



*Avoiding Ethical Dilemmas:
The Model Rules of
Professional Conduct and
Emerging
Technological Issues*



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About the Presenter

Daniel A. Cotter

Daniel A. Cotter is Attorney and Counselor at Howard & Howard Attorneys PLLC. Dan focuses his practices in a variety of areas of corporate law and litigation, including insurance law, complex business disputes and counseling, employment law, corporate transactions, corporate governance and compliance, and cybersecurity and privacy law. His clients benefit from his diverse professional experience, which – in addition to his years serving as trusted outside counsel – includes positions as a corporate accountant and an in-house attorney. He spent 14.5 years in-house at insurance organizations, where he focused on insurance, regulatory, technology, IT, compliance and transactional matters.

Dan served as President of The Chicago Bar Association for the 2014-2015 bar year and is former Chair of The Young Lawyers Section of the CBA. Dan was an adjunct professor at The John Marshall Law School, and has taught Insurance Law, Accounting for Lawyers and SCOTUS Judicial Biography.

Dan graduated summa cum laude from The John Marshall Law School and received his B.A. in Accounting from Monmouth College, magna cum laude. Dan is a frequent writer and presenter on various substantive topics, including technology and privacy, and in 2019, his book, “The Chief Justices,” was published.”

Email Address: **dac@h2law.com**

Website: **www.howardandhoward.com**

Mailing Address: **200 S. Michigan Ave., Suite 1100, Chicago, IL 60604**

Phone Number: **(312) 502-7480**

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Course Description

Course Presentation

This course provides an in-depth examination of the process and procedure of technology changes in the law firm.

This course provides practical guidance and a discussion on best practices regarding roles and responsibilities of counsel in situations involving applying the rules, using public Wifi, Wifi at home and technology limits.

The ability to recognize and describe the requirement of reasonable steps and cyber security measures.

The ability to identify and distinguish reasonable law firm policies, COVID-19 protocols and the use of remote technology.

The ability to understand, discuss and implement practice tips to improve an attorney's practice and provide improved representation to clients.

This course explores the complex issues and presents potential solutions to the legal and factual situations that arise under Illinois Rule 1.1 (Competence), Illinois Rule 1.6 (Confidentiality of Information), Illinois Rule 1.4 (Communication), Illinois Rules 1.15, 1.16 (Duty to Safeguard Client Property), Illinois Rules 5.1, 5.2, 5.3 (Duty of Supervision), and Illinois Rule 1.1 Duty of Competence.

This course will provide a comprehensive overview of the laws and strategic considerations in Cyber Issues, attorney's ethical obligations.

This course provides an intellectual foundation and introduces a set of learning skills essential for success in the legal profession and for life beyond. The course will provide opportunities for careful reading, for creative and critical thinking, for oral and written communication, and for engaging with others in a shared conversation about stimulating material.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The

course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

Course Learning Objectives and Outcomes

This course is designed to provide the following learning objectives

The ability to understand the relevant state and federal law related to

The ability to understand the duties, roles and responsibilities of counsel in situations involving applying the rules, using public Wifi, Wifi at home and technology limits.

The ability to recognize and describe the requirement of reasonable steps and cyber security measures.

The ability to identify and distinguish reasonable law firm policies, COVID-19 protocols and the use of remote technology.

The ability to understand, discuss and implement practice tips to improve an attorney's practice and provide improved representation to clients.

Participants will develop an understanding of Specific Rules of Professional Conduct including Illinois Rule 1.1 (Competence), Illinois Rule 1.6 (Confidentiality of Information), Illinois Rule 1.4 (Communication), Illinois Rules 1.15, 1.16 (Duty to Safeguard Client Property), Illinois Rules 5.1, 5.2, 5.3 (Duty of Supervision), and Illinois Rule 1.1 Duty of Competence.

The ability to recognize and describe CyberIssues, the Duty of Confidentiality, Illinois Rule 1.6(e).

Professionalism/Ethics

This course provides a variety of tools and techniques available to an attorney to recognize and reduce possible ethical violations or sanctions.

This course covers ethical issues faced by attorneys such in a changing technology landscape.

Participants will develop the ability to recognize the impact of the Model Rules of Professional Conduct and similar local rules of professional conduct on an attorney's practice.

Participants will develop the ability to recognize how attorney conduct, practices and communications may be in violation of the Model Rules of Professional Conduct and similar local rules of professional conduct.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.

Timed Agenda:

Presenter Name: Daniel A. Cotter

CLE Course Title: Avoiding Ethical Dilemmas: The Model Rules of Professional Conduct and Emerging Technological Issues.

Time Format (00:00:00 - Hours:Minutes:Seconds)	Description
00:00:00	ApexCLE Company Credit Introduction
00:00:20	CLE Presentation Title Avoiding Ethical Dilemmas: The Model Rules of Professional Conduct and Emerging Technical Issues
00:00:32	CLE Presentation Start
00:01:54	Tech in the 1990's
00:03:14	Tech from 2000 to 2008 and beyond
00:03:48	The World in Law and Tech/AI in 2016
00:08:26	The Parade of Horribles
00:12:45	Specific Rules of Professional Conduct
00:13:38	<ul style="list-style-type: none">• Illinois Rule 1.1 (Competence)• Illinois Rule 1.6 (Confidentiality of Information)• Illinois Rule 1.4 (Communication)• Illinois Rules 1.15, 1.16 (Duty to Safeguard Client Property)• Illinois Rules 5.1, 5.2, 5.3 (Duty of Supervision)
00:14:44	Illinois Rule 1.1 Duty of Competence
00:23:26	ABC's of Cyber
00:28:57	Duty of Confidentiality
00:29:11	Illinois Rule 1.6(e)(Amended October 15, 2015, Effective January 1, 2016)
00:36:22	Ariz. Bar. Op. 09-04
00:38:19	Illinois RPC 1.15(a)
00:39:08	ABA Formal Opinion 477 (May 11, 2017)
00:42:49	ABA Formal Opinion 483 (October 10, 2018)
00:47:33	Rule 1.4
00:49:45	Applying the Rules
00:54:06	Can You Use the Wifi at Starbucks?
00:56:13	What about the Wifi at Home?
00:58:20	Working in the Cloud?

00:58:48	What Are Reasonable Steps?
00:59:32	Law Firm Policies
01:02:16	COVID-19
01:04:20	NYSBA Opinion 1240
01:05:30	In Conclusion
01:06:02	Presenter Closing
01:06:04	ApexCLE Company Closing Credits
01:06:08	End of Video

Course Material

The materials in this presentation are intended to provide a general overview of the issues contained herein and are not intended nor should they be construed to provide specific legal or regulatory guidance or advice. If you have any questions or issues of a specific nature, you should consult with appropriate legal or regulatory counsel to review the specific circumstances involved. Views expressed are those of the speaker and are not to be attributed to his firm or clients.

Goals/Roadmap

- A Little Bit of History and Looking Back
- Why do you as a lawyer care?
- RPCs
- Some actual application and some tools for the practitioner
- COVID-19 and considerations

A Quick Look in the Rearview Mirror

The Bottom Line

- We have come very far in the last 30 years
- Creates benefits
- But what of risks?

Life Was Good

“I can't complain but sometimes i still do

Life's been good to me so far”- Life's Been Good

A Pictorial of 2000 to 2008 and beyond

E-Discovery

The World in Law and Tech/AI in 2016

Source: Goodman, Joanna, Robots in Law: How Artificial Intelligence is Transforming Legal Services (ARK Group 2016)

STATISTICS- SMARTPHONES

- 2013 – 181.4 million United States users
- 2017- was expected to climb to 222.4 million users
- 2021- 298 million
- 2024- 308 million
- Current population – 330 million
- Thumb Drives
- HDD Disks
- Smart Watches
- Basic Office Equipment

- Phones
- Implant Devices

Name Badges

- WIVB Feature
- Boston
- Humanyze badges
- Bluetooth
- Infrared
- Motion sensors
- Microphones

While Technology and Data Proliferates

The Hackers have come alive

Some sobering numbers from ITRC

- January 1, 2005 to March 31, 2020
- Number of Breaches = 11,556
- Number of Records = 1,663,188,482
-
- * ITRC no longer lists going back to 2005.
-

Industries Most Impacted by Breaches

- Healthcare
- Retail
- Finance
- Education

Industries Most Impacted by Breaches

- 2019 data (Baker Hostetler Data Security Incident Response Report):

- 25% Healthcare (including Biotech & Pharma)
- 17% Finance & Insurance
- 17% Business & Professional Services (including Engineering & Transportation)
- 12% Retail, Restaurant & Hospitality (including Media & Entertainment)
- 11% Education 11% Other 5% Government 1% Nonprofit 1% Energy

Why Do We as Lawyers Care?

The Parade of Horribles

- Inadvertence, mistake: Law Firm's Documents Dumped in Trash, Gainesville Times, October 16, 2011.
- Readers of WSJ on 3/29/2016: "Hackers Breach Law Firms, Including Cravath and Weil Gotshal" – deal pressers
- Edelson Law putative class action against Johnson & Bell (N.D. IL 2016)
- Real Estate closings/class action- wire instead of check
- You have all gotten e-mails from people that you have never heard of looking for representation, "to collect a past due bill let me know if your firm can handle" or "Legal representation based on breach of sale contract. I wait to hear from you if your firm can take on my case. Just click this link for more information about the case."

More recent

- Law Firm Cyber Breach May Impact 23K, Including Financial Institution Client's Customers- Stevens & Lee- 2022- J. Morgan and I did deal

Clients

- "Operation CuckooBees"
- Massive Chinese theft

Why?

Are you worried?

Should You Be?

Some Initial Thoughts

- There is no need for a lawyer to become an IT professional.
- Dangerous, and stick to our knitting
- Know what you don't know
- Call on help from professionals

Rules of Professional Conduct

- Some Relevant Ethical Rules
- Illinois Rule 1.1 (Competence)
- Illinois Rule 1.6 (Confidentiality of Information)
- Illinois Rule 1.4 (Communication)
- Illinois Rules 1.15, 1.16 (Duty to Safeguard Client Property)
- Illinois Rules 5.1, 5.2, 5.3 (Duty of Supervision)

Illinois Rule 1.1

Duty of Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Duty of Competence

- Rule 1.1 includes competence in selecting and using technology. It requires attorneys who lack the necessary technical competence for security (many, if not most attorneys) to consult with qualified people who have the requisite expertise.
- Comment [8] MRPC: To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Relevant Laws Relating to Legal Obligations

- All 50 states and DC have adopted ABA Model Rule 1.1 (either in whole or with modifications).
- At least 36 states have adopted Comment 8.
- Michigan and Tech
- Rule 1.1, Maintaining Competence
- including the knowledge and skills regarding existing and developing technology that are reasonably necessary to provide competent representation for the client in a particular matter.
- Nevada and Comments
- “The preamble and comments to the ABA Model Rules of Professional Conduct are not enacted by this Rule but may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments.”
- Just the rule, general competence.

Florida Rule

- September 30, 2016- every lawyer admitted to Florida Bar must take three hours of technology-related CLE during a three-year cycle.
- 9/20/2018- North Carolina Supreme Court approved the requirement

ABC'S OF CYBER

AI

Bitcoin

Cyber insurance

Data privacy

E-discovery and e-sign

Fintech

GDPR

Health information

IOT

Jurisdiction/Japan

Korea

Litecoin

Malaware

Notice of Breach

Online privacy

Privacy Shield

Quotes

Ransomware

Soviet Union aka Russia

Target

Uganda

Victims

Wannacry ransomware

XHTML

Yahoo!

Zip files

Duty of Confidentiality

- Illinois Rule 1.6(e)(amended October 15, 2015, effective January 1, 2016)

- – “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to information relating to the representation of a client.”
- Comments to Illinois Rule 1.6
- Acting Competently to Preserve Confidentiality
- [19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.
- Comment to Model Rule 1.6, now in comments to Illinois Rule, effective January 1, 2016
- Acting Competently to Preserve Confidentiality
- [18] Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

What does your client want?

- Illinois Rule 1.6, Comment [19]:
- “A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.”

The Duties of Competence and Confidentiality

Ariz. Bar. Op. 09-04

- Lawyer encrypted files, installed layers of password protection, randomly generated folder names and passwords, and converted each document to PDF format that required password.
- “In satisfying the duty to take reasonable security precautions, lawyers should consider firewalls, password protection schemes, encryption, anti-virus measures, etc.”
- The duty “does not require a guarantee that the system will be invulnerable to unauthorized access.”

Duty to Safeguard Client Property

Illinois RPC 1.15(a)

“A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. ... Other property shall be identified as such and appropriately safeguarded.”

ABA Formal Opinion 477 (May 11, 2017)

Unencrypted generally okay

But special circumstances/laws may require.

Lawyer must make “reasonable efforts to prevent inadvertent or unauthorized access”

Includes a “reasonable efforts” balancing

Concludes that: “A lawyer generally may transmit information relating to the representation of a client over the Internet....where...has undertaken reasonable efforts....”

Nuts and Bolts of ABA Formal Opinion 477

What does it say?

What if anything does it mandate?

Does it change the landscape?

What should lawyers do to address?

ABA Formal Opinion 483 (October 10, 2018)

“Lawyer’s Obligations After an Electronic Data Breach or Cyberattack,”
available at
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_op_483.pdf

Imposes obligations on lawyers to advise clients of breaches as part of duty to keep clients informed about matters.

Notes that “compliance with statutes such as state breach notification laws, HIPAA, or the Gramm-Leach-Bliley Act does not necessarily achieve compliance with ethics obligations.”

483- reminder of obligation

“Applying this reasoning, and based on lawyers’ obligations (i) to use technology competently to safeguard confidential information against unauthorized access or loss, and (ii) to supervise lawyers and staff, the Committee concludes that lawyers must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data and the use of data. Without such a requirement, a lawyer’s recognition of any data breach could be relegated to happenstance --- and the lawyer might not identify whether a breach has occurred, whether further action is warranted, whether employees are adhering to the law firm’s cybersecurity policies and procedures so that the lawyers and the firm are in compliance with their ethical duties, and how and when the lawyer must take further action under other regulatory and legal provisions.”

Again, not to be an IT expert, but have to be on lookout for risks!

ABA 95-398

[95-398.authcheckdam.pdf \(americanbar.org\)](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/95-398.authcheckdam.pdf)

Access of Nonlawyers to a Lawyer’s Data Base

A lawyer who gives a computer maintenance company access to information in client files must make reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of client information. Should a significant breach of confidentiality occur, the lawyer may be obligated to disclose it to the client.

Termination of Representation

Illinois RPC 1.16(d)

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as 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 lawyer may retain papers relating to the client to the extent permitted by other law.”

Other Applicable Rules

Duty to supervise (Rules 5.1 and 5.3)

Illinois Rule 5.1(a):

“A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.”

Duty to supervise (Rules 5.1, 5.2 and 5.3)

Illinois Rule 5.3:

“With respect to a nonlawyer employed or retained by or associated with a lawyer:

The lawyer, and, in a law firm, each partner, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer and the firm;

Warning to client?

You are obligated under Rule 1.4 to warn your client about the risk of using electronic communications where there is a significant risk that a 3d party may gain access.

E.g., when representing a company employee, employer could read/access the email.

And a warning may not be enough – you may be required to recommend to the client methods of ensuring that electronic communications remain confidential.

[ABA Formal Op. 11-459 \(8/4/11\)](#)

Texas Opinion No. 648

And that's not all...

Duty to Former clients?

Model Rule 1.9(c)

“[A] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter ... reveal information relating to the representation except as these Rules would permit or require with respect to a client.”

What laws might be relevant?

- Mass. Security Regulations (201 CMR 17.00)
- Data Breach Notification laws (50 states, including Illinois have these laws) HIPAA/HITECH
- Gramm Leach Bliley
- Data Security Laws
- Fiduciary Duty?
- Privacy laws- Maine, CA, UT, CO, VA, CT, IL BIPA, etc.
- Malpractice laws?

Applying the Rules

- Your emails?
- Your trash?
- Your desk and office?

- Working at a coffee shop?
- Your workspace at home?
- Portable data storage devices?
- Your laptop?
- Working in the “cloud”?
- Your laptops/other portables
- Recent situation:
 - Laptop of vendor stolen from locked car
 - Password and encryption key in bag
 - Things saved locally to laptop- client
 - Trash and recycling
 - Shred everything privileged or confidential.
- When in doubt, or when you don’t know:
- Shred.

Your office and your files

Are you working with hard copies of sensitive information, like Protected Health Information (PHI) or Personally Identifiable Information (PII)?

Can you use the Wifi at Starbucks?

THE STATE BAR OF CALIFORNIA

FORMAL OPINION NO. 2010-179

Short answer: probably, if you take appropriate steps.

Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client’s instructions and circumstances, such as access by others to the client’s devices and communications.

Can you use the Wifi at Starbucks?

THE STATE BAR OF CALIFORNIA

FORMAL OPINION NO. 2010-179

Attorney goes to local coffee shop and uses public Wi-Fi to work on firm laptop.

California state bar applied the multi-factor test, and said, not, an attorney risks violating his professional obligations unless

BUT... "With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client's matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so."

What about the Wifi at home?

THE STATE BAR OF CALIFORNIA

FORMAL OPINION NO. 2010-179

"[I]f Attorney's personal wireless system has been configured with appropriate security features, the Committee does not believe that Attorney would violate his duties of confidentiality and competence by working on Client's matter at home. Otherwise, Attorney may need to notify Client of the risks and seek her informed consent, as with the public wireless connection."

Citrix: Citrix XenApp offers "end to end" security and is generally considered secure.

Portable Electronic Storage Devices

Duties of Confidentiality And Competence

What is an attorney's obligation with respect to information stored on portable electronic storage devices, such as thumb drives, CD discs, and back-up storage drives?

What are "reasonable steps"?

What's in your hard drive?

Cloud

"I says, Hey! You! Get off of my cloud

Hey! You! Get off of my cloud

Hey! You! Get off of my cloud

Don't hang around 'cause two's a crowd." - Get Off of My Cloud

Working in the cloud?

Numerous ethical opinions relevant to this topic:

- ISBA Ethics Op. 10-01 (July 2009)
- ISBA Ethics Op. 16-06 (October 2016)
- Affirms ability to use, but reasonable steps
- Pennsylvania Formal Opinion 2011-200
- North Carolina 2011 Formal Op. 6
- New York State Bar Ethics Opinion 842
- Alabama Ethics Opinion 2010-2
- Washington State Bar Advisory Opinion 2215
- Iowa Bar Ethic Opinion 11-01
- Vermont Ethics Opinion 2010-6
- Massachusetts Bar Ethics Opinion 12-03
- New Hampshire Ethics Committee Advisory Op. #2012-13/4
- ISBA and Cloud
- July 2009, Opinion No. 10-01- off-site network administrator
- 2016: 16-06.pdf (isba.org)
- Use of cloud vendor
- Focused on 1.1 and 1.16(e)

Did attorney in selecting vendor act “reasonably and competently”?

Law Firm Policies

- Incident response plan
- Password policies
- Designation of security official
- Security risk analysis
- Workstation use
- Device and media controls

A Few Words on Lawyers and Cyber Insurance

- COVID-19
- Remoteness
- Collaboration tools
- WFH
- Also, considerations of whether transacting law in state not licensed in
- COVID-19
- The physical virus is not the only potential harm
- Remote commuting presents challenges
- Supervise from afar?
- Confidentiality?
- BYOD?
- Online solutions for meetings?
- <https://media.defense.gov/2020/Apr/24/2002288653/-1/-1/0/CSI-SELECTING-AND-USING-COLLABORATION-SERVICES-SECURELY-SHORT-FINAL.PDF>

Recent ABA opinions on remote

ABA 495- Unauthorized Practice of Law and Working Remotely
ABA 498- Ethics Rules Most Likely to Be Violated by Remote Practice
Again, back to technology competence
NYSBA Opinion 1240- Opn-1240-with-letterhead.pdf (nysba.org)

Smartphones and contacts access.

"If 'contacts' on a lawyer's smartphone include any client whose identity or other information is confidential under Rule 1.6, then the lawyer may not consent to share contacts with a smartphone app unless the lawyer concludes that no human being will view that confidential information, and that the information will not be sold or transferred to additional third parties, without the client's consent."

Sometimes, it is not sophisticated

Email spoofing

Fake checks- Law firm scammed by fake client scheme eats nearly \$200K after taking a case, demanding payment of a debt, getting payment and success for the client, until it turned out to be an unfortunate, but all too common scam. That payment was a fake check, but its good faith deposit by Wells Fargo was legit, and the resulting wire transfer into the ether happened.

CONCLUSION

These words define not only successful businesses, but also the law firm that represents them. Howard & Howard is the law firm businesses use because our vision of success is not lavishly decorated offices. The attorneys at Howard & Howard use a different measure -

Creativity. Results. Practicality. Solutions.

Your Success.

The Model Rules and The Illinois Rules - Compared And Contrasted

Overall the ABA Model Rules and the Illinois Rules of Professional Conduct are very similar. While Illinois adopted the majority of the Model Rules, they merged the Illinois Code into our existing rules as well. What we end up with is a set of rules, generally more elaborate than the ABA Model Rules.

There are some general differences between the two sets of rules that are worth noting. Typically, where the model rules require the attorney to “know” the Illinois Rules use the standard to “know or reasonably should know.” In both the Model Rules and Illinois rules “Knowingly,” “known,” or “knows” is defined as “actual knowledge of the fact in question.” See Terminology section of Model Rules; Abbreviations, References and Terminology of Illinois Rules. The terminology section of the Illinois Rules explains ““Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.” This adds a burden to most of the Illinois rules. Under the Model Rules, attorneys must have actual knowledge. In Illinois attorneys may be culpable for a rule violation even if they don’t have actual knowledge. If a prudent and competent attorney would have had the knowledge, the attorney can be found in violation of the Illinois Rules.

In many cases, the Model Rules add a writing requirement. So for example in Rule 1.7 under the Model Rules, the attorney must obtain informed consent confirmed in writing to meet the disclosure requirements for a conflict of interest. MRPC, 1.7(b)(3). Whereas in the corresponding Illinois Rule, the attorney is only obligated to obtain the client’s consent after disclosure. IRPC, 1.7(a)(2). With regards to disclosures, the Model Rules are more conservative and require a written component. This offers a measure of protection for the attorney and an attorney is probably well served to abide by the written requirement of the Model Rules even though unnecessary pursuant to the Illinois Rules.

Please note for the following discussion I have omitted rules that are identical or substantially similar. I have also omitted a discussion of rules that were not adopted in Illinois. The ABA Model Rules of Professional Conduct and the Illinois Rules of Professional Conduct can be found in the Appendix. Attorneys practicing in Illinois should at least take the time to thoroughly read the Illinois Rules. Remember, “ignorance of the Code is no excuse for attorney misconduct.” Vrdolyak, 560 N.E.2d at 845.

Rule 1

Rule 1 under both codes addresses the Client-Lawyer Relationship. Rule 1.1 is titled Competence. The rule in Illinois requires lawyers to provide competent

representation (IRPC 1.1(a)). “Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.” IRPC 1.1(a). If a lawyer knows he is not competent on a certain subject, he needs the assistance of another lawyer who is competent. IRPC 1.1(b). However, if he obtains assistance from outside counsel, he must have his client’s permission to do so. IRPC 1.1(c). Illinois Rule 1.1(a) is identical to the ABA Model Rule 1.1 on competence. The difference between the two sets of rules is Illinois’ addition of 1.1(b) and 1.1(c). The addition of 1.1(b) and 1.1(c) serve to elaborate on what is competent representation and how a lawyer should handle a situation in which he has a client whose needs may be outside the scope of his knowledge.

Rule 1.2 is titled Scope of Representation. This rule mandates an attorney to listen to his client and follow the client’s decisions about his representation and what is to be accomplished. IRPC 1.2(a). Illinois included all of the Model Rule requirements but elaborated with additional details from the Illinois Code. Subsections (e), (f), (g), (h) and (i) are not in the Model Rules. These sections prohibit an attorney from threatening criminal charges or disciplinary action to obtain an advantage in a civil matter, filing suit simply to harass or injure another party, advancing a claim if he knows it’s not supported by the law, failing to disclose information he is required by law to reveal, protecting a client who refuses to rectify a fraud he committed, failing to reveal a fraud committed by someone other than the client, and assisting a client with something not permitted by the rules. IRPC 1.2(e),(f)(1)(2)(3),(g),(h), (i).

The next rule where the Illinois Rules and the Model Rules substantially differ is Rule 1.5 regarding fees. The Model Rules Rule 1.5(a) declares “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expense.” As opposed to Illinois, much briefer “A lawyer’s fees must be reasonable.” The factors to be used to determine a reasonable fee are identical in both sets of rules and include items like the time and labor required 1.5(a)(1), customary fees for similar work 1.5(a)(3) and whether the fee is fixed or contingent. 1.5(a)(8). See Rule 1.5 for a complete list of all the relevant factors.

Rule 1.5(b) requires an attorney to inform the client about the basis or rate of the fee within a reasonable time after the representation begins. The Model Rules adds that the basis of the fee be communicated to the client “preferably in writing.” MRPC 1.5(b). Since the requirement is “preferable”, it appears it is not a breach of the Model Rules to communicate with the client verbally regarding the fee structure. The Model Rules also add “Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.” MRPC 1.5(b). Regarding the communication of fees, the Model Rules are far more focused on the understanding of the fees involved with his or her representation.

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

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

Rule 1.6

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

The Illinois rules indicate a time frame, “a lawyer shall not (disclose) during or after the termination of the professional relationship.” The Model Rules remain silent on the issue of disclosure after the attorney-client relationship has been terminated. Both rules permit disclosure with client consent. Both rules allow disclosure to prevent death or serious bodily harm or to comply with a court order. The Model Rules speak to permissible disclosure when the client is committing a crime or fraud and the attorney has unwittingly participated. The Illinois Rules focuses only on the intention of a client to commit a crime (the attorney's unwitting participation has been omitted). In Illinois, disclosure is also permissible if necessary to collect one's fee. Under both sets of rules disclosure is allowed to defend oneself against claims of misconduct. The Illinois Rules also address the Lawyers Assistance Programs and indicate that participant's disclosures fall under the protection of this rule.

Rule 1.7

Rule 1.7 addresses Conflict of Interests. Both sets of Rules prohibit an attorney from representing a client in a concurrent conflict of interest. Such a conflict exists when one client's representation is directly adverse to another client or if there is a risk that representation will be limited by the lawyer's responsibilities to another client. Both rules allow for representation in cases where the lawyer reasonably believes that he can provide competent representation to each client, and each affected client gives informed consent. MRPC 1.7(b), IRPC 1.7(a)(1)(2). The Model Rules add that the attorney can provide the representation so long as it is not prohibited by law and it does not involve one client asserting a claim against another client. MRPC 1.7(b). The Illinois Rule adds subsection (c) which explains what the disclosure must include – the implications of common representation and the advantages and risks involved. IRPC 1.7(c).

With regards to Conflict of Interests for Current Clients, Rule 1.8, the Illinois Rules are significantly different than the Model Rules. The Model Rules prohibit transactions between attorneys and their current clients unless the terms are fair and reasonable and disclosed in writing. MRPC 1.8(a)(1), the client has been directed in writing to obtain independent counsel MRPC 1.8(a)(2) and the client gives his informed consent in writing. MRPC 1.8(a)(3). The Illinois rules prohibit such business transaction if the lawyer knows or reasonably should know that the lawyer and his clients interests may conflict or the client expects the lawyer to use his professional judgment to protect the client. IRPC 1.8(a)(1) and (2). Illinois does not require written consent on the part of the client.

Many of subsections of this rule are substantially similar in both sets of rules. However in Illinois an attorney can't provide financial assistance with litigation unless the client remains ultimately liable. IRPC 1.8(d)(1). Additionally, in Illinois there is a prohibition from negotiating an agreement limiting a client's right to file a claim with the ARDC. IRPC 1.8(h). Likewise the Model Rules has a few additions not found in Illinois. The Model Rules adds subsection (j) which prohibits an attorney from having sexual relations with a client unless the sexual relationship preceded the attorney-client relationship. MRPC 1.8(j). Model Rules also adds subsection (k) which applies all the rules in this general rule to all members of a law firm, if it effects one, it effects them all. MRPC 1.8(k).

Rule 1.9

Rule 1.9 is titled Conflict of Interest: Former Client. The Illinois rules prohibit an attorney from representing a person with interests conflicting with the interests of a former client unless the former client consents after disclosure. IRPC

1.9(a)(1) The Model Rules require “informed consent, confirmed in writing.” MRPC 1.9(a).

The Model Rules adds subsection (b) which addresses when a lawyer leaves a firm. In such a case, the lawyer can not represent someone in the same or substantially related matter when his prior law firm had represented someone with materially adverse interests. MRPC 1.9(b). Additionally, such representation is precluded if the lawyer has obtained information protected by Rule 1.6 and 1.9 unless the former client gives informed consent confirmed in writing. MRPC 1.9(b)(2). The Illinois rules do not speak to this issue. The remaining parts of the rules are substantially similar.

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

In Illinois, subsection (b) addresses new lawyers to a firm. IRPC 1.10(b). This issue is not addressed in the model rules. The Model Rules adds subsection (d) directing readers to rule 1.11 with issues regarding special conflicts for current or former government lawyers. MRPC 1.10(d). The Illinois Rules adds subsection (e) which addresses how to screen a law firm lawyer from a case to prevent a conflict when possible. IRPC 1.10(e). Any subsections not addressed are similar in both rules.

Rule 1.13 addresses the organization as client. Subsections (a) are identical in the Illinois and Model Rules. Model Rules subsection (f) is same as IL subsection (d) and Model Rules (g) is same as Illinois subsection (e). This rule is slightly different in the middle. Under the Model Rules, an attorney can reveal information otherwise protected under Rule 1.6 if the highest authority in the organization fails or refuses to take action to prevent a legal violation and the lawyer believes that the legal violation will result in substantial injury to the organization. MRPC 1.13(c)(1)(2). In Illinois, under the same circumstances, the lawyer may resign. IRPC 1.13(c).

The Model Rules prohibit a lawyer from disclosing information if he is defending a claim arising out of an alleged violation of law. MRPC 1.13(d). The Illinois rules provide a description about how to proceed, if he has information that someone in the organization is violating the law which is likely to substantially injure the organization. IRPC 1.13(b). The Model Rules

simply state that the lawyer shall refer the matter to the highest authority in the organization. MRPC 1.13(b).

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

Rule 1.15 speaks to the issue of safekeeping property. Illinois sections (a) and (b) have identical counterparts in the Model Rules. Illinois section (c) has a substantially similar counterpart in the Model Rules. The Model Rules permits lawyers to deposit their own funds in the trust account to pay bank service charges. MRPC 1.15(b). Lawyers can also deposit prepaid legal fees and expenses and withdraw those funds as the fees are earned or expenses incurred. MRPC 1.15(c).

Section (d) of the Illinois Rules require attorneys to designate the Lawyers Trust Accounts (IOLTA) program as the beneficiary of all income derived from nominal or short-term account. IRPC 1.15(d). The IOLTA program was established so that any interest earned on these small and short term accounts can be used to sponsor non-profit legal aid organizations. (<http://www.law.cornell.edu/ethics/il/> - See the Narrative for Rule 1.15). The rules specifically state that an attorney will not be accused of professional misconduct when using his judgment as to what is a nominal or short term fund. IRPC 1.15(d)(5).

Interestingly, Justice Hipple wrote a dissent about the IOLTA program arguing that it is the equivalent of looting. IRPC, Rule 1.15 Hipple’s Dissent. He argued that this program is essentially “the taking private property for public use without just compensation.” Id. The fact that the money is taken with philanthropic goals in mind, does not give the court the authority to take interest earned on client funds and distribute those funds to other people. Id. “As income produced by clients’ funds, this interest, however small, belongs to the clients, and its assignment by the state to others represents an unconstitutional taking of property.” Id.

Section G of Rule 1.5 in Illinois refers to Real Estate Funds Accounts also known as REFAs. REFAs are segregated accounts used by Real Estate lawyers which allow them to “handle the receipt and disbursement of funds deposited but not collected.” (<http://www.law.cornell.edu/ethics/il/> - See the Narrative for Rule 1.15). This commonly arises in real estate closings where the attorney may have to accept and disseminate uncleared funds. Id. REFAs offer a solution for those

situations allowing the attorney to act within the confines of Rule 1.15 as long as he has previously established a REFA account. *Id.*

In order to meet the requirements of section (g), the attorney must be acting as a closing agent or must meet the "good-funds" requirements. IRPC (g)(1) (2). The good funds requirement is where the lawyer directs the bank in writing to honor all disbursements up to a specified amount at least the amount deposited in good funds. IRPC (g)(2). The rule goes on to enumerated all the sources of "good funds" IRPC 1.15(g)(2)(a-g). The Model Rules do not speak to funds similar to the IOLTA or REFA.

Overall the feelings of both the Model Rule 1.16 and the Illinois Rule 1.16 are substantially similar although worded quite differently. The bottom line is that under both rules attorneys may withdraw if continued representation would yield a Rule violation, if the attorney is unable to continue representation due to a physical or mental impairment, if the lawyer is discharged, if the client acting in an illegal manner or if he is not paying his fees. IRPC 1.16(a)(1)-(4), MRPC(a)(1)-(3). Illinois adds that withdrawal is permissible if the client is bringing the case to harass or maliciously injure someone. IRPC 1.16(a)(1). Both require that attorneys comply with the law regarding the proper means to effectuate a withdrawal and refund any unearned fees that have been advanced. IRPC 1.16(d)(e), MRPC(c)(d).

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

The subject of Part Three of the Model Rules and Illinois Rules is Counselors as Advocate. Under this section, the first rule where the Model Rules and the Illinois Rules substantially differ is Rule 3.3 Conduct. The Illinois Rule is far more detailed. Both rules prohibit a lawyer from making a false statement of fact or law to a tribunal. IRPC 3.3(a)(1), MRPC 3.3(a)(1). The Model Rules also requires the lawyer to correct a false statement made before a tribunal. MRPC 3.3(a)(1). They both require an attorney to disclose legal authority even where it is directly adverse to his client's position. IRPC 3.3(a)(3), MRPC 3.3(a)(2). Both rules prohibit an attorney from offering evidence he knows to be false. IRPC 3.3(a)(4), MRPC 3.3(a)(3). In Illinois if the attorney offers evidence and later learns it's false, the rule requires the lawyer to take "reasonable remedial measures." IRPC 3.3(a)(4). The Model Rule continues that remedial measures include "disclosure to the tribunal" if necessary. MRPC 3.3(a)(3).

Both rules allow an attorney to refuse to offer evidence he reasonably believes is false. IRPC 3.3(c), MRPC 3.3(a)(3). Additionally both rules require a lawyers in ex parte proceedings to inform the tribunal of all material facts he knows even if they are adverse so that the tribunal can make an informed decision. IRPC 3.3(d)

MRPC 3.3(d). The remaining sections found in the Illinois rule are based on the Illinois Code of Professional Conduct. <http://www.law.cornell.edu/ethics/il/> - See the Narrative for Rule 3.3. For additional discussion of the Rule 3.3 requirements, see the section in this paper on the Attorney's duty to the court.

Rule 3.4

Rule 3.4 is titled Fairness to Opposing Party and Counsel. There rules are very similar except that the Model Rules has two additional subsections that were not adopted in Illinois. The Model Rules add that lawyers shall not make frivolous discovery requests or fail to comply with legal discovery requests in pre-trial proceedings. MRPC 3.4(d). The Model Rules also add that in a trial, a lawyer shall not allude to irrelevant matters, "assert personal knowledge of facts in issue...or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." MRPC 3.4(e). The drafters of the Illinois rules rejected these subsections because the tribunal would be a better forum to address these issues. http://www.law.cornell.edu/ethics/il/narr/IL_NARR_3.HTM#3.4:100.

Rule 3.5

Illinois rule 3.5 on Impartiality and Decorum of the Tribunal is far more in depth than its Model Rule counterpart incorporating many aspects of the Illinois Code. The Model Rules prohibit an attorney from trying to influence or communicate ex parte with a judge, juror, or prospective juror. MRPC 3.5(a) and (b). Additionally, once the jury has been discharged, an attorney shall not communicate with a juror or prospective juror if prohibited by law, MRPC 3.5(c)(1), if the juror has made known he does not want to communicate MRPC 3.5(c)(2), or the communication is a misrepresentation, coercion, duress or harassment. MRPC 3.5(c)(3). Lastly, an attorney is prohibited from engaging in "conduct intended to disrupt a tribunal MRPC 3.5(d).

The Illinois Rules start with the general notion that before a trial, a lawyer shall not communication with anyone he knows is a member of the venire from which the jury will be selected. IRPC 3.5(a). Once the trial has begun, a lawyer shall not communicate with a juror . IRPC 3.5(b)(1). Even if it is not his case, a lawyer is prohibited from talking with a juror regarding the case. IRPC 3.5(b)(2). Although, a lawyer is permitted to talk with members of the jury in the "course of official proceedings." IRPC 3.5(c). Communications to harass, embarrass or influence the jurors as well as "vexatious or harassing investigation" of the jurors are prohibited. IRPC 3.5(d) and (e). All the rules of 3.5 apply to investigations of jurors families. IRPC 3.5(f). If a lawyer learns of improper conduct of a juror or his family, he is to reveal it promptly. IRPC 3.5(g). If a lawyer makes a gift to a judge or employee of a tribunal it must comply with the Code of Judicial

Conduct. IRPC 3.5(h). A lawyer shall not communicate with the judge in a case the lawyer is trying unless it is during the course of official proceedings, IRPC 3.5(i)(1), the communication is in writing and given to opposing counsel as well, IRPC 3.5(i)(2), an oral communication is permissible if opposing counsel receives adequate notice, IRPC 3.5(i)(3), or if otherwise permitted by law. IRPC 3.5(i)(4).

Rule 3.6 regarding Trial Publicity is identical in both sets of rules except that the Illinois drafters added subsection (b). This subsection enumerates the subjects that would pose a serious threat to the fairness of a proceeding and as such should not be disseminated to the public. These subjects include a witness's identity and expected testimony. [IRPC 3.6\(b\)\(1\), possibility of a guilty pleas in a criminal case, IRPC 3.6\(b\)\(2\), and one's opinion about guilt or innocence, IRPC 3.6\(b\)\(3\)](#) [For a complete list see the Illinois Model Rule 3.6 \(b\) located in the Appendix.](#)

Rule 3.8

Rule 3.8 addresses the Special Responsibilities of a Prosecutor. The Illinois rules begin with the noble declaration, "The duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict." IRPC 3.8(a). This broad statement is not included in the Model Rules. "Paragraph (a) of Rule 3.8 is intended to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably." Committee Comments to IRPC Rule 3.8.

The Illinois rules continues with a broader inclusion of to whom this rule applies. In Illinois, this rule is directed to a public prosecutor or other government lawyer. IRPC 3.8(a). Whereas the Model Rules are directed to prosecutors. MRPC 3.8(a). Both rules require that these attorney's do not prosecute a charge they know (and in IL reasonably should know) is not supported by probable cause. MRPC 3.8(a), IRPC 3.8(b). Both require the disclosure of adverse and mitigating evidence. IRPC 3.8(c), MRPC 3.8(d). Both prohibit extrajudicial statements if they would result in public condemnation of the accused or if they are forbidden under rule 3.6. MRPC 3.8(f), IRPC 3.8(d) (e). However, the Model Rules adds that the prosecutor shall make sure the accused knows of his right to and how to obtain counsel. MRPC 3.8(b). Also, the Model Rules speaks to prevent an unrepresented accused person from waiving pretrial rights. MRPC 3.8(c). Lastly, the Model Rules prohibits the subpoena of an attorney to present evidence about a past or present client unless the evidence is not protected by a privilege, MRPC 3.8(e)(i) the evidence is essential to complete an ongoing investigation, MRPC 3.8(e)(ii) or there is no other way to get the information. MRPC 3.8(e)(iii).

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

Rule 4.3

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

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

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

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

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

The Model Rules and Illinois Rules are similar with regards to Rule 7.2 Advertising. In Illinois, a copy of all advertisement material must be kept for 3 years after its last dissemination. IRPC 7.2(a)(1). The Model Rules have no such

requirement. The Model Rules expressly permits reciprocal referral agreements so long as they are not exclusive and the client is told of the agreement. MRPC 7.1(b)(4). The Illinois Rules do not speak to this issue.

Rule 7.3

Rule 7.3 addresses direct contact with prospective clients. Both Illinois and the model rules prohibit a lawyer from soliciting a client if his main motive is pecuniary gain. IRPC 7.3. MRPC 7.3(a). The exception is if the contact is a relative, friend or they have prior relationship. IRPC 7.3(a)(1). MRPC 7.3(a)(2). Illinois extends the prohibition on solicitation if the lawyer knows or should have known that the person solicited does not have physical or mental state to exercise reasonable judgment in employing a lawyer. IRPC 7.3(b)(1). Additionally, both sets of rules prohibit solicitation if the person has made it known he does not want to be solicited or solicitation involves coercion, duress or harassment. . IRPC 7.3(b)(2) and (3) MRPC 7.3(b)(1) and (2). Both sets of rules require that envelopes be labeled as advertising material when appropriate. IRPC 7.3(a)(2) MRPC 7.3(c). Illinois allows attorneys to utilize services for self promotion such as charitable legal services organization or a bona fide political, social, civic, charitable, religious, fraternal, employee or trade organization promote the lawyer. IRPC 7.3(a)(3).

Rule 7.4

Rule 7.4 addresses communication of fields of practice. Both sets of rules are concerned with an attorney accurately communicating his or her field of expertise. The Model Rules allow an attorney to communicate his field of expertise. MRPC 7.4(a). For example, if he is a patent attorney admitted by United States Patent and Trademark Office, he can use the designation "Patent Attorney" MRPC 7.4(b). Similarly, if he is engaged in Admiralty practice, he may use designation "Admiralty" or "Proctor in Admiralty." MRPC 7.4(c). Lastly, an attorney cannot state or imply he is certified as a specialist unless he is certified by an organization that is approved by state authority or the ABA and the name of certifying organization is identified. MRPC 7.4(d)(1), (2).

In Illinois, a lawyer or firm can designate a specialty and describe legal matters they'll accept. IRPC 7.4. Just like in the Model Rules, an attorney admitted before United States Patent and Trademark office can use "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney," IRPC 7.4(b)(1) or if in admiralty can use "Admiralty," "Proctor in Admiralty" or "Admiralty Lawyer," IRPC 7.4(b)(3). Unlike the Model Rules, the Illinois rules also account for attorneys engaged in trademark practice and they are allowed to use the terms "Trademarks," "Trademark Attorney" or "Trademark Lawyer." IRPC 7.4(b)(2). If using the term certified, specialist or expert must be truthful

and verifiable and must state that the Illinois Supreme Court does not recognize such certifications for specialties in practice of law. IRPC 7.4(c)(1), (2).

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

Rule 8.3

Rule 8.3 speaks to Reporting Professional Misconduct. The Model Rules are simple. If a lawyer knows that another lawyer or judge has violated the Rules of Professional Conduct so as to raise questions of their honesty, trustworthiness or fitness, the lawyer is to inform the appropriate professional authority. MRPC 8.3(a) , (b). The exception is if the disclosure would violate rule 1.6 or if the information was obtained when the lawyer or judge was attending a lawyers assistance program. MRPC 8.3(c). The Illinois rules are far more detailed. To begin with if a lawyer has knowledge of a violation that is not protected that another lawyer or judge has violated Rule 8.4(a)(3) or (4), the lawyer must report that knowledge. Rule 8.4(a)(3) addresses criminal acts reflecting honesty, trustworthiness or fitness and Rule 8.3(a)(4) addresses conduct involving dishonesty, fraud, deceit or misrepresentation. Additionally, the Illinois rules expressly command attorneys to cooperate with an investigative authority when asked about the conduct of lawyers or judges. IRPC 8.4(c). Lastly, the attorney must report to the ARDC if he has been disciplined by any body other than ARDC. IRPC 8.4(d).

Rule 8.4

The Illinois Rules are far more detailed related to Rule 8.4 on Misconduct. The Model Rules are all encompassed with in the Illinois Rule but the Illinois rule makes numerous additions. Both rules prohibit a lawyer from violating the rules, IRPC 8.4(a)(1), MRPC 8.4(a), from inducing or a helping another lawyer to violate the rules IRPC 8.4(a)(2), MRPC 8.4(a), from committing a criminal act reflecting poorly on the lawyers honesty, trustworthiness or fitness, IRPC 8.4(a)(3), MRPC 8.4(b), from dishonest, fraudulent, deceitful or misrepresenting behavior IRPC 8.4(a)(4), MRPC 8.4(c), inhibiting the administration of justice, IRPC 8.4(a)(5), MRPC 8.4(d), (Illinois elaborates on this subsection where the model rules remain silent. Illinois states that as part of this the lawyer can not treat litigants, jurors, witnesses, lawyers or others in a discriminatory fashion.), from indicating they can improperly influence a tribunal, legislative body,

government agency or official IRPC 8.4(a)(6), MRPC 8.4(e), and from helping (Model Rules has a knowingly helping standard) a judge to violate the rules. IRPC 8.4(a)(7), MRPC 8.4(f).

With that the Model Rule is complete but the Illinois rule continues on to prohibit a multitude of other potential misconduct by attorneys. Attorneys may not fail to repay an education loan in bad faith, IRPC 8.4(a)(8). Additionally, attorneys may not discriminate based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. IRPC 8.4(9)(a). Further, the Illinois rules include an entire subsection devoted to what lawyer who holds public offices shall not do. IRPC 8.4(b).

Support And Programs To Assist Attorneys

Often an ethical issue arises and the Illinois Rules of Professional Conduct are unclear as to how to proceed. The attorney can look to the ABA Model Rules and their comments for guidance but still may be unable to find a solution. At that point the attorney may want to contact the Ethics Inquiry Program created by the ARDC. The Ethics Inquiry Program provides research assistance and guidance regarding ethics issues. They do not accept e-mails or faxes but can be reached via telephone at 312-565-2600 or 800-826-8625.¹ The Commission will not keep a record of the caller's identity or the substance of the inquiry. The attorney can even remain anonymous and is urged to present the question hypothetically. Id.

Through this program, an Ethics attorney will hear the problem and assist in identifying the relevant Rules of Professional Conduct, case law or other sources to help resolve the issue.² Any information received through the Program is neither legal advice nor a binding advisory opinion. Id. It is legal research assistance only and the attorney is ultimately responsible for her own final judgment. The fact that the inquiry has been made or the response from the Ethics Inquiry attorneys will not be admissible in an attorney disciplinary proceeding. Id.

“The goal of the Program is to help lawyers understand their professional obligations and assist them in resolving important issues in their practice.³ The ARDC attorneys and paralegals that staff the program look to existing professional responsibility law, legal precedent, bar association ethics opinions, law review articles and practical guidelines to help attorneys answer their ethics

¹ <http://www.iardc.org/ethics.html#1>.

² <http://www.iardc.org/ethics.html#1>.

³ .” <http://www.iardc.org/ethics.html#1>

queries.⁴ The Program is also available to the general public if they have concerns about their attorney's behavior.⁵ Note that utilizing this service does not satisfy any requirements to report attorney misconduct.⁶

The Ethics Inquiry Program is just one of a few services offered by the ARDC to assist attorneys in discerning the Rules requirements. On the ARDC website – www.iardc.org – there is a section on rules and decisions. Attorneys can use this link to research independently or simply keep abreast of recent rulings. The ARDC website also has a Publication section which includes articles on the following topics:

- Avoiding ARDC Anxiety: A Disciplinary Primer
- Ten Ethics Questions From Young Lawyers
- Lawyer Admission and Regulation in Illinois
- Client Trust Account Handbook⁷

The ARDC is not the only organization offering assistance to attorneys' in Illinois. The Illinois State Bar Association in conjunction with the Chicago Bar Association established The Lawyers' Assistance Program (LAP). This not-for-profit organization works with Illinois legal professionals dealing with addiction issues or mental illness. LAP provides educational, informational and referral, peer assistance and intervention services. Acknowledging that ten to twenty percent of attorneys and judges suffer from alcohol and drug dependency or mental health problems and recognizing that these problems significantly impact a professional's performance, LAP works to protect the public, improve the integrity and reputation of the legal profession and saves the lives and practices of impaired attorneys.⁸

⁴ ." <http://www.iardc.org/ethics.html#1>

⁵ ." <http://www.iardc.org/ethics.html#1>

⁶ ." <http://www.iardc.org/ethics.html#1>.

⁷ See <http://www.iardc.org/pubs.html>.

⁸ www.illinoislap.org

Program Transcript

No transcript is available for this program.

Resources

Resources Specific to this Course

In addition, please see the resources cited within the material.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - <http://www.illinois.gov/jib>

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation -
www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org