrets."[5]
2. Mandatory Disclosure of Clients' Intent to Commit Future Crimes. The new rules require lawyers to disclose client confidences to prevent someone's death or serious bodily harm (even if a non-client intends to commit the crime—unlike the old rules). The ABA Model Rules do not require such disclosure.[6]
3. Discretionary Disclosure of Clients' Intent to Commit Future Crimes. Like the old rules, the new rules permit lawyers to disclose a client's intent to commit any future crime. The ABA Model Rules only permit such disclosure in the case of certain serious crimes.[7]
4. Discretionary Disclosure to Rectify Clients' Past Crimes or Frauds. Unlike the old rules, the new rules permit disclosure to "mitigate or rectify" any "substantial injury" to another's financial interests or property that has resulted from the client's past crime or fraud, in which the client used the lawyer's services.[8]

5. *See* discussion *infra* Part III.B.
6. *See* discussion *infra* Part III.C.
7. *See* discussion *infra* Part III.D.2.
8. *See* discussion *infra* Part III.D.4.

5. Pro Bono Clients. Like the old rules, the new rules do not explicitly deal with lawyers' pro bono obligations (which continue to be dealt with outside the ethics rules).[9]
6. Legal Services Clients. Unlike the old rules, the new rules loosen the conflicts of interest standards for lawyers providing "short-term limited legal services" to clients—thus freeing lawyers to help with legal services programs like "no bills nights," etc.[10]
7. Clients with Diminished Capacity. The new rules provide more detailed guidance to lawyers dealing with clients whose capacity is diminished—allowing the lawyers to take steps other than simply seeking a guardian's appointment.[11]
8. Corporate Clients. The new rules provide much more detailed guidance to lawyers representing organizations, and who learn that a corporate constituent has engaged in wrongdoing that might injure the corporation. Among other things, such lawyers must refer the matter up the corporate ladder, may disclose the wrongdoing outside the corporation, and must explain to upper management if the lawyer is fired in retaliation for such disclosure. Compared to the ABA Model Rules' provision (which is the ethics corollary to Sarbanes-Oxley), the new rules contain a broader intra-corporate disclosure obligation (covering "crime, fraud or other violation of law") but a narrower range of discretionary disclosure outside the corporation (covering only "crime or fraud").[12]
9. Creation of an Attorney-Client Relationship. The new rules recognize an attorney-client relationship only when a lawyer and a prospective client "discuss" the relationship (thus preventing the creation of such a relationship through an unsolicited e-mail from a would-be client). Even then, a lawyer discussing a possible relationship with a prospective client (and who is not hired) may represent the adversary, unless the lawyer acquired "significantly harmful" information during the discussion. The lawyer's law firm can represent the adversary if a lawyer with such harmful information is screened from the representation.[13]
10. Withdrawal from an Attorney-Client Relationship. Unlike the old rules, the new rules specify numerous situations in which lawyers can withdraw from a representation, including withdrawal: at any time if

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9. *See* discussion *infra* Part IV.C.1.
10. *See* discussion *infra* Part IV.C.2.
11. *See* discussion *infra* Part IV.C.3.
12. *See* discussion *infra* Part IV.C.6.
13. *See* discussion *infra* Part V.A.

it would not hurt the client or if the client insists on some "repugnant" step.[14]

11. Useful Comments on Conflicts of Interests. Unlike the old rules, the new rules contain numerous helpful comments dealing with basic conflicts of interest duties, including guidance on: the need for an explicit consent to cure conflicts; "thrust-upon" conflicts, family conflicts; revocation of consent; "positional adversity" (taking differing legal positions on behalf of different clients); the special risks of joint representations; factors for determining whether a lawyer representing one member of a corporate family can take matters adverse to another member of the corporate family, etc.[15]
12. Ability to Take a Matter Adverse to a Former Client if All Lawyers with Pertinent Knowledge Have Left the Firm. Unlike the old rules, the new rules allow a law firm to take a matter adverse to a former client even if the matter is substantially related to what the firm did for the former client—as long as all lawyers with pertinent knowledge have left the firm.[16]
13. Prohibition on Threatening Criminal or Disciplinary Charges. The new rules continue the prohibition found in the old rules (although not in the ABA Model Rules) prohibiting lawyers from presenting, participating in presenting or threatening to present criminal or professional disciplinary charges to gain an advantage in a civil matter.[17]
14. Marketing. The new rules contain more liberal marketing rules, including dropping such requirements as saving advertisements for a certain number of years, and keeping track of where and when the lawyer used the advertisements.[18]
15. Prohibition on Misstatements. The new rules generally prohibit lawyers from "knowingly" making false statements to others—abandoning the old rules' prohibition on such misstatements that the lawyer "knows or reasonably should know is false."[19]
16. Dealing with Inadvertently Received Communications or Documents. Unlike the old rules, the new rules only require lawyers receiving communications or documents they know to be inadvertently transmitted or produced to notify the sender—not necessarily to stop reading them (although the new rules provide a "safe harbor" for

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14. *See* discussion *infra* Part V.D.
15. *See* discussion *infra* Part VI.A.
16. *See* discussion *infra* Part VI.G.5.
17. *See* discussion *infra* Part VIII.I.4.
18. *See* discussion *infra* Part IX.F.
19. *See* discussion *infra* Part X.A.1.

lawyers who choose not to read them). Unlike the ABA Model Rules, the new rules require such notification only if the lawyer "knows" the document was sent inadvertently—the ABA Model Rules trigger that duty if the lawyer "knows or reasonably should know" of the inadvertence.[20]

17. Negotiation Ethics. A comment to the new rules explains that the prohibition on misstatements applies in a slightly different fashion to negotiations—recognizing that the prohibition does not apply to such statements as "a party's intentions as to an acceptable settlement of a claim."[21]
18. Ex Parte Communications with Represented Persons. Although the new rules continue the old rules' general prohibition on a lawyer's ex parte communications with a represented person, the new rules do not contain the phrase "or cause another to communicate"—and thus presumably allow lawyers to advise clients of their right to communicate with represented third persons (even without the other lawyer's consent). This change also presumably invalidates a 2005 legal ethics opinion prohibiting lawyers from suggesting that their clients directly contact another party, or assisting their clients in doing so.[22]
19. Reporting Other Lawyers' Misconduct. The new rules continue the old rules' unique approach to reporting other lawyers' misconduct. Compared to the ABA Model Rules, the Illinois approach: (1) requires lawyers to report another lawyer's ethics violation, even if it does not raise a "substantial question" as to that lawyer's fitness as a lawyer in other respects; (2) imposes this heightened reporting duty on a narrower range of misconduct (involving "dishonesty, fraud, deceit or misrepresentation."); and (3) relieves lawyers of this reporting requirement only if it would require the disclosure of communications protected by the attorney-client privilege (not by the broader general confidentiality duty).[23]
20. Determining which States Ethics Rules Govern Illinois Lawyers' Conduct. For litigators, the new rules indicate that lawyers acting in other states "in connection" with litigation, arbitrations or similar proceedings will be governed by those tribunals' ethics rules, unlike the old rules (which applied the tribunals' ethics rules only if the lawyer had been admitted to practice before the tribunal). For transactional lawyers and litigators acting other than "in connection

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20. *See* discussion *infra* Part X.A.3.
21. *See* discussion *infra* Part X.A.6.
22. *See* discussion *infra* Part X.B.
23. *See* discussion *infra* Part X.E.2.

with" a pending matter, the new rules look to the ethics rules of the state where the lawyer acts, or where "the predominant effect" of the lawyer's conduct will be felt—even if the lawyers are not licensed in such other jurisdictions. The old rules applied such other states' ethics rules only if the Illinois lawyer was also licensed there.[24]

21. Multijurisdictional Practice. Although the new rules' multi-jurisdictional practice provision governs only out-of-state lawyers acting in Illinois, it is worth noting that the new rules generally follow the ABA Model Rules' very liberal approach to out-of-state lawyers' temporary practice of law in Illinois.[25]

II. SCOPE OF RULES

The new rules contain a Scope section that matches the ABA Model Rules' Scope section. Most significantly, a Scope comment indicates that a rules violation "should not itself give rise to a cause of action against a lawyer" or create a presumption of wrongdoing.[26]

However, the same comment explains that the rules "establish standards of conduct," and therefore a lawyer's rule violation "may be evidence of breach of the applicable standard of conduct."[27] Another Scope comment confirms that the rules "are rules of reason."[28] Courts and bars frequently point to this sentence to avoid an overly technical or counterintuitive interpretation of the rules.

III. CONFIDENTIALITY

A. Introduction

Lawyers' duty of confidentiality to their clients sets the legal profession apart from any other American profession. Lawyers have a higher duty of confidentiality than doctors, accountants, etc. In fact, confidentiality is one of the legal profession's "core" values. Thus, it makes sense to start any analysis of a lawyer's duties with this ethics principle of confidentiality.

It makes even more sense to start this analysis of Illinois's new ethics rules with the topic of confidentiality. Illinois has always followed a unique approach to confidentiality. The new rules adopt standards that no

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24. *See* discussion *infra* Part XI.
25. *See* discussion *infra* Part XII.
26. ILL. RULES OF PROF'L CONDUCT scope cmt. 20 (2010).
27. ILL. RULES OF PROF'L CONDUCT scope cmt. 20 (2010).
28. ILL. RULES OF PROF'L CONDUCT scope cmt. 14 (2010).

other state has recognized. At the same time, the new rules include dramatic changes from the old rules.

B. Scope of the Confidentiality Duty

The new rules follow the ABA Model Rules in generally prohibiting lawyers from revealing "information relating to the representation of a client."[29] Lawyers may reveal such information only with the client's informed consent, if "impliedly authorized" in representing the client, or as permitted or required elsewhere in the rules (discussed below).[30]

The new rules differ from the old rules in three ways. First, the new rules prohibit disclosure of any "information relating to the representation of a client."[31] The old rules prohibited lawyers from using or revealing "a confidence or secret of the client."[32] The old rules defined a "confidence" as information protected by the "lawyer-client privilege" (presumably the same as the attorney-client privilege).[33] The old rules defined "secret" as information "gained in the professional relationship" that either: (1) the client "has requested be held inviolate;" or (2) "the revelation of which would be embarrassing to or would likely be detrimental to the client."[34] This formulation followed the old ABA Code.

The new rules' formulation covers all information the lawyer learns while representing the client, even if the client does not specifically ask that it be kept secret and even if its disclosure would not hurt the client. A comment to the new rules explains that this duty also prevents a lawyer from disclosing information that "could reasonably lead to the discovery of such information by a third person."[35] Lawyers may not even use hypotheticals to discuss a client's issue with a third party, if the third party might be able to "ascertain the identity of the client or the situation involved."[36] Thus, the new rules contain a dramatically broader confidentiality duty than the old rules.

Second, the new rules' basic confidentiality provision only prohibits *disclosure* of confidential information.[37] The old rule prohibited a lawyer's "use" of a client's confidences or secrets.[38] As explained above, the old rule

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29. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (2010).
30. *Id.*
31. *Id.*
32. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (repealed 2010).
33. ILL. RULES OF PROF'L CONDUCT Terminology (repealed 2010).
34. *Id.*
35. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 4 (2010).
36. *Id.*
37. ILL. RULES OF PROF'L CONDUCT R. 1.6 (2010).
38. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (repealed 2010).

thus covered a narrower scope of information than that covered by the new rules. The new rules follow the ABA Model Rules by changing the placement of the prohibition on a lawyer's "use" of confidential information "to the disadvantage of the client."[39] This provision essentially matches the old rules' provision.

Third, the new rules' limitation to "disclosure"[40] rather than "use" differs from the old rules' prohibition on a lawyer's "use" of a client's confidences or secrets after the relationship ends.[41] Thus, the new rules' basic confidentiality duty does not address a lawyer's use of information after the lawyer stops representing the client. Thus, the new rules follow the ABA Model Rules both in the placement and the substance of a lawyer's duties of confidentiality to former clients. That rule prohibits lawyers from using a former client's information to the former client's disadvantage, except: (1) as required otherwise by the rules;[42] or (2) "when the information has become generally known."[43]

On its face, this new rule would seem to allow lawyers to use generally known information about a former client to the former client's disadvantage, but a comment to the new rules make it clear that lawyers may not use or disclose a former client's confidential information to the former client's disadvantage.[44] That comment explains that the new rules' provision allows a lawyer to use "generally known information" about a former client when later representing another client. Lawyers presumably may use such "generally known information" in a matter other than one adverse to the former client.[45]

The new rules differ from the ABA Model Rules in two ways. First, the general confidentiality provision in the new rules mentions an exception for disclosure *required* by the new rules.[46] As explained below, the basic ABA Model Rules confidentiality provision only describes discretionary disclosure, and does not include any required disclosure,[47] although the ABA Model Rules require disclosure in another provision, involving a client's fraud on a tribunal.[48]

Second, the new rules follow the old rules in a specific provision protecting as confidential information received by a lawyer participating in

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39. ILL. RULES OF PROF'L CONDUCT R. 1.8(b) (2010).
40. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (2010).
41. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (repealed 2010).
42. ILL. RULES OF PROF'L CONDUCT R. 1.9(c)(1) (2010).
43. *Id.*
44. ILL. RULES OF PROF'L CONDUCT R. 1.9 cmt. 8.
45. *Id.*
46. ILL. RULES OF PROF'L CONDUCT R.1.6(a) (2010).
47. MODEL CODE OF PROF'L CONDUCT R. 1.6. (2009).
48. MODEL CODE OF PROF'L CONDUCT R. 3.3(a)(3) (2009); MODEL CODE OF PROF'L CONDUCT R. 3.3(b) (2009).

an approved lawyers' assistance program or other court-approved intermediary program to which nondisciplinary complaints against lawyers can be referred.[49] The old rules contained two provisions that protected such information.[50] The ABA Model Rules do not contain such a provision.[51]

C. Exception: Mandatory Disclosure

The new rules contain a provision requiring disclosure of a client's confidences that is dramatically different from the old rules and from the ABA Model Rules. The new rules require lawyers to disclose confidential information to the extent the lawyer "reasonably believes necessary" to "prevent reasonably certain death or substantial bodily harm."[52]

The new rules differ dramatically from the old rules in one way. The new rules require disclosure to prevent anyone's act that is "reasonably certain" to cause anyone's "death or substantial bodily harm."[53] The old rules required lawyers to disclose "information about a client" only if it "appears necessary" to prevent the *client* from committing an act "that would result in death or serious bodily harm."[54] Thus, the new rules require lawyers to disclose client confidences to prevent *non-clients* from committing such wrongful acts, while the old rules were limited to the client's commission of such acts. This obviously broadens the required disclosure obligation.

The new rules also differ dramatically from the ABA Model Rules in one way. The new rules *require* disclosure of a client's confidences to prevent anyone's death or serious bodily harm.[55] The ABA Model Rules only allow but do not require the disclosure of such information.[56] The new rules continue the old rules' adoption of mandatory disclosure, although expanding it to include a non-client's wrongful act. Other states requiring disclosure in such circumstances have made a similar shift, which focuses more on saving someone's life and less on protecting the client's confidences about someone else's intent to kill or injure.

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49. ILL. RULES OF PROF'L CONDUCT R. 1.6(d) (2010); ILL. RULES OF PROF'L CONDUCT R.1.6 cmt. 19 (2010).
50. Ill. Rules of Prof'l Conduct R. 1.6(d) (repealed 2010); Ill. Rules of Prof'l Conduct R.1.6(e) (repealed 2010).
51. See discussion infra Part V.A, Part IV.C.6 (analyzing the reach of a lawyer's confidentiary duty to prospective clients and organizations).
52. ILL. RULES OF PROF'L CONDUCT R. 1.6(c) (2010).
53. *Id.*
54. ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (repealed 2010).
55. ILL. RULES OF PROF'L CONDUCT R. 1.6(c) (2010).
56. MODEL CODE OF PROF'L CONDUCT R. 1.6(b)(1) (2009).

D. Exception: Discretionary Disclosure

The new rules largely follow the ABA Model Rules in listing a number of situations in which lawyers may but do not have to disclose client confidences. The new rules' discretionary disclosure provisions differ from the old rules in several ways.

1. Impliedly Authorized Disclosure

The new rules follow the ABA Model Rules in allowing a lawyer's disclosure of client confidences if the disclosure is "impliedly authorized in order to carry out the representation."[57]

The new rules differ from the old rules in one way. The new rules allow lawyers to disclose client confidences if the disclosure is "impliedly authorized in order to carry out the representation."[58] The old rules did not contain this generally implied authorization provision.[59] A comment to the new rules explains that this provision allows lawyers to admit facts that cannot be denied, to disclose a client's confidence to facilitate "a satisfactory conclusion to a matter," or to share confidences within a law firm unless the client has instructed otherwise.[60]

2. Disclosure to Prevent a Client's Crime

The new rules follow the old rules in permitting lawyers to disclose a client's confidences to prevent the client from committing any crime.[61] As explained above, the new rules *require* lawyers to disclose client confidences to prevent the client, or anyone else, from committing a crime that will result in anyone's death or substantial bodily harm.[62]

The new rules differ from the old rules in two ways. First, the new rules allow lawyers to disclose information in this context only "to the extent the lawyer reasonably believes necessary" to prevent the client from committing a crime.[63] The old rules allowed lawyers to "use or reveal" the client's intent to commit any crime[64] without specifically warning lawyers to limit the discretionary disclosure "to the extent the lawyer reasonably believes necessary." This change probably is not material, because the old

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57. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (2010).
58. *Id.*
59. ILL. RULES OF PROF'L CONDUCT R. 1.6 (repealed 2010).
60. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 5 (2010).
61. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2010).
62. ILL. RULES OF PROF'L CONDUCT R. 1.6(c) (2010).
63. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2010).
64. ILL. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (repealed 2010).

rule implicitly limited the discretionary disclosure to the client's intent itself.

Second, the new rules allow lawyers to disclose any information "relating to the representation of a client" to prevent the client from committing any crime.[65] The old rules allowed lawyers to "use or reveal" the "intention of a client" to commit any criminal act.[66] Although using different terminology, this new provision matches the old rules' provision. A comment to the new rules (not found in the ABA Model Rules) explains that the provision "preserves" the old rules' policy permitting a lawyer "to reveal the intention of a client to commit a crime."[67]

The new rules differ from the ABA Model Rules in two ways. First, the new rules allow lawyers to disclose protected client confidential information to prevent the client from committing *any* crime.[68] The ABA Model Rules allow lawyers to disclose protected information only to prevent: (1) anyone from committing a crime involving death or substantive bodily harm (discussed above); or (2) the client from committing "a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another."[69] Thus, the new rules allow a lawyer's disclosure in a much broader range of contexts than the ABA Model Rules.

Second, the new rules allow lawyers to disclose protected client confidences to prevent the client from committing any crime, even if the client has not used, or is not using, the lawyer's services in committing the crime.[70] The ABA Model Rules allow lawyers to disclose protected client confidences to prevent the client from committing crimes *only* if the client "has used or is using the lawyer's services" in "furtherance" of the crime.[71]

Thus, the new rules allow lawyers to disclose protected client confidential information in a broader array of contexts, including those in which the client has not used, or is not using, the lawyer's services to further the criminal acts.[72]

3. Disclosure to Prevent the Client from Committing Fraud

The new rules generally follow the ABA Model Rules in allowing lawyers to disclose protected client confidential information to prevent the

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65. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2010).
66. ILL. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (repealed 2010).
67. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 6A (2010).
68. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2010).
69. MODEL CODE OF PROF'L CONDUCT R. 1.6(b)(2) (2009).
70. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2010).
71. MODEL CODE OF PROF'L CONDUCT R. 1.6(b)(2) (2009).
72. MODEL CODE OF PROF'L CONDUCT R. 1.6(b)(1) (2009).

client from committing a fraud that is "reasonably certain" to result in "substantial injury to the financial interests or property of another" if the client "has used or is using the lawyer's services" to further the fraud.[73]

The new rules differ from the old rules in one way. The new rules allow disclosure to prevent certain specified types of fraud.[74] The old rules allowed a lawyer's disclosure of protected client information to prevent a client's crime, but *not* a client's fraud that is not also a crime.[75]

The new rules also differ from the ABA Model Rules in one other way. The new rules allow lawyers to disclose protected client confidential information to prevent clients from committing *any* criminal act, regardless of the seriousness of the act or the lawyer's use of the lawyer's services in committing the criminal act.[76] Thus, the new rules separate the provisions dealing with a client's criminal[77] and fraudulent[78] acts and uses different standards for each. The ABA Model Rules allow lawyers to disclose protected client information to prevent the client from committing a criminal or fraudulent act but *only* if the act would cause substantial financial injury or property damage, and *only* if the client has used or is using the lawyer's services in furtherance of the criminal or fraudulent act.[79]

Thus, the new rules allow a more expansive permissive disclosure of information to prevent clients from committing crimes that do not rise to the level of criminal conduct involving death or substantial bodily harm.

4. Disclosure to Mitigate or Rectify a Client's Criminal or Fraudulent Act

The new rules follow the ABA Model Rules in allowing lawyers to disclose protected client confidential information to "prevent, mitigate or rectify" any "substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's" criminal or fraudulent act, *if* the client has used the lawyer's services in furtherance of the act.[80]

This rule allows disclosure to prevent an injury reasonably certain to result from a criminal or fraudulent act that the client has already committed in contrast to the preceding rules, which allow disclosure only to

73. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2010).
74. *Id.*
75. ILL. RULES OF PROF'L CONDUCT R. 1.6 (repealed 2010).
76. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2010).
77. *Id.*
78. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2010).
79. MODEL CODE OF PROF'L CONDUCT R. 1.6(b)(2) (2009).
80. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2010).

prevent a client from committing the crime[81] or the fraud.[82] This rule also allows disclosure to "mitigate or rectify" the damage caused by the client's previously committed crime or fraud. A comment to the new rule explains this situation.[83]

The old rules did not contain a similar provision. The old rules only allowed lawyers to disclose a client's intent to commit a future crime.[84] The old rules required lawyers' disclosure of protected client information to rectify a client's fraud on the tribunal, but not another crime or fraud that caused financial injury or property damage to another.[85]

This provision in the new rules is similar to a provision elsewhere in the old rules, which required a lawyer to reveal a client's fraud on a third person that occurred "in the course of the representation" unless the information was protected as a "privileged communication."[86]

That old rules' provision was broader than the new rules, because it required rather than just permitted disclosure in certain circumstances. On the other hand, the old rules' provision was narrower than the new rules' provision, because it did not allow disclosure of a "privileged communication."[87] The old rules did not define "privileged communications," although a provision in the old rules defined "confidence" as information protected by the "lawyer-client privilege."[88] Because the attorney-client privilege only protects communications between clients and lawyers, presumably the old rules required lawyers to disclose a client's fraud on a third person if the lawyer acquired information about the fraud from someone other than the client, because such information would not be "protected as privileged communication" even though it might have been a client "secret" generally protected under the old rules' basic confidentiality duty.[89]

Interestingly, the old rule required disclosure if the client perpetrated a fraud upon a third person "in the course of the representation,"[90] even if the client had *not* used the lawyer's services in furtherance of the fraud. The new rules' discretionary disclosure provision only applies if the client uses the lawyer's services in furtherance of the fraud.[91]

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81. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2010).
82. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2010).
83. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 8 (2010).
84. ILL. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (repealed 2010).
85. *See* discussion *infra* Part VIII.C.2.
86. ILL. RULES OF PROF'L CONDUCT R. 1.2(g) (repealed 2010).
87. *Id.*
88. ILL. RULES OF PROF'L CONDUCT Terminology (repealed 2010).
89. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (repealed 2010).
90. ILL. RULES OF PROF'L CONDUCT R. 1.2(g) (2010).
91. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2010).

5. Disclosure to Obtain Legal Advice about the Lawyer's Obligations

The new rules follow the ABA Model Rules in allowing lawyers to disclose protected client confidential information to obtain legal advice about their compliance with the rules.[92] A comment to the new rules explains this exception.[93] That comment recognizes that in most situations such disclosures will fall within the "impliedly authorized" exception (discussed above), but notes that the provision allows disclosure even if not "impliedly authorized." The old rules did not contain this or any similar provision.[94]

6. Disclosure to Establish a Claim Against a Client

The new rules follow the ABA Model Rules in allowing lawyers to disclose protected client confidential information "to establish a claim" in "a controversy between the lawyer and the client."[95] A comment to the new rules explains that lawyers may rely on this provision to collect a fee to which they are entitled.[96]

The new rules differ from the old rules by generally allowing lawyers to disclose protected information to establish any claim in a "controversy" with the client.[97] The old rules allowed lawyers to disclose protected "confidences or secrets" to the extent "necessary to establish or collect the lawyer's fee."[98] Thus, the new rules provide a broader exception, although lawyers are still most likely to use the exception when attempting to collect a fee from a recalcitrant client.

7. Disclosure to Defend Oneself

The new rules follow the ABA Model Rules in allowing lawyers to disclose protected client confidential information: (1) to establish a "defense" in "a controversy between the lawyer and the client"; (2) to establish "a defense to a criminal charge or civil claim against the lawyer" based upon "conduct in which the client was involved"; or (3) to "respond to allegations in any proceeding concerning the lawyer's representation of the client."[99]

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92. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2010).
93. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 9 (2010).
94. ILL. RULES OF PROF'L CONDUCT R. 1.6 (repealed 2010).
95. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2010).
96. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 11 (2010).
97. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2010).
98. ILL. RULES OF PROF'L CONDUCT R. 1.6(c)(3) (repealed 2010).
99. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2010).

Significantly, these exceptions to the general confidentiality rule deal with two separate scenarios. One scenario involves lawyers disclosing client confidences to defend themselves from a client's attacks.[100] In that situation, one would expect the ethics rules to allow lawyers to defend themselves.[101] After all, when the client attacks the lawyer, the client could not reasonably expect that the lawyer will remain silent. The other scenario involves a far different situation, lawyers defending themselves from a non-client's attack. In that situation, it is not as clear that a lawyer should be allowed to disclose a client's confidences to defend himself or herself. Allowing such disclosure in that context might actually hurt the client.

The first exception in the new rules allow lawyers to disclose protected information to defend against non-clients': (1) "criminal charge or civil claim" against the lawyer; or (2) allegations in any "proceeding concerning the lawyer's representation of the client."[102] The old rules allowed such disclosure to defend the lawyer "against an accusation of wrongful conduct."[103] Thus, the new rules are somewhat more limited, because they do not permit lawyers to disclose protected information in defending against a third party's accusation of wrongful conduct that has not risen to "a criminal charge or civil claim," or is not made in a "proceeding." This presumably restricts lawyers' ability to defend themselves from a third party's attacks in the press or some other non-judicial context. The new rules allow such self-defense in the context of a "controversy" with the client, so the limitation to charges or claims presumably does not apply when lawyers defend themselves from *clients'* attacks.

Second, the new rules on their face are limited to lawyers.[104] On the other hand the old rules allowed lawyers to disclose protected information to defend either themselves "or the their employees or associates" against "an accusation of wrongful conduct."[105] This change probably is not material, because accusations against the lawyer's "employees or associates" presumably would amount under a respondeat superior theory to an accusation against the lawyer.

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100. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 10 (2010).
101. *Id.*
102. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2010).
103. ILL. RULES OF PROF'L CONDUCT R. 1.6(c)(3) (repealed 2010).
104. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2010).
105. ILL. RULES OF PROF'L CONDUCT R. 1.6(c)(3) (repealed 2010).

8. Disclosure to Comply with Court Orders or Other Law

The new rules follow the ABA Model Rules in allowing lawyers to disclose protected client confidential information to comply with "a court order" or "other law."[106]

A comment to the new rules explains that unless the client directs otherwise, a lawyer "should" assert all nonfrivolous arguments to resist a court's entry of an order requiring disclosure of protected information.[107] That comment indicates that a lawyer who has unsuccessfully tried to resist entry of such a court order "must consult with the client about the possibility of appeal," but in the absence of an appeal may comply with the court's order to disclose protected information.[108] Thus, a lawyer need not always appeal an adverse court ruling, and does not have to take other extraordinary steps such as risking contempt by refusing to comply with a court order. In essence, the new rules provide a "safe harbor" allowing lawyers to disclose protected client confidences if ordered to do so by a court.

Another comment to the new rules permits lawyers to comply with other laws requiring disclosure of "information about a client."[109] That comment also requires discussion with a client, and recognizes that the ethics rules do not explain what other law trumps a lawyer's duty of confidentiality. In essence, this comment also provides a "safe harbor" allowing lawyers to comply with any other legal obligation to disclose protected client confidences.[110]

E. Noisy Withdrawals

The new rules contain a noisy withdrawal provision not found in the old rules or in the ABA Model Rules.

A comment to the new rules allows a lawyer's "noisy" withdrawal in certain circumstances.[111] That comment explains that lawyers withdrawing from a representation because continuing the representation "will result in a violation of the ethics rule[s] or other law[s]":[112] (1) may "decide [] to disclose information" as permitted by the basic confidentiality rule's list of discretionary exceptions;[113] (2) may "withdraw or disaffirm any opinion or

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106. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(6) (2010).
107. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 13 (2010).
108. *Id.*
109. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 12 (2010).
110. *Id.*
111. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 15A (2010).
112. *Id.*
113. ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (2010).

other document" that the lawyer has prepared for the client or others; and [114] (3) must consider the provisions governing a lawyer's representation of an organization.[115]

This comment to the new rules differs from the old rules in two ways. First, the new rules' comment allows the lawyer's disclosure of his withdrawal and the disaffirmance of any opinion or other document that the lawyer has prepared for a client or others, regardless of any possible attorney-client privilege protection. The old rules required lawyers to disclose a client's fraud upon a third person or a tribunal if it occurred during the course of the representation, unless the information was protected by the attorney-client privilege.[116] As a practical matter, it is unlikely that any of this information would deserve attorney-client privilege protection, so the new comment probably does not materially differ from the old rules.

Second, the new rules' comments reference to the rule governing a lawyer representing an organization[117] obviously incorporate the new rules' different provisions governing such lawyers.[118] Among other things, a lawyer representing an organization who believes that she has been discharged because she properly reported certain wrongdoing within the organization, or who withdraws under that provision must assure disclosure to the organization's "highest authority" of her discharge or withdrawal.[119]

The new rules' comment[120] essentially repeats another comment to the new rules, most of which is also in the ABA Model Rules, allowing notice of withdrawal and disaffirmance of any opinion or document in the case of a client's wrongful course of action that "has already begun and is continuing."[121] That other comment also refers to the general withdrawal provision,[122] and another new comment that occasionally requires a noisy withdrawal.[123] The same comment contains a reference referring back to the discretionary disclosure provision of the basic confidentiality rule.[124]

The new rules' comment[125] also essentially repeats another comment to the new rules that permit a noisy withdrawal if necessary to avoid

114. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 15A (2010).
115. ILL. RULES OF PROF'L CONDUCT R. 1.13 (2010).
116. ILL. RULES OF PROF'L CONDUCT R. 1.2(g) (repealed 2010); *see* discussion *supra* Part III.D.4.
117. ILL. RULES OF PROF'L CONDUCT R. 1.13 (2010).
118. *See* discussion *infra* Part IV.C.6.
119. ILL. RULES OF PROF'L CONDUCT R. 1.13(e) (2010).
120. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 15A (2010).
121. ILL. RULES OF PROF'L CONDUCT R. 1.2 cmt. 10 (2010).
122. ILL. RULES OF PROF'L CONDUCT R. 1.16(a) (2010).
123. ILL. RULES OF PROF'L CONDUCT R. 4.1 cmt. 3 (2010).
124. ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (2010).
125. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 15A (2010).

assisting a client's criminal or fraudulent act.[126] That other comment explains that in "extreme cases," other laws may require the lawyer to disclose information to "avoid being deemed to have assisted the client's crime or fraud."[127] The other comment requires lawyers to disclose protected information if doing so is the only way to avoid assisting a client's crime or fraud *unless* the disclosure is prohibited by the general confidentiality provision.[128] Thus, the new rules' comment[129] serves more as a reference and reminder of other rules than a substantive provision that independently requires or prohibits noisy withdrawals.

F. Other Rules Requiring Disclosure of Client Confidences

A comment to the new rules[130] lists other rules involving lawyers' confidentiality duty, and possible exceptions. That comment refers to other provisions in the new rules requiring disclosure. Some of those other provisions require disclosure even in the context where the other lawyer otherwise has no discretion to disclose. In other words, those provisions trump the lawyer's general duty of confidentiality.

1. Disclosures Required Even if Not Covered by the List of Permissible Discretionary Disclosures

Other provisions in the new rules follow the ABA Model Rules in identifying situations in which lawyers must disclose protected client confidential information *even* if the disclosure does *not* fall within the discretionary provision of the basic confidentiality rule.[131]

These include a lawyer's required disclosure: (1) of evidence offered by the client or by a witness called by the lawyer that the lawyer later learns to be false;[132] (2) of information necessary to remedy *any* person's past, current or intended "criminal or fraudulent conduct" related to a proceeding;[133] and (3) of another lawyer's violation of the ethics rules prohibiting certain criminal or dishonest acts.[134] This third mandated disclosure does not require disclosure of privileged information, a unique

126. ILL. RULES OF PROF'L CONDUCT R. 4.1 cmt. 3 (2010).
127. *Id.*
128. ILL. RULES OF PROF'L CONDUCT R. 1.6 (2010).
129. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 15A (2010).
130. ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. 15 (2010).
131. ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (2010).
132. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2010); ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 10 (2010).
133. ILL. RULES OF PROF'L CONDUCT R. 3.3(b) (2010).
134. ILL. RULES OF PROF'L CONDUCT R. 8.3(a) (2010).

Illinois rule.[135] All of these provisions are discussed elsewhere in this article.

2. Disclosures Required Only if Covered by the List of Permissible Discretionary Disclosures

Other provisions in the new rules follow the ABA Model Rules in explaining that some provisions require disclosure *only* if permitted under the new list of discretionary disclosure situations. These include a lawyer's required disclosure: (1) of a client's continuing wrongdoing in certain circumstances,[136] if such disclosure is necessary to avoid assisting a client's criminal or fraudulent act;[137] (2) of information necessary to correct a "misapprehension" in connection with someone's bar admission or disciplinary matter;[138] (3) in response to a demand for information from an admissions or bar disciplinary authority.[139] All of these provisions are discussed elsewhere in this outline.

G. Other Rules Allowing, but Not Requiring, Disclosure of Client Confidences

The new rules generally follow the ABA Model Rules in permitting disclosure of protected client confidences in other situations.

First, the rules allow lawyers to disclose certain client confidential information to determine if their client is suffering from diminished capacity.[140]

Second, the new rules allow lawyers who represent organizations to disclose confidential information within the organization and occasionally beyond the organization.[141]

IV. OTHER BASIC DUTIES TO CLIENTS

In addition to the bedrock duty of confidentiality,[142] lawyers owe their clients several other basic duties: competence,[143] diligence,[144]

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135. *See* discussion *infra* Part XI.E.2.
136. ILL. RULES OF PROF'L CONDUCT R. 1.2 cmt. 10 (2010).
137. ILL. RULES OF PROF'L CONDUCT R. 4.1(b) (2010); ILL. RULES OF PROF'L CONDUCT R. 4.1 cmt. 3 (2010).
138. ILL. RULES OF PROF'L CONDUCT R. 8.1(b) (2010).
139. *Id.*
140. ILL. RULES OF PROF'L CONDUCT R. 1.14(b), (c) (2010); *see* discussion *supra* Part IV.C.3.
141. ILL. RULES OF PROF'L CONDUCT R. 1.13 (2010); *see* discussion *supra* Part IV.C.6.
142. *See* discussion *supra* Part III.
143. ILL. RULES OF PROF'L CONDUCT R. 1.1 (2010).
144. ILL. RULES OF PROF'L CONDUCT R. 1.3 (2010).

communication,[145] and loyalty. The duty of loyalty usually plays out in connection with conflicts of interest.[146] The new rules generally follow the ABA Model Rules in describing these other basic duties.

A. Illinois's Unique Rules Expanding Basic Duties to Clients

The new rules contain two provisions from the old rules not found in the ABA Model Rules that limit a lawyer's freedom to delegate work for a client.

First, the new rules prohibit a lawyer absent the client's informed consent from delegating responsibility for performing work for the client "to another lawyer not in the lawyer's firm."[147] The old rules included this provision in a different place.[148] A comment, not found in the ABA Model Rules, explains this provision.[149] This limitation presumably limits a lawyer's ability (absent client consent) to arrange for a client's work to be performed by temp or contract lawyers, or outsource the work outside the firm.

It is unclear whether this continued approach prohibiting delegation without consent would affect the continued applicability of an Illinois legal ethics opinion,[150] which explained that "[p]ayment to an independent or temporary lawyer on an hourly basis does not require disclosure to a client if there is close supervision," and that "[i]f work is delegated without close supervision then disclosure to a client is necessary."

Second, the new rules prohibit lawyers from agreeing with current or former clients to limit, or purport to limit, the client or former client's right to file or pursue a bar complaint against the lawyer.[151] The old rules included this provision in a different place.[152] The new rules thus restrict lawyers' ability to immunize themselves from a client's bar complaint.

B. Limits on Basic Duties to Clients

The new rules follow the ABA Model Rules in allowing a lawyer to limit the representation of a client.

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145. ILL. RULES OF PROF'L CONDUCT R. 1.4 (2010).
146. *See* discussion *infra* Part VI.
147. ILL. RULES OF PROF'L CONDUCT R. 1.2(e) (2010).
148. ILL. RULES OF PROF'L CONDUCT R. 1.1(c) (repealed 2010).
149. ILL. RULES OF PROF'L CONDUCT R. 1.2 cmt. 14 (2010).
150. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 98–02 (1998).
151. ILL. RULES OF PROF'L CONDUCT R. 8.4(h) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.8(h) (repealed 2010).
152. ILL. RULES OF PROF'L CONDUCT R. 1.8(h) (2010).

As in the old rules, the new rules indicate that a lawyer can "limit the scope of the representation" if the client provides informed consent to a reasonable limitation.[153] A comment to the new rules explains the permissible limitations, including the lawyer's freedom to exclude actions that "the lawyer regards as repugnant or imprudent."[154] This comment allows the lawyer to decline from the beginning of a representation to take actions that the lawyer considers unprofessional. Another comment to the new rules explains that there are limits on such limitations.[155] For instance, a lawyer cannot limit the representation to a very brief action on the client's behalf, if "the time allotted was not sufficient" to provide useful advice.[156]

The new rules also follow the ABA Model Rules in explaining other limitations on a lawyer's basic duties to clients in certain circumstances. For example, a comment explains that in certain circumstances a lawyer can delay in transmitting information to the client if the client would be "likely to react imprudently to an immediate communication."[157] That comment gives the example of a psychiatrist's diagnosis of the client.[158] Given a lawyer's normal duty of communication and diligence, the new rules recognize only a very limited circumstance where lawyers can keep secrets from their own clients.

C. Rules for Specific Clients

The new rules contain specific guidance about specific types of clients. This guidance appears in several portions of the new rules, but it seems logical to discuss all of the provisions in one place. These provisions provide additional guidance for lawyers representing particular types of clients, and either supplement or trump the general duties that lawyers have to all of their clients.

1. Pro Bono Clients

The new rules follow the old rules in addressing lawyers' pro bono obligation outside of the ethics rules.

The rule dealing with pro bono service is left blank in the new rules.[159] A comment to the new rules explains that Illinois's decision not to adopt

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153. ILL. RULES OF PROF'L CONDUCT R. 1.2(c) (2010).
154. ILL. RULES OF PROF'L CONDUCT R. 1.2 cmt. 6 (2010).
155. ILL. RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2010).
156. *Id.*
157. ILL. RULES OF PROF'L CONDUCT R. 1.4 cmt. 7 (2010).
158. *Id.*
159. ILL. RULES OF PROF'L CONDUCT R. 6.1 (2010).

the ABA Model Rule on pro bono practice[160] "should not be interpreted as limiting the responsibility" of Illinois lawyers to engage in such service.[161] Another comment to the new rules, not found in the ABA Model Rules, provides a very general statement of Illinois lawyers' pro bono responsibilities, and refers to Illinois Supreme Court Rule 756(f)'s disclosure obligations.[162]

2. Legal Services Clients

The new rules follow the ABA Model Rules in describing lawyers' duties when involved in "nonprofit and court-annexed limited legal services programs."[163] This provision did not appear in the old rules.

The new rules indicate that lawyers assisting such programs who provide "short-term limited legal services" to clients: (1) must deal with conflicts of interest "only if the lawyer knows that the representation of the client involves a conflict of interest";[164] and (2) is subject to the imputed disqualification provision[165] only if the lawyer knows that another lawyer in her firm is disqualified by the conflicts rules.[166] Thus, the new rules allow lawyers assisting in such worthwhile programs to provide quick-hitting advice to needy clients without running a conflicts check for each question the lawyer answers.

3. Clients with Diminished Capacity

The new rules generally follow the ABA Model Rules in explaining how lawyers should deal with clients with diminished capacity.[167] Like the old rules,[168] the new rules explain that lawyers whose clients who are experiencing a "diminished" capacity to make decision for themselves should try to maintain a normal attorney-client relationship.[169]

The new rules differ from the old rules in three ways. First, the new rules use the term "diminished capacity" to describe a client whose "capacity to make adequately considered decisions in connection with a

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160. MODEL CODE OF PROF'L CONDUCT R. 6.1 (2009).
161. ILL. RULES OF PROF'L CONDUCT preamble [6B] (2010).
162. ILL. RULES OF PROF'L CONDUCT preamble [6A] (2010).
163. ILL. RULES OF PROF'L CONDUCT R. 6.5 (2010).
164. ILL. RULES OF PROF'L CONDUCT R. 6.5(a)(1) (2010).
165. ILL. RULES OF PROF'L CONDUCT R. 1.10 (2010).
166. ILL. RULES OF PROF'L CONDUCT R. 6.5(a)(2) (2010).
167. ILL. RULES OF PROF'L CONDUCT R. 1.14 (2010).
168. ILL. RULES OF PROF'L CONDUCT R. 1.14(a) (repealed 2010).
169. ILL. RULES OF PROF'L CONDUCT R. 1.14(a) (2010).

representation is diminished."[170] The old rules use the terms "disability"[171] and "impaired"[172] in describing such clients. The new terms seem to reflect a more politically correct approach, but do not make any substantive difference.

Second, the new rules indicate that such lawyers may consult with those who can protect the client, in addition to seeking the appointment of a guardian.[173]

Third, the new rules indicate that lawyers taking such protective steps are "impliedly authorized" to disclose confidential information about the client, to the "extent reasonably necessary to protect the client's interests."[174] The old rules identified only one specific step that a lawyer could take if a client lost the capacity to make adequate decisions, seek the appointment of a guardian.[175]

The new rules differ from the ABA Model Rules in one way. As in the ABA Model Rules,[176] a comment to the new rules indicates that even in an emergency situation (where the diminished client's "health, safety or financial interest" is "threatened with imminent and irreparable harm"), the lawyer should not act unless he reasonably believes that the client has no other person available to help.[177]

However, Illinois added an exception, not found in the ABA Model Rules, to such lawyer forbearance "when that representative's actions or inaction threaten immediate and irreparable harm" to the client with diminished capacity.[178] This comment thus expands the lawyer's ability to act in such circumstances.

4. Advisor Role

The new rules follow the old rules[179] in describing a lawyer's duty when acting as an advisor when representing a client.[180]

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170. ILL. RULES OF PROF'L CONDUCT R. 1.14 (2010); ILL. RULES OF PROF'L CONDUCT R. 1.14(a) (2010).
171. ILL. RULES OF PROF'L CONDUCT R. 1.14 (repealed 2010).
172. ILL. RULES OF PROF'L CONDUCT R. 1.14(a) (repealed 2010).
173. ILL. RULES OF PROF'L CONDUCT R. 1.14(b) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.14 cmt. 5 (2010).
174. ILL. RULES OF PROF'L CONDUCT R. 1.14(c) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.14 cmt. 8 (2010).
175. ILL. RULES OF PROF'L CONDUCT R. 1.14(b) (repealed 2010).
176. MODEL CODE OF PROF'L CONDUCT R. 1.14 cmt. 9 (2009).
177. ILL. RULES OF PROF'L CONDUCT R. 1.14(b) 1.14 cmt. 9 (2010).
178. *Id.*
179. ILL. RULES OF PROF'L CONDUCT R. 1.14(b) 2. (repealed 2010).
180. ILL. RULES OF PROF'L CONDUCT R. 1.14(b) 2.1 (2010).

The new rules differ from the ABA Model Rules in one way. A comment to the new rules acknowledges that lawyers might sometimes have to give a client advice even if the client does not ask for it.[181] This comment does not include a sentence included in the ABA Model Rules comment explaining that a lawyer representing a client in a matter "likely to involve litigation" may have a duty "to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."[182] It is unclear why Illinois did not include this sentence from the ABA Model Rules comment. The new rules generally are not hostile to ADR proceedings.

5. *Third-Party Neutral Role*

The new rules contain a provision describing the role of lawyers serving as third-party neutrals.[183] Although lawyers serving as third-party neutrals technically do not have "clients,"[184] it makes sense to discuss them here.

In acting as a third-party neutral, such as an arbitrator, mediator, or playing some other ADR role, a lawyer assists two or more non-clients in an effort to resolve a dispute.[185] The old rules did not contain this provision.

The new rules differ from the ABA Model Rules in one way. The new rules require lawyers to explain their role.[186] The ABA Model Rules require such disclosure only if those participating in the ADR might not understand the lawyers' role.[187] Thus, the new rules affirmatively require such disclosure, even if the lawyer does not think that the ADR participants are confused.

6. *Corporate and Other Organizational Clients*

The new rules contain an expanded version of the provision guiding lawyers who represent organizations.[188] This rule provides important guidance for lawyers who represent corporations. A comment to the new rules explains how these rules also apply to lawyers representing a

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181. ILL. RULES OF PROF'L CONDUCT R. 1.14(b) 2.1 cmt. 5 (2010).
182. MODEL CODE OF PROF'L CONDUCT R. 2.1 cmt. 5 (2009).
183. ILL. RULES OF PROF'L CONDUCT R. 2.4 (2010).
184. ILL. RULES OF PROF'L CONDUCT R. 2.4(a) (2010).
185. *Id.*
186. ILL. RULES OF PROF'L CONDUCT R. 2.4(b) (2010).
187. MODEL CODE OF PROF'L CONDUCT R. 2.4(b) (2009).
188. ILL. RULES OF PROF'L CONDUCT R. 1.13 (2010).

governmental organization.[189] Another provision in the new rules follows the ABA Model Rules in providing guidance for lawyers attempting to identify the "client" when a lawyer represents the government.[190]

The new rules repeat some of the basic principles of the old rules. For instance, a lawyer "employed or retained by" an organization represents the organization, not its constituents[191]—although the lawyer can also represent one or more of the constituents if there are no conflicts.[192]

Like the old rules, the new rules describe a lawyer's responsibilities upon learning that an organization's constituent is "engaged in action, intends to act or refuses to act" in a matter relating to the lawyer's representation of the client that meets a certain standard of wrongdoing (discussed below), and "that is likely to result in substantial injury to the organization."[193] Thus, an organization's lawyer's duties to take some action do not arise unless the lawyer learns of serious constituent misconduct that could cause "substantial injury" to the organization.

The new rules differ from the old rules in six ways. First, the new rules indicate that unless the lawyer reasonably believes that it is in the organization's best interests not to do so, the lawyer "shall" refer specified matters to the higher authority,[194] including even the highest authority.[195] A comment to the new rules describes this *mandatory* referral up the organizational chain.[196] The old rules provided guidance to lawyers learning of a constituent's wrongdoing that could reasonably be imputed to the organization, and which was likely to result in 'substantial injury' to the organization.[197] A lawyer in that circumstance was directed to 'proceed' to take some action, and could find three possible measures listed in the old rules. One of those measures was referring the matter to a higher authority in the organization, including the highest authority.[198] This difference, which the ABA adopted in its post-Enron revisions to the Model Rules, increases the likelihood that the lawyer will be obligated to report up the organization's chain of command.

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189. ILL. RULES OF PROF'L CONDUCT R. 1.13 cmt. 9 (2010).
190. ILL. RULES OF PROF'L CONDUCT R. 1.11 cmt. 5 (2010).
191. ILL. RULES OF PROF'L CONDUCT R. 1.13(a) (2010).
192. ILL. RULES OF PROF'L CONDUCT R. 1.13(g) (2010).
193. ILL. RULES OF PROF'L CONDUCT R. 1.13(b) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.13 cmt. 3 (2010).
194. ILL. RULES OF PROF'L CONDUCT R1.13 cmt. 5 (explaining that an organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body). However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.
195. ILL. RULES OF PROF'L CONDUCT R. 1.13(b) (2010).
196. ILL. RULES OF PROF'L CONDUCT R. 1.13 cmt. 5 (2010).
197. ILL. RULES OF PROF'L CONDUCT R. 1.13(b) (repealed 2010).
198. ILL. RULES OF PROF'L CONDUCT R. 1.13(b)(3) (repealed 2010).

Second, the new rules indicate that the lawyer "may" reveal information otherwise protected by her duty of confidentiality *outside* the organization, if its highest authority fails to address a constituent's crime or fraud that is reasonably certain to result in substantial injury to the organization.[199] The old rules did not mention the possibility of the organization's lawyer disclosing a constituent's wrongdoing outside the organization. Under the old rules, an Illinois lawyer might have looked elsewhere because Illinois's old and new rules provide a more expansive disclosure provision than the ABA Model Rules. This is discussd elsewhere in this comment. The old rules merely indicated that the lawyer could resign in such a circumstance.[200]

A comment to the new rules describes this discretion to disclose outside the organization.[201] This comment follows the ABA Model Rules approach allowing disclosure outside the organization,[202] but limits the disclosure to a narrower range of wrongdoing crime or fraud, rather than the ABA Model Rules' "violation of law."

Third, the new rules explicitly follow the ABA Model Rules in making one obvious point. Under the new rules, a lawyer does not have discretion to disclose information outside the organization that the lawyer learns while investigating a constituent's wrongdoing or defending the organization from a claim arising from such wrongdoing.[203] A comment to the new rules explains that this provision enables the organization "to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim."[204] The old rules did not contain such a provision.

Fourth, in explaining the lawyer's duty to properly identify her client when dealing with an organization's constituent, the new rules replace the term "apparent"[205] with the phrase "the lawyer knows or reasonably should know of any adversity between the organization's and a constituent's interests."[206] A comment to the new rules explains the lawyer's disclosure duty to such constituents, which includes the warning that the attorney-client privilege might not protect their communications.[207] The old rules indicated that a lawyer dealing with an organization's constituents "shall

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199. ILL. RULES OF PROF'L CONDUCT R. 1.13(c) (2010).
200. ILL. RULES OF PROF'L CONDUCT R. 1.13(c) (repealed 2010).
201. ILL. RULES OF PROF'L CONDUCT R. 1.13 cmt. 6 (2010).
202. MODEL CODE OF PROF'L CONDUCT R. 1.13(b) (2009).
203. ILL. RULES OF PROF'L CONDUCT R. 1.13(d) (2010).
204. ILL. RULES OF PROF'L CONDUCT R. 1.13 cmt. 7 (2010).
205. ILL. RULES OF PROF'L CONDUCT R. 1.13(d) (repealed 2010).
206. ILL. RULES OF PROF'L CONDUCT R. 1.13(f) (2010).
207. ILL. RULES OF PROF'L CONDUCT R. 1.13 cmt. 10 (2010).

explain the identity of the client" when it was "apparent" that the organization's interests were adverse to the constituent's interests."[208]

The term "apparent" seems to loosely equate to the term "reasonably should know." However, Illinois lawyers should keep the different terminology in mind, because this provision plays such an important role in fulfilling their duty on a daily basis and in avoiding the accidental creation of an attorney-client relationship with an organization's constituent.

Fifth, the new rules follow the ABA Model Rules in providing guidance to lawyers who reasonably believe that they were discharged in retaliation for disclosure of a constituent's wrongdoing inside or outside the organization. The new rules require such lawyers to nevertheless assure that the organization's highest authority learns of their discharge.[209] A comment to the new rules explains this post-discharge duty.[210] The old rules did not address the lawyer's continuing duty if he was discharged before taking any of the possible permissible steps upon learning of a constituent's wrongdoing. As explained below, Illinois supplements this duty with a unique additional disclosure obligation.

Sixth, the new rules expand the type of constituent misconduct that triggers the rule's provisions.[211] This difference is addressed immediately below, because it also distinguishes the new rules from the ABA Model Rules.

The new rules differ from the ABA Model Rules in four ways. First, the new rules use the phrase "crime, fraud or other violation of law" in describing the type of constituent wrongdoing that triggers a lawyer's duty to take action *within* the organization.[212] The ABA Model Rules, like the old rules, trigger the lawyer's obligation to take the specified steps if a corporate constituent engages or will engage in a matter that violates his legal obligation to the organization, or is a "violation of law," that might be imputed to the organization and which would result in "substantial injury" to the organization.[213]

The new rules' addition of the reference to "fraud" expands the circumstances in which a lawyer's obligations are triggered by this rule. The term "fraud" is defined in the new rules' terminology, and requires "a

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208. ILL. RULES OF PROF'L CONDUCT R. 1.13(d) (repealed 2010).

209. ILL. RULES OF PROF'L CONDUCT R. 1.13(e) (2010).

210. ILL. RULES OF PROF'L CONDUCT R. 1.13 cmt. 8 (2010).

211. ILL. RULES OF PROF'L CONDUCT R. 1.13(b) (2010). A lawyer in this situation must proceed as he or she reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal, and what the lawyer reasonably believes to be the basis for his or her discharge or withdrawal.

212. ILL. RULES OF PROF'L CONDUCT R. 1.13(b) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.13 cmt. 3, 7 (2010).

213. MODEL CODE OF PROF'L CONDUCT R. 1.13(b) (2009); ILL. RULES OF PROF'L CONDUCT R. 1.13(b) (repealed 2010).

purpose to deceive."[214] Although this definition excludes negligent or constructive misrepresentation, the new rules' inclusion of "fraud" expands the reach of the rules' application beyond that of the ABA Model Rules.[215]

Second, the new rules adopt a narrower definition than the ABA Model Rules of the wrongdoing that triggers the lawyer's discretion to disclose *outside* the organization.[216] The new rules use the phrase "crime or fraud" in this provision.[217] The ABA Model Rules indicate that a lawyer may disclose confidential information outside the organization if its highest authority does not take steps to stop or correct an act that is a "violation of law" and that is reasonably certain to substantially injure the organization.[218]

Thus, the new rules *expand* the type of wrongdoing that triggers the lawyer's duty to take steps *within* the organization by using the phrase "crime, fraud or other violation of law,"[219] while *shrinking* the type of wrongdoing that the lawyer may disclose *outside* the organization limiting that wrongdoing to what is "clearly a crime or fraud,"[220] rather than the ABA Model Rules' formulation of "violation of law."[221]

This has the effect of reducing Illinois lawyers' discretion to disclose the organization's wrongdoing outside the organization. The new rules explain this limitation in a comment not found in the ABA Model Rules.[222] The last sentence of that comment confirms that a wider range of wrongdoing triggers an Illinois lawyer's obligation to report within the organization than triggers the discretion to report outside the organization.[223]

Third, as explained above, the new rules require a lawyer who reasonably believes that she has been discharged in retaliation for disclosing a constituent's wrongdoing within or outside the organization to inform the organization's highest authority of her discharge.[224]

Fourth, a comment to the new rules casts some doubt on whether members of an unincorporated association can bring a derivative action.[225]

214. ILL. RULES OF PROF'L CONDUCT R. 1.0(d) (2010).
215. MODEL CODE OF PROF'L CONDUCT R. 1.13(b) (2009).
216. ILL. RULES OF PROF'L CONDUCT R. 1.13(c) (2010).
217. *Id.*
218. MODEL CODE OF PROF'L CONDUCT R. 1.13(c) (2009).
219. ILL. RULES OF PROF'L CONDUCT R. 1.13(b) (2010).
220. ILL. RULES OF PROF'L CONDUCT R. 1.13(c) (2010).
221. MODEL CODE OF PROF'L CONDUCT R. 1.13(c) (2009).
222. ILL. RULES OF PROF'L CONDUCT R. 1.13 cmt. 6 (2010).
223. *Id.*
224. ILL. RULES OF PROF'L CONDUCT R. 1.13(e) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.3 cmt. 8 (2010).
225. ILL. RULES OF PROF'L CONDUCT R. 1.13 cmt. 13 (2010).

This minor variation of the ABA Model Rules presumably reflects Illinois case law on derivative action in the context of unincorporated associations.

V. CREATING AND ENDING AN ATTORNEY-CLIENT RELATIONSHIP

The new rules contain several new provisions, most of which match the ABA Model Rules that affect the beginning and the end of attorney-client relationships.

A. Creating an Attorney-Client Relationship

The new rules contain a new provision describing the effect of communications between a lawyer and a prospective client.[226] The old rules did not contain this or any similar rule.

The rules treat as a "prospective client" anyone with whom the lawyer "discusses . . . the possibility of forming a client-lawyer relationship."[227] The focus on "discussions" means that a person who unilaterally sends an unsolicited communication to a lawyer does not deserve any confidentiality or loyalty from the lawyer.[228] A comment confirms this effect,[229] which presumably applies to unsolicited e-mails or voicemails.

A lawyer obtaining information from a prospective client during such discussion must treat the information as if the prospective client were a "former client."[230] The new rules define such duties to former clients in a different place.[231]

A lawyer who is not retained by a prospective client may represent the adversary, unless the lawyer received "significantly harmful" information from the prospective client.[232] The new rules do not define the term "significantly harmful."[233] A comment to the new rules explains that a

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226. ILL. RULES OF PROF'L CONDUCT R. 1.18 (2010).
227. ILL. RULES OF PROF'L CONDUCT R. 1.18(a) (2010).
228. ILL. RULES OF PROF'L CONDUCT R. 1.4 (2010), and ILL. RULES OF PROF'L CONDUCT R. 1.7 (2010).
229. ILL. RULES OF PROF'L CONDUCT R. 1.18 cmt. 2 (2010). This comment explains that "[a] person who communicates information unilaterally to a lawyer" generally will not be considered a "prospective client."
230. ILL. RULES OF PROF'L CONDUCT R. 1.18(b) (2010).
231. ILL. RULES OF PROF'L CONDUCT R. 1.9 (2010).
232. ILL. RULES OF PROF'L CONDUCT R. 1.18(c) (2010).
233. ILL. RULES OF PROF'L CONDUCT R. 1.18 cmt. 6 (2010). Although the new rules do not define "significantly harmful," it would be easy to imagine what type of information would fall within that category. For instance, a prospective plaintiff's explanation that she was involved in an automobile accident at Clark & Lake has not communicated "significantly harmful" information to the prospective lawyer. On the other hand, a plaintiff advising the lawyer that she "might have

lawyer can insist that a prospective client provide prospective consent that allows the lawyer to represent the prospective client's adversary if the lawyer is not retained.[234]

Even if the individual lawyer cannot represent the adversary because she has obtained such "significantly harmful" information, other lawyers in the firm can represent the adversary if: (1) the lawyer had taken reasonable measures to avoid exposure to more information than necessary to run the conflicts check; and (2) the lawyer is screened from the matter, including screened from any financial benefit.[235] The new rules define the steps required for an effective screen.[236]

The new rules prevent the sort of mischief that could come from a clever person sending unsolicited e-mails or voicemails to every firm in town, in an effort to "knock them out" from representing an adversary. The new rules presumably render obsolete the analysis of an Illinois legal ethics opinion,[237] in which the Bar held that a lawyer could not represent a husband in a divorce case without the consent of the husband's wife, who had discussed a possible representation with the lawyer.

The new rules differ from the ABA Model Rules in two ways. First, the new rules allow the law firm to represent a prospective client's adversary even if the lawyer who communicated with the prospective client is individually disqualified—if the prospective client and the adversary wishing to retain the law firm give informed consent, in writing or otherwise.[238] The ABA Model Rule requires that such consent be confirmed in writing.[239]

Second, the new rules allow the individually disqualified lawyer's law firm to represent the prospective client's adversary if the law firm screens the disqualified lawyer.[240] The new rules do not require that the law firm give notice to the prospective client. The ABA Model Rules require that the law firm promptly provide written notice to the prospective client that the law firm will represent the adversary.[241]

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had a few too many drinks" before the accident presumably has conveyed "significantly harmful" information.

234. ILL. RULES OF PROF'L CONDUCT R. 1.18 cmt. 5 (2010). The consent can even allow the lawyer's "subsequent use of information received from the prospective client."

235. ILL. RULES OF PROF'L CONDUCT R. 1.18(d)(2) (2010).

236. ILL. RULES OF PROF'L CONDUCT R. 1.0(k) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.0 cmt. 9, 10 (2010).

237. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 91–20 (1992).

238. ILL. RULES OF PROF'L CONDUCT R. 1.18(d)(1) (2010).

239. MODEL CODE OF PROF'L CONDUCT R. 1.18(d)(1) (2009).

240. ILL. RULES OF PROF'L CONDUCT R. 1.18(d)(2) (2010).

241. MODEL CODE OF PROF'L CONDUCT R. 1.18(d)(2)(ii) (2009).

B. Defining the End of an Attorney-Client Relationship

Given the dramatic difference between a lawyer's duties to a current client and a former client, lawyers often must determine if they have a current attorney-client relationship. Because lawyers can never be adverse to a current client without consent, a lawyer wishing to take a matter adverse to a person or entity obviously will want to argue that there is no current attorney-client relationship. Otherwise, the lawyer could proceed only with consent.

The new rules follow the ABA Model Rules in providing a comment that helps analyze whether an attorney-client relationship exists between a lawyer and a client. That comment follows the ABA Model Rules in explaining that a lawyer hired to handle a specific matter no longer represents the client when he finishes that matter.[242] In contrast, a lawyer might have to provide notice of withdrawal to terminate a relationship with a client whom the lawyer has served over a "substantial period in a variety of matters."[243] Lawyers should resolve, in writing, any ambiguity about a continuing relationship. Lawyers "must" discuss with the client whether the lawyer will handle an appeal of an adverse ruling, if they have not already agreed on that issue.[244] The old rules did not contain any similar guidance.

C. Restrictions on Lawyers' Practice

The new rules follow the ABA Model Rules in prohibiting lawyers from offering or making a partnership or employment agreement that restricts a lawyer's right to practice, except as part of a retirement agreement, or a settlement.[245]

The new rules differ from the old rules in two fairly insignificant ways. First, the new rules prohibit lawyers from restricting their practice as "part of the settlement of a client controversy."[246] The old rules used the phrase "controversy between private parties."[247] Presumably the new rules restrict a somewhat broader range of controversies.

Second, the new rules move from a black-letter rule[248] to a comment allowing a restriction on the lawyer's practice as part of an agreement under

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242. ILL. RULES OF PROF'L CONDUCT R. 1.3 cmt. 4 (2010).
243. *Id.*
244. *Id.*
245. ILL. RULES OF PROF'L CONDUCT R. 5.6(a) (2010).
246. ILL. RULES OF PROF'L CONDUCT R. 5.6(b) (2010).
247. ILL. RULES OF PROF'L CONDUCT R. 5.6(b) (repealed 2010).
248. *Id.*

which the lawyer sells a practice.[249] These minor changes do not amount to much. Thus, Illinois lawyers can continue to follow the existing guidance on this important issue.

D. Withdrawal from an Attorney-Client Relationship

The new rules follow the ABA Model Rules in describing the situations in which a lawyer may withdraw from representing a client. The new rules are much more permissive than the old rules in allowing a lawyer's discretionary withdrawal from a representation.

The new rules differ from the old rules in eleven ways. First, the new rules follow the ABA Model Rules in allowing lawyers to withdraw if the withdrawal "can be accomplished without material adverse effect on the interests of the client."[250] The old rules did not contain such a provision.[251]

On its face, this new provision allows lawyers to withdraw at any time and for any reason as long as the withdrawal does not harm the client. However, many courts have adopted what is called the "hot potato" rule, which prohibits a lawyer from dropping a client if the lawyer is primarily motivated by the desire to take a matter adverse to the now-former client.[252] In essence, the "hot potato" rule continues to treat the dropped client as a current client, thus prohibiting the lawyer from taking a matter adverse to it. Some courts consider the withdrawal itself to be an act of disloyalty.

Second, the new rules follow the ABA Model Rules by allowing lawyers to withdraw even if it causes "material adverse effect" on the client's interests if the client insists on taking an action that the lawyer considers "repugnant" or "with which the lawyer has a fundamental disagreement."[253] The old rules did not contain such a provision.[254] Among other things, this provision allows the lawyer to withdraw from representing a client that insists on unprofessional conduct.

Third, the new rules follow the ABA Model Rules in allowing lawyers to withdraw even if it causes "material adverse effect" on the client's interests if the representation will result in "an unreasonable financial burden" on the lawyer.[255] This rule allows the lawyer to withdraw if the

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249. ILL. RULES OF PROF'L CONDUCT R. 5.6 cmt. 3 (2010).
250. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(1) (2010).
251. ILL. RULES OF PROF'L CONDUCT R. 1.16(b) (repealed 2010).
252. Picker Int'l, Inc. v. Varian Assoc., Inc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987); *see* SWS Fin. Fund A v. Salomon Bros. Inc., 790 F. Supp. 1392, 1398–99, 1403 (N.D. Ill. 1992); Metro. Life Ins. Co. v. Guardian Life Ins. Co., No. 06 C 5812, 2009 U.S. Dist. LEXIS 42475, at *3, *4–5, *9–10, *10–11 (N.D. Ill. May 18, 2009).
253. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2010).
254. ILL. RULES OF PROF'L CONDUCT R. 1.16(b) repealed 2010).
255. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(6) (2010).

lawyer is not being paid. The old rules did not contain such a provision. However, it would be more difficult for the lawyer to satisfy this standard than to point to the client's failure to comply with an obligation to pay a bill.

Fourth, the new rules permit a lawyer to withdraw, even if it causes "material adverse effect" on the client's interests, if the client fails to "fulfill an obligation to the lawyer regarding the lawyer's services."[256] The old rules permitted such withdrawal if the client failed to fulfill an obligation "as to expenses or fees."[257] The new rules thus expand the grounds for a lawyer's withdrawal.

Fifth, the new rules require that a lawyer withdrawing because the client "fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services" must give the client a "reasonable warning" that the lawyer will withdraw unless the client fulfills the obligation.[258] The old rules did not contain this warning requirement.[259]

In essence, the lawyer must give the client the chance to pay a bill and warn of the consequences if the client does not pay the bill before withdrawing in this circumstance. The requirement that the lawyer warn the client that the lawyer will withdraw unless paid renders obsolete legal ethics opinions discussing withdrawal, but not requiring such a warning.[260]

Sixth, the new rules follow the ABA Model Rules in allowing lawyers to withdraw, even if it causes "material adverse effect" on the client's interests, if "other good cause for withdrawal exists."[261] The old rules did not contain such a provision,[262] but they did contain a somewhat similar provision, not found in the new rules, allowing a lawyer to withdraw if the lawyer "reasonably believes" that a tribunal will "find the existence of other good cause for withdrawal."[263] This catch-all ground highlights the new rules' more liberal approach to a lawyer's withdrawal.

Seventh, the new rules do not contain other grounds for withdrawal that appeared in the old rules.[264] The new rules' catch-all provision presumably would include this ground for withdrawal.

Eighth, the new rules follow the ABA Model Rules in requiring that a lawyer terminating a representation must take steps "to the extent

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256. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(5) (2010).
257. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(1)(F) (repealed 2010).
258. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(5) (2010).
259. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(1)(F) (repealed 2010).
260. *See, e.g.,* Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 01–02 (2001).
261. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(7) (2010).
262. ILL. RULES OF PROF'L CONDUCT R. 1.16(b) (repealed 2010).
263. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(4) (repealed 2010).
264. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(2) (repealed 2010).

reasonably practicable to protect the client's interests."[265] The old rules used the similar phrase "to avoid foreseeable prejudice to the rights of the client."[266] It is unclear whether a court or the bar would consider this to be a change in the lawyer's duties.

Ninth, the new rules follow the ABA Model Rules in requiring a withdrawing lawyer to refund "any advance payment of fee or expense that has not been earned or incurred."[267] The old rules only required the return of unearned fees.[268] It seems likely that lawyers withdrawing under the old rules would have also been required to return unincurred expenses.

Tenth, the new rules follow the ABA Model Rules in permitting the lawyer to "retain papers relating to the client to the extent permitted by other law."[269] The old rules required the withdrawing lawyer to deliver to the client "all papers and property to which the client is entitled."[270]

Like other states, Illinois has wrestled with a lawyer's right to withhold those papers and property until the client pays the lawyer, and also with the definition of the files to which the client is entitled. The trend nationally has been against recognizing a lawyer's right to withhold the file until paid, and in favor of an expansive view of the file to which the client is entitled, the debate generally involves whether the lawyer must turn over work product not previously shared with the client.

A 1995 Illinois legal ethics opinion explained that "a lawyer may retain a client's papers or property only if asserting a common law or statutory retaining lien."[271] That same month, the Illinois Bar held that absent an agreement or formal litigation discovery, lawyers may refuse to provide clients with "internal administrative materials" and "documents such as the lawyer's personal research, drafts and notes of interviews."[272] Later opinions have not taken a different approach.[273] Because the new rules allow lawyers to retain files "to the extent permitted by other law," presumably the legal ethics opinion still provides governing guidance on this issue.[274]

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265. ILL. RULES OF PROF'L CONDUCT R. 1.16(d) (2010).
266. ILL. RULES OF PROF'L CONDUCT R. 1.16(d) (repealed 2010).
267. ILL. RULES OF PROF'L CONDUCT R. 1.16(d) (2010).
268. ILL. RULES OF PROF'L CONDUCT R. 1.16(e) (repealed 2010).
269. ILL. RULES OF PROF'L CONDUCT R. 1.16(d) (2010).
270. ILL. RULES OF PROF'L CONDUCT R. 1.16(d) (repealed 2010).
271. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 94–14 (1995).
272. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 94–13 (1995).
273. *See*, *e.g.*, Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 94–14 (1995); Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 95–2 (1995); Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 01–01 (2001); Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 01–02 2001).
274. *Id.*

Eleventh, the new rules follow the ABA Model Rules in requiring lawyers to take the required steps "[u]pon termination of representation."[275] These steps include giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The old rules did not allow the lawyer to withdraw "until" the lawyer had taken these and other steps to avoid "foreseeable prejudice to the rights of the client."[276] Thus, the new rules do not require that the withdrawing lawyer take the required steps *before* withdrawing.

The new rules contain one frequently cited ground for withdrawal that also appeared in the old rules. A lawyer can withdraw if the representation "has been rendered unreasonably difficult by the client."[277] The old rules contained the same language.[278] This provision allows lawyers to withdraw if the attorney-client relationship breaks down, but has not reached the "repugnant" or "fundamental disagreement" standard discussed above.

The new rules differ from the ABA Model Rules in one way. A comment to the new rules reminds Illinois lawyers that they may have an obligation to return certain retainer payments if they withdraw from a representation.[279] This provision probably reflects the unique Illinois approach to retainers.[280]

The new rules generally follow the old rules and the ABA Model Rules in describing situations in which a lawyer *must* withdraw from a representation.[281] The new rules differ from the old rules by not containing a provision found in the old rules, which required a lawyer to withdraw if the lawyer knows or "reasonably should know" that the client is acting in litigation "merely for the purpose of harassing or maliciously injuring any person."[282] The new rules, like the old rules and the ABA Model Rules, prohibit lawyers themselves from engaging in such actions.[283] The old rules' provision arguably recognized more situations in which lawyers must withdraw.

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275. ILL. RULES OF PROF'L CONDUCT R. 1.16(d) (2010).
276. ILL. RULES OF PROF'L CONDUCT R. 1.16(d) (repealed 2010).
277. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(6) (2010).
278. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(1)(D) (repealed 2010).
279. ILL. RULES OF PROF'L CONDUCT R. 1.16 cmt. 10 (2010).
280. *See* discussion *infra* Part VII.A.
281. ILL. RULES OF PROF'L CONDUCT R. 1.16(a) (2010).
282. ILL. RULES OF PROF'L CONDUCT R. 1.16(a)(1) (repealed 2010).
283. ILL. RULES OF PROF'L CONDUCT R. 3.1 (2010); ILL. RULES OF PROF'L CONDUCT R. 4.4(a) (2010).

The main issue in which the new rules provide additional guidance and vary from the ABA Model Rules involves the "noisiness" of the withdrawal.[284]

E. Lawyers Selling Their Law Practice

The new rules explain the ways lawyers can sell their law practice.[285] The incidence of lawyers selling their practices has increasd over recent years, so Illinois lawyers should welcome additional guidance on this issue.

The new rules differ from the old rules in four ways. First, the new rules simply allow the lawyer to sell a law practice.[286] The old rules listed specific reasons why the lawyer might want to sell a law practice.[287] This change does not materially affect the rule, because one of the listed reasons in the old rule was simply the lawyer's decision to stop actively practicing law in a geographic area.[288] Second, the new rules explicitly allow a disabled lawyer's guardian or representative to sell a practice,[289] while the old rules did not contain such a provision.[290]

Third, a comment to the new rules, which follows the ABA Model Rules, explains that lawyers negotiating the sale or purchase of a law practice may exchange information "relating to a specific representation of an identifiable client" without violating the confidentiality rules.[291] The old rules did not contain such a provision.

Fourth, the new rules contain comments[292] that were contained in black-letter provisions of the old rules.[293]

The new rules differ from the ABA Model Rules in three ways. First, the new rules explicitly allow the sale of a law practice by "the estate of a deceased lawyer or the guardian or authorized representative of a disabled lawyer."[294] It is unclear whether the ABA Model Rules implicitly permit such a sale.

Second, the new rules require lawyers to sell their "entire practice"[295] although a lawyer may sell the practice in only a certain "geographic

284. *See* discussion *supra* Part III.E.
285. ILL. RULES OF PROF'L CONDUCT R. 1.17 (2010).
286. *Id.*
287. ILL. RULES OF PROF'L CONDUCT R. 1.17(a) (repealed 2010).
288. ILL. RULES OF PROF'L CONDUCT R. 1.17(a)(7) (repealed 2010).
289. ILL. RULES OF PROF'L CONDUCT R. 1.17 (2010).
290. ILL. RULES OF PROF'L CONDUCT R. 1.17 (repealed 2010).
291. ILL. RULES OF PROF'L CONDUCT R. 1.17 cmt. 7 (2010).
292. ILL. RULES OF PROF'L CONDUCT R. 1.17 cmt. 11, 14, 15 (2010).
293. ILL. RULES OF PROF'L CONDUCT R. 1.17(e), (f), (g) (repealed 2010).
294. ILL. RULES OF PROF'L CONDUCT R. 1.17 (2010).
295. ILL. RULES OF PROF'L CONDUCT R. 1.17(b) (2010).

area."[296] The ABA Model Rules explicitly allow a lawyer to sell an "area" of practice.[297] Thus, the new rules require lawyers wishing to sell part of their practice to stop practicing entirely in a geographic area—they cannot sell an "area" of practice but keep practicing in the geographic region.

Third, a comment to the new rules recommends that the parties to such a transaction agree to "define the geographic area" covered by the sale.[298] The ABA Model Rules do not contain this comment. It is difficult to imagine that the parties would not do so in their agreement.

VI. CONFLICTS OF INTEREST

A. Conflicts of Interest between Current Clients' Interests

The new rules generally follow the ABA Model Rules in articulating the basic conflicts rule governing adversity to current clients.[299] The basic principle has always been the same: lawyers cannot represent a client adverse to another current client except under certain limited conditions.

The new rules differ from the old rules in two ways. First, the new rules follow the ABA Model Rules in prohibiting per se a lawyer or a law firm representing a client in "the assertion of a claim" against another client represented by the same law firm in the "same litigation or other proceeding" in a tribunal.[300] The old rules did not contain such an explicit prohibition.

Second, the new rules follow the ABA Model Rules in allowing lawyers to handle matters adverse to current clients only if the lawyer "reasonably believes" that she will "be able to provide competent and diligent representation to each affected client."[301] The old rules required that the lawyer reasonably believe that the representation of a client "will not be adversely affected."[302] The new formulation seems more forgiving, because it focuses on the lawyer's actions, compared to the old rules' focus on an adverse impact on the client relationship, which seems within the client's power to control.

The new rules differ from the ABA Model Rules in three ways. First, the new rules allow lawyers to represent one client adverse to another current client if both clients give "informed consent."[303] This was also the

296. ILL. RULES OF PROF'L CONDUCT R. 1.17(a) (2010).
297. MODEL CODE OF PROF'L CONDUCT R. 1.17(b) (2009).
298. ILL. RULES OF PROF'L CONDUCT R. 1.17 cmt. 4 (2010).
299. ILL. RULES OF PROF'L CONDUCT R. 1.7(a) (2010).
300. ILL. RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2010).
301. ILL. RULES OF PROF'L CONDUCT R. 1.7(b)(1) (2010).
302. ILL. RULES OF PROF'L CONDUCT R. 1.7(b)(1) (repealed 2010).
303. ILL. RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2010).

approach of the old rules.[304] The ABA Model Rules require the client to confirm such consent in writing,[305] but Illinois has no similar requirement.[306]

Lawyers generally balk at written consent requirements. This resistance seems strange, because confirming a consent in writing protects the lawyer rather than the client. As the fiduciary, the lawyer must establish, usually by clear and convincing evidence, that the lawyer has not taken advantage of the client in a setting where their interests might be at odds. Thus, lawyers nearly always lose any "he said/she said" debate about a client's consent. One would think that lawyers would welcome a written consent requirement, so they could point to the ethics rules requiring them to broach the issue with their clients. However, Illinois and many other states reject the ABA Model Rules requirement of a written client consent.

Second, the new rules weaken the basic principle that the attorney-client privilege does not attach to communications among jointly represented clients, and will not apply if jointly represented clients later become litigation adversaries.[307] Unlike the ABA Model Rules, the new rules add the word "generally" in two places. It is unclear why the new rules contain this qualifying language; the Illinois privilege case law does not appear to differ from the consensus rule that is articulated in the ABA Model Rules.

The new rules' comments on conflicts of interest are among the most useful of any of the new provisions as a source of guidance for Illinois lawyers. The most important comments:

1. describe the disclosure necessary to obtain a client's informed consent;[308]
2. remind lawyers that they "may not assume consent" from a client's silence;[309]
3. explain the concept of a "thrust-upon" conflict, which may allow the lawyer to withdraw from a representation to clear a conflict that the client (rather than the lawyer) has caused;[310]
4. differentiate among types of adversity (such as economic adversity among competing clients) that do not trigger the conflicts rules from the type of adversity that does trigger the conflicts rules (such as a

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304. ILL. RULES OF PROF'L CONDUCT R. 1.7(a)(2) (repealed 2010).
305. MODEL CODE OF PROF'L CONDUCT R. 1.7(b)(4) (2009).
306. ILL. RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2010).
307. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 30 (2010).
308. ILL. RULES OF PROF'L CONDUCT R. 1.0 cmt. 6 (2010).
309. ILL. RULES OF PROF'L CONDUCT R. 1.0 cmt. 7 (2010).
310. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 5 (2010).

lawyer's cross-examination of a witness who is a client in an unrelated matter);[311]

5. confirm that direct adversity can arise in transactional matters such as business negotiations;[312] and that representing both sides in negotiations in which the parties' interests are "fundamentally antagonistic to each other" might be prohibited per se;[313]
6. assure lawyers that they can represent a client adverse to another client who is represented by one of the lawyer's close family members, as long as both clients provide informed consent;[314]
7. explain that in some situations lawyers cannot even ask for consent, if the request would require disclosure of a client confidence that would hurt the client;[315]
8. provide an analysis of a client's revocation of a consent—which does not always require the lawyer's withdrawal from an adverse representation, if the client relying on the consent would be harmed by the revocation;[316]
9. list the type of factors that will allow a client to rely on a client's prospective consent (such as the sophistication of the client, and the detail of the lawyer's description of the future adversity covered by the consent);[317]
10. take a surprisingly liberal view of what is called "positional adversity"—noting that lawyers "ordinarily" may "take inconsistent legal positions in different tribunals at different times on behalf of different clients";[318]
11. instruct trust and estate lawyers that in estate administration matters "the identity of the client may be unclear," depending on the jurisdiction;[319]
12. explain the special care that lawyers must take when representing multiple clients;[320]
13. include the guidance to explain at the beginning of such a joint representation that the lawyer will share with all the jointly represented clients what the lawyer learns from one of them (and would have to withdraw if one of the jointly represented clients asks

311. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2010).
312. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 7 (2010).
313. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 28 (2010).
314. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 11 (2010).
315. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 19 (2010).
316. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 21 (2010).
317. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (2010).
318. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 24 (2010).
319. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 27 (2010).
320. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2010).

the lawyer to keep such secrets), except in limited circumstances where lawyers may represent multiple clients and keep secrets from them;[321] and

14. describe how to identify the "client" in a corporate family setting—generally stating that a lawyer representing a corporation can be adverse to a corporate affiliate, but then listing a number of factors that might prevent such adversity including circumstances that would call for the affiliate to "also be considered a client of the lawyer," an understanding between the client and lawyer to the contrary, or a material limitation on the lawyer's representation caused by the lawyer's "obligations to either the organizational client or the new client."[322] This comment about corporate affiliates is consistent with an Illinois legal ethics opinion[323] which essentially took the same approach. Despite the language that seems to permit such adversity, most lawyers choose not to take such action—mostly because it is bad for business (a corporate client might fire a lawyer who becomes adverse to its affiliate), or because the lack of certainty about the lawyer's ability to undertake such a matter deters the other client from hiring the lawyer (and avoid the risk of an expensive and time-consuming "side show" over a disqualification motion).

The new rules contain one other pertinent provision that affects this analysis.[324] The new rules follow the ABA Model Rules in adopting a very forgiving conflicts of interest standard for lawyers providing "short-term limited legal services" when working with a nonprofit limited legal services programs.[325] In essence, a lawyer in that setting faces a conflict only if the lawyer knows of the conflict. Under Rule 6.5(a), such a lawyer is subject to the normal conflicts rules "only if the lawyer knows that the representation of the client involves a conflict of interest."[326] Similarly, a lawyer is subject to imputed disqualification under Rule 1.10 "only if the lawyer knows that another lawyer associated with the lawyer in the law firm is disqualified" by the conlicts rules.[327]

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321. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 31 (2010).
322. ILL. RULES OF PROF'L CONDUCT R. 1.7 cmt. 34 (2010).
323. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 95–15 (1996).
324. *See* discussion *infra* Part IV.C.2.
325. ILL. RULES OF PROF'L CONDUCT R. 6.5 (2010).
326. ILL. RULES OF PROF'L CONDUCT R. 6.5(a)(1) (2010).
327. ILL. RULES OF PROF'L CONDUCT R. 6.5(a)(2) (2010).

B. Conflicts of Interest between Current and Former Clients

The new rules generally follow the old rules in dealing with the conflicts of interest implications of lawyers' adversity to former clients.[328] The new rules follow the ABA Model Rules in explaining that a lawyer may be adverse to a client represented by the lawyer's former firm as long as the lawyer himself had not acquired pertinent information about the client while at the old firm.[329] This principle was implicit in the old rule.

The new rules differ from the ABA Model Rules in one way. The new rules, like the old rules, permit adversity if the former client gives "informed consent" but do not require the consent confirmed in writing.[330] The ABA Model Rules require that lawyers obtain the client's consent confirmed in writing.[331]

As with the new rules' provision dealing with adversity to current clients, several comments to the new rules provide useful guidance. Among other things, the comments: (1) define the term "matter," which helps lawyers determine if they are adverse to a former client in the "same or substantially related matter" as that on which they represented the client.[332] For instance, a "specific transaction" is defined as the same "matter," but a lawyer who has "recurrently handled a type of problem for a former client" can be adverse to that former client on a "factually distinct problem of that type";[333] and (2) define the term "substantially related" as including "the same transaction or legal dispute."[334] Significantly, matters are *also* "substantially related" if "there otherwise is a substantial risk that confidential factual information" that the lawyer "normally would have obtained" in the previous representation would "materially advance" the new client's position adverse to the former client.[335]

C. Government Lawyers Moving to the Private Sector

The new rules generally follow the ABA Model Rules and the old rules in dealing with the individual disqualification of a former government officer or employee, including a government lawyer.[336]

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328. ILL. RULES OF PROF'L CONDUCT R. 1.9(a) (2010).
329. ILL. RULES OF PROF'L CONDUCT R. 1.9(b) (2010), ILL. RULES OF PROF'L CONDUCT R. 1.9(b)(2) cmt. 5 (2010).
330. ILL. RULES OF PROF'L CONDUCT R. 1.9(a) (2010).
331. MODEL CODE OF PROF'L CONDUCT R. 1.9(b) (2009).
332. ILL. RULES OF PROF'L CONDUCT R. 1.9 cmt. 2 (2010).
333. *Id.*
334. ILL. RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (2010).
335. *Id.*
336. ILL. RULES OF PROF'L CONDUCT R. 1.11(a) (2010).

In essence, former government employees or lawyers cannot represent a client in a matter in which the lawyer "participated personally and substantially" while in the government, unless the government agency gives its informed consent.[337]

The new rules follow the ABA Model Rules[338] and the old rules[339] in defining the term "matter" very narrowly in this context the new rules have essentially limited it to a "particular matter involving a specific party or parties."[340] This provides a further limitation on the disqualification standard applicable to former government lawyers, as compared to private lawyers.

A comment to the new rules explains the purpose of this lower standard for former government employees' or lawyers' individual disqualification.[341] The "personally and substantially" language provides a more forgiving disqualification standard than for lawyers working in the private sector. The comment explains that this liberal definition combined with the availability of screening to avoid imputed disqualification when the government lawyer moves to the private sector is designed to avoid "imposing too severe a deterrent against entering public service."[342]

The new rules differ from the ABA Model Rules in one way. The ABA Model Rules require that the agency's consent be confirmed in writing[343] while the new rules do not require written consent.[344]

D. Private Lawyers Moving to the Government

The new rules follow the ABA Model Rules[345] and the old rules[346] in describing the disqualification of former private lawyers who enter government service.[347]

In essence, the standard is the same for lawyers leaving government service, discussed immediately above. The new rules impose on such lawyers the same prohibition on using a former client's information as imposed by the new rule on lawyers leaving the government service.

337. ILL. RULES OF PROF'L CONDUCT R. 1.11(a)(2) (2010).
338. MODEL CODE OF PROF'L CONDUCT R. 1.11(e) (2009).
339. ILL. RULES OF PROF'L CONDUCT R. 1.11(d) (repealed 2010).
340. ILL. RULES OF PROF'L CONDUCT R. 1.11(e) (2010).
341. ILL. RULES OF PROF'L CONDUCT R. 1.11 cmt. 4 (2010).
342. *Id.*
343. ILL. RULES OF PROF'L CONDUCT R. 1.11(a)(2) (2010).
344. MODEL CODE OF PROF'L CONDUCT R. 1.11(a)(2) (2009).
345. MODEL CODE OF PROF'L CONDUCT R. 1.11(d) (2009).
346. ILL. RULES OF PROF'L CONDUCT R. 1.11(c) (repealed 2010).
347. ILL. RULES OF PROF'L CONDUCT R. 1.11(d) (2010).

E. Former Judges and Third-Party Neutrals

The new rules follow the ABA Model Rules[348] and generally follow the old rules[349] in describing the disqualification of former judges and third-party neutrals.[350] In essence, these individuals are treated similarly to former government lawyers by following the "personally and substantially" standard discussed above.

The new rules differ from the old rules in one way. The new rules follow the ABA Model Rules[351] in adding mediators and other third-party neutrals to this section.[352] The old rules[353] did not explicitly cover them.

F. Conflicts of Interest between Lawyers and Clients

The new rules contain several new and dramatically changed provisions governing conflicts between a lawyer's interests and her client's interests. These types of conflicts differ from those between clients' interests. These conflicts put lawyers against hier own clients, and therefore raise very different issues than that of other conflicts.

1. Doing Business with Clients

The new rules generally follow the ABA Model Rules in restricting lawyers' doing business with clients.[354] The new rules differ from the old rules in five ways. First, the new rules prohibit, except under certain conditions, lawyers from entering into business transactions with clients or "knowingly" acquiring an "ownership, possessory, security or other pecuniary interest" adverse to a client.[355] The old rules applied only to "a business transaction," and thus had a narrower reach than the new rules.[356]

Second, under the new rules, such transactions are prohibited unless the terms are "fair and reasonable" to the client.[357] The old rules did not contain this explicit requirement.

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348. MODEL CODE OF PROF'L CONDUCT R. 1.12 (2009).
349. ILL. RULES OF PROF'L CONDUCT R. 1.12 (repealed 2010).
350. ILL. RULES OF PROF'L CONDUCT R. 1.12 (2010).
351. MODEL CODE OF PROF'L CONDUCT R. 1.12(a), (b) (2009).
352. ILL. RULES OF PROF'L CONDUCT R. 1.12(a), (b) (2010).
353. ILL. RULES OF PROF'L CONDUCT R. 1.12 (repealed 2010).
354. ILL. RULES OF PROF'L CONDUCT R. 1.8(a) (2010).
355. *Id.*
356. ILL. RULES OF PROF'L CONDUCT R. 1.8(a) (repealed 2010).
357. ILL. RULES OF PROF'L CONDUCT R. 1.8(a)(1) (2010).

Third, the new rules also require that the lawyer explain the terms to the client in writing.[358] The old rules did not exclusively cover this situation.

Fourth, the new rules require that lawyers entering into such transactions with clients must inform the client, in writing, that the client "may" seek an independent lawyer's advice and be given a "reasonable opportunity to do so."[359] The old rules did not contain this requirement.

Fifth, the new rules require a client's informed consent "in a writing signed by the client," which must include: (1) the client's consent to the transaction's terms; and (2) a description of the lawyer's role and "whether the lawyer is representing the client in the transaction."[360] The old rules did not contain this requirement. A comment to the new rules confirms that this provision does not apply to "standard commercial transactions" between lawyers and clients.[361]

The new rules differ from the ABA Model Rules in two ways. First, the new rules require that lawyers entering into such transactions with clients must inform the client in writing that the client "may" seek an independent lawyer's advice and be given a "reasonable opportunity to do so."[362] The ABA Model Rules require that the lawyer also advise the client in writing of the "desirability" of seeking such an independent lawyer's advice.[363] Thus, the new rules do not go as far as the ABA Model Rules in requiring lawyers to remind clients that they should seek an independent lawyer's advice.

Second, the new rules contain a sentence not found in the ABA Model Rules, which reminds lawyers that the common law governing such business transactions "may" impose other requirements, such as "encouraging the client to seek independent legal counsel."[364] It is interesting that the new rules did not include the ABA Model Rules requirement that the lawyer inform the client of the "desirability" of seeking an independent lawyer's advice,[365] but instead refer to what might be essentially the same requirement in the common law.[366]

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358. *Id.*
359. ILL. RULES OF PROF'L CONDUCT R. 1.8(a)(2) (2010).
360. ILL. RULES OF PROF'L CONDUCT R. 1.8(a)(3) (2010).
361. ILL. RULES OF PROF'L CONDUCT R. 1.8 cmt. 1 (2010).
362. ILL. RULES OF PROF'L CONDUCT R. 1.8(a)(2) (2010).
363. MODEL CODE OF PROF'L CONDUCT R. 1.8(a)(2) (2009).
364. ILL. RULES OF PROF'L CONDUCT R. 1.8 cmt. 2 (2010).
365. ILL. RULES OF PROF'L CONDUCT R. 1.8(a)(2) (2010).
366. ILL. RULES OF PROF'L CONDUCT R. 1.8 cmt. 2 (2010).

2. Use of Client information

The new rules follow the ABA Model Rules in restricting lawyers' "use" of client confidences.[367] The old rules dealt with a lawyer's "use" of client information in the rule governing client confidences.[368]

The new rules prohibit lawyers from using any "information relating to the representation of a client" to the "disadvantage of the client."[369] That definition of protected information matches the definition in the new rules' basic confidentiality provisions.[370] A comment to the new rules explains that lawyers cannot use a client's information to benefit either the lawyer or a third person if it would hurt the client, but lawyers *may* use such information if it does not disadvantage the client.[371] That comment provides an example: a lawyer who learns while representing a client of a government agency's "interpretation of trade legislation," which the lawyer may use to benefit other clients.[372]

3. Client Gifts to Lawyers or Their Family

The new rules follow the ABA Model Rules in dealing with client gifts to lawyers.[373] A comment to the new rules explains that lawyers may seek appointment of the lawyer or law firm as a client's executor or other "lucrative fiduciary position." However, lawyers may not seek such an appointment if it would violate some other rule such as the rule recognizing a conflict if the lawyer's personal interest will materially limit the lawyer's independent professional judgment.[374] If there is such a conflict, the lawyer seeking the client's consent must advise the client of the lawyer's "financial interest in the appointment," and the "availability of alternative candidates for the position."[375]

The new rules differ from the old rules in one way. The new rules prohibit lawyers from soliciting, or preparing a document under which the lawyer or lawyer's relative receives any "substantial gift" from a client, unless the client is the lawyer's relative.[376] The old rules only prohibited

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367. ILL. RULES OF PROF'L CONDUCT R. 1.8(b) (2010).
368. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (repealed 2010); *see* discussion *supra* Part III.B.
369. ILL. RULES OF PROF'L CONDUCT R. 1.8(b) (2010).
370. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (2010).
371. ILL. RULES OF PROF'L CONDUCT R. 1.8 cmt. 5 (2010).
372. *Id.*
373. ILL. RULES OF PROF'L CONDUCT R. 1.8(c) (2010).
374. ILL. RULES OF PROF'L CONDUCT R. 1.8 cmt. 8 (2001).
375. *Id.*
376. ILL. RULES OF PROF'L CONDUCT R. 1.8(c) (2010).

document preparation, but did not prohibit the lawyer from soliciting such gifts.[377]

4. Lawyers Paid by Non-Clients

The new rules follow the ABA Model Rules in prohibiting lawyers from being paid by non-clients unless: (1) the client gives informed consent; and (2) the non-client does not interfere with the lawyer's duties to the client.[378] The old rules covered this situation in a different provision,[379] which the new rules also contain.[380] The new rules differ from the old rules by requiring the client's informed consent to the third party paying the lawyer.[381] The old rules did not explicitly require client consent.[382]

5. Aggregate Settlements

The new rules follow the ABA Model Rules in prohibiting a lawyers participation in making an aggregate settlement, except under certain conditions.[383] In essence, lawyers cannot participate in offering or accepting aggregate settlements, which require the agreement of every client represented by the lawyer in a matter, unless each client understands every other client's participation in the settlement.[384]

The new rules differ from the old rules by requiring that the client sign an informed consent in writing for aggregate settlements.[385] The old rule required client consent, but not in a signed writing.[386] It is interesting that the new rules follow the ABA Model Rules in adopting a requirement of written consent, but not a similar ABA Model Rule requirement of a written consent for the more common situations in which lawyers are adverse to current[387] or former[388] clients.

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377. ILL. RULES OF PROF'L CONDUCT R. 1.8(c) (repealed 2010).
378. ILL. RULES OF PROF'L CONDUCT R. 1.8(f) (2010).
379. ILL. RULES OF PROF'L CONDUCT R. 5.4(c) (repealed 2010).
380. ILL. RULES OF PROF'L CONDUCT R. 5.4(c) (2010).
381. ILL. RULES OF PROF'L CONDUCT R. 1.8(f) (2010).
382. ILL. RULES OF PROF'L CONDUCT R. 5.4(c) (repealed 2010).
383. ILL. RULES OF PROF'L CONDUCT R. 1.8(g) (2010).
384. *Id.*
385. *Id.*
386. ILL. RULES OF PROF'L CONDUCT R. 1.8(e) (repealed 2010).
387. ILL. RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2010).
388. ILL. RULES OF PROF'L CONDUCT R. 1.9(a) (2010).

6. Settling Client Claims

The new rules follow the ABA Model Rules in dealing with lawyers settling client claims against them. Thus, an Illinois lawyer should look at this provision when responding to client's claim of malpractice or some other wrongdoing. A comment to the new rules follows the ABA Model Rules in allowing lawyers to enter into agreements with their clients that require arbitration of legal malpractice claims, if the lawyer "fully" informs the client of the "scope and effect of the agreement."[389]

The new rules differ from the old rules in one way. The new rules allow lawyers to settle a client's or former client's claim or potential claim against the lawyer only if the client is "advised in writing of the desirability of seeking" an independent lawyer's advice, and is given a reasonable opportunity to do so.[390] The old rules only required that the lawyer advise the client in writing that it would be "appropriate" for the client to seek an independent lawyer's advice.[391] The new rules thus require a stronger statement about the "desirability" of a client doing so.

The new rules differ from the ABA Model Rules in one way. The new rules contain a provision from the old rules[392] not found in the ABA Model Rules prohibiting lawyers from attempting to limit their clients' or former clients' right to file a bar complaint about the lawyer.[393]

7. Sexual Relationships with Clients

The new rules follow the ABA Model Rules in prohibiting lawyers' sexual relationships with a client, unless a consensual relationship existed before the attorney-client relationship began.[394] The old rules did not deal with this issue.

Several comments provide guidance on this issue.[395] The comments prohibit an in-house or outside lawyer who represents an organization from having a prohibited sexual relationship with an organization's constituent "who supervises, directs or regularly consults" with the lawyer.[396]

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389. ILL. RULES OF PROF'L CONDUCT R. 1.8 cmt. 14 (2010).
390. ILL. RULES OF PROF'L CONDUCT R. 1.8(h) (2010).
391. ILL. RULES OF PROF'L CONDUCT R. 1.8(g) (repealed 2010).
392. ILL. RULES OF PROF'L CONDUCT R. 1.8(h) (repealed 2010).
393. ILL. RULES OF PROF'L CONDUCT R. 8.4(h) (2010).
394. ILL. RULES OF PROF'L CONDUCT R. 1.8(j) (2010).
395. ILL. RULES OF PROF'L CONDUCT R. 1.8 cmts. 17, 18, 19 (2010).
396. ILL. RULES OF PROF'L CONDUCT R. 1.8 cmt. 19 (2010).

G. Imputation of an Individual Lawyer's Disqualification

1. Introduction and Basic Principles

The new rules differ dramatically from the old rules in their treatment of imputing an individual lawyer's disqualification to a law firm or law department.

The new rules follow the old rules[397] and the ABA Model Rules[398] in defining "firm" and "law firm" to include the law department of a "corporation or other organization."[399] A comment to the new rules indicates that a nonlawyers' individual disqualification is not imputed to the law firm, although such nonlawyers "ordinarily must be screened."[400]

2. Ethics Screens

The new rules contain a description of an ethics screen that satisfies various ethics provisions allowing law firms and law departments to avoid imputation of an individual lawyer's disqualification by screening the lawyer.

The new rules differ from the old rules in one way. The new rules[401] contain a much more elaborate description of ethically required "screens" than the old rules. A comment to the new rules explains that law firms screening an individually disqualified lawyer should: (1) arrange for the screened lawyer to "acknowledge the obligation not to communicate" with other lawyers from whom she is screened; and (2) inform those other lawyers that they "may not" communicate with the screened lawyer.[402] The same comment explains that it "may be appropriate" for the law firm to: (1) arrange for a "written undertaking by the screened lawyer" that he will comply with the screen; (2) send out "written notice and instructions to all other firm personnel" announcing the screen; (3) deny "access by the screened lawyer to firm files or other materials relating to the matter"; and (4) send out "periodic reminders of the screen."[403] The old rules essentially required only that the individually disqualified lawyer be isolated from

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397. ILL. RULES OF PROF'L CONDUCT Terminology (repealed 2010).
398. MODEL CODE OF PROF'L CONDUCT R. 1.0(c) (2009).
399. ILL. RULES OF PROF'L CONDUCT R. 1.0(c) (2010).
400. *See* discussion infra Part VII.A.
401. ILL. RULES OF PROF'L CONDUCT R. 1.0(k) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.0 cmts. 810 (2010).
402. ILL. RULES OF PROF'L CONDUCT R. 1.0 cmt. 9 (2010).
403. *Id.*

anyone working on the matter, and be prohibited from discussing the matter with anyone working on the matter.[404]

A comment to the new rules reminds lawyers that the law firm or law department must screen the individual lawyer "as soon as practical" after learning of the need for screening.[405] The old rules did not deal with timing.

The new rules differ from the ABA Model Rules in one way. A comment to the new rules, not found in the ABA Model Rules, explains the required financial screening, and confirms that lawyers financially screened from a matter may receive a salary or partnership share "established by independent agreement," but may not receive any payment "directly relating" to the fee the law firm earns in the matter from which the lawyer is screened.[406]

3. Conflicts between Current Clients' Interests

The new rules follow the ABA Model Rules in dealing with imputing disqualification based on conflicts between current clients. Absent unusual circumstances involving a firm lawyer's personal interests[407] or a lateral hire,[408] any individual lawyer's disqualification is imputed to the entire law firm or law department.[409]

4. Conflicts of Interest Between a Law Firm's Client and a Lateral Hire's Former Client

The new rules follow the ABA Model Rules in addressing imputation of a lateral hire's individual disqualification to his or her new law firm or law department. One provision continues an approach in the old rules that the ABA has recently adopted, and another provision dramatically changes one of the old rules.

The new rules continue the approach of the old rules[410] by allowing a law firm or a law department to avoid the imputed disqualification of a newly hired lawyer as long as the lawyer is "timely screened" from participating in the matter at the new law firm.[411]

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404. ILL. RULES OF PROF'L CONDUCT R. 1.10(e) (repealed 2010).
405. ILL. RULES OF PROF'L CONDUCT R. 1.0 cmt. 10 (2010).
406. ILL. RULES OF PROF'L CONDUCT R. 1.10 cmt. 9 (2010).
407. ILL. RULES OF PROF'L CONDUCT R. 1.10(a) (2010).
408. ILL. RULES OF PROF'L CONDUCT R. 1.10(e) (2010).
409. ILL. RULES OF PROF'L CONDUCT R. 1.10(a) (2010).
410. ILL. RULES OF PROF'L CONDUCT R. 1.10(b) (repealed 2010).
411. ILL. RULES OF PROF'L CONDUCT R. 1.10(e) (2010).

The ABA Model Rules traditionally did not contain such permissible screens to avoid a newly hired lawyer's individual disqualification, but the ABA revised the ABA Model Rules on February 16, 2009, to permit essentially the same approach.[412] The new ABA Model Rule requires screening of the disqualified lawyer,[413] written notice to any affected former clients including specific details of the screening,[414] and delivery of a compliance certification to a former client when: (1) the former client asks for one; or (2) the firm terminates the screening.[415]

The new rules differ from the old rules in two ways. First, as explained above, the new rules contain a more elaborate description than the old rules[416] of the type of "screen" that will pass ethical muster.[417] Second, the new rules require that the individually disqualified lawyer be "apportioned no part of the fee" from the new matter.[418] The old rules did not require such a step.

The new rules differ from the ABA Model Rules by requiring a less elaborate screen than the ABA Model Rules.[419]

5. Conflicts Between a Law Firm's Current Client and a Former Client Previously Represented by Lawyers Who Have Left the Firm

The new rules follow the ABA Model Rules in permitting the law firm or law department to take matters adverse to a client formerly represented by a lawyer who has now left the firm or department.[420]

The new rules differ dramatically from the old rules by allowing a law firm to take matters adverse to a former client unless: (1) "the matter is the same or substantially related" to that in which the firm's former lawyer represented the client;[421] and (2) any "lawyer remaining in the firm" has "material" confidential information about the matter.[422] The old rules prohibited a law firm from taking matters adverse to clients of departed lawyers *even if* every lawyer with material confidential information had also left the firm.[423]

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412. MODEL CODE OF PROF'L CONDUCT R. 1.10(a)(2) (2009).
413. MODEL CODE OF PROF'L CONDUCT R. 1.10(a)(2)(i) (2009).
414. MODEL CODE OF PROF'L CONDUCT R. 1.10(a)(2)(ii) (2009).
415. MODEL CODE OF PROF'L CONDUCT R. 1.10(a)(2)(iii) (2009).
416. ILL. RULES OF PROF'L CONDUCT R. 1.10(e) (repealed 2010).
417. ILL. RULES OF PROF'L CONDUCT R. 1.0 cmts. 8–10 (2010).
418. ILL. RULES OF PROF'L CONDUCT R. 1.10(e) (2010).
419. MODEL CODE OF PROF'L CONDUCT R. 1.10(a)(2) (2009).
420. ILL. RULES OF PROF'L CONDUCT R. 1.10(b)(1), (2) (2010).
421. ILL. RULES OF PROF'L CONDUCT R. 1.10(b)(1) (2010).
422. ILL. RULES OF PROF'L CONDUCT R. 1.10(b)(2) (2010).
423. ILL. RULES OF PROF'L CONDUCT R. 1.10(c) (repealed 2010).

The old rules' prohibition was stated as a positive rather than a negative, and one cannot help but wonder whether the broad reach of the old rules' imputed disqualification resulted from what essentially was a typographical error based on that different way of articulating the prohibition.

The new rules follow the ABA Model Rules in examining only information in the possession of *lawyers* who remain at the firm.[424] On its face, this reference to lawyers means that a law firm could take a matter adverse to a former client. This is true even if nonlawyers, such as paralegals or secretaries, have material confidential information that the law firm could use against the former client, and even if material confidential information remains in the law firm's files. This approach seems odd, because non-lawyers remaining at the firm are just as likely as lawyers to disclose or use material confidential information against a former firm client. In fact, such non-lawyers might be more tempted to do so, because they have no professional license at risk if they act inappropriately. Similarly, it seems odd that a law firm could turn on a former client if the former client's pertinent confidential information sits in some storeroom down the hall from the lawyer now suing the former client. Still, the rule on its face only examines whether any individually disqualified lawyers remain at the firm.

6. Conflicts Between a Law Firm's Current Client and Government Entities Previously Represented by Government Lawyers Joining the Firm

The new rules generally follow the old rules and the ABA Model Rules in describing the imputation of an individually disqualified former government employee or lawyer. The law firm or law department hiring a former government employee or lawyer can avoid imputed disqualification by screening the lateral hire.[425]

Under the traditional ABA Model Rules approach, the availability of screening for lateral hires was very significant, because it differed dramatically from the imputed disqualification effect of a law firm or a law department hiring a lateral private sector lawyer. Because Illinois traditionally allowed screening to avoid imputed disqualification when law firms or law departments hired from the public sector, the distinction was not as important in Illinois.

424. ILL. RULES OF PROF'L CONDUCT R. 1.10(b)(2) (2010).

425. ILL. RULES OF PROF'L CONDUCT R. 1.11(b) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.12(c) (2010).

As with the old rules, a law firm or law department screening an individually disqualified former government lawyer must provide written notice of the screen to the government agency.[426]

7. Former Judges and Third-Party Neutrals

The new rules generally follow the old rules and the ABA Model Rules in describing the imputation rules for former judges and third-party neutrals, such as mediators or arbitrators.[427]

The new rules differ from the old rules by requiring that a law firm or law department provide written notice of the screen "to the parties and any appropriate tribunal."[428] The old rules did not require notice to parties.[429]

The new rules differ from the ABA Model Rules in one way. The new rules contain a reference in the general imputation provision to the rule governing former judges, third-party neutrals, etc.[430] The ABA Model Rules do not contain such a provision. This change seems unnecessary, because lawyers looking for the appropriate rule would clearly look in that other provision.

8. Conflicts Between Clients' and Lawyers' Interests

The new rules follow the ABA Model Rules in dealing with the imputation of an individual lawyer's disqualification or prohibition on conduct resulting from a conflict between her interests and her client's interests.[431]

The new rules differ dramatically from the old rules in two ways. First, the new rules automatically impute any individual lawyer's disqualification because of adversity to the current client to an entire firm, *except* if the individual lawyer's disqualification is based on her "personal interest," and that personal interest will not significantly risk the other lawyers' representation of the client.[432] A comment to the new rules gives the example of an individual lawyer whose "strong political beliefs" might materially affect her representation of a client, thus requiring her

426. ILL. RULES OF PROF'L CONDUCT R. 1.11(b)(2) (2010).
427. ILL. RULES OF PROF'L CONDUCT R. 1.12(c) (2010).
428. ILL. RULES OF PROF'L CONDUCT R. 1.12(c)(2) (2010).
429. ILL. RULES OF PROF'L CONDUCT R. 1.12(c)(2) (repealed 2010).
430. ILL. RULES OF PROF'L CONDUCT R. 1.10(d) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.10 cmt. 7 (2010).
431. ILL. RULES OF PROF'L CONDUCT R. 1.8(k) (2010).
432. ILL. RULES OF PROF'L CONDUCT R. 1.10(a) (2010).

disqualification, but which would not prohibit other lawyers in the firm from representing that client.[433]

The old rules instead imputed disqualification based on an individual lawyer's "own interests."[434] This significant change saves law firms and law departments from disqualification if one of their lawyers would not be able to handle a matter because of some strong personal interest that would interfere with that individual lawyer's representation of a client.

Second, the new rules apply prohibitions on an individual lawyer's conduct to the entire law firm or law department, *except* in the case of an individual lawyer's sexual relations with a client.[435] The new rules apply to all other lawyers in a law firm or law department any individual lawyer's prohibition on or restriction on:

1. doing business with a client, except under specified conditions;[436]
2. using any client information to the client's disadvantage, absent consent;[437]
3. soliciting, or preparing any documents under which a lawyer receives, any "substantial gift" from a client, unless the lawyer is related to the client;[438]
4. negotiating for a book or other media deal about a matter before the representation ends;[439]
5. providing financial assistance to clients in connection with litigation, except under certain conditions;[440]
6. accepting compensation from a non-client, unless the client consents and the non-client does not attempt to influence the lawyer;[441]
7. arranging for an aggregate settlement without advising every client of the terms;[442]
8. limiting the lawyer's liability to the client in advance, or settling claims or potential claims by a client or former client except under specified conditions;[443] and
9. acquiring a "proprietary interest" in a cause of action, except under certain conditions.[444]

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433. ILL. RULES OF PROF'L CONDUCT R. 1.10 cmt. 3 (2010).
434. ILL. RULES OF PROF'L CONDUCT R. 1.10(a) (repealed 2010); ILL. RULES OF PROF'L CONDUCT R. 1.7(b) (repealed 2010).
435. ILL. RULES OF PROF'L CONDUCT R. 1.8(k) (2010).
436. ILL. RULES OF PROF'L CONDUCT R. 1.8(a) (2010).
437. ILL. RULES OF PROF'L CONDUCT R. 1.8(b) (2010).
438. ILL. RULES OF PROF'L CONDUCT R. 1.8(c) (2010).
439. ILL. RULES OF PROF'L CONDUCT R. 1.8(d) (2010).
440. ILL. RULES OF PROF'L CONDUCT R. 1.8(e) (2010).
441. ILL. RULES OF PROF'L CONDUCT R. 1.8(f) (2010).
442. ILL. RULES OF PROF'L CONDUCT R. 1.8(g) (2010).
443. ILL. RULES OF PROF'L CONDUCT R. 1.8(h) (2010).

The old rule[445] imputed *only* the provision involving a client's gift to a lawyer.[446] Thus, the new rules provide a much broader array of prohibitions and restrictions that apply to every lawyer in a law firm or law department. Imputing these prohibitions and restrictions may disqualify other lawyers in the same law firm or law department from representing clients in many situations. For instance, under the new rules a lawyer may not represent a client in litigation if a partner is providing improper financial assistance to that client.[447]

The explicit exception for a lawyer's sexual relations with a client[448] means that a lawyer may represent a client even if his colleague has an improper sexual relationship with the client.[449]

9. Nonlawyers

The new rules follow the ABA Model Rules[450] in generally refusing to impute a nonlawyer's individual disqualification to an entire law firm or law department.

A comment to the new rules explains that a *nonlawyer's*, including a law student's, individual disqualification is not imputed to the law firm. Although these nonlawyers "ordinarily must be screened" from any matters about which they have confidential information.[451]

Nationally, states disagree about such imputation. Most states take the approach of the new rules and the ABA Model Rules. Other states which do not allow the screening of lateral-hire lawyers to avoid imputed disqualification permit such self-help screening when law firms or law departments hire nonlawyers. States taking a different approach go in one of two directions. Some states, which do not allow nonlawyers exactly as they would lawyers—impute an individual nonlawyer's disqualification to the entire law firm or law department. Although law firms certainly welcome a more forgiving approach, it seems logical to treat nonlawyers the same as lawyers. They frequently have just as much information as lawyers, and have much less incentive to avoid disclosing that information—because they do not risk losing a professional license.

444. ILL. RULES OF PROF'L CONDUCT R. 1.8(i) (2010).
445. ILL. RULES OF PROF'L CONDUCT R. 1.10(a) (repealed 2010).
446. ILL. RULES OF PROF'L CONDUCT R. 1.8(c) (repealed 2010).
447. ILL. RULES OF PROF'L CONDUCT R. 1.8(e) (2010).
448. ILL. RULES OF PROF'L CONDUCT R. 1.8(k) (2010).
449. ILL. RULES OF PROF'L CONDUCT R. 1.8(j) (2010).
450. MODEL CODE OF PROF'L CONDUCT R. 1.10 cmt. 4 (2009).
451. ILL. RULES OF PROF'L CONDUCT R. 1.10 cmt. 4 (2010).

VII. FEES AND TRUST ACCOUNTS

The new rules generally follow the old rules in dealing with fees. Among other things, they continue a unique approach to retainer payments and trust accounts.

A. Retainer Payments

The new rules follow the old rules and differ dramatically from the ABA Model Rules by specifically describing the type of retainer payments that a lawyer may receive from a client. This description of retainer payments does not appear in the new rules governing fees,[452] but rather in the new rule dealing with trust accounts.[453]

This unfortunate split of the rules governing retainers into two separate sections of the new rules could cause some confusion. For instance, the new rules governing fees follow the ABA Model Rules in confirming that lawyers may require advance payment of a fee, but are "obligated to return any unearned portion."[454] That important provision refers to the specific pertinent trust account rules,[455] but the trust account rule comment only refers generally to the rule governing fees.[456]

Like all states, Illinois recognizes what are called "true" retainers, which the client pays to the lawyer "in order to ensure the lawyer's availability during a specific period of time or for a specific matter."[457] As a comment explains, the lawyer earns this retainer upon payment. The lawyer must deposit such payments in the lawyer's operating account "whether the lawyer ever actually performs any services for the client."[458]

Like all states, Illinois also recognizes what the new rules call "security" retainers that are used to "secure[] payment for future services and expense."[459] Unlike a true retainer, lawyers must deposit such security retainers in the lawyer's trust account, because the lawyer earns it only upon providing the services described in the retainer agreement.[460]

Unlike other states, Illinois recognizes what it calls "advance payment retainers." The ABA Model Rules do *not* recognize such retainers. The new rules explain that such retainers may be used only "when necessary."

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452. ILL. RULES OF PROF'L CONDUCT R. 1.5 (2010).
453. ILL. RULES OF PROF'L CONDUCT R. 1.15(c) (2010).
454. ILL. RULES OF PROF'L CONDUCT R. 1.5 cmt. 4 (2010).
455. *Id.*
456. ILL. RULES OF PROF'L CONDUCT R. 1.15 cmt. 3A (2010).
457. ILL. RULES OF PROF'L CONDUCT R. 1.15 cmt. 3B (2010).
458. *Id.*
459. *Id.*
460. *Id.*

Such retainers are necessary when a security retainer would not accomplish the purpose.[461] The new rules require that an agreement calling for the client to pay such an "advance payment retainer" must be in writing signed by the client, and include very specific provisions.[462]

Lawyers must deposit such advance payment retainers in the lawyer's operating account, but must return the money if the lawyer does not ultimately earn it.[463]

B. Contingent Fees

The new rules follow the ABA Model Rules in describing the requirements of a permissible contingent fee arrangement.[464] Most importantly, the new rules now require clients to sign contingent fee agreements.

The new rules differ from the old rules in four ways. First, the new rules require that a contingent fee arrangement must be signed by the client,[465] while the old rules required that the contingent fee arrangement be in writing, but did not require a client signature.[466] The requirement that the client sign a written contingent fee agreement renders obsolete legal ethics opinions not describing such a requirement.[467]

Second, the new rules require that any contingent fee arrangement "clearly notify" the client of any expenses for which a client will be liable regardless of any success.[468] The old rules did not contain such a requirement.

Third, the new rules do not contain a description found in the old rules of the type of permissible contingent fee arrangements. The old rules indicated that contingent fee agreements "regarding the collection of commercial accounts or of insurance company subrogation claims" were permissible if "made in accordance with the customs and practice in the locality for such legal services."[469] There is no reason to think that such

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461. ILL. RULES OF PROF'L CONDUCT R. 1.15(c) (2010).
462. *Id.*
463. ILL. RULES OF PROF'L CONDUCT R. 1.15(c) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.15 cmt. 3C (2010), ILL. RULES OF PROF'L CONDUCT R. 1.15 cmt 3B (2010).
464. ILL. RULES OF PROF'L CONDUCT R. 1.5(c) (2010).
465. ILL. RULES OF PROF'L CONDUCT R. 1.5(c) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.5 cmt. 7 (2010).
466. ILL. RULES OF PROF'L CONDUCT R. 1.5(c) (repealed 2010).
434. *See*, *e.g.*, Ill. State Bar Ass'n Comm. On Prof'l Conduct, Advisory Op. 02–03 (2002) (addressing contigent fee agreements and not mentioning the requirement of a client signature).
468. ILL. RULES OF PROF'L CONDUCT R. 1.5(c) (2010).
469. ILL. RULES OF PROF'L CONDUCT R. 1.5(e) (repealed 2010).

contingent fee arrangements would be improper now, as long as they met the overarching requirement that any contingent fee be reasonable.[470]

Fourth, the new rules place in a comment a provision allowing a contingent fee arrangement in a domestic relations matter involving "the recovery of postjudgment balances due under support, alimony or other financial orders."[471] The old rules contained that provision in the black-letter rule.[472]

C. Fee Splitting

The new rules generally follow the old rules in describing permissible fee splitting.[473]

The new rules differ from the old rules in two ways. First, the new rules require that the fee-split arrangement be "confirmed in writing."[474] The new rules explain that "confirmed in writing" can include a lawyer's confirmation back to a client of an oral consent.[475] The old rules required that the client sign the written fee-split arrangement.[476] This elimination of a signature requirement is unusual, most states' and the ABA's rules changes usually *increase* the requirements for writings and client signatures when they update ethics rules.

Second, the new rules follow the ABA Model Rules in allowing lawyers to share court-ordered fees with a nonprofit organization with whom the lawyer is working.[477] The old rules did not contain such a provision.

The new rules differ from the ABA Model Rules in three ways. First, the new rules permit fee splitting among lawyers who are not in the same firm if one lawyer refers a client to another lawyer, and each lawyer assumes joint financial responsibility for the representation.[478] The ABA Model Rules do not explicitly permit fee splitting in a referral situation, although the ABA Model Rules permit fee splitting if the lawyers assume a *different* kind of joint responsibility than that required in the new rules and thus presumably would permit fee splitting involving such a referral, in certain circumstances.

470. ILL. RULES OF PROF'L CONDUCT R. 1.5(a) (2010); ILL. RULES OF PROF'L CONDUCT R 1.5 cmt. 3 (2010).
471. ILL. RULES OF PROF'L CONDUCT R. 1.5 cmt. 6 (2010).
472. ILL. RULES OF PROF'L CONDUCT R. 1.5(d)(1) (repealed 2010).
473. ILL. RULES OF PROF'L CONDUCT R. 1.5(e) (2010).
474. ILL. RULES OF PROF'L CONDUCT R. 1.5(e)(2) (2010).
475. ILL. RULES OF PROF'L CONDUCT R. 1.0(b) (2010).
476. ILL. RULES OF PROF'L CONDUCT R. 1.5(f) (repealed 2010).
477. ILL. RULES OF PROF'L CONDUCT R. 5.4(a)(4) (2010).
478. ILL. RULES OF PROF'L CONDUCT R. 1.5(e)(1) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.5 cmt. 7.

Second, the new rules permit fee splitting in such a referral situation as long as both lawyers assume "joint financial responsibility" for the representation.[479] As mentioned above, the ABA Model Rules allow fee splitting among lawyers in different firms without mentioning referral situations, but presumably including referral situations.[480]

A comment to the new rules describes this unique Illinois formulation.[481] The term "joint financial responsibility" obviously is a subset of "joint responsibility." Presumably, the term "joint financial responsibility" equates to malpractice coverage, rather than ethics responsibility or day-to-day responsibility for a matter.

Third, a comment to the new rules follows the old rules[482] in exempting from any fee-splitting regulation "payments made pursuant to a separation or retirement agreement."[483] The ABA Model Rules do not include such a provision.

D. Trust Accounts

The new rules follow the old rules in describing lawyers' obligations to create and maintain trust accounts.[484] As explained immediately above, the rule governing trust accounts[485] also includes provisions governing retainer payments, which probably should have been included in the rule governing fees.[486]

The new rules differ from the ABA Model Rules in three ways. First, the new rules contain provisions dealing with retainer agreements in the trust account provision. Second, the new rules require lawyers to maintain trust account records for seven years after the representation ends.[487] The ABA Model Rules only suggests a five-year period.[488] Third, Illinois has specific rules governing trust accounts.[489] The ABA Model Rules take a much more generic approach.[490]

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479. ILL. RULES OF PROF'L CONDUCT R. 1.5(e)(1) (2010).
480. MODEL CODE OF PROF'L CONDUCT R. 1.5(e)(1) (2009).
481. ILL. RULES OF PROF'L CONDUCT R. 1.5 cmt. 7 (2010) (citing *In re* Storment, 786 N.E.2d 963, 203 Ill. 2d 378 (2002)).
482. ILL. RULES OF PROF'L CONDUCT R. 1.5(j) (repealed 2010).
483. ILL. RULES OF PROF'L CONDUCT R. 1.5 cmt. 8 (2010).
484. ILL. RULES OF PROF'L CONDUCT R. 1.15 (20).
485. *Id.*
486. ILL. RULES OF PROF'L CONDUCT R. 1.5 (2010).
487. ILL. RULES OF PROF'L CONDUCT R. 1.15(a) (2010).
488. MODEL CODE OF PROF'L CONDUCT R. 1.15(a) (2009).
489. ILL. RULES OF PROF'L CONDUCT R. 1.15(f) (2010); ILL. RULES OF PROF'L CONDUCT R. 1.15 cmt. 3, 6, 7 (2010).
490. MODEL CODE OF PROF'L CONDUCT R. 1.15 (2009).

VIII. LITIGATION

The new rules contain several new provisions that litigators might face. The new rules contain detailed provisions that deal with nonadjudicative proceedings and criminal proceedings.

A. Specific Type of Proceedings

The new rules contain specific rules for specific types of proceedings.

1. Nonadjudicative Proceedings

The new rules follow the ABA Model Rules in adopting a provision governing lawyers acting as advocates in nonadjudicative proceedings.[491] The old rules did not contain such a provision.

The new rules apply a portion of the ethics rules governing trials to proceedings before a "legislative body or an administrative agency" in a nonadjudicative proceeding.[492] Among the rules that this new provision does *not* apply to such nonadjudicative proceedings are the rules requiring lawyers to disclose unfavorable facts in ex parte proceedings[493] and the rules governing discovery,[494] trial conduct,[495] and the prohibition on requesting non-clients from providing information to others.[496] A comment to the new rules explains that this new provision likewise does not apply to negotiations or government investigations.[497]

2. Criminal Proceedings

The new rules generally follow the ABA Model Rules in describing the special responsibilities of prosecutors.[498] The new rules governing prosecutors' responsibilities differ from the old rules in five ways. First, the new rules are limited to public prosecutors.[499] The old rules also covered "other government lawyer[s]."[500] Thus, the new rules apply to a much smaller group of governmental lawyers than the old rules.

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491. ILL. RULES OF PROF'L CONDUCT R. 3.9 (2010).
492. *Id.*
493. ILL. RULES OF PROF'L CONDUCT R. 3.3(d) (2010).
494. ILL. RULES OF PROF'L CONDUCT R. 3.4(d) (2010).
495. ILL. RULES OF PROF'L CONDUCT R. 3.4(e) (2010).
496. ILL. RULES OF PROF'L CONDUCT R. 3.4(f) (2010).
497. ILL. RULES OF PROF'L CONDUCT R. 3.9 cmt. 3 (2010).
498. ILL. RULES OF PROF'L CONDUCT R. 3.8 (2010).
499. *Id.*
500. ILL. RULES OF PROF'L CONDUCT R. 3.8(a) (repealed 2010).

Second, the new rules require prosecutors to make "reasonable efforts" to assure that a criminal defendant has the opportunity to obtain counsel.[501] The old rules did not contain such a provision.

Third, the new rules prohibit prosecutors from seeking an unrepresented accused's[502] waiver of pretrial rights. The old rules did not contain such a provision.

Fourth, the new rules require prosecutors to disclose to the defense helpful evidence or information in connection with sentencing and at other times.[503] The old rules did not explicitly cover the sentencing phase.[504]

Fifth, the new rules prohibit prosecutors from issuing subpoenas to lawyers in most circumstances.[505] The old rules did not contain such a provision.

The new rules differ from the ABA Model Rules in four ways. First, the new rules contain a comment[506] explaining the general principle that prosecutors must "seek justice" rather than merely seek victory. The ABA Model Rules take this approach in the black-letter rule and in another comment,[507] but do not contain this expansive comment.[508]

Second, a comment to the new rules warns prosecutors not to seek "waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons."[509] Third, a comment to the new rules includes a Northern District of Illinois citation dealing with prosecutors' extrajudicial statements.[510] Prosecutors seeking guidance about permissible extrajudicial statements should review that decision. Fourth, the new rules do not contain the relatively new ABA Model Rule that generally requires prosecutors to disclose later-discovered evidence that supports a criminal defendant's innocence or mitigates any punishment.[511] The ABA adopted this provision while Illinois was considering its rule changes, so the absence of this new ABA Model Rule almost surely does not reflect a rejection of the concept.

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501. ILL. RULES OF PROF'L CONDUCT R. 3.8(b) (2010).
502. ILL. RULES OF PROF'L CONDUCT R. 3.8(c) (2010).
503. ILL. RULES OF PROF'L CONDUCT R. 3.8(d) (2010).
504. ILL. RULES OF PROF'L CONDUCT R. 3.8(c) (repealed 2010).
505. ILL. RULES OF PROF'L CONDUCT R. 3.8(e) (2010).
506. ILL. RULES OF PROF'L CONDUCT R. 3.8 cmt. 1A (2010).
507. MODEL CODE OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009).
508. MODEL CODE OF PROF'L CONDUCT R. 3.8 (2009).
509. ILL. RULES OF PROF'L CONDUCT R. 3.8 cmt. 2 (2010).
510. ILL. RULES OF PROF'L CONDUCT R. 3.8 cmt. 5 (2010) (citing Devine v. Robinson, 131 F. Supp. 2d 963 (N.D. Ill. 2001)).
511. MODEL CODE OF PROF'L CONDUCT R. 3.8(g) (2009).

B. Lawyers' Presentation of Evidence and Legal Arguments

The new rules generally follow the ABA Model Rules in describing the ethical implications of lawyers presenting evidence and legal arguments in a judicial proceeding. A comment to the new rules explains that the provisions governing a lawyer's conduct before a tribunal also applies to an "ancillary proceeding" such as a deposition.[512]

1. Avoiding Misstatements to Tribunals

The new rules follow the ABA Model Rules in describing lawyers' obligation to avoid misstatements to tribunals.[513] The new rules use the title "Candor Toward the Tribunal,"[514] rather than the old rule's title "Conduct Before a Tribunal."[515] A comment to the new rules explains that in certain circumstances silence can amount to an affirmative misrepresentation.[516]

The new rules differ dramatically from the old rules in four ways. First, the new rules prohibit lawyers from "knowingly" making false statements of fact or law to the tribunal.[517] The old rules prohibited lawyers from making statements, if material, which the lawyer "knows *or reasonably should know*" is false.[518] Thus, the new rules *narrow* the prohibition by focusing on the lawyer's actual knowledge of falsity, rather than adopting a negligence standard. Second, the new rules prohibit lawyers from knowingly making "a false statement of fact or law" to the tribunal.[519] The old rules prohibited lawyers from making "material" false statements of fact or law to the tribunal.[520] Thus, the new rules *expand* the prohibition, by prohibiting *any* false statement of fact or law.

Third, the new rules do not contain a provision, found in the old rules, prohibiting lawyers from failing to disclose a material fact "known to the lawyer" if disclosure is required "to avoid assisting a criminal or fraudulent act by the client."[521] The new rules' provision dealing with fact rather than law, generally does not require disclosure, but instead focuses on prohibiting false statements. Other rules require or allow disclosure of client confidences in certain situations involving client crime or fraud.[522]

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512. ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 1 (2010).
513. ILL. RULES OF PROF'L CONDUCT R. 3.3(a) (2010).
514. ILL. RULES OF PROF'L CONDUCT R. 3.3 (2010).
515. ILL. RULES OF PROF'L CONDUCT R. 3.3 (repealed 2010).
516. ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 3 (2010).
517. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2010).
518. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(1) cmt. 10 (2010) (emphasis added).
519. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2010).
520. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(1) (repealed 2010).
521. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(2) (repealed 2010).
522. *See* discussion *supra* Part III.

Fourth, the new rules do not contain provisions that were previously found in the old rules that prohibited a lawyer from: (1) failing to disclose the client's identity, unless the privilege protects the identity;[523] (2) degrading a witness;[524] and (3) refusing to accede to opposing counsel's request if it would not hurt the lawyer's client.[525]

2. Freedom to Present False or Possibly False Evidence

The new rules follow the ABA Model Rules by allowing lawyers in certain situtaitons to present false or possibly false evidence.

A comment to the new rules explains that a lawyer may offer false evidence "for the purpose of establishing its falsity."[526] Thus, a lawyer can elicit false testimony from an adverse witness in order to impeach that witness.

A comment to the new rules explains that "[i]n some jurisdictions" courts require criminal defense lawyers to allow a criminal defendant "to give a narrative statement if the accused so desires," even if the lawyer knows that the client will lie.[527] Interestingly, the comment does not explain if Illinois is one of those jurisdictions.

The new rules contain a comment, found in the ABA Model Rules[528] but not in the old rules, explaining that "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact."[529] This freedom might have been implicit in the old rules, but the new rules explicitly contain this arguably counter-intuitive freedom. The new rules also contain the safe harbor allowing lawyers, other than those representing criminal defendants, to "refuse to offer evidence . . . that the lawyer reasonably believes is false."[530] As explained immediately below, the new rules' safe harbor is narrower than the old rules' comparable provision in the criminal context.

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523. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(8) (repealed 2010).
524. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(9) (repealed 2010).
525. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(11) (repealed 2010).
526. ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 5 (2010).
527. ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 7 (2010).
528. MODEL CODE OF PROF'L CONDUCT R. 3.3 cmt. 8 (2009).
529. ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 8 (2010).
530. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2010).

3. Refusing to Present Possibly False Testimony

The new rules generally follow the old rules[531] and the ABA Model Rules in describing a lawyer's right to refuse to put on evidence that the lawyer reasonably believes is false.[532]

The new rules differ from the old rules in one way. The new rules do not allow the lawyer to refuse to offer evidence that the lawyer reasonably believes is false, *if* it is a criminal defendant's testimony.[533] The old rules did not have this exception,[534] which highlights the heightened duty of a criminal defense lawyer to represent her client, even if the lawyer's conduct would otherwise violate the ethics rules applicable in other contexts.

4. Lawyers' Remedial Steps Upon Learning That They Have Presented False Evidence

The new rules follow the ABA Model Rules in describing lawyers' duties upon learning that they have presented false evidence.[535]

The new rules, similar to the old rules and the ABA Model Rules, require such lawyers to "take reasonable remedial measures."[536] A comment to the new rules explains that lawyers taking the specified "reasonable remedial measures" should first seek the client's correction of the false statements, but failing that "*must* take further remedial action."[537] Lawyers *must* disclose the false testimony to the tribunal if the lawyer's withdrawal is not permitted "or will not undo the effect of the false evidence."[538] This duty trumps the general confidentiality duties.[539]

The new rules differ from the old rules in two ways. First, the new rules require that lawyers "take reasonable remedial measures" if they learn that their "client, or a witness called by the lawyer" has offered material evidence that turned out to have been false.[540] The old rules did not mention the lawyer's client or witness called by the lawyer.[541] The new rules might not change the reach of lawyers' duty, but make it clearer that lawyers must take remedial steps if they sponsor false evidence presented by their client or by a witness.

531. ILL. RULES OF PROF'L CONDUCT R. 3.3(c) (repealed 2010).
532. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2010).
533. *Id.*
534. ILL. RULES OF PROF'L CONDUCT R. 3.3(c) (repealed 2010).
535. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2010).
536. *Id.*
537. ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 10 (2010) (emphasis added).
538. *Id.*
539. ILL. RULES OF PROF'L CONDUCT R. 1.6 (2010).
540. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2010).
541. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(4) (repealed 2010).

Second, the new rules mention that such "reasonable remedial measures" include, "if necessary, disclosure to the tribunal."[542] The old rules did not explicitly mention such disclosure to the tribunal.[543] Although lawyers in such a situation might have concluded that they must disclose the false testimony to the tribunal, the new rules clear up any doubt that such disclosure may ultimately be required.

5. Advising Clients of Adverse Legal Authority

The new rules follow the old rules[544] in prohibiting lawyers from failing to advise the tribunal of legal authority "in the controlling jurisdiction" that the lawyer knows to be "directly adverse to the position of the client" and not disclosed by the adversary.[545] A comment to the new rules confirms that this provision does not require the lawyer "to make a disinterested exposition of the law."[546]

6. Duration of Lawyers' Disclosure and Remediation Duties

The new rules follow the ABA Model Rules in defining when all of these disclosure and remediation duties end.[547] The new rules differ dramatically from the old rules in one way. The new rules terminate the disclosure and remediation duties at the "conclusion of the proceeding."[548] A comment to the new rules explains that a proceeding concludes "when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed."[549] The old rules indicated that the duties were "continuing."[550]

This critical distinction could be most important in eliminating a lawyer's obligation to take remedial measures upon learning that the lawyer had offered false evidence, which under the new rules now ends when the proceedings conclude.

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542. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2010).
543. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(4) (repealed 2010).
544. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(3) (repealed 2010).
545. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2010).
546. ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 4 (2010).
547. ILL. RULES OF PROF'L CONDUCT R. 3.3(c) (2010).
548. *Id.*
549. ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 13 (2010).
550. ILL. RULES OF PROF'L CONDUCT R. 3.3(b) (repealed 2010).

C. Client Fraud on Tribunals

The new rules follow the ABA Model Rules in describing two contexts in which a lawyer might have duties relating to a client's fraud on a tribunal.

1. Lawyers' Duties Upon LearningThat They Have Presented False Evidence[551]

2. Lawyers' Duties in Connection with Clients' Past, Current, or Future Crime or Fraud

The new rules follow the ABA Model Rules in the way they describe a lawyer's duty in connection with a client's past, current, or future crime or fraud. This type of wrongdoing could occur anywhere, but the rule clearly covers such wrongdoing in a litigation setting.

The new rules differ from the old rules in two ways. First, the new rules contain a provision requiring a lawyer to take "reasonable remedial measures" if the lawyer knows that any person including a client[552] — "intends to engage, is engaging or has engaged" in any "criminal or fraudulent conduct relating to the proceeding."[553] The old rules did not contain this provision, which governs the lawyer's conduct before, during, or even after a client had committed fraud on a tribunal or any other criminal or other fraudulent conduct.

Second, as explained above, the new rules terminate these duties at the "conclusion of the proceeding."[554] The old rules indicated that the duties were "continuing,"[555] and therefore presumably required some remedial measures even after the proceedings ended.

Other new rules permit lawyers to disclose client confidences to prevent, mitigate, or rectify a client's crime or fraud, including in the context of a tribunal.[556]

Other rules might require[557] or allow[558] a lawyer to withdraw from a representation in such circumstances. A comment to the new rules explains that a lawyer seeking to withdraw as part of a remedy for "a client's

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551. *See* discussion *infra* Part VIII.B.4.
552. ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 12 (2010).
553. ILL. RULES OF PROF'L CONDUCT R. 3.3(b) (2010).
554. ILL. RULES OF PROF'L CONDUCT R. 3.3(c) (2010).
555. ILL. RULES OF PROF'L CONDUCT R. 3.3(b) (repealed 2010).
556. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(1), (2), (3) (2010); *see* discussion *supra* Part III.D.4.
557. ILL. RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2010).
558. ILL. RULES OF PROF'L CONDUCT R. 1.16(b)(2), (3) (2010).

misconduct" may reveal confidential information "only to the extent reasonably necessary to comply with this Rule" or otherwise permitted.[559]

D. Third-Party Fraud on Tribunals

The new rules follow the ABA Model Rules in describing lawyers' duties in connection with a third party's fraud on a tribunal. The new rules differ from the old rules in describing a lawyer's duty upon learning of false testimony by either a third-party witness called by the lawyer or a third party witness not called by the lawyer.

1. Third-Party Witnesses Called by the Lawyer

Lawyers must take "reasonable remedial measures" if they come to learn that a witness called by the lawyer has testified falsely.[560] This is discussed immediately above, because it contains the same requirement as that for lawyers learning of a client's fraud on the tribunal.

2. Third-Party Witnesses Not Called by the Lawyer

The new rules follow the ABA Model Rules in requiring lawyers to take reasonable remedial measures if they know that a third party "intends to engage, is engaging or has engaged" in any criminal or fraudulent conduct relating to a proceeding.[561]

The new rules differ from the old rules in five ways. First, the new rules require a lawyer "who represents a client in an adjudicative proceeding" to take certain steps in specified circumstances.[562] The old rules, on their face, required *any* lawyer who knew of a third party's fraud on a tribunal to disclose the fraud.[563] Thus, the new rules limit the duty to a smaller set of lawyers than the old rules. Theoretically, the old rules applied to lawyers sitting in the audience at a proceeding, but not representing a client.

Second, the new rules require lawyers to take "reasonable remedial measures" if they learn that any person "intends to engage, is engaged in, or has engaged in" any "criminal or fraudulent conduct related to the proceedings."[564] The old rules required lawyers to reveal a third party's

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559. ILL. RULES OF PROF'L CONDUCT R. 3.3 cmt. 15 (2010).
560. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2010).
561. ILL. RULES OF PROF'L CONDUCT R. 3.3(b) (2010).
562. *Id.*
563. ILL. RULES OF PROF'L CONDUCT R. 1.2(h) (repealed 2010).
564. ILL. RULES OF PROF'L CONDUCT R. 3.3(b) (2010).

"fraud upon a tribunal."[565] Thus, the new rules require a lawyer's remedial action in a broader set of circumstances.

Third, the new rules require such remedial measures if any person has already engaged in *or* "intends to engage" or "is engaging" in such misconduct.[566] The old rules only dealt with a third party's past misconduct.[567]

Fourth, the new rules require lawyers to take "reasonable remedial measures" in such circumstances, mentioning disclosure to the tribunal if it is "necessary."[568] The old rules specifically required disclosure to the tribunal.[569]

Fifth, the new rules do not explicitly explain how soon lawyers must take the "reasonable remedial measures."[570] The old rules required that lawyers make the required disclosure to the tribunal "promptly."[571]

3. Duration of Lawyers' Disclosure and Remediation Duties

The new rules follow the ABA Model Rules in terminating these duties at the "conclusion of the proceeding."[572] The old rules indicated that the duties were "continuing,"[573] and therefore presumably required some remedial measures even after the proceeding ended.

E. Witness-Advocate Rule

The new rules follow the ABA Model Rules in addressing what is called the witness-advocate rule, which restricts a lawyers' ability to act both as a fact witness and an advocate in litigation.[574] The old rules' witness-advocate provision[575] was based on the old ABA Code formulation.

The new rules differ from the old rules in four ways. First, the new rules prohibit a lawyer who is likely to be a necessary witness from acting "as advocate at a trial."[576] The old rules prohibited a lawyer who "may be called as a witness" to "accept or continue employment" in a litigation

565. ILL. RULES OF PROF'L CONDUCT R. 1.2(h) (repealed 2010).
566. ILL. RULES OF PROF'L CONDUCT R. 3.3(b) (2010).
567. ILL. RULES OF PROF'L CONDUCT R. 1.2(h) (repealed 2010).
568. ILL. RULES OF PROF'L CONDUCT R. 3.3(b) (2010).
569. ILL. RULES OF PROF'L CONDUCT R. 1.2(h) (repealed 2010).
570. ILL. RULES OF PROF'L CONDUCT R. 3.3(b) (2010).
571. ILL. RULES OF PROF'L CONDUCT R. 1.2(h) (repealed 2010).
572. ILL. RULES OF PROF'L CONDUCT R. 3.3(c) (2010).
573. ILL. RULES OF PROF'L CONDUCT R. 3.3(b) (repealed 2010).
574. ILL. RULES OF PROF'L CONDUCT R. 3.7 (2010).
575. ILL. RULES OF PROF'L CONDUCT R. 3.7 (repealed 2010).
576. ILL. RULES OF PROF'L CONDUCT R. 3.7(a) (2010).

matter.[577] Thus, the new rules allow the lawyer to accept the representation and (presumably) conduct activities other than at the trial itself. The old rules theoretically prohibited the lawyer from even accepting the representation, or playing any role in the litigation matter.

Second, the new rules prohibit a lawyer from acting as an advocate only if the lawyer is "likely to be a necessary witness."[578] The old rules prohibited the lawyer from accepting or continuing employment if the lawyer knew or reasonably should know that the lawyer "may be called as a witness on behalf of the client."[579] Thus, the new rules apply only to those lawyers who are likely to be "necessary" witnesses—a far narrower range than the old rules' application to lawyers who "may be called as a witness."

Third, the new rules apply equally to any lawyer who is likely to be called as a "necessary witness" whether offered as a witness by the client or by the adversary.[580] The old rules distinguished between these two situations. The old rules applied the general rule and the exceptions only when a lawyer "may be called as a witness on behalf of the client."[581]

A separate provision in the old rules allowed a lawyer to accept or continue a representation if the lawyer may be called as a witness "other than on behalf of the client," unless the lawyer's testimony "is or may be prejudicial to the client."[582] This formulation theoretically created a narrower application than the new rules, because it would not force withdrawal of a lawyer who is called to testify by the adverse party even if the lawyer was a "necessary witness," unless the lawyer's testimony would harm the client. As a practical matter, a lawyer operating under the new rules would be required to withdraw if the lawyer's testimony would harm the client—but under general conflicts principles rather than under the specific provisions of the witness-advocate rule.

Fourth, the new rules do not contain an exception to the withdrawal requirement that the old rules contained, which stated if the lawyer's testimony related to a "matter of formality" and the lawyer believed that "no substantial evidence will be offered in opposition to the testimony."[583] The new rules' exception for testimony that relates to an "uncontested issue"[584] covers part of the same type of testimony, but the deletion of the other exception arguably expands the new rules' reach of the mandatory withdrawal under the witness-advocate rule.

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577. ILL. RULES OF PROF'L CONDUCT R. 3.7(a) (repealed 2010).
578. ILL. RULES OF PROF'L CONDUCT R. 3.7(a) (2010).
579. ILL. RULES OF PROF'L CONDUCT R. 3.7(a) (repealed 2010).
580. ILL. RULES OF PROF'L CONDUCT R. 3.7(a) (2010).
581. ILL. RULES OF PROF'L CONDUCT R. 3.7(a) (repealed 2010).
582. ILL. RULES OF PROF'L CONDUCT R. 3.7(b) (repealed 2010).
583. ILL. RULES OF PROF'L CONDUCT R. 3.7(a)(2) (repealed 2010).
584. ILL. RULES OF PROF'L CONDUCT R. 3.7(a)(1) (2010).

The new rules follow the old rules[585] by imputing an individual lawyer's disqualification to the firm *only* if the regular conflicts rules prevent the firm from representing the client.[586] The normal conflicts rules[587] were to prevent the entire law firm from representing a client if one of the firm's lawyers would testify against a current or former client's interests among other situations.

F. Lawyers' Ex Parte Communications with Tribunals and Jurors

The new rules follow the ABA Model Rules in prohibiting lawyers' ex parte communication with tribunals and others involved in proceedings.

1. Ex Parte Communications with a Tribunal

The new rules follow the ABA Model Rules in prohibiting certain ex parte communications with judges, or other court officials.[588] The new rules differ from the old rules in three ways. First, the new rules contain a flat prohibition on ex parte communications with a judge or other court official "unless authorized to do so by law or court order."[589] The old rules prohibited lawyers from communicating, "or caus[ing] another to communicate," ex parte with a judge or other official absent some exceptions.[590] This may not be a material change, given the new rules' general prohibition on a lawyer's inducement of someone else to violate an ethics rule.[591]

Second, the new rules flatly prohibit *any* ex parte communication with a judge or other court officer.[592] The old rules prohibited only those ex parte communications that related to "the merits of the cause."[593] Thus, the new rules create a broader prohibition on the substance of any ex parte communication.

Third, the new rules contain only two exceptions to the flat prohibition on such ex parte communications, allowing ex parte communications that are authorized "by law or court order."[594] The old rules contained three additional exceptions—allowing ex parte communications: (1) in the

585. ILL. RULES OF PROF'L CONDUCT R. 3.7(c) (repealed 2010).
586. ILL. RULES OF PROF'L CONDUCT R. 3.7(b) (2010).
587. ILL. RULES OF PROF'L CONDUCT R. 1.7 (2010); ILL. RULES OF PROF'L CONDUCT R. 1.9 (2010).
588. ILL. RULES OF PROF'L CONDUCT R. 3.5(b), (c) (2010).
589. ILL. RULES OF PROF'L CONDUCT R. 3.5(b) (2010).
590. ILL. RULES OF PROF'L CONDUCT R. 3.5(i) (repealed 2010).
591. ILL. RULES OF PROF'L CONDUCT R. 8.4(a) (2010).
592. ILL. RULES OF PROF'L CONDUCT R. 3.5(b) (2010).
593. ILL. RULES OF PROF'L CONDUCT R. 3.5(i) (repealed 2010).
594. ILL. RULES OF PROF'L CONDUCT R. 3.5(b) (2010).

course of official proceedings;[595] (2) in writing, if the lawyer promptly served a copy on the adversary;[596] (3) orally, after "adequate notice" to the adversary.[597] Thus, the new rules contain a far more restrictive prohibition on lawyers' ex parte communications with judges or other court officials.

2. Ex Parte Communications with Jurors or the Venire

The new rules follow the ABA Model Rules in prohibiting certain ex parte communications with jurors or members of a jury venire.

The new rules differ from the old rules in three ways. First, the new rules flatly prohibit ex parte communication with a juror or prospective juror "during the proceeding" unless authorized by law or court order.[598] The old rules contained separate prohibitions that applied before the trial[599] and during the trial.[600] This change does not seem material.

Second, the new rules prohibit any lawyer from engaging in such ex parte communications with a juror or prospective juror.[601] The old rules contained separate provisions prohibiting such ex parte communications during a trial by a lawyer "connected" with the case[602] and a lawyer who is "not connected" with the case.[603] This change does not seem material.

Third, the new rules do not specifically prohibit lawyers' involvement in investigations of potential jurors or their families.[604] The old rules contained a specific provision prohibiting lawyers from conducting or causing another to conduct even through financial support a "vexatious or harassing investigation" of potential jurors.[605] Another provision in the old rules applied all of the ex parte restrictions to "communications with or investigations of the families" of any juror or potential juror.[606] Presumably, such improper behavior would violate some other provisions of the new rules, such as the general prohibition on a lawyer's conduct that is "prejudicial to the administration of justice."[607]

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595. ILL. RULES OF PROF'L CONDUCT R. 3.5(i)(1) (repealed 2010).
596. ILL. RULES OF PROF'L CONDUCT R. 3.5(i)(2) (repealed 2010).
597. ILL. RULES OF PROF'L CONDUCT R. 3.5(i)(3) (repealed 2010).
598. ILL. RULES OF PROF'L CONDUCT R. 3.5(b) (2010).
599. ILL. RULES OF PROF'L CONDUCT R. 3.5(a) (repealed 2010).
600. ILL. RULES OF PROF'L CONDUCT R. 3.5(b) (repealed 2010).
601. ILL. RULES OF PROF'L CONDUCT R. 3.5(b) (2010).
602. ILL. RULES OF PROF'L CONDUCT R. 3.5(b)(1) (repealed 2010).
603. ILL. RULES OF PROF'L CONDUCT R. 3.5(b)(2) (repealed 2010).
604. ILL. RULES OF PROF'L CONDUCT R. 3.5 (2010).
605. ILL. RULES OF PROF'L CONDUCT R. 3.5(e) (repealed 2010).
606. ILL. RULES OF PROF'L CONDUCT R. 3.5(f) (repealead 2010).
607. ILL. RULES OF PROF'L CONDUCT R. 8.4(d) (2010).

G. Special Duty of Prosecutors[608]

H. Lawyers' Other Dealings with Tribunals

The new rules follow the old rules in restricting lawyers' other dealings with tribunals.

1. Prohibition on Gaining a Special Advantage

The new rules follow the old rules in prohibiting lawyers who hold public office from using their office "to influence, or attempt to influence, a tribunal to act in favor of a client."[609] The old rules contained this provision in a different place.[610] The ABA Model Rules do not contain such a provision.

The new rules follow the old rules in applying this basic principle to lawyers who hold public office in their dealings with legislative and other public bodies.[611]

2. Gifts to Judges

The new rules follow the old rules in prohibiting lawyers from giving gifts or loans to judges or other court officials or employees, except under limited circumstances involving campaign contributions.[612] The old rules contained the provision in a different place.[613] The ABA Model Rules do not contain such a provision.

I. Dealing with Others

The new rules contain several provisions governing lawyers' dealings with others in connection with litigation.

1. Public Statements

The new rules generally follow the ABA Model Rules in prohibiting certain public statements in connection with "the investigation or litigation of a matter."[614]

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608. ILL. RULES OF PROF'L CONDUCT R. 3.8 (repealed 2010); *see* discussion *supra* Part VIII.A.2.
609. ILL. RULES OF PROF'L CONDUCT R. 8.4(k)(2) (2010).
610. ILL. RULES OF PROF'L CONDUCT R. 8.4(b)(2) (repealed 2010).
611. *See* discussion *infra* Part IX.D.1.
612. ILL. RULES OF PROF'L CONDUCT R. 8.4(f) (2010).
613. ILL. RULES OF PROF'L CONDUCT R. 3.5(h) (repealed 2010).
614. ILL. RULES OF PROF'L CONDUCT R. 3.6 (2010).

The new rules differ from the old rules in three ways. First, the new rules apply the specific prohibition on extrajudicial statements to any "civil matter triable to a jury, a criminal matter," or "any other proceeding that could result in incarceration."[615] The old rules on their face did not apply to "other proceedings" that could "result in incarceration."[616] Thus, the new rules contain a broader reach of the prohibition.

Second, the new rules prohibit lawyers from publicly disclosing information that is inadmissible as evidence, but only if its disclosure would "create a substantial risk of prejudicing an impartial trial."[617] The old rules contained a flat prohibition on extrajudicial statements that included such inadmissible evidence, without this standard.[618] Thus, the new rules contain a narrower prohibition on this type of extrajudicial statement.

Third, the new rules follow the ABA Model Rules in listing permissible extrajudicial statements in the black-letter rule[619] and impermissible extrajudicial statements in a comment.[620] The old rules contained both the permissible extrajudicial statements[621] and the impermissible extrajudicial statements[622] in the rule itself. Apart from the substantive variations mentioned above, this different placement is not material.

The new rules differ from the ABA Model Rules in one way. The new rules prohibit extrajudicial statements that "would pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter."[623] The ABA Model Rules use a difference phrase, "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[624] The new rules' formulation seems narrower.

2. Represented Persons

Lawyers often deal with represented persons in connection with litigation.

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615. ILL. RULES OF PROF'L CONDUCT R. 3.6 cmt. 5 (2010).
616. ILL. RULES OF PROF'L CONDUCT R. 3.6(b) (repealed 2010).
617. ILL. RULES OF PROF'L CONDUCT R. 3.6 cmt. 5 (2010).
618. ILL. RULES OF PROF'L CONDUCT R. 3.6(b)(5) (repealed 2010).
619. ILL. RULES OF PROF'L CONDUCT R. 3.6(b) (2010).
620. ILL. RULES OF PROF'L CONDUCT R. 3.6 cmt. 5 (2010).
621. ILL. RULES OF PROF'L CONDUCT R. 3.6(c) (repealed 2010).
622. ILL. RULES OF PROF'L CONDUCT R. 3.6(b) (repealed 2010).
623. ILL. RULES OF PROF'L CONDUCT R. 3.6(a) (2010); ILL. RULES OF PROF'L CONDUCT R. 3.6 cmts. 3, 4 (2010).
624. MODEL CODE OF PROF'L CONDUCT R. 3.6(a) (2009).

3. Unrepresented Persons[625]

4. Prohibition on Threatening Criminal or Disciplinary Charges

The new rules follow the old rules by considering it "professional misconduct" for a lawyer to "present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter."[626]

The new rules differ from the old rules in one way. The new rules include this prohibition in a general list of lawyer misconduct.[627] The old rules included the prohibition in the rule governing the "Scope of Representation."[628]

The new rules differ dramatically from the ABA Model Rules in one way. The ABA Model Rules do not contain this prohibition, a variation of which had appeared in the old ABA Model Code.[629] An ABA legal ethics opinion[630] explains that such action might violate other prohibitions on wrongful conduct.[631]

5. Inadvertent Production of Privileged or Work Product Documents

The new rules generally follow the ABA Model Rules in requiring a lawyer who receives an inadvertently sent document to notify the sender.[632] The new rules differ dramatically from the bar's interpretation of a lawyer's duty. In such a circumstance, the old rules did not contain any provision governing a lawyer's duty.

A comment to the new rules explains that this general provision covers documents "mistakenly . . . produced by opposing parties or their lawyers."[633]

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625. *See* discussion *infra* Part XI.C.
626. ILL. RULES OF PROF'L CONDUCT R. 8.4(g) (2010).
627. *Id.*
628. ILL. RULES OF PROF'L CONDUCT R. 1.2(e) (repealed 2010).
629. MODEL CODE OF PROF'L CONDUCT R. DR 7–105(A) (1980).
630. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 363 (1992).
631. However, many states continue to include this or a similar prohibition in their ethics rules. It can be particularly difficult for lawyers to find such a provision in a state's ethics rules, because a state wishing to continue the prohibition must find some place to include it in the ethics rules.
632. ILL. RULES OF PROF'L CONDUCT R. 4.4(b) (2010).
633. ILL. RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2010); *see* discussion *infra* Part XI.A.3.

6. Paying Fact Witnesses

The new rules generally follow the ABA Model Rules in prohibiting a lawyer from offering "an inducement to a witness that is prohibited by law."[634]

The new rules differ from the old rules in two ways. First, the new rules provide more detailed guidelines for permissible payments to fact witnesses.[635] The old rules indicated simply that a lawyer "may advance, guarantee, or acquiesce in the payment of expenses reasonably incurred in attending or testifying."[636]

Second, the new rules deal with payments to witnesses in the rule governing "Fairness to Opposing Party and Counsel"[637] and provide more detail in a comment to that rule.[638] The old rules included the general principle in the rule with that title,[639] but provided somewhat more detail in *another* rule, "Conduct Before a Tribunal."[640]

The new rules differ from the ABA Model Rules with a comment to the new rules that specifically permit lawyers to pay witnesses or prospective witnesses "the reasonable expenses incurred in providing evidence."[641] That comment provides detailed descriptions of such as permissible payments, which can include travel reimbursement, out-of-pocket costs including hotels, meals, and child care and "compensation for the reasonable value of time spent" in preparing for and attending a deposition or hearing.[642] The ABA Model Rules do not contain such a comment.

7. Prohibition on Lawyers' Attempting to Prevent the Adversary's Access to Witnesses' Information

The new rules follow the ABA Model Rules in prohibiting lawyers from requesting a person other than a client from voluntarily providing information to another party, except in certain circumstances.[643]

The new rules differ from the old rules in one way. The new rules do not explicitly prohibit lawyers from arranging for witnesses to make

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634. ILL. RULES OF PROF'L CONDUCT R. 3.4(b) (2010).
635. ILL. RULES OF PROF'L CONDUCT R. 3.4 cmt. 3 (2010).
636. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(15) (repealed 2010).
637. ILL. RULES OF PROF'L CONDUCT R. 3.4(b) (2010).
638. ILL. RULES OF PROF'L CONDUCT R. 3.4 cmt. 3 (2010).
639. ILL. RULES OF PROF'L CONDUCT R. 3.4(a)(2) (repealed 2010).
640. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(15) (repealed 2010).
641. ILL. RULES OF PROF'L CONDUCT R. 3.4 cmt. 3 (2010).
642. *Id.*
643. ILL. RULES OF PROF'L CONDUCT R. 3.4(f) (2010).

themselves unavailable to testify. The old rules contained a separate provision indicating that a lawyer shall not "advise or cause a person to become unavailable as witness by leaving the jurisdiction or making secret their whereabouts within the jurisdiction."[644]

Presumably the new rules would prohibit the same lawyer misconduct under the rule prohibiting a lawyer from asking a person to refrain from voluntarily giving information to another party (discussed above) or under the general prohibition on lawyer misconduct that is "prejudicial to the administration of justice."[645] Thus, the absence of an explicit prohibition in the new rules does not free lawyers to engage in such misconduct.

8. Settlement Ethics[646]

IX. LAW FIRM MANAGEMENT

A. Subsidiaries and Law Related Services

The new rules follow the old rules in leaving out the ABA Model Rule provision governing lawyers providing law-related services.[647]

A majority of states have adopted some variation of this ABA Model Rule, which essentially indicates that lawyers providing law-related services must follow all of the ethics rules: (1) if the lawyer provides such services in circumstances that "are not distinct"[648] from the lawyer's provision of legal services; or (2) if the lawyer fails to explain to the recipient of such services that the services "are not legal services" and that "the protections of the client-lawyer relationship do not exist."[649]

B. Hiring Lawyers

A law firm's hiring of lawyers implicates the conflicts of interest rules, because the law firm risks imputed disqualification by hiring a lawyer who is individually prohibited from adversity to one of the law firm's clients, based on the new lawyer's previous representation of a now-former client.[650]

The new rules contain several other provisions that could affect the hiring of new lawyers. A comment to the new rules explains that lawyers

644. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(14) (repealed 2010).
645. ILL. RULES OF PROF'L CONDUCT R. 8.4(d) (2010).
646. ILL. RULES OF PROF'L CONDUCT R. 4.1 (2010); *see* discussion *infra* Part XI.A.6.
647. MODEL CODE OF PROF'L CONDUCT R. 5.7 (2009).
648. MODEL CODE OF PROF'L CONDUCT R. 5.7(a)(1) (2009).
649. MODEL CODE OF PROF'L CONDUCT R. 5.7(a)(2) (2009).
650. *See* discussion *supra* Part VI.G.4.

do not violate the general confidentiality duty when engaging in "preliminary discussions concerning the possible association of another lawyer or mergers between firms."[651] This comment also indicates that a lawyer does not require a client's consent to engage in such discussions.[652] Interestingly, this comment appears in the rule relating to the sale of a law practice, but presumably applies in every lateral hire situation. This comment follows the ABA Model Rules, but was not in the old rules.

C. Hiring Nonlawyers

As with the hiring of lawyers, law firms' hiring of nonlawyer staff most frequently implicates ethics issues if the nonlawyer would be individually disqualified from adversity to a current law firm client.[653]

Although the other provisions discussed immediately above on their face are limited to lawyers, the basic principles presumably apply to nonlawyers as well. The unique Illinois rule prohibiting delegation of a firm lawyer's "employment"[654] also implicates unauthorized practice of law issues when applied to nonlawyers.

D. Duties of Supervisors and Subordinates

The new rules follow the ABA Model Rules in defining the responsibility of supervisory lawyers.[655] The new rules differ only slightly from the old rules.

1. Lawyers Supervising Other Lawyers

The new rules follow the ABA Model Rules in defining the duties of a lawyer supervising other lawyers.

The new rules differ from the old rules in two ways. First, the new rules require supervisory lawyers to make reasonable efforts to assure that their subordinates comply with the ethics rules if the lawyers: (1) directly supervise subordinate lawyers; (2) are law firm partners; *or* (3) individually or with others possess "comparable managerial authority in a law firm."[656] The old rule did not mention the third category of supervisors.[657] Thus, the

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651. ILL. RULES OF PROF'L CONDUCT R. 1.17 cmt. 7 (2010).
652. *Id.*
653. *See* discussion *supra* Part VI.G.
654. *Id.*
655. ILL. RULES OF PROF'L CONDUCT R. 5.1 (2010).
656. ILL. RULES OF PROF'L CONDUCT R. 5.1(a) (2010); ILL. RULES OF PROF'L CONDUCT R. 5.1 cmt. 2 (2010).
657. ILL. RULES OF PROF'L CONDUCT R. 5.1(a) (repealed 2010).

new rules expand the responsibility of supervising lawyers beyond just law firm partners and direct supervisors. This probably reflects the increasingly varied structure of law firms, but does not materially change the provision.

Second, the new rules make such lawyers responsible for another lawyer's violation of the ethics rules under certain circumstances.[658] The old rules did not mention the third category of supervisors.[659] As explained immediately above, the new rules thus expand the liability of law firms and law department management.

2. Lawyers Supervising Nonlawyers

The new rules follow the same changed approach in defining the responsibilities of lawyers who supervise nonlawyer subordinates.[660]

As described above, the new rules expand those responsibilities beyond law firm partners and direct supervision, and now requires the same conduct from (and impose the same liability on) law firm lawyers who possess "comparable managerial authority in a law firm."[661] The old rules limited the responsibilities to partners and direct supervisors.[662]

3. Subordinate Lawyers

The new rules follow the old rules and the ABA Model Rules in describing the responsibilities and liabilities of subordinate lawyers.[663] Like the old rules, the new rules explain that subordinate lawyers must comply with the ethics rules even while acting at the direction of another.[664] On the other hand, subordinate lawyers may safely act "in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[665]

Although the new rules governing supervising lawyers deal with those lawyers' responsibility for nonlawyers under their supervision,[666] the new rules (like the old rules) by definition do not address the responsibilities or the liabilities of subordinate nonlawyers.

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658. ILL. RULES OF PROF'L CONDUCT R. 5.1(c)(2) (2010).
659. ILL. RULES OF PROF'L CONDUCT R. 5.1(b) (repealed 2010).
660. ILL. RULES OF PROF'L CONDUCT R. 5.3 (2010).
661. ILL. RULES OF PROF'L CONDUCT R. 5.3(a) (2010); ILL. RULES OF PROF'L CONDUCT R. 5.3(c)(2) (2010).
662. ILL. RULES OF PROF'L CONDUCT R. 5.3(a) (repealed 2010); ILL. RULES OF PROF'L CONDUCT R. 5.3(c)(2) (repealed 2010).
663. ILL. RULES OF PROF'L CONDUCT R. 5.2 (2010).
664. ILL. RULES OF PROF'L CONDUCT R. 5.2(a) (2010).
665. ILL. RULES OF PROF'L CONDUCT R. 5.2(b) (2010).
666. ILL. RULES OF PROF'L CONDUCT R. 5.3 (2010).

E. Marketing

The new rules generally follow the old rules and the ABA Model Rules in regulating lawyer marketing. The ABA Model Rules generally take a minimalist approach to regulating lawyer marketing. Most states have far more detailed and restrictive rules governing marketing. Illinois is one of the few states to essentially follow the ABA Model Rules approach.

The new rules differ from the old rules in ten ways. First, the new rules explain in a comment that a lawyer's statements about "achievements on behalf of clients or former clients" may be misleading if it would lead a reasonable person to form an "unjustified expectation" that the lawyer could obtain the same results for the person.[667] The old rules did not specifically discuss lawyers' statements about past results, but instead contained a general prohibition on marketing "likely to create an unjustified expectation about the results the lawyer can achieve."[668]

Second, the new rules require that all lawyer advertisements provide the name and office address of the lawyer or law firm responsible for its content.[669] The old rules required the advertisement to include only the name of "at least one lawyer responsible for its content."[670] Thus, the new rules expand the requirement to include an office address, but also allow the advertisement to include a law firm's name rather than just a lawyer's name.

Third, the new rules do not require lawyers to keep their advertisements for any specified period of time.[671] The old rules required that lawyers maintain for three years a copy or recording of all advertisements and written communications.[672]

Fourth, the new rules do not require lawyers to keep a record of when and where they used advertisements.[673] The old rules required lawyers to maintain for three years "a record of when and where" they used all advertisements and written communications.[674]

Fifth, the new rules include under the "direct contact with prospective clients" rule any "real-time electronic contact."[675] The old rules did not

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667. ILL. RULES OF PROF'L CONDUCT R. 7.1 cmt. 3 (2010).
668. ILL. RULES OF PROF'L CONDUCT R. 7.1(b) (repealed 2010).
669. ILL. RULES OF PROF'L CONDUCT R. 7.2(c) (2010).
670. ILL. RULES OF PROF'L CONDUCT R. 7.2(a)(2) (repealed 2010).
671. ILL. RULES OF PROF'L CONDUCT R. 7.2 (2010).
672. ILL. RULES OF PROF'L CONDUCT R. 7.2(a)(1) (repealed 2010).
673. ILL. RULES OF PROF'L CONDUCT R. 7.2 (2010).
674. ILL. RULES OF PROF'L CONDUCT R. 7.2(a)(1) (repealed 2010).
675. ILL. RULES OF PROF'L CONDUCT R. 7.3(a) (2010).

explicitly address electronic contact, although they included a quaint reference to contact by "telegraph."[676]

Sixth, the new rules permit in-person, telephonic or real-time electronic solicitation of persons who have a "prior professional relationship with the lawyer."[677] The old rules allowed such solicitation of persons who had a prior professional relationship with the lawyer *or* "the lawyer's firm."[678] Thus, the new rules on their face provide a more limited scope of permissible in-person solicitation, because they limit such solicitation to those who have worked with the individual lawyers now soliciting new business.

Seventh, the new rules include "electronic communications" in the provision governing direct mail.[679] The old rules covered only direct-mail marketing consisting of "letters or advertising circulars."[680]

Eighth, the new rules require such direct mail to include the words "Advertising Material" on the envelope and at the beginning and end of any recorded or electronic communications.[681] The old rules required that direct mail, which did not include electronic communications in the definition, be "plainly labeled as advertising material."[682] Thus, the new rules require specific wording for the required disclaimer. A comment to the new rules explains that this requirement does not apply to communications responding to a client's request for information.[683]

Ninth, the new rules allow lawyers to engage in otherwise improper solicitation when participating in "a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer."[684] The old rules allowed such participation under the auspices of a wider range of organizations.[685] Thus, the new rules limit the type of legal service plans with which a lawyer can work in undertaking in-person solicitation.

Tenth, the new rules allow lawyers to communicate the fact that the lawyer "does or does not practice in particular fields of law."[686] The old rules explicitly allowed lawyers to indicate that the lawyer or law firm "concentrates or limits" their practice in or to certain legal areas.[687] This does not seem to be a material change, but eliminates an arguably "safe

676. ILL. RULES OF PROF'L CONDUCT R. 7.3 (repealed 2010).
677. ILL. RULES OF PROF'L CONDUCT R. 7.3(a)(2) (2010).
678. ILL. RULES OF PROF'L CONDUCT R. 7.3(a)(1) (repealed 2010).
679. ILL. RULES OF PROF'L CONDUCT R. 7.3(c) (2010).
680. ILL. RULES OF PROF'L CONDUCT R. 7.3(a)(2) (repealed 2010).
681. ILL. RULES OF PROF'L CONDUCT R. 7.3(c) (2010).
682. ILL. RULES OF PROF'L CONDUCT R. 7.3(a)(2) (repealed 2010).
683. ILL. RULES OF PROF'L CONDUCT R. 7.3 cmt. 7 (2010).
684. ILL. RULES OF PROF'L CONDUCT R. 7.3(d) (2010).
685. ILL. RULES OF PROF'L CONDUCT R. 7.3(a)(3) (repealed 2010).
686. ILL. RULES OF PROF'L CONDUCT R. 7.4(a) (2010).
687. ILL. RULES OF PROF'L CONDUCT R. 7.4(a) (repealed 2010).

harbor" for lawyers wishing to use the word "concentrates" in their marketing.

The new rules differ from the ABA Model Rules in four ways. First, the new rules allow lawyers to pay the usual charges of a "legal service plan or a not-for-profit lawyer referral service."[688] The ABA Model Rules also permit lawyers to pay the usual charges of a "qualified lawyer referral service," which the ABA Model Rules define as a lawyer referral service that has been approved by "an appropriate regulatory authority."[689] Thus, the new rules are more restrictive than the ABA Model Rules, because they only permit lawyers to pay the usual charges of not-for-profit referral services.

Second, the new rules note that the Supreme Court of Illinois does not recognize certifications of specialties or expertise.[690] The ABA Model Rules do not contain a similar statement.

Third, the new rules restrict lawyers in their use of the terms "certified," "specialist," "expert," or other similar terms in describing the lawyers' qualifications.[691] The new rules permit lawyers to use those terms in identifying "certificates, awards or recognitions" by a public or private group, but only: (1) if the reference is truthful and verifiable;[692] and (2) is accompanied by a statement that the Supreme Court of Illinois "does not recognize certifications of specialties in practice of law" and that such certificate, award or recognition "is not a requirement to practice law in Illinois."[693] The ABA Model Rules allow lawyers to state that they are certified as a "specialist in a particular field of law" if the lawyer has been certified by an organization approved by "an appropriate state authority" or by the ABA,[694] and the lawyer clearly identifies the certifying organization.[695] Thus, the new rules limit lawyers' use of such terms to awards and recognitions rather than a particular area of practice, and even then require a disclaimer.

Fourth, the new rules do not adopt the ABA Model Rule commonly called the "pay to play" provision.[696]

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688. ILL. RULES OF PROF'L CONDUCT R. 7.2(b)(2) (2010); ILL. RULES OF PROF'L CONDUCT R. 7.4 cmt 6, 7 (2010).
689. MODEL CODE OF PROF'L CONDUCT R. 7.2(b)(2) (2009).
690. ILL. RULES OF PROF'L CONDUCT R. 7.4(b) (2010).
691. ILL. RULES OF PROF'L CONDUCT R. 7.4(c) (2010).
692. ILL. RULES OF PROF'L CONDUCT R. 7.4(c)(1) (2010).
693. ILL. RULES OF PROF'L CONDUCT R. 7.4(c)(2) (2010); ILL. RULES OF PROF'L CONDUCT R. 7.4 cmt. 3 (2010).
694. MODEL CODE OF PROF'L CONDUCT R. 7.4(d)(1) (2009).
695. MODEL CODE OF PROF'L CONDUCT R. 7.4(d)(2) (2009).
696. MODEL CODE OF PROF'L CONDUCT R. 7.6 (2009).

F. Restrictions on Practice

The new rules follow the ABA Model Rules in prohibiting lawyers from either offering or making: (1) a partnership, employment, or other similar agreement that "restricts the right of a lawyer to practice after termination of the relationship";[697] or (2) an agreement that restricts the lawyer's right to practice as part of a settlement.[698]

The new rules differ from the old rules in two ways. First, the new rules apply the prohibition to "settlement of a client controversy."[699] The old rules used the phrase "settlement of a controversy between private parties."[700] Thus, the new rules arguably have a broader application, because presumably there could be a "client controversy" other than "a controversy between private parties."

Second, the new rules include in a comment rather than in a black-letter rule lawyers' freedom to restrict their practice when selling their law practice.[701] The old rules included that provision in the rule itself.[702]

G. Selling a Law Practice[703]

X. DEALING WITH OTHERS

The new rules provide guidance for lawyers' interaction with non-clients in various contexts.[704]

A. Dealing with All Non-Clients

The new rules contain several provisions that govern lawyers' dealing with all third parties other than clients. The new rules' provisions dealing with lawyers' interactions with specific third parties or specific types of interactions are discussed below.

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697. ILL. RULES OF PROF'L CONDUCT R. 5.6(a) (2010).
698. ILL. RULES OF PROF'L CONDUCT R. 5.6(b) (2010).
699. *Id.*
700. ILL. RULES OF PROF'L CONDUCT R. 5.6(b) (repealed 2010).
701. ILL. RULES OF PROF'L CONDUCT R. 5.6(b) cmt. 3 (2010).
702. ILL. RULES OF PROF'L CONDUCT R. 5.6(a) (repealed 2010).
703. *See* discussion *supra* Part V.E.
704. *See* discussion *supra* Part VIII.I.

1. General Prohibition on Deception

The new rules follow the ABA Model Rules in prohibiting lawyers from knowingly making "a false statement of material fact or law to a third person."[705]

The new rules differ dramatically from the old rules in one way. The new rules prohibit lawyers from "knowingly" making false statements of fact or law to a third person.[706] The old rules prohibited such a statement of material fact or law which the "lawyer knows or reasonably should know is false."[707] The new rules,[708] like the old rules,[709] define the term "know" to mean "actual knowledge of the fact in question," although such knowledge "may be inferred from circumstances."[710] Thus, the new rules limit the prohibition to a statement that the lawyer "knows" to be false, and drops the old rules' negligence standard.

2. Prohibition on Discrimination

The new rules follow the old rules[711] in prohibiting lawyers from violating any statute or ordinance prohibiting discrimination through conduct that "reflects adversely on the lawyer's fitness as a lawyer."[712]

The new rules contain a detailed description of how to analyze whether such a discriminatory act reflects adversely on a lawyer's fitness as a lawyer.[713] The new rules, like the old rules,[714] indicate that a professional discipline charge can be brought against a lawyer only after a court or administrative agency has found the lawyer to have engaged in an improper act.[715] The ABA Model Rules do not contain this prohibition.

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705. ILL. RULES OF PROF'L CONDUCT R. 4.1(a) (2010)
706. *Id.*
707. ILL. RULES OF PROF'L CONDUCT R. 4.1(a) (repealed 2010).
708. ILL. RULES OF PROF'L CONDUCT R. 1.0(f) (2010).
709. ILL. RULES OF PROF'L CONDUCT Terminology (repealed 2010).
710. ILL. RULES OF PROF'L CONDUCT R. 1.0(f) (2010); ILL. RULES OF PROF'L CONDUCT Terminology (repealed 2010).
711. ILL. RULES OF PROF'L CONDUCT R. 8.4(a)(9)(A) (repealed 2010).
712. ILL. RULES OF PROF'L CONDUCT R. 8.4(j) (2010).
713. *Id.*
714. ILL. RULES OF PROF'L CONDUCT R. 8.4(a)(9)(B) (repealed 2010).
715. ILL. RULES OF PROF'L CONDUCT R. 8.4(j) (2010).

3. Inadvertently Disclosed Documents

The new rules require a lawyer to "promptly notify the sender" if the lawyer receives a document "relating to the representation of the lawyer's client" if the lawyer "knows that the document was inadvertently sent."[716]

The new rules contain several explanatory comments. A comment to the new rules explains that the provision covers documents "mistakenly sent or produced by opposing parties or their lawyers."[717] The same comment indicates that the rule does *not*: (1) require the lawyer to take any additional step, such as returning the document; (2) address any privilege waiver issues; (3) deal with the lawyer's duty if the lawyer receives a document that "may have been wrongfully obtained by the sending person."[718]

Another comment to the new rules explains that lawyers may "choose to return a document unread," for example, if the lawyer "learns before receiving the document that it was inadvertently sent to the wrong address."[719] That comment indicates that the lawyer generally may decide herself to return the document voluntarily if not required by "applicable law" to do. Essentially meaning that a lawyer may return such documents without falling short of the rules requiring diligent representation of the client.[720]

The old rules did not contain any provision providing guidance to a lawyer who received such an inadvertently sent document.[721] However, an Illinois legal ethics opinion explained that Illinois lawyers should return without reviewing any material that they know to have been inadvertently transmitted.[722] That Illinois legal ethics opinion limited application of that standard to the "inadvertent disclosure of confidential client information to opposing counsel."[723]

The new rules differ dramatically from the bar's application of the old rules in two ways. First, the new rules apply its standard to *any* document "relating to the representation of the lawyer's client."[724] The old bar approach was limited to confidential client information.[725] Second, the new rules do not prohibit the receiving lawyer from reading the inadvertently

716. ILL. RULES OF PROF'L CONDUCT R. 4.4(b) (2010).
717. ILL. RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2010).
718. *Id.*
719. ILL. RULES OF PROF'L CONDUCT R. 4.4 cmt. 3 (2010).
720. *Id.*
721. ILL. RULES OF PROF'L CONDUCT R. 4.4 (repealed 2010).
722. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 98–04 (1999).
723. *Id.*
724. ILL. RULES OF PROF'L CONDUCT R. 4.4(b) (2010).
725. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 98–04 (1999).

sent document, such a lawyer must instead merely notify the sending lawyer.[726] The old bar approach required the receiving lawyer to return unread the inadvertently sent document.[727]

The new rules differ dramatically from the ABA Model Rules in one way. By way of background, the ABA issued several ethics opinions in the early 1990s that required lawyers to stop reading and return unread documents that the lawyer received inadvertently from another person. Many states adopted this approach or, as explained above, a variation of this approach as Illinois did in 1999.[728]

In 2002, the ABA Model Rules abandoned this approach in favor of a much simpler approach that requires lawyers in such a situation to simply notify the sender. This essentially took the issue out of the ethics realm and gave it to courts.[729]

The new rules require a lawyer receiving an inadvertently transmitted document to notify the sender if the lawyer "knows" that the document was inadvertently sent.[730] The ABA Model Rules require the lawyer to take such a step if the lawyer "knows or reasonably should know" that the document was inadvertently sent.[731]

Thus, the new rules not only abandon the approach of the earlier Illinois legal ethics opinion,[732] but actually retreat beyond the ABA Model Rules, not even requiring the receiving lawyer to notify the sender unless the lawyer "knows" that the document was inadvertently sent.

4. Prohibition on Threatening Criminal or Disciplinary Charges

The new rules retain the prohibition on lawyers presenting, participating in presenting, or threatening "criminal or disciplinary charges to obtain an advantage in a civil matter."[733] This provision appeared elsewhere in the old rules,[734] and does not appear in the ABA Model Rules.

5. Advising Third Parties of a Client's Fraud

The new rules follow the ABA Model Rules in permitting but not requiring lawyers to disclose confidential information to "mitigate or rectify

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726. ILL. RULES OF PROF'L CONDUCT R. 4.4(b) (2010).
727. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 98–04 (1999).
728. *Id.*
729. MODEL CODE OF PROF'L CONDUCT R. 4.4(b) (2009).
730. ILL. RULES OF PROF'L CONDUCT R. 4.4(b) (2010).
731. MODEL CODE OF PROF'L CONDUCT R. 4.4(b) (2009).
732. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 98–04 (1999).
733. ILL. RULES OF PROF'L CONDUCT R. 8.4(g) (2010); *see* discussion *supra* Part VIII.I.4.
734. ILL. RULES OF PROF'L CONDUCT R. 1.2(e) (repealed 2010).

substantial injury to the financial interests or property of another": (1) that has resulted or "is reasonably certain to result" from "the client's commission of a crime or fraud"; *and* (2) "in furtherance of which the client has used the lawyer's services."[735]

The new rules differ from the old rules in two ways. First, the new rules do not require lawyers to first call upon their clients to rectify fraud on a third person. The old rules required a lawyer who knew that the client had defrauded a person to first call upon the client to rectify the fraud.[736] The disclosure duty arose if the client did not or could reveal the fraud.[737]

Second, the new rules do not *require* lawyers to disclose a client's fraud on a third person. The old rules indicated that if a client refused or was unable to do so, the lawyer "shall reveal the fraud to the affected person," unless "the information is protected as a privileged communication."[738] The old rules did not define "privilege," but defined a "confidence" protected under the general duty of confidentiality[739] as "information protected by the lawyer-client privilege,"[740] presumably meaning the attorney-client privilege.

The old rules' mandatory disclosure obligation probably applied only rarely, because lawyers were most likely to have learned of a client's fraud in a privileged communication with the client. However, the old rules' exception based on privileged rather than confidential communications meant that there might have been occasions under the old rules where a lawyer was obligated to disclose a client's past fraud on a third person if the lawyer learned of the fraud on her own or from a third party.

6. *Negotiation Ethics*

The new rules follow the ABA Model Rules[741] in providing guidance to lawyers wishing to comply with the general anti-deception provision during negotiations.[742] This guidance did not appear in the old rules.

The new rules prohibit lawyers from knowingly making "a false statement of material fact or law to a third person."[743] The old rules applied a "knows or reasonably should know" standard.[744]

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735. ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2010); *see* discussion *supra* Part III.D.4.
736. ILL. RULES OF PROF'L CONDUCT R. 1.2(g) (repealed 2010).
737. *Id.*
738. *Id.*
739. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (repealed 2010).
740. ILL. RULES OF PROF'L CONDUCT Terminology (repealed 2010).
741. MODEL CODE OF PROF'L CONDUCT R. 4.1 cmt. 2 (2009).
742. ILL. RULES OF PROF'L CONDUCT R. 4.1(a) cmt. 2 (2010).
743. ILL. RULES OF PROF'L CONDUCT R. 4.1(a) (2010).
744. ILL. RULES OF PROF'L CONDUCT R. 4.1(a) (repealed 2010); *see* discussion *infra* Part X.A.1.

The new rules not only drop the negligence standard that was found in the old rules, they also provide guidance to lawyers wondering to what extent they can engage in "puffery" during negotiations. A comment to the new rules explains what circumstances dictate whether a statement "should be regarded as one of fact."[745] That comment explains that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact" such as: (1) a lawyer's price or value estimates; and (2) "a party's intentions as to an acceptable settlement of a claim."[746]

Although the same comment reminds lawyers of "their obligations under applicable law to avoid criminal and tortious misrepresentation,"[747] this comment essentially provides a "safe harbor" for the kind of "puffery" that clients and lawyers generally recognize as taking place in negotiations.

B. Dealing with Represented Persons

The new rules follow the ABA Model Rules in prohibiting a lawyer, who is representing a client, from communicating "about the subject of the representation" with any person the lawyer "knows to be represented by another lawyer in the matter" unless: (1) the other lawyer consents; or (2) the communication is authorized by law or court order.[748]

The new rules differ from the old rules in five ways. First, the new rules on their face only address the lawyer's own obligation.[749] The old rules also applied to those whom the lawyer caused to engage in such ex parte communications with a represented person.[750] The old rule followed the old ABA Model Code formulation, which arguably prohibited lawyers from suggesting or assisting their client's communication to a represented person.

To be sure, the new rules contain the standard overall prohibition on lawyers' knowing assistance or inducement of another to violate the ethics rules, and the prohibition on violating the rules "through the acts of another."[751] However, the deletion of the phrase "or cause another" from the ex parte communication rule almost surely provides lawyers greater freedom to discuss with their client the client's absolute freedom to communicate with another lawyer's clients without that lawyer's consent.

745. ILL. RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (2010).
746. *Id.*
747. *Id.*
748. ILL. RULES OF PROF'L CONDUCT R. 4.2 (2010).
749. *Id.*
750. ILL. RULES OF PROF'L CONDUCT R. 4.2 (repealed 2010).
751. ILL. RULES OF PROF'L CONDUCT R. 8.4(a) (2010).

Most states allow lawyers to suggest such ex parte communications, but prohibit them from directing or scripting such ex parte communications.

The new rules presumably invalidate the approach described in an Illinois legal ethics opinion,[752] which emphasized the difference between the ABA Model Rules and the then-current Illinois Rules by explaining that the "cause another" language meant that lawyers "may not suggest the client contact the other party" and may not "assist the client in contacting the represented party."

Second, the new rules permit such ex parte communications if the lawyer is "authorized to do so by law or a court order."[753] The old rules included an exception for communications "authorized by law," but did not contain a reference to a court order.[754] This difference reminds lawyers that they can obtain a court order allowing such ex parte communications, and also highlights the distinction between a court order and other "authorizations" by law, which presumably includes a broader range of permissible conduct.

Third, a comment to the new rules deals with a lawyer's ex parte communications with the constituents of an adverse organization. That comment prohibits such communications only with a constituent of the adverse organization: (1) "who supervises, directs or regularly consults with the organization's lawyer concerning the matter"; (2) "has authority to obligate the organization with respect to the matter"; or (3) "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."[755] The old rules did not provide any guidance on this issue. However, the Illinois State Bar Association adopted this standard in January 2009, in a legal ethics opinion that probably presaged the new rules.[756]

This comment follows the ABA Model Rules approach,[757] which no longer prohibits ex parte communications with an adverse organization's constituent whose statements would be admissions against interest.

The comment also follows the ABA Model Rules[758] approach in: (1) generally permitting ex parte communications with a represented organization's former constituent; and (2) reminding lawyers that during otherwise permissible ex parte communications they "must not use methods of obtaining evidence that violate the legal rights of the organization,"[759]

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752. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 04–02 (2005).
753. ILL. RULES OF PROF'L CONDUCT R. 4.2 (2010).
754. ILL. RULES OF PROF'L CONDUCT R. 4.2 (repealed 2010).
755. ILL. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2010).
756. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 09–01 (2009).
757. MODEL CODE OF PROF'L CONDUCT R. 4.2 cmt. 7 (2009).
758. *Id.*
759. ILL. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2010).

such as inquiring into privileged communications that the constituent had with the organization's lawyer.

Fourth, another comment to the new rules provides guidance for lawyers who are adverse to the government.[760] The old rules did not provide any guidance on this issue. The comment to the new rules explains that the constitutional right to communicate with the government might essentially trump the general prohibition on ex parte communications with a represented person.[761]

Fifth, the same comment requires government lawyers communicating with an accused criminal defendant to comply with the rules.[762] The comment reminds government lawyers that the state or federal constitutionality of such a communication "is insufficient to establish that the communication is permissible under this Rule."[763]

C. Dealing with Unrepresented Persons

The new rules follow the ABA Model Rules in providing guidance to lawyers who deal with unrepresented persons.[764] The new rules differ from the old rules in one way. The new rules prohibit lawyers from giving any legal advice, other than "the advice to secure counsel," to an unrepresented person whose interests are "or have a reasonable possibility or being" in conflict with the interests of the lawyer's client.[765] The old rules did not contain this prohibition. Although careful lawyers may have refrained from such conduct under the more general principles of the old rule, the new rules provide a more specific description of the prohibited conduct.

Several comments to the new rules provide guidance for lawyers dealing with unrepresented persons. For example, one comment to the new rules explains that they do not prohibit a lawyer from negotiating a transaction or settlement with an unrepresented person.[766] The same comment explains that the new rules do not prohibit a lawyer who has properly explained her role from: (1) advising an unrepresented person of the term by which the lawyer's client will enter into an agreement or a settlement; (2) preparing documents requiring the unrepresented person's signature; and (3) explaining "the lawyer's own view" of such documents' meaning and of "the underlying legal obligations."[767]

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760. ILL. RULES OF PROF'L CONDUCT R. 4.2. cmt. 5 (2010).
761. *Id.*
762. *Id.*
763. *Id.*
764. ILL. RULES OF PROF'L CONDUCT R. 4.3 (2010).
765. *Id.*
766. ILL. RULES OF PROF'L CONDUCT R. 4.3 cmt. 2 (2010).
767. *Id.*

D. Dealing with Specific Third Parties

1. Lawyers in Public Office

The new rules follow the old rules[768] in prohibiting lawyers holding public office from: (1) improperly influencing the legislature; or (2) representing any client in the promotion or defeat of a legislative or other proposal pending before a public body which employs the lawyer or on which the lawyer is a member.[769] The old rules contained this provision in a different part of the same rule.[770] The ABA Model Rules do not contain this provision.

The new rules follow the old rules[771] by applying the same basic principle to lawyers who hold public office in their dealings with tribunals.[772]

Those provisions supplement the more general prohibition also found in the ABA Model Rules[773] prohibiting lawyers in any position from stating or implying an ability to improperly influence a government agency or official.[774]

2. Lawyers Failing to Pay Student Loans

The new rules follow the old rules[775] in prohibiting lawyers' bad faith failure to repay student loans, which may include declaring bankruptcy.[776] The old rules contained this provision in a different section of the same rule.[777] The ABA Model Rules do not contain this provision.

E. Dealing with Other Lawyers

1. Bar Admissions

The new rules follow the ABA Model Rules in prohibiting lawyers from making knowingly false statements or failing to disclose certain information: (1) when they apply for admission to the bar; (2) in

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768. ILL. RULES OF PROF'L CONDUCT R. 8.4(b)(1), (3) (repealed 2010).
769. ILL. RULES OF PROF'L CONDUCT R. 8.4(k)(1), (3) (2010); *see* discussion *supra* Part VIII.H.1.
770. ILL. RULES OF PROF'L CONDUCT R. 8.4(b)(1), (3) (repealed 2010).
771. ILL. RULES OF PROF'L CONDUCT R. 8.4(b)(2) (repealed 2010).
772. ILL. RULES OF PROF'L CONDUCT R. 8.4(k)(2) (2010).
773. MODEL CODE OF PROF'L CONDUCT R. 8.4(e) (2009).
774. ILL. RULES OF PROF'L CONDUCT R. 8.4(e) (2010).
775. ILL. RULES OF PROF'L CONDUCT R. 8.4(a)(8) (repealed 2010).
776. ILL. RULES OF PROF'L CONDUCT R. 8.4(i) (2010).
777. ILL. RULES OF PROF'L CONDUCT R. 8.4(a)(8) (repealed 2010).

connection with any other bar admission application; or (3) in connection with a disciplinary matter.[778]

The new rules differ from the old rules in two ways. First, the new rules prohibit lawyers from "knowingly" failing to respond to a demand from an admissions or disciplinary authority.[779] The old rules simply prohibited the failure to respond, without the "knowingly" standard.[780] This change probably is not material, although theoretically a lawyer might have violated the old rules by not responding to a demand that the lawyer did not know she received.

Second, the new rules do not specifically prohibit lawyers from furthering the application of a bar applicant known by the lawyer to be unqualified.[781] The old rules contained such a prohibition.[782] This type of misconduct presumably would fall under the more general prohibition on failing to correct a misapprehension about such an applicant.[783]

2. *Reporting Other Lawyer's Misconduct*

The new rules largely follow the old rules in continuing Illinois's unique approach to a lawyer's duty to report another lawyer's misconduct. The new rules differ in some respects from the old rules, and differ dramatically from the ABA Model Rules. A comment to the new rules cites the famous *Himmel* case, which highlighted Illinois's unique approach to this issue.[784]

The new rules follow the old rules in articulating an exception to the reporting requirement but use a different phrase that could generate some confusion. The new rules require a lawyer to report another lawyer's misconduct, under the specified circumstances, unless, among other things, the information deserves protection under the "attorney-client privilege or by law."[785] The old rules required reporting unless the information deserved protection "as a confidence by these Rules or by law."[786] This recognition of privileged rather than confidential communications as an

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778. ILL. RULES OF PROF'L CONDUCT R. 8.1 (2010).
779. ILL. RULES OF PROF'L CONDUCT R. 8.1(b) (2010).
780. ILL. RULES OF PROF'L CONDUCT R. 8.1(a)(2) (repealed 2010).
781. ILL. RULES OF PROF'L CONDUCT R. 8.1 (2010).
782. ILL. RULES OF PROF'L CONDUCT R. 8.1(b) (repealed 2010).
783. ILL. RULES OF PROF'L CONDUCT R. 8.1(b) (2010).
784. ILL. RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2010).
785. ILL. RULES OF PROF'L CONDUCT R. 8.3(c) (2010); ILL. RULES OF PROF'L CONDUCT R. 8.3 cmt. 2 (2010).
786. ILL. RULES OF PROF'L CONDUCT R. 8.3(a) (repealed 2010).

exception to the reporting requirement is consistent with Illinois legal ethics opinions.[787]

However, it is important to note that the old rules defined "confidence" as "information protected by the lawyer-client privilege under applicable law."[788] That term appeared in the old rules' formulation of a lawyer's basic duty of confidentiality, which covered "a confidence or secret of the client."[789]

That old formulation, taken from the old ABA Model Code, has now been replaced in the basic confidentiality provision with the broader ABA Model Rules formulation, "information relating to the representation of a client."[790] Under this new formulation, the new rules do not contain a definition of the term "confidence."[791] Thus, switching the phrase "confidence" to "attorney-client privilege" does not change the meaning, but instead follows the old approach. As explained immediately below, this provision differs from the ABA Model Rules approach.

The new rules differ from the old rules in one way. The new rules require reporting to "the appropriate professional authority."[792] A comment to the new rules explains that lawyers should report another lawyer's misconduct to the Illinois Attorney Registration and Disciplinary Commission unless another "agency is more appropriate in the circumstances."[793] The old rules required reporting to "a tribunal or other authority empowered to investigate or act upon such violation."[794]

The removal of the "tribunal" reference follows the ABA Model Rules approach,[795] and provides more specific guidance to lawyers analyzing their duties. The change also relieves tribunals of both the burden of handling ethics charges and the uncertainty of what remedies they might impose.

The new rules differ dramatically from the ABA Model Rule in eight ways. First, the new rules[796] require a lawyer to report to "the appropriate professional authority" another lawyer's criminal act "that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respect"[797] or other conduct "involving dishonesty, fraud, deceit or

787. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 91–23 (4/3/92). *See also* Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 91–7 (1991); Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 90–8 (1991).
788. ILL. RULES OF PROF'L CONDUCT Terminology (repealed 2010).
789. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (repealed 2010).
790. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (2010).
791. ILL. RULES OF PROF'L CONDUCT R. 1.0 (2010).
792. ILL. RULES OF PROF'L CONDUCT R. 8.3(a) (2010).
793. ILL. RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (2010).
794. ILL. RULES OF PROF'L CONDUCT R. 8.3(a) (repealed 2010).
795. MODEL CODE OF PROF'L CONDUCT R. 8.3(a) (2009).
796. ILL. RULES OF PROF'L CONDUCT R. 8.3(a) (2010).
797. ILL. RULES OF PROF'L CONDUCT R. 8.4(b) (2010).

misrepresentation."[798] The ABA Model Rules require a lawyer to report another lawyer's ethics violation *only* if it "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."[799]

Although that phrase is embedded in the new rules' reference to criminal wrongdoing, it does *not* appear in the new rules reference to "conduct involving dishonesty, fraud, deceit, or misrepresentation." This means that under the new rules a lawyer must report such misconduct even if it does *not* meet the higher "substantial question" standard. Thus, the new rules are broader than the ABA Model Rules.

Second, the new rules[800] only require a lawyer to report another lawyer's violation of the two specific ethics rules mentioned immediately above.[801] The ABA Model Rules require reporting another lawyer's violation of *any* ethics rule.[802] Thus, the new rules seem to have a narrower range than the ABA Model Rules. However, the absence of the ABA Model Rule's "substantial question" standard as a practical matter expands a lawyer's reporting obligation under the new rules.

Third, the new rules do not require a lawyer to report another lawyer's misconduct if it would require disclosure of information "otherwise protected by the attorney-client privilege or by law."[803] The ABA Model Rules relieve a lawyer of a reporting obligation if it would disclose information otherwise protected by the basic confidentiality duty,[804] which covers all "information relating to the representation of a client."[805]

This ABA Model Rule exception covers a much broader range of information than the attorney-client privilege, which generally protects only communications between lawyers and clients. An ABA Model Rule comment explains that the basic confidentiality duty "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[806]

The new rules therefore require a lawyer to report another lawyer's misconduct if the disclosure would reveal information that the reporting lawyer learns from anyone but a client while the ABA Model Rules would *not* require reporting in that circumstance, because such information might

798. ILL. RULES OF PROF'L CONDUCT R. 8.4(c) (2010).
799. MODEL CODE OF PROF'L CONDUCT R. 8.3(a) (2009).
800. ILL. RULES OF PROF'L CONDUCT R. 8.3(a) (2010).
801. ILL. RULES OF PROF'L CONDUCT R. 8.4(b) (2010); ILL. RULES OF PROF'L CONDUCT R. 8.4(c) (2010).
802. MODEL CODE OF PROF'L CONDUCT R. 8.3(a) (2009).
803. ILL. RULES OF PROF'L CONDUCT R. 8.3(c) (2010), ILL. RULES OF PROF'L CONDUCT R. 8.3 cmt. 2 (2010).
804. MODEL CODE OF PROF'L CONDUCT R. 8.3(c) (2009).
805. MODEL CODE OF PROF'L CONDUCT R. 1.6(a) (2009).
806. MODEL CODE OF PROF'L CONDUCT R. 1.6 cmt. 3 (2009).

not be privileged, but would still be "information relating to the representation of a client" that falls within the basic confidentiality duty. Thus, to this extent the reporting requirement in the new rules is broader than the ABA Model Rules.

Fourth, the new rules relieve a lawyer's obligation to disclose another lawyer's misconduct if it would require disclosure of information gained from the lawyer's participation in "an approved lawyers' assistance program" or court-approved "intermediary program" handling "nondisciplinary complaints" against lawyers.[807] The ABA Model Rules refer only to "an approved lawyers assistance program."[808] This difference does not seem material.

Fifth, a lawyer disciplined by any body other than the Illinois Attorney Registration and Disciplinary Commission must report that discipline to the Commission.[809] The ABA Model Rules do not contain a similar provision.

Sixth, a comment to the new rules explains that lawyers should report another lawyer's misconduct to the Illinois Attorney Registration and Disciplinary Commission, unless another "agency is more appropriate in the circumstances."[810] The ABA Model Rules do not contain a similar provision.

Seventh, the new rules contain a comment exempting from the reporting requirement a lawyer retained by another lawyer to advise whether that lawyer had a duty to report a third lawyer's misconduct.[811] The ABA Model Rules exemption only covers a lawyer retained to represent a lawyer "whose professional conduct is in question,"[812] not a lawyer seeking advice about her reporting obligations.

This added exemption seems unnecessary, because the attorney-client privilege exception presumably would cover communications between the lawyer/client seeking advice about her reporting obligations and the lawyer providing such advice.

Eighth, the new rules prohibit lawyers from entering into an agreement with current or former clients limiting their right to file a bar complaint about the lawyer's conduct.[813] The ABA Model Rules do not contain such a provision, although such an agreement might violate other more general ethics rules.

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766. ILL. RULES OF PROF'L CONDUCT R. 8.3(c) (2010).
767. MODEL CODE OF PROF'L CONDUCT R. 8.3(c) (2009).
809. ILL. RULES OF PROF'L CONDUCT R. 8.3(d) (2010); ILL. RULES OF PROF'L CONDUCT R. 8.3 cmt. 6 (2010).
810. ILL. RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (2010).
811. ILL. RULES OF PROF'L CONDUCT R. 8.3 cmt. 4 (2010).
812. MODEL CODE OF PROF'L CONDUCT R. 8.3 cmt. 4 (2009).
813. ILL. RULES OF PROF'L CONDUCT R. 8.4(h) (2010).

XI. ILLINOIS LAWYERS ACTING OUTSIDE ILLINOIS

The new rules largely follow the ABA Model Rules in explaining what disciplinary law will apply to an Illinois lawyer's conduct outside Illinois.[814] The new rules differ from the old rules in three ways. First, the new rules indicate that conduct "in connection with a matter pending before a tribunal" will be governed by the rules of the tribunal's host jurisdiction.[815] The old rules indicated that a lawyer's conduct in connection with "a proceeding in a court" to which the lawyer had been "admitted to practice" was governed by the court's host jurisdiction.[816]

The new rules' reference to "tribunal" rather than "court" expands the reach of this provision. The new rules define "tribunal" to include a court, an arbitrator in binding arbitration, and a legislative body, administrative agency or other body acting in an adjudicative capacity.[817] Thus, a lawyer involved in binding arbitration or adjudicative matters before non-courts will now normally be governed by their host jurisdiction's ethics rules.

Second, the new rules apply this provision to any conduct "in connection with" the pending matter.[818] The old rules applied the provision *only* if the lawyer had been admitted to practice either generally or *pro hac vice* before the court.[819] Thus, the new rules apply to the conduct of lawyers not yet admitted to the tribunal, and to other lawyers assisting the admitted or to-be-admitted lawyer. This expands the tribunal's host jurisdiction's ethics rules' reach over conduct in connection with the tribunal's pending matters, to cover lawyers working on a pending matter but not yet admitted, or with no plans to be "admitted."

Third, the new rules indicate that any conduct other than in connection with a pending matter before a tribunal is governed by either: (1) the ethics rules of the jurisdiction "in which the lawyer's conduct occurred"; or (2) a different jurisdiction, if "the predominant effect of the conduct" is in that different jurisdiction.[820] This provision covers transactional lawyers and litigators engaging in conduct before a matter is "pending" before a tribunal. The old rule applied the ethics rules of the jurisdiction where the lawyer "principally practices," unless the conduct "clearly has its predominant effect in another jurisdiction" but *only* if the lawyer was

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814. ILL. RULES OF PROF'L CONDUCT R. 8.5 (2010).
815. ILL. RULES OF PROF'L CONDUCT R. 8.5(b)(1) (2010).
816. ILL. RULES OF PROF'L CONDUCT R. 8.5(b)(1) (repealed 2010).
817. ILL. RULES OF PROF'L CONDUCT R. 1.0(m) (2010).
818. ILL. RULES OF PROF'L CONDUCT R. 8.5(b)(1) (2010).
819. ILL. RULES OF PROF'L CONDUCT R. 8.5(b)(1) (repealed 2010).
820. ILL. RULES OF PROF'L CONDUCT R. 8.5(b)(2) (2010).

licensed in that jurisdiction.[821] In other words, such conduct could be governed *only* by a jurisdiction in which the lawyer was licensed.

In sum, transactional lawyers and litigators engaging in conduct before a matter is "pending before a tribunal" will be governed by the ethics rules of the jurisdiction where they act, or where the predominant effect of their action occurs—even if the lawyers are not licensed there. This requires lawyers licensed only in Illinois to familiarize themselves for the first time with the ethic rules of other states where they act or where the predominant effect of their actions might be felt.

The new rules differ from the ABA Model Rules in two ways. First, the new rules contain a comment explaining that for purposes of "reciprocal discipline,"[822] a lawyer temporarily suspended "pursuant to" the multi-jurisdictional practice provision[823] shall not be considered to have been suspended from the practice of law in Illinois.[824]

The meaning of this provision is not clear. Lawyers are not suspended "pursuant to" the cited multijurisdictional practice rule.[825] That rule simply indicates that lawyers not suspended from the practice in another jurisdiction may temporarily practice law in Illinois under specified conditions.[826] Moreover, the multijurisdictional practice rule does not involve discipline, but rather the ability of out-of-state lawyers to practice law in Illinois. If this provision meant to assure out-of-state lawyers that a temporary suspension in another jurisdiction will not be considered "equivalent" to a suspension in Illinois, such a provision seems unnecessary. If the provision's purpose is to assure Illinois lawyers that their temporary suspension in Illinois will have some effect in some other state, the provision is meaningless, because the other jurisdiction will have to make that decision.

Second, the new rules do not contain a provision appearing in the ABA Model Rules indicating that a lawyer subject to a jurisdiction's discipline is deemed to appoint "an official to be designated by this court" to receive service of process in the jurisdiction.[827] It is unclear why Illinois did not adopt this ABA Model Rules provision.

The new rules contain comments that provide some guidance and relief. A comment to the new rules explains that a lawyer is not subject to discipline if she follows the ethics rules of the jurisdiction in which the lawyer "reasonably believes" that the predominant effect of the action will

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821. ILL. RULES OF PROF'L CONDUCT R. 8.5(b)(2)(ii) (repealed 2010).
822. ILL. RULES OF PROF'L CONDUCT R. 8.5(a) (2010).
823. ILL. RULES OF PROF'L CONDUCT R. 5.5(c) (2010).
824. ILL. RULES OF PROF'L CONDUCT R. 8.5 cmt. 1 (2010).
825. ILL. RULES OF PROF'L CONDUCT R. 5.5(c) (2010).
826. *Id.*
827. MODEL CODE OF PROF'L CONDUCT R. 8.5 cmt. 1 (2009).

be felt.[828] This comment reinforces the general "rule of reason" approach,[829] and assures lawyers that there will be some leeway in a jurisdiction's enforcement of its rules.

Another comment to the new rules explains that two jurisdictions proceeding against a lawyer for the same conduct should identify the "same governing ethics rules," and "in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules."[830] This comment, which comes from the ABA Model Rules, refers to "two admitting" jurisdictions, but presumably would apply equally to jurisdictions to which the lawyer is *not* admitted. In essence, this comment assures lawyers that they will not be whipsawed by disciplinary authorities in different jurisdictions if the lawyer's conduct violates one jurisdiction's ethics rules but is permitted under another jurisdiction's ethics rules. This provision thus softens the frightening statement in the new rules, which also appeared in the old rules[831] and in the ABA Model Rules,[832] that a lawyer can be subject to discipline by more than one jurisdiction "for the same conduct."[833]

XII. OUT-OF-STATE LAWYERS ACTING IN ILLINOIS

The new rules generally follow the ABA Model Rules in providing guidance about multijurisdictional practice, the practice of law in Illinois by out-of-state lawyers. The old rules indicated simply that lawyers could not practice law in a jurisdiction "where doing so violates" that jurisdiction's regulations—presumably including Illinois.[834] Interestingly, the new rules contain a comment stating that the definition of a practice of law "varies from one jurisdiction to another"[835] but does not provide the Illinois definition.

Although contained in the same rule number,[836] the new multijurisdictional practice provision is essentially a new rule. It is important to note that this rule does *not* apply to lawyers licensed in Illinois. Thus, Illinois lawyers trying to determine what activities they may undertake in another jurisdiction must analyze *that* jurisdiction's multijurisdictional rules.

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828. ILL. RULES OF PROF'L CONDUCT R. 8.4 cmt. 5 (2010).
829. ILL. RULES OF PROF'L CONDUCT Scope cmt. 14 (2010).
830. ILL. RULES OF PROF'L CONDUCT R. 8.5 cmt. 6 (2010).
831. ILL. RULES OF PROF'L CONDUCT R. 8.5(a) (repealed 2010).
832. MODEL CODE OF PROF'L CONDUCT R. 8.5(a) (2009).
833. ILL. RULES OF PROF'L CONDUCT R. 8.5(a) (2010).
834. ILL. RULES OF PROF'L CONDUCT R. 5.5(a) (repealed 2010).
835. ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2010).
836. ILL. RULES OF PROF'L CONDUCT R. 5.5 (2010).

The new rules differ dramatically from the old rules in four ways. First, the new rules explain that an out-of-state lawyer may not "establish an office or other systematic and continuous presence" in Illinois for the practice of law,[837] or "hold out to the public or otherwise represent" that they are admitted to practice law in Illinois.[838] As indicated above, the old rules simply indicated that a lawyer could not practice law in a jurisdiction if it violated that jurisdiction's regulations.

A comment to the new rules warns that a lawyer's presence in Illinois might meet this standard "even if the lawyer is not physically present here."[839] Thus, lawyers must be wary of a "virtual" presence in Illinois. This approach is consistent with an Illinois legal ethics opinion, which found that a lawyer's "[r]egular representation" of Illinois parties in arbitration amounted to the unauthorized practice of law in Illinois.[840]

Second, the new rules indicate that lawyers admitted in another jurisdiction (and not disbarred or suspended from practice in any jurisdiction) may provide legal services in Illinois on a "temporary basis" in a number of situations: (1) if they act in association with an Illinois lawyer who "actively participates in the matter";[841] (2) if their services are in or "reasonably related" to a "pending or potential proceeding" before a tribunal in Illinois or elsewhere, and if the lawyer "or a person the lawyer is assisting" is authorized to appear in such proceeding or "reasonably expects" to eventually be authorized;[842] (3) if their services are in or "reasonably related" to an arbitration or other ADR proceeding in Illinois or elsewhere, and the services "arise out of or are reasonably related" to the lawyer's practice in a state where the lawyer is licensed (and are not services for which the Illinois ADR forum requires pro hac vice admission);[843] or (4) if the services otherwise "arise out of or are reasonably related to" the lawyer's practice in a jurisdiction where the lawyer is admitted to practice.[844]

A comment to the new rules explains that a lawyer's presence can meet the "temporary" standard even if the lawyer provides services in Illinois "on a recurring basis" or "for an extended period of time," such as "a single lengthy negotiation or litigation."[845]

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837. ILL. RULES OF PROF'L CONDUCT R. 5.5(b)(1) (2010).
838. ILL. RULES OF PROF'L CONDUCT R. 5.5(b)(2) (2010).
839. ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 4 (2010).
840. Ill. State Bar Ass'n Comm. on Prof'l Conduct, Advisory Op. 94–5 (1994).
841. ILL. RULES OF PROF'L CONDUCT R. 5.5(c)(1) (2010); ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 8 (2010).
842. ILL. RULES OF PROF'L CONDUCT R. 5.5(c)(2) (2010).
843. ILL. RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2010); ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 12 (2010).
844. ILL. RULES OF PROF'L CONDUCT R. 5.5(c)(4) (2010).
845. ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 6 (2010).

The catch-all rule allows out-of-state lawyers to engage in *any* temporary activities in Illinois as long as they "arise out of or are reasonably related to the lawyer's practice" in the jurisdiction where they are licensed.[846] A comment to the new rules explain that such a reasonable relationship can include: (1) the client's residence in or "substantial contacts" with the licensing jurisdiction; (2) the matter's "significant connection" with the licensing jurisdiction; (3) the fact that "significant aspects of the lawyer's work" will be conducted in the licensing jurisdiction; (4) the licensing jurisdiction's law's applicability to "a significant aspect of the matter"; (5) the legal issues' involvement of "multiple jurisdictions" (presumably including the licensing jurisdiction); or (6) the lawyer's "recognized expertise" developed through providing services to "clients in matters involving a particular body of federal, nationally uniform, foreign, or international law."[847]

Thus, the new rules provide very liberal opportunities for out-of-state lawyers to provide legal services in Illinois. Several comments provide examples of the broad nature of the new rules' approach. For instance, one comment to the new rules provides some examples of permissible activities by a lawyer preparing for a proceeding or hearing: client meetings; witness interviews; document reviews; depositions.[848] Another comment to the new rules explains that those lawyers' subordinates may engage in similar conduct.[849]

Another comment to the new rules goes even further noting that "[t]he fact that conduct is not so identified [in the rule] does not imply that the conduct is or is not authorized."[850]

Third, the new rules explain that a lawyer admitted in some jurisdictions (and not suspended or disbarred in any jurisdiction) may provide legal services is Illinois (not just temporarily, and therefore presumably through an office or other "systematic and continuous presence" in Illinois) as long as the lawyer provides the services to her "employer or its organizational affiliates," and those services do not require pro hac vice admission.[851] This provision allows in-house lawyers licensed in other states to practice fulltime in Illinois.

A comment to the new rule describes "organizational affiliates" as "entities that control, are controlled by, or are under common control."[852] The same comment to the new rules reminds in-house lawyers that this

846. ILL. RULES OF PROF'L CONDUCT R. 5.5(c)(4) (2010).
847. ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 14 (2010).
848. ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 10 (2010).
849. ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 11 (2010).
850. *Id.*
851. ILL. RULES OF PROF'L CONDUCT R. 5.5(d)(1) (2010).
852. ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 16 (2010).

provision does not allow them to provide "personal legal services to the employer's officers or employees."[853]

Another comment to the new rules reminds in-house lawyers that they must comply with Illinois's regulation governing in-house lawyers practicing but not licensed in Illinois.[854] As explained below, the new rules contain a specific reference to those Illinois regulations.[855]

Fourth, the new rules explain that a lawyer admitted in some jurisdictions (and not suspended or disbarred in any jurisdiction) may provide legal services in Illinois (not just temporarily, and therefore presumably through an office or other "systematic and continuous presence" in Illinois) as long as the lawyer's services are "authorized by federal law" or other Illinois law.[856]

This provision reflects the power of the U.S. Constitution's Supremacy Clause, which prohibits states from interfering with a lawyer's ability to provide services that could be considered "federal." The clearest examples include purely federal specialty "niches" like patent law, military law, etc. Theoretically, an out-of-state lawyer might also set up a continuous and systematic presence in Illinois limited to federal labor law issues, federal tax law matters, etc. However, most states recognize that it can be essentially impossible for such lawyers to avoid straying into common law issues, state tax law matters, etc.

As a Supremacy Clause matter, federal courts can decide for themselves which lawyers can practice before them. Thus, an Illinois federal court could decide to allow out-of-state lawyers to practice before the court even without arranging for a pro hac vice admission. However, most federal courts require lawyers appearing before them to either be admitted to their host jurisdiction's bar, or be admitted pro hac vice.

The new rules differ from the ABA Model Rules in two ways. First, the new rules do not include the relatively new ABA Model Rules provision allowing temporary services in states that have suffered a major disaster.[857] The ABA adopted this provision while Illinois was considering its new rules, so the absence of this provision presumably does not reflect a rejection of this concept.

Second, the new rules contain a comment specifically identifying the Illinois registration requirements for in-house lawyers practicing (but not

853. *Id.*
854. ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 17 (2010).
855. *Id.*
856. ILL. RULES OF PROF'L CONDUCT R. 5.5(d)(2) (2010).
857. MODEL CODE OF PROF'L CONDUCT R. 5.5 cmt. 14 (2009).

licensed) in Illinois.[858] The ABA Model Rules do not contain this provision.

XIII. CONCLUSION

It took Illinois many years to adopt its new ethics rules, but the effort has been worth it.

Unlike some states that have tinkered with the ABA Model Rule language in hundreds of spots, Illinois has used remarkable self restraint. The new rules differ from the ABA Model Rules only in spots where Illinois has deliberately decided to take a different approach than the ABA Model Rules. This decision to parallel the ABA Model Rules in nearly all respects will make it easier for Illinois lawyers to tap into all of the rich legal resources interpreting and discussing the ABA Model Rules.

This is not to say that Illinois's decision to largely follow the ABA Model Rules is not significant. The move to the ABA approach brings significant changes in a number of important areas, including the scope of lawyers' confidentiality duties, creation of the attorney client relationship, dealing with an inadvertently received communication or document, and other areas. Illinois lawyers will have to become familiar with these changes, but at least can take some comfort in knowing that in nearly every case the new Illinois rules follow the exact wording of the ABA Model Rules which have been interpreted by the ABA itself and other states taking the same approach.

In several other areas, Illinois has maintained its traditional approach to ethics topics. These include disclosure of clients' intent to commit future wrongdoing, prohibition on threatening criminal or disciplinary charges to gain an advantage in a civil matter, and reporting other lawyers' misconduct. In these and other areas, the new rules continue Illinois's tradition of independence. For instance, the wellknown Illinois approach to reporting other lawyers' misconduct is unique among all the states. Illinois lawyers presumably are already familiar with these principles, but may have to look for them in different places among the new rules.

All in all, those many Illinois lawyers who toiled on this project and the Supreme Court deserve credit for balancing the efficiency of a nationally uniform approach to ethics and Illinois's deliberate decision to go its own way in certain areas.

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858. ILL. RULES OF PROF'L CONDUCT R. 5.5 cmt. 17 (2010).