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Illinois' New Legal Ethics Rules: A Disappointing Travail, A Lesson for All, and Their Impact on the Practice of Business and Commercial Law

Steven H. Resnicoff*

I. INTRODUCTION

Illinois business and commercial law attorneys must comply with legal ethics rules designed not only to promote the public interest in the efficient and effective administration of justice, but also to protect clients and other participants in the justice system. Whether an attorney engages in private practice, serves the public as an employee of a government or non-profit entity, or works as in-house counsel, these rules pervasively affect his professional activities, including his relationships with adversaries, employees, colleagues, judges, witnesses, and, of course, clients. Mastering these rules is essential to an attorney’s success at advancing his client’s and his firm’s interests, while protecting himself from possibly devastating disciplinary sanctions.

Prior to January 1, 2010, Illinois attorneys were obligated to comply with the Illinois Rules of Professional Conduct (“IRPC”). Effective January 1, 2010, the IRPC was replaced by the Illinois Rules of Professional Conduct of 2010,¹ pursuant to an Illinois Supreme Court order issued on July 1, 2009. This action, which constituted the first major overhaul of Illinois’ legal ethics rules since 1990,² was the culmination of over a decade of work by a variety of distinguished and well-intentioned actors and institutions. Nevertheless, the procedure was fundamentally flawed. It produced a variety of new rules that are either morally questionable or materially unclear, further burdening the practice of commercial law. It also failed to provide answers for many of the modern ethical issues that confront commercial lawyers.

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The process producing the new rules inexplicably proceeded at a snail's pace. It was a process in which the principal participants systematically shirked the moral responsibility for the rules proposed, misrepresented (and perhaps importantly misunderstood) the significance of the proposals, and failed adequately to document the rationales for their adoption. Part II examines and criticizes this process. The proposals themselves almost studiously avoided addressing many of the most vexing, pervasive, and long-standing of legal ethics issues as well as virtually all of the modern issues that have been addressed by the legal ethics opinions in various jurisdictions throughout the past ten years. Moreover, in a number of instances, the rules represent unjustifiably low ethical standards. Part III focuses on these substantive sins of omission and commission. Part IV highlights the process' failure to suggest any of a number of additional innovations that could have substantially improved the Illinois legal ethics system. By identifying and discussing the shortcomings in the Illinois experience, this article aspires to assist other jurisdictions to avoid these pitfalls. Finally, Part V highlights a few of the less problematic changes which, nonetheless, are of especial practical importance for attorneys.

II. THE PROCESS PRODUCING THE RULES

The process leading to the new Illinois ethics rules entailed an enormous amount of work by many exceptionally dedicated and capable people. Nevertheless, the process failed in several significant respects. First, it took a very long time – far too long, especially in light of the relatively little good that it accomplished. Second, it largely avoided moral responsibility for the rules that were adopted, deferring, instead, to the previous work of the American Bar Association. Third, it misrepresented the extent to which, and the ways in which, the new rules, and the comments adopted with them, constitute a change from the former Illinois ethics rules. Finally, the process produced a dismally poor historical record regarding the ethical pros and cons of many of the decisions that were explicitly or implicitly made.

3. In 2003, when a Joint Committee published its Final Report, its chairs authored an article entitled An Introduction to the New Illinois Rules of Professional Conduct. See Robert A. Creamer & Thomas P. Luning, An Introduction to the New Illinois Rules of Professional Conduct, Chi. Bar Ass'n Rec., Nov. 2003, at 25, 25. This title was overly optimistic. Not all of these proposed rules were ultimately adopted by the Illinois Supreme Court, and even those that were adopted would not become effective until January 1, 2010.
A. A Snail's Pace


In September 1999, even before the ABA Commission’s final report was submitted, the Illinois State Bar Association (“ISBA”) created a Special Committee on Ethics 2000 to monitor the Commission’s work and to evaluate possible changes to the Illinois Rules. In November 2002, the ISBA and the Chicago Bar Association (“CBA”) agreed to pursue this project through a Joint ISBA-CBA Committee on Ethics 2000 (the “Joint Committee”). The Joint Committee issued an initial “Final Report” to the ISBA and CBA on October 17, 2003. The Final Report, including a black-line copy of the proposed new rules, was posted on the ISBA and CBA websites. Those sites explained how people could submit comments on the report and the proposed rules. The Final Report was presented to the ISBA General Assembly at its November 7, 2003, mid-year meeting. The Assembly voted to allow the ISBA Board of Governors to vote on the report at its January 2004 meeting, but not to schedule a vote by the ISBA Assembly until June 2004. Announcements in the ISBA’s Bar News and the CBA’s E-News Bulletin solicited comments on the report and its pro-

6. Id.
7. Id.
9. Id.
10. Redmond, supra note 5, at 10.
12. Redmond, supra note 5, at 2.
posal by the end of December 2003.14 The proposed rules were the
subject of the CBA Young Lawyers' Section Seminar on December
16, 2003.15 An article describing the Joint Committee's work and re-
commendations was published in the November 2003 CBA Record.16
A Revised Final Report, responding to the input received from vari-
ous sources, was issued on January 8, 2004, and a Corrected Revised
Final Report was issued on April 1, 2004 (hereafter the "Corrected
Final Report").17

The Board of Managers of the CBA approved the Committee's Re-
vised Final Report on January 15, 2004.18 On March 26, 2004, the
ISBA Board of Governors voted to recommend to the ISBA Assem-
by that it adopt the report, and, on June 19, 2004, the ISBA Assembly
did so unanimously.19 Another article about the Joint Committee's
proposals appeared in the ISBA Journal in June 2004,20 and, on June
19, 2004, the ISBA Assembly unanimously approved it.21 Thus, ap-
proval by the CBA Board of Managers and the ISBA Board of Gover-
nors both preceded issuance of the Corrected Final Report on April 1,
2004. Neither articles by the Chairs of the Joint Committee, nor a
letter by the Chair of the Supreme Court Committee on Professional
Responsibility, indicates whether either of these bodies ever formally
acted on the Corrected Final Report.22

On April 30, 2004, even before approval by the ISBA Assembly, the
Corrected Final Report was submitted to the Illinois Supreme
Court,23 which, pursuant to Supreme Court Rule 3,24 referred it to the
Committee on Professional Responsibility. The Committee on Pro-
fessional Responsibility began its review of the Corrected Final Re-

14. Id.
15. Redmond, supra note 5, at 10.
16. Creamer & Luning, supra note 8, at 306.
17. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT (2004), available
at http://www.state.il.us/court/SupremeCourt/Public_Hearings/Rules/2007/ISBACBAFinal
Report.pdf (corrected Apr. 1, 2004). None of the materials on the websites of the Illinois Su-
preme Court or the Illinois Attorney Registration and Disciplinary Commission describe the
differences between the ISBA-CBA Revised Final Report and the ISBA-CBA Corrected Final
Report.
18. Creamer & Luning, supra note 8, at 306. It is unclear to the author whether the CBA
Board of Managers took any formal action with respect to the Special Committee's Corrected
22. See generally Redmond, supra note 5; Creamer & Luning, supra note 8.
23. Redmond, supra note 5. The Redmond Letter never mentions the fact that a Corrected
Final Report was ever issued. Nevertheless, the version of the Revised Final Report that is on
the ARDC website, along with the Redmond Letter, indicates that it was corrected on April 1,
2004.
port at its October 7, 2005 meeting.\textsuperscript{25} The Committee on Professional Responsibility reviewed the Report throughout eleven additional meetings through January 26, 2007.\textsuperscript{26} On February 20, 2007, the then Chair of that Committee submitted a letter to the Chair of the Illinois Supreme Court Rules Committee announcing that it had completed a "careful[ ] review[ ]" of the Corrected Final Report, presumably referring to the Corrected Final Report, and making recommendations with respect to the various proposed changes in the ethics rules.\textsuperscript{27}

The Supreme Court Rules Committee held a public hearing on the proposal submitted by the Committee on Professional Responsibility on September 14, 2007.\textsuperscript{28} An additional hearing was held on October 24, 2008, to consider revisions to proposed new rules 1.0, 1.8 and 5.7, as well as to consider proposed revisions, based on the Supreme Court's decision in \textit{Dowling v. Chicago Options Associates, Inc.},\textsuperscript{29} to rules 1.15 and 1.16.\textsuperscript{30} After one or both of these hearings, the Committee on Professional Responsibility may have provided additional input to the Rules Committee, but no other written statements by that Committee appear to be available on the Illinois Supreme Court website. The Illinois Supreme Court adopted the new rules on July 1, 2009, effective January 1, 2010.\textsuperscript{31} Thus, a proposal unanimously adopted by the ISBA Assembly and submitted to the Illinois Supreme Court in April 2004 gave rise to the adoption of rules – not all, of course, exactly as proposed – first effective more than five-and-a-half years later.

A variety of factors complicates, and renders inexact, any comparison between the responses of different states to the work of the ABA's Ethics 2000 Commission. Nevertheless, it is at least notewor-
othy that forty-one of the other forty-nine states responded by revising their ethics rules earlier than Illinois, and thirty-two of the forty-one implemented their changes two or more full years before Illinois.

Rendering the Illinois delay less explicable is the fact that the Joint Committee “determined early in its deliberations that it would recommend adoption of each ABA Model Rule and its Comments unless there was a compelling reason (major policy considerations, typically positions previously expressed by the Illinois Supreme Court) not to do so.”

Choosing this standard, while itself a questionable decision, as will be discussed below, dramatically reduced the difficulty of the Joint Committee’s task. Similarly, the Illinois Supreme Court’s Committee on Professional Responsibility limited its task when it “decided not to reinvent the wheel” and “proceeded by assuming that the individual rule recommendations contained in the ISBA/CBA Ethics 2000 Report were valid.”

Part of the delay seems attributable to the fact that the Joint Committee and the Committee on Professional Responsibility seem to have worked in tandem. Given the apparent early decision to model the new proposals on the recommendations of the ABA’s Ethics 2000 Commission, it is unclear why these two entities could not have worked more cooperatively or concurrently.

In addition, there are several seemingly unnecessary and significant temporal gaps in the process. Although the Corrected Final Report of the ISBA-CBA Joint Committee was forwarded to the Illinois Su-

32. See generally ABA, Status of State Review of Professional Conduct Rules, http://www.abanet.org/crt/pic/ethics_2000_status_chart.pdf (providing a chart with information on a state-by-state basis). The following jurisdictions, in addition to Illinois, approved significant revisions based on the ABA’s Ethics 2000 Project, and, in each case, the effective date of the most significant of those changes is indicated in parentheses: Alabama (eff. 6/23/08), Alaska (eff. 04/15/09), Arizona (eff. 12/01/03), Arkansas (eff. 05/01/05), Colorado (eff. 01/01/08), Connecticut (eff. 01/01/07), Delaware (eff. 07/01/03), District of Columbia (eff. 02/01/07), Florida (eff. 05/22/06), Idaho (eff. 07/01/04), Indiana (eff. 01/01/05), Iowa (eff. 07/01/05), Kansas (eff. 07/01/07), Kentucky (eff. 07/15/09), Louisiana (eff. 03/01/04), Maine (eff. 08/01/09), Maryland (eff. 07/01/05), Minnesota (eff. 10/01/05), Mississippi (eff. 11/03/05), Missouri (eff. 07/01/07), Montana (eff. 04/01/04), Nebraska (eff. 09/01/05), Nevada (eff. 05/01/06), New Hampshire (eff. 01/01/08), New Jersey (eff. 01/01/04), New Mexico (eff. 11/02/08), New York (eff. 04/01/09), North Carolina (eff. 03/01/03), North Dakota (eff. 08/01/06), Ohio (eff. 02/01/07), Oklahoma (eff. 01/01/08), Oregon (eff. 01/01/05), Pennsylvania (eff. 01/01/05), Rhode Island (eff. 04/15/07), South Carolina (eff. 10/01/05), South Dakota (eff. 01/01/04), Utah (eff. 11/01/05), Vermont (eff. 09/01/09), Virginia (eff. 01/01/04), Washington (eff. 09/01/06), Wisconsin (eff. 07/01/07), Wyoming (eff. 07/01/06). The chart shows that the eight states that did not revise their ethics rules before Illinois were California, Georgia, Hawaii, Massachusetts, Michigan, Tennessee, Texas and West Virginia. Id.

33. Id.

34. Creamer & Luning, supra note 8, at 306.

35. Redmond, supra note 5, at 3.
preme Court on April 30, 2004, the Supreme Court’s Committee on Professional Responsibility did not begin to review the report until October 7, 2005, more than seventeen months later. Similarly, although the Supreme Court Committee on Professional Responsibility submitted its own proposals to the Supreme Court Rules Committee by letter of February 20, 2007, no hearings on this proposal were held for almost a full seven months, on September 14, 2007. The Supreme Court’s rule-making procedures provide that, other than on a fixed hearing date, hearings are to be scheduled “with 60 days’ notice to the bench, bar, and public.” Given the extended period of time during which public and professional attention had already been focused on the proposed ethics rules prior to February, 2007, this seven month delay seems excessive.

B. Shirked Responsibility

Second, and quite apart from the problem of its pace, the process permitted the principal players to avoid, to a great degree, apparent moral responsibility for the rules they proposed. Instead of exercising independent ethical judgment regarding the propriety of each rule, both the Joint Committee and the Committee on Professional Responsibility deferred to the ABA Model Rules by declaring they would follow them except where there was a “compelling reason” not to do so. The Committees failed to enumerate the criteria that would be applied to determine whether a particular reason, or groups of reasons, would be considered “compelling.” The closest that the ISBA-CBA Corrected Final Report came was when it said that deviations from the ABA Model Rules or Comments were “typically [where] positions previously expressed by the Illinois Supreme Court . . . compelled specific changes.” One gets the feeling that these ex-

36. Id. at 10.
37. Id. at 3.
38. Id.
40. The Process of a Proposed Supreme Court Rule, supra note 24.
41. By contrast, after the Joint Committee released its initial “Final Report” in October 2003, it asked for comments to be submitted on or before December 2003, a much shorter time frame. Redmond, supra note 5, at 10.
42. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 8-9.
43. Id. at 8.
44. Id. (emphasis added).
pressions by the Illinois Supreme Court were regarded almost as a nuisance that prevented the easier, verbatim adoption of the ABA Model Rules and Comments.

This standard, by its clear terms, would permit the proposal of an ABA rule that was less than ethically optimal so long as there was no "compelling" reason to the contrary. A good reason for rejecting the rule, but one that is not quite "compelling," would not be enough. Interestingly, however, the Committees' reports do not reveal whether such a situation ever arose; the reports never expressly identify any proposed rule as being less than ideal. Of course, adoption of this "follow the ABA unless there is a compelling reason not to" standard may have had the practical effect of stifling discussion of many provisions except in the rare instances in which someone raised what he or she felt might be a compelling objection. Anyone with an objection that he or she did not regard as "compelling" may simply have refrained from raising the issue. If this was the case, the Committees' work seems to have been insufficiently thorough, and their snail's pace even less defensible.

In attempting to justify the decision to follow the ABA Model Rules absent a compelling reason not to do so, both the Joint Committee and the Committee on Professional Responsibility cited three considerations. First, they asserted that the ABA Model Rules "are the de facto national standard for ethics rules," citing among other things, that candidates for admission to the Illinois bar must know the ABA Model Rules in order to take the Multistate Professional Responsibility Exam (MPRE). This argument, of course, begs the question: the practice of admitting students based on their knowledge of the ABA Model Rules rather than their knowledge of the Illinois ethics rules has always seemed somewhat absurd. One could perhaps justify the Multistate Bar Examination (MBE), which deals with substantive law issues, by arguing that it is a proxy to see if the applicant has learned basic legal principles and rules. Someone capable of mastering this material could be presumed capable of learning Illinois substantive law on a case by case basis while she practices. Knowledge of criti-

45. In various places, the ISBA-CBA Joint Committee on Ethics 2000, Corrected Final Report mentions that there is no compelling reason to deviate from the ABA Model Preamble or Rules. See id. at 11, 12, 26, 34, 35, 36, 37. Nevertheless, in none of these instances does the Report state that a different rule would be preferable. Perhaps this is not so surprising after all. Political realities might have made it awkward at best for the Report to specifically acknowledge that a particular proposed rule was less than ethically optimal.

46. See ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 5.
cally important Illinois substantive law is in any event tested in the essay portion of the bar exam.

If, however, the purpose of the ethics test were simply to test an applicant's training, the ethics test could simply be included as part of the MBE. There would be no need for the national ethics rules to be tested by a separate multiple-choice exam or for it to be tested so much more thoroughly than any other MBE topic. Indeed, the real purpose of a separate, extensive test regarding legal ethics ought to be to ensure that an applicant is already satisfactorily conversant with applicable ethics rules. Ethics issues are often subtle. Neither they nor their proper resolutions are always intuitively obvious. Because inexperienced attorneys may not be adequately sensitive to the existence of ethics issues, we cannot assume that they will learn "the ethics law" simply by practicing law. We need to ensure that they know the applicable ethics laws before they start practicing. As a result, it makes little sense to admit an applicant who knows the ABA Model Rules but not the Illinois Rules. After all, an Illinois attorney who complies with the ABA Rules, but violates the applicable Illinois Rules, can be suspended or disbarred.47

The Joint Committee and the Committee on Professional Responsibility also asserted that the practice of law was increasingly an interstate and multistate business and argued that following the ABA Model Rules would have the salutary effect of achieving a "higher level of uniformity and consistency with the rules other jurisdictions."48 This is the type of efficiency argument once advanced for adoption of uniform commercial laws and, of course, is to some extent valid. But the argument ignores the possibility that ethics rules may importantly differ from commercial law and ethical sensitivities and consensus may differ from state to state. Similarly, the argument seems to disregard the effectiveness of Rule 8.5,49 a conflict of law

47. For example, ABA Model Rule 1.6 does not require a lawyer to disclose information relating to the representation of a client even if doing so is obviously necessary to save a life. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003). Illinois Rule 1.6 requires such a disclosure. ILL. RULES OF PROF'L CONDUCT R. 1.6 (2010). Similarly, Model Rule 8.3 does not allow a lawyer to report another lawyer's wrongdoing if this means disclosing information relating to the representation of a client, yet Illinois Rule 1.6 (and its predecessor) requires such reporting so long as it does not involve disclosure of information protected by the attorney-client evidentiary privilege. See, e.g., David Logan, Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility, 56 WASH. & LEE L. REV. 1023 (1999) (arguing that states should test an applicant's knowledge of the states' own ethics rules on the "essay" portions of the states' respective bar exams).

48. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 5; Redmond, supra note 5, at 7.

49. ILL. RULES OF PROF'L CONDUCT R. 8.5(b) (2010).
provision, to resolve or at least minimize “problems” that might arise from lack of uniform state rules.

The supposition that the use of common language will result in commonly interpreted rules is somewhat curious in the context of Illinois professional responsibility law, which has not always followed the ABA’s apparent construction of words originating from the ABA. *In re Himmel* is one of the most famous – and, according to some, infamous – Illinois legal ethics decisions. It involved events that transpired in 1983. The Illinois Supreme Court found that Himmel, an Illinois attorney, had obtained information about another Illinois attorney’s conversion of a client’s funds and failed to relate that information to the Illinois Attorney Registration & Disciplinary Commission (“ARDC”). It found that this failure was a violation of Disciplinary Rule (“DR”) 1-103(a), which stated, “(a) A lawyer possessing unprivileged knowledge of a violation of [Disciplinary] Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.”

The Court’s decision turned on the interpretation of the word “unprivileged” or the phrase “unprivileged knowledge.” Himmel argued that the phrase included not only “client confidences” (i.e., information that would be protected by the attorney-client evidentiary privilege), but also “client secrets” (i.e., “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”). Himmel argued that his knowledge was at least a “client secret” and, therefore, his knowledge was “privileged knowledge” which DR 1-103(a) did not obligate him to disclose.

The Court ruled against Himmel, holding that only client confidences were privileged. By contrast, client secrets were “unprivileged knowledge” that had to be disclosed. The Court suspended Himmel from the practice of law for one year.

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51. Id. at 791.
52. Id. at 793.
53. Id. at 793-95.
54. Id. at 792-93.
55. *In re Himmel*, 533 N.E.2d at 795-96.
56. Id. at 794-95.
57. Id. at 796.
Perhaps curiously, the Court never even mentioned ABA Formal Opinion 341,\textsuperscript{58} which was issued on September 30, 1975, long before the 1983 events in the Himmel case. ABA Formal Opinion 341 interpreted the scope of an attorney's obligation under DR 7-102(B) of the ABA Model Code of Professional Responsibility, which stated:

(B) A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.\textsuperscript{59}

The Opinion ruled that a client secret, as well as a client confidence, was a "privileged communication." If so, someone in Himmel's position in 1983 could reasonably have assumed that the knowledge obtained from a client secret, i.e., knowledge obtained from a "privileged communication," would in turn be "privileged knowledge."

The rationale expressed by ABA Formal Opinion 341 similarly supported Himmel's suggested construction of the Illinois Rule. The Opinion stated:

An interpretation of [DR 7-102(B)] which would limit its scope to the attorney-client privilege as it exists in each jurisdiction and the Federal Rules of Evidence is undesirable because the lawyer's ethical duty would depend upon the rules of evidence in a particular jurisdiction. There may be significant problems in knowing which jurisdiction's evidentiary rule would be applied in a given case and the scope of that privilege may vary widely among jurisdictions. Furthermore, it would raise problems as to the difference between waiver of privilege by a client and a consent to the lawyer's disclosure of a confidence.\textsuperscript{60}

Thus, ABA Formal Opinion 341 makes it clear that it would be problematic to construe the word "unprivileged," as it appeared in the ABA Model Code of Professional Responsibility as being limited to information protected by any attorney-client evidentiary rule. Nevertheless, the Illinois Supreme Court did not follow this interpretative approach, even though, at the time of the events in \textit{Himmel}, Illinois' ethics rules tracked the language of the ABA Model Code.


\textsuperscript{60} ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 341 (1975).
Finally, the Joint Committee and the Committee on Professional Responsibility contend that, "amending well-known and commonly-used standard language will have consequences. . . . Even minor stylistic amendments will inevitably cause lawyers consulting the Illinois Rules to speculate why the Illinois language was changed from the original ABA text," and might cause courts to misinterpret the Illinois Rules. However, one might ask whether it is better to adopt less than optimal ABA Rules that very likely will be enforced or to adopt optimal rules, taking deliberative steps (such as the use of careful wording and the provision of clarifying commentary) so that they will be enforced? Moreover, if the Illinois Rules were written in Illinois' own voice and with Illinois' own words, one might also ask whether courts would inevitably compare them to "the original ABA text."

C. Unreported and Misrepresented Changes

A third problem with the overall process is that the Joint Committee and Committee on Professional Responsibility reports importantly misrepresented the extent to, and ways in which, the new rules, with their comments, constitute changes from the former Illinois ethics rules. This is principally because of the ways in which the reports characterize the significance of the ABA Comments. Paragraph 14 of the Preamble to the new Illinois Rules downplays the role of the Comments, asserting that they do not add obligations, but only provide guidance. There are two somewhat inconsistent problems with this approach.

On the one hand, the Corrected Final Report states that various provisions of the former Illinois Rules are not included in the new Rules, but are to be included in the new Comments. But if the Comments no longer have the force of rules, and are only for guidance, such changes would appear to be significant. Nevertheless, the immediately pertinent portions of the Corrected Final Report do not justify any such substantive changes. Indeed, they do not even acknowledge that the movement of these provisions from the Rules to the Comments will have any substantive impact.

61. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 7 (emphasis added).
63. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 13-14 ("the substance of IRPC 1.5(j), concerning separation and retirement payments, should be added to Comment [8]"); id. at 39 (switching the rule banning certain discrimination against litigants and others, IRPC rule 8.4(a)(5), to a new Comment [3]).
On the other hand, to the extent, if any, that the Comments actually have the force of law, and are not mere guidance, two serious issues arise. The first is that Paragraph 14 of the Illinois Preamble, which says that the Comments do not add obligations, would simply be wrong. The second is that the Corrected Final Report fails to acknowledge most of the Rules in the Comments. Thus, the Corrected Final Report would fail to adequately announce the substantive changes reflected in the new Rules.

Indeed, it seems clear that, contrary to Paragraph 14 of the Preamble, the Comments, or at least some of them, go beyond the actual text of the Rules and constitute actual “obligations” rather than just advice. New Illinois Rule 1.8(j), for instance, states: “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.” The former Illinois Rules did not contain an express per se ban on such relations. The new Illinois Rules do not define the term “client,” but it is clear from some of the Rules themselves that when a lawyer represents an organization, the organization, and not its constituents, is the lawyer’s client. Consequently, on its face, new Illinois Rule 1.8(j) would not forbid sexual relations between the organization’s lawyer and the various individuals who serve as the organizational client’s officers, agents or employees. Indeed, the Corrected Final Report tried to make this point pellucid by proposing that Comment 19 to new Illinois Rule 1.8 “should state that the rule does not apply to organizational clients.”

The Committee on Professional Responsibility, however, objected, and the Illinois Supreme Court adopted Comment 19 as it appears in the ABA Model Rules, which states:

When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters.

64. Its discussion of the Comments is almost exclusively limited to situations in which: (1) the Comments embody provisions that were previously in the former IRPC; and (2) the Committee recommends that the Comments be revised.
65. See, e.g., ILL. RULES OF PROF’L CONDUCT R. 1.13(a) (2010) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).
66. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 17.
Thus, the adopted version of Comment 19 construes new Illinois Rule 1.8(j) beyond its literal words and states its construction as a rule, positing that "paragraph (j) of this Rule [1.8] prohibits." This new per se prohibition could especially affect corporate attorneys, including in-house counsel, who regularly consult with multiple corporate agents. It can hardly be assumed that, after adopting such a Comment, the Illinois Supreme Court would conclude that there was no such prohibition. Thus, the Supreme Court’s adoption of a voluminous body of Comments is tantamount to adoption of countless new “rules” – or at least many new rules and many less than obvious applications of old rules.

D. Failure to Explain or Document Reasons

Fourth, not only did the process producing the new Illinois Rules provide a dismal historical record of the ethical calculus underlying each of the various Comments, it also failed, time and again, even to state a reason for its recommendations regarding specific Rules. Thus, with respect to a change in one Rule, the Corrected Final Report states, “The Committee does not recommend retention of IRPC 1.5(e), which apparently creates an exception to the requirements of Rule 1.5 that would otherwise be applicable for contingent fee agreements for collection of commercial accounts or insurance company subrogation claims.” The supposed inappropriateness of retaining IRPC 1.5(e) is not addressed.

Similarly, in another place, when following the ABA’s lead, the Corrected Final Report states:

The model rule redefines the scope of protected information ("information relating to representation of a client," rather than "confidence or secret of the client"), and expands the areas of permissible disclosure to include certain instances of client fraud and to permit specifically disclosure to obtain legal advice about compliance with the rules. Those changes are appropriate.

Why are the changes “appropriate”? No explanation is given.

In short, the process giving rise to the new Illinois Rules was terribly time-consuming and not worth the wait. It involved an overwhelming deferral of ethical judgment to the ABA. It misrepresented the nature and extent of the changes the new Rules introduced, especially in light of the role of the Comments. Finally, it failed to provide

68. Id. (emphasis added).
69. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 14.
70. Id.
an adequate historical record of either the various ethical issues considered or of even the basic ethical rationales for the adoption of the new Rules.

III. A DEEPLY FLAWED AND UNIMPRESSIVE PRODUCT

The new Rules themselves represent the twin sins of omission and commission. Some Rules are problematic because they preserve former Rules that are insufficiently clear to convey meaningful guidance. Others, on the other hand, although clear, adopt unjustifiably low ethical standards.

A. Manifest Refusal to Clarify the Most Important Rules

A trigger for many of the most important legal ethics provisions is whether a lawyer either "knows" something or acts "knowingly." The terminology section of the former IRPC provided no meaningful guidance as to what constituted "knowledge." It merely declared: "'Knowingly,' 'known' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." The new Rules leave this definition unchanged. But what does this "definition" mean? After all, it is elementary that one should not define a word by using the word itself — or even another form of the word — in the definition. The definition states that whether a person, in fact, has knowledge may be inferred from circumstances. However, it does not explain whether the person’s knowledge itself may be based on circumstances. For example, for a person to have “actual knowledge” about an event, must he have witnessed the event himself, or is hearsay evidence sufficient? Alternatively, does the word “actual” in “actual knowledge” mean that we look to the person’s subjective judgment as to whether he “knows” something rather than to an objective, reasonable person test? Or perhaps use of the phrase “actual knowledge” is an imprecise effort to

71. See, e.g., ILL. RULES OF PROF'L CONDUCT R. 1.1(b); 1.2(d), (f)(1), (g), (h), (i); 1.8(a)(1); 1.10(a), (b); 1.11(a), (b), (c); 1.12(c); 1.13(b); 1.16(a)(1) (repealed Jan. 1, 2010).
72. ILL. RULES OF PROF'L CONDUCT Preamble (repealed Jan. 1, 2010).
73. ILL. RULES OF PROF'L CONDUCT R. 1.0(f) (2010). Rule 1.0(a) provides that "'[b]elief' or 'believes' denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances." Id. R. 1.0(a).
74. See, e.g., TINA L. STARK, DRAFTING CONTRACTS 84 (2007) ("Do not create a circular definition; that is, do not define a term by using the same term.") (emphasis removed).
75. But see Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1996-145 (1996) (stating that whether an attorney has “actual knowledge” cannot only be imputed from the circumstances but can be determined by an objective standard rather than the attorney's subjective awareness).
refer to the persuasiveness of the data that can give rise to "knowledge." If so, however, the definition fails to clarify just how persuasive the evidence must be.

Confusion regarding these and related questions is rampant. Most courts and authorities agree that "mere suspicion" of some fact is not "knowledge" thereof, but that's where the agreement ends. Some use a "clear belief standard," that depends, in part, on the attorney's subjective perspective. Others require that there be a "firm factual basis," standard, without, of course, identifying the quantity or quality of information that would make an otherwise wobbly factual basis "firm," or a "substantial basis" test, which, in some cases, may be satisfied by little more than undocumented hearsay evidence. Other authorities apply more demanding language, stating that an attorney only has "knowledge" that a client intends to commit perjury if the client tells him so or if the attorney possesses either "compelling support" for the belief or evidence establishing the belief "beyond a reasonable doubt."

Evaluating these various approaches is further complicated by the fact that many authorities indiscriminately cluster together cases and opinions from a number of jurisdictions, without specifying which jurisdictions, such as Illinois, provide some definition of "knowledge" and which, such as New York, following the original American Bar Association's version of the Code of Professional Responsibility, do not.

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78. For discussions of the diverse tests, see, for example, Brian Slipakoff & Roshini Thayaparan, The Criminal Defense Attorney Facing Prospective Client Perjury, 15 Geo. J. Legal Ethics 935 (2002); Jaskot & Mulligan, supra note 76.

79. See, e.g., N.Y. State Bar Assoc. Comm. on Prof'l Ethics, Op. 635, at 5 (1992) ("Thus, DR 1-103(A) would not be triggered unless the lawyer has a clear belief, or possesses actual knowledge, as to the pertinent facts."); Nassau County (N.Y.) Bar Assoc., Op. 93-41 (Inquiry 502) (addressing the obligation to report another attorney's wrongdoing under DR 1-103).


Thus, before New York dramatically amended its Rules of Professional Responsibility, effective April 1, 2009, its DR 1-103 provided that a “lawyer possessing knowledge . . . of a violation of DR 1-102 [by another lawyer] that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness is other respects as a lawyer shall report such knowledge.” Various New York ethics decisions stated that this reporting requirement applied when a lawyer had either “actual knowledge” or a “clear belief” of such a violation of DR 1-102. At least one ethics opinion declared that this test “must be to at least some degree subjective, dependent upon the attorney’s assessment of the facts at the attorney’s disposal.”

Of course, it is possible that the Illinois definition, which refers to “actual knowledge,” was intended to rule out a “clear belief” standard as insufficient to constitute “knowledge.” But Illinois case law suggests that this is not so. In its 1989 decision, People v. Flores, the Illinois Supreme Court considered a convicted criminal defendant’s alleged denial of his constitutional right to counsel because his criminal defense attorney had refused, among other things, to call the client’s family members as witnesses. The attorney had refused because he believed the family members would testify to a false alibi. The convicted defendant contended that his counsel could only have refused to call him to testify if the lawyer had “actual knowledge” that his testimony would have been perjurious, and the attorney lacked such “actual knowledge.” The Illinois Supreme Court declared:

The defendant argues, however, that unless defense counsel had actual knowledge that the testimony was perjurious, his mere suspicion is insufficient grounds to refuse to call an alibi witness. We disagree, as defense counsel should have discretion to make a good-faith determination whether particular proposed witnesses for the defendant would testify untruthfully. Absent some showing that coun-

85. N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY D.R. 1-103(A) (repealed April 1, 2009).
86. See N.Y. State Bar Assoc. Comm. on Prof'l Ethics, Op. 635, at 5 (1992); Nassau County (N.Y.) Bar Assoc., Op. 93-41 (1993). Incidentally, one could question these New York ethics opinions. The phrase, “clear belief” was not used in DR 1-103, but in Ethical Consideration 1-4, which stated that, “[a] lawyer should reveal voluntarily to [the proper officials] . . . all knowledge . . . of conduct of another lawyer which the lawyer believes clearly to be a violation of the Disciplinary Rules that raises a substantial question . . . ” But the Preliminary Statement of New York’s version of the Code of Professional Responsibility made it clear that the Ethical Considerations were “aspirational in character” rather than required. Consequently, one might have distinguished between “knowledge,” which would mandate reporting under DR 1-103(A), and “a clear belief,” which would not. These ethics opinions, however, did not make this distinction, and seemed to treat both “actual knowledge” and “a clear belief” as “knowledge.”
sel's decision was unreasonable under the circumstances, we cannot say that the defendant was denied a fair trial as a consequence of counsel's election not to call the members of his family to present an alibi. For the same reason, defense counsel was not incompetent in refusing to permit the defendant to testify to the purported alibi.89

Although Flores technically involved the convicted defendant's constitutional rights and not the ethical status of the attorney's conduct, the court's language clearly suggests that it believes the criminal defense attorney behaved properly by saying that he "should have discretion to make a good-faith determination whether particular proposed witnesses for the defendant would testify untruthfully."90 A "good faith determination" rather than actual knowledge was sufficient to refuse to call the alibi witnesses.

Of course, Flores did not deal with a failure to call the client, only the failure to call the client's family members as alibi witnesses. Several subsequent Illinois cases, however, have applied the Flores rationale to counsel's refusal to call and question counsel's own client, at least to call and question the client in the normal, effective manner. In People v. Bartee,91 the Second District cited Flores and applied it to a criminal defendant's claim that he had been denied effective assistance of counsel when his counsel refused to question him, not his family members, and only permitted him to testify in the narrative.92 Specifically, the Second District rejected the defendant's argument that he was entitled to a hearing at which his counsel was required to establish a "firm factual basis" for the belief that the client would commit perjury.93 Similarly, in People v. Taggart, the Second District denied a claim that a defendant was denied effective assistance of counsel when he was forced to testify in the narrative.94 The court found that defense counsel had evinced a "good-faith determination" that the defendant would have lied.95 The court stated that "[i]n these types of cases, it is important to identify on the record the basis for counsel's belief [that his client will lie] so a proper determination of its reasonableness can be made."96

89. Id. at 498 (emphasis added).
90. Id.
92. Id. at 857.
93. Id.
95. Id.
96. Id. (emphasis added).
In People v. Calhoun,97 the Fourth District cited Flores, Bartee, and Taggart, and agreed with their analysis, stating that the test was whether defense counsel, in forcing a client to testify in the narrative, acted on “a good-faith determination that defendant was going to commit perjury.”98 In Calhoun, however, the court ruled that defense counsel’s decision was “not reasonable.”99 Defense counsel simply believed a different witness’ testimony more than he believed his client’s.

The former IRPC, and its definition of “knowingly,” “known” and “knows,” was adopted in February 8, 1990, effective August 1, 1990. Former IRPC 1.2(a) provided that, “In a criminal case, the lawyer shall abide by the client’s decision . . . and whether the client will testify.”100 Former IRPC 3.3(a)(4) stated that, “[a] lawyer may not offer evidence the lawyer knows to be false.”101 Consequently, in a criminal case, the client had the right to testify unless the lawyer “knew” that the testimony would be false, with knowledge now defined as “actual knowledge.”

One could suggest that this change was intended to overrule the Flores, Bartee, Taggart, and Calhoun reasoning that “defense counsel should have discretion to make a good-faith determination whether particular proposed witnesses for the defendant would testify untruthfully.”102 But there is no evidence to support such a suggestion.

After all of the years in which this definition has been in the Illinois Rules, would it not have been useful for the Illinois Supreme Court to have provided more guidance as to what “knows” and “knowingly” mean? This is not to suggest that the Illinois Supreme Court should have provided a philosophically or epistemologically “correct” definition for knowledge. Rather, the point is that the Supreme Court should have taken this opportunity to more clearly communicate to lawyers the circumstances in which the Supreme Court wants them to act in the manner prescribed for those who act “knowingly.” The Supreme Court could have provided at least a verbal standard – such as a lawyer’s “clear belief” or the lawyer’s possession of “clear and convincing evidence” – and probably should have provided, in a comment perhaps, illustrative examples of what would and would not constitute

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98. Id. at 499-500.
99. Id. at 500.
100. ILL. RULES OF PROF’L CONDUCT R. 1.2(a) (repealed Jan. 1, 2010).
101. Id. R. 3.3(a)(4).
102. Flores, 538 N.E.2d at 498 (emphasis added).
knowledge. Instead, the Illinois Supreme Court preserved the old, un-informative definition, including it in new Rule 1.0(f).103

Ironically, although the new Illinois Rules did not alter the definition of "knowledge," they did offer a new rule for this one specific situation: an attorney's calling as a witness a client he expects will testify falsely. The new Rules make only a relatively insignificant change to former IRPC 1.2(a)'s injunction that an attorney must abide by a criminal defendant's decision as to whether to testify.104 Nevertheless, there is an interesting change to former IRPC 3.3. New Rule 3.3(a)(3) states:

(a) A lawyer shall not knowingly:

. . . .

(3) offer evidence that the lawyer knows to be false . . . A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.105

On the one hand, because this new language does not alter the "knows to be false" standard, it would not appear to effect a change in the ethics rules. On the other hand, its clear message is that a lawyer may not refuse to offer the testimony of a defendant in a criminal matter merely because the lawyer has a "reasonable belief" that the testimony will be false. If so, this may mark a major change from Flores and its progeny. In a somewhat cryptic Comment, the Joint Committee noted that new Rule 3.3(a) represented a substantive change in the Rules, suggesting that in the past a lawyer could have based a refusal to call his client upon a "reasonable belief."106 In any event, the Joint Committee did not explain whether the change was to a standard of "firm factual foundation," "clear and convincing proof," or some other criterion.

103. ILL. RULES OF PROF'L CONDUCT R. 1.0(f) (2010).
104. Compare ILL. RULES OF PROF'L CONDUCT R. 1.2(a) (repealed Jan. 1, 2010), with ILL. RULES OF PROF'L CONDUCT R. 1.2(a) (2010).
106. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 26 ("One substantive change made by the model rule that [sic] should be noted, although it seems appropriate in deference to the rights of criminal defendants. MR 3.3(a)(3) provides that although a lawyer ordinarily may (but is not obliged to) refuse to offer evidence that the lawyer believes is false, the lawyer may not refuse to offer testimony of a defendant in a criminal case that the lawyer merely believes, rather than knows, is false."). This comment is cryptic, first, because it fails to explain the apparently incorrect assertion that former IPRC utilized a "reasonable belief" standard. Second, it refuses to address the Flores line of cases. Third, in light of Flores, it fails to explain why the supposed new rule "seems appropriate."
B. Ignoring Important Modern Ethics Issues

By following the ABA Model Rules absent a “compelling reason” not to do so, those involved in revising the Illinois ethics rules conveniently avoided addressing issues not clearly covered by the ABA Model Rules. Thus, important ethics issues involving relatively innovative forms of practice were ignored, although they were the subject of ethics opinions in other jurisdictions. For example, collaborative lawyering,107 which was the subject of many ethics opinions elsewhere, not all of which were in agreement,108 was not addressed in Illinois.

Similarly, serious ethical issues raised by the outsourcing of services to domestic or foreign lawyers or non-lawyers are of increasing concern throughout the profession.109 Relevant issues include, for instance, the need for disclosure to the client, the obtaining of the client’s informed consent, ensuring that those providing the services are competent, exercising other supervisory responsibilities over the attorneys and non-attorneys performing the outsourced services, and billing practices. Numerous bar association ethics opinions have considered these issues and reached somewhat different results.110 Moreover, although some characterize the relevant ABA opinion as providing “rigorous, if not onerous, suggestions for lawyers to meet the challenges of ensuring tasks are delegated to competent individuals and overseeing appropriately the execution of the projects,”111 others believe that the ABA opinion fails properly to appreciate the

107. In a typical collaborative law procedure, the attorneys for the parties sign an agreement that, should the collaborative process not result in an agreement and the parties go to court, the attorneys will not represent their respective clients in the ensuing litigation. See, e.g., Susan Daicoff, Collaborative Law: A New Tool for the Lawyer’s Toolkit, 20 U. FLA. J.L. & PUB. POL’Y 113, 120-21 (2009); Helen Gunnarson, Collaborative Divorce, 93 ILL. B.J. 561 (2005).


110. See, e.g., Ohio Bd. of Comm’rs on Grievances and Discipline, Op. 2009-6 (2009) (requiring client’s informed consent prior to outsourcing to lawyers or non-lawyers; can bill as part of the legal fee or as an expense; citing various state and local bar association ethics opinions); North Carolina State Bar, Formal Op. 12 (2008) (requiring client’s written informed consent to outsourcing); Ass’n of the Bar of the City of N.Y., Formal Op. 2006-3 (2006) (client’s consent is not always required when outsourcing non-legal services, listing, however, a number of exceptions).

The nuances and challenges involved in outsourcing to foreign countries. The new Illinois ethics rules do not address these issues at all.

Technological advances, as well as dramatically increased use of the internet, have also raised important new issues, but the project to overhaul Illinois’ ethics rules, which ran from 1999 to July 2009, dealt with few of them. For example, a number of bar associations weighed in on the risk of transmitting metadata hidden in electronically transferred files and on the appropriateness of mining metadata from such documents. Illinois’ new ethics rules provide no relevant guidance. Furthermore, while ethics opinions from around the country have addressed a variety of concerns regarding the internet in the past ten years, Illinois’ new ethics rules contain only a few references to

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112. See, e.g., Alexandra Hanson, Legal Process Outsourcing to India: So Hot Right Now, 62 SMU L. Rev. 1889 (2009).


114. Nor are there any relevant Illinois State Bar Association ethics opinions.

the internet, or even to electronic communications, and do not provide adequate guidance regarding the many individual issues that continue to arise.

C. Unjustifiably Low Ethical Standards

Another complication is that in the past many Rules applied either when a lawyer knew or "reasonably should" have known, the latter now appears in far fewer Rules. As a result, it becomes increasingly important to fathom what constitutes knowledge. Elimination of the "reasonably should know" language leads us to another concern regarding the substance of the new Rules. In a number of important contexts, the new Rules either reduce the standards of conduct to which lawyers were previously held or, even when they increase those standards, they fail to do so adequately. Thus, although a number of obligations used to be triggered as long as a lawyer reasonably should have known about certain facts, they are no longer triggered unless the lawyer actually knows (whatever "knows" means) the facts.

Another example is Illinois' response to the new ABA Rules requiring that in certain scenarios clients receive informed consent and requiring that, at a minimum, this informed consent be confirmed in writing. New Illinois Rule 1.0(e) adopts the ABA's definition of "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct" and uses this term in

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116. See Ill. Rules of Prof'l Conduct R. 1.0(n) (includes "electronic record" in the definition of "writing" or "written"); R. 4.4 cmt. 2 (including electronic communication in the notion of a "document" that may have been inadvertently received); R. 7.2 (as to advertising); R. 7.3 (as to direct contact with prospective clients). The most recent Illinois State Bar Association ethics opinion dealing with internet use was issued in 1996. See Ill. State Bar Ass'n, Op. 96-10 (1996). Although that opinion provided a fairly thorough consideration of the issues it addressed, the opinion responded to few, if any, of the issues which have preoccupied ethics opinions in other jurisdictions over the past 10 years.

117. See, e.g., Ill. Rules of Prof'l Conduct R. 1.1(b); 1.2(f)(1); 1.8(a)(1); 1.10(a), (b); 1.11(a); 1.12(c); 1.16(a)(1), (2); 3.3(a)(1), (a)(5); 3.6(a), (b)(5); 3.7(a), (b); 3.8(b); 4.1(a); 4.3; 7.3(b)(1); 8.4(b)(1) (repealed Jan. 1, 2010).

118. See, e.g., Ill. Rules of Prof'l Conduct R. 1.1(f); 2.3(b); 3.6(a); 3.6 cmt. 5(5); 4.3; 8.4(k) cmt. 10, 13 (2010).

119. Of course, there are also some instances in which the new Illinois Rules do elevate the standards.
many different provisions. Nevertheless, although the ABA Model Rules invariably require that "informed consent" be "confirmed in writing," Illinois' new ethics rules generally do not. This is very troubling, because it is the written confirmation requirement that helps to ensure that consent is given and that helps to prove whether it was given. (Indeed, one might even suspect that a lawyer's malpractice carrier might soon independently require such written confirmation.) The failure to follow the ABA Model Rules in this respect is especially surprising given the Joint Committee's policy of following the ABA Model Rules absent "a compelling reason not to do so." Strangely, the Joint Committee's justification for its disposing of the confirmation in writing requirement cites no previous Illinois Supreme Court precedent and seems concerned principally with protecting attorneys from relatively unlikely complications.

In fact, let us examine each part of the explanation provided in the Corrected Final Report with respect to new Rule 1.7, which the Corrected Final Report cross-referenced when it rejected various other "confirmed in writing" requirements. The explanation begins as follows: "The [ABA] model rule requires waivers of conflicts (i.e., client consents) to be in writing. That would be a significant change from the current Illinois rule." In fact, however, ABA Rule 1.7(b)(4) does not require that a client's informed consent be in writing. It only requires that such consent "be confirmed in writing." New Illinois Rule 1.0(b) explains that, "'confirmed in writing,' when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent."

The Corrected Final Report goes on to say: "Although written conflict waivers are clearly desirable in many situations, requiring written

120. See, e.g., ILL. RULES OF PROF'L CONDUCT R. 1.0(e); 1.2(c); 1.4(a)(1); 1.6(a); 1.7(b)(4); 1.8(a)(3), (b); 1.8(f)(1), (g); 1.9(a), (b)(2); 1.11(a)(2), (d)(2)(i); 1.12(a); 1.18(d)(1); 2.3(b) (2010).

121. Instances in which Illinois omits any requirement for informed consent to be "confirmed in writing" include Rules 1.7(b)(4); 1.9(a), (b)(2); 1.11(a)(2), (d)(2)(i); 1.12(a); 1.18(d)(1). ILL. RULES OF PROF'L CONDUCT (2010). Illinois only expressly includes the "confirmed in writing" requirement in Rule 1.5. Id. R. 1.5.

122. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 5 (citing major policy considerations, typically positions previously expressed by the Illinois Supreme Court, as compelling reasons).

123. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 16.


125. ILL. RULES OF PROF'L CONDUCT R. 1.0(b) (2010) (emphasis added).
consent in every situation as a matter of discipline is both unnecessary and inappropriate. Often, the conflict issues are clear, the affected clients understand the issues, and the matter is uncomplicated. Yet even where the issues are arguably clear, the matter is uncomplicated, and affected clients supposedly understand all of this, informed consents are unquestionably required under the new Illinois Rules. Merely confirming them in writing would not seem to be unduly onerous.

The Corrected Final Report continues: “The need for a consent may arise unexpectedly and without notice in the midst of a transaction or other matter. In such cases, requiring a writing merely adds unnecessary delay and expense, and elevates technicality over the substantive question whether consent was given.” Note, first, even according to the new Illinois Rules, the fact that “[t]he need for a consent may arise unexpectedly and without notice in the midst of a transaction or other matter,” in absolutely no way dispenses with the requirement of informed consent, no matter how much “delay and expense” obtaining informed consent entails.

Second, the assertion that requiring a writing “merely adds unnecessary delay and expenses” is incorrect. Requiring a writing encourages attorneys to seek consent and helps both attorneys and clients to prove whether consent was actually provided.

Third, the reference to “unnecessary delay and expense” appears to be out of touch with the “confirmed in writing” requirement itself. A writing is defined by new Illinois Rule 1.0(n) as “a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail.” Consequently, a lawyer could use e-mail, a cell phone, or a fax machine to transmit such a confirmation without either significant delay or cost. Furthermore, “[i]f it is not feasible to obtain or transmit the writing at the time the person gives informed consent,” new Illinois Rule 1.0(b) states, “then the lawyer must obtain or transmit it within a reasonable time thereafter.”

126. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 16.
127. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 16.
128. Of course, one wonders why obtaining such consent should often involve significant expense.
129. ILL. RULES OF PROF'L CONDUCT R. 1.0(n) (2010).
130. Id. R. 1.0(b).
After discounting the material benefits of a writing requirement and exaggerating its inconvenience, the Corrected Final Report cites three fears:

Moreover, subjecting a lawyer to potential discipline, disqualification, and malpractice liability for want of a writing—when it may be entirely clear that the consent was in fact given—is not reasonable. Accordingly, the Committee recommends that the rule and comments be revised to eliminate the requirement that conflict waivers be in writing.¹³¹

Yet, because confirming consent in writing is not difficult, time-consuming or expensive, it is difficult to understand how a lawyer who fails to provide it could justifiably object to the possibility of discipline. Whether discipline would be imposed and the nature of any such discipline would, of course, depend on the attendant circumstances. Where it is “entirely clear that the [informed] consent was in fact given,” the likelihood of serious discipline seems remote. After all, if informed consent was in fact given, the lack of written confirmation would seem to be harmless error, and courts are reluctant to disqualify counsel, and disrupt their own calendars, in cases of harmless error. Similarly, in instances of harmless error, the very lack of damages would make civil malpractice liability quite unlikely. As already mentioned, one of the best ways for an attorney to protect herself against a claim of not having given informed consent would be to routinely confirm in writing that such consent was given.

Even if one could argue that there was a “compelling reason” not to follow the ABA’s “confirmed in writing” requirement, it is unclear why the new Illinois Rules do not at least indicate that such client consent should “preferably be confirmed in writing.” New Illinois Rule 1.5(b), for instance, states: “The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing . . . .”¹³² One of the Comments to the new Illinois Rules refer to a preference that certain communications be in writing.¹³³

From a technical perspective, it is interesting to note that new Illinois Rule 1.0(b) only defines the term “confirmed in writing” with respect to “informed consent”:

“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to

¹³³. See ILL. RULES OF PROF’L CONDUCT R. 5.7 cmt. 6 (2010).
the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.\textsuperscript{134}

However, the only new Illinois Rule, other than Rule 1.0(b), to use the phrase, “confirmed in writing,” is new Illinois Rule 1.5. Yet, although Rule 1.5 twice requires that a client’s agreement must be “confirmed in writing,” it never refers to a client’s “informed consent.”\textsuperscript{135} Thus, there is no provision in Illinois’ new rules that expressly uses the term “confirmed in writing” in reference to “the informed consent of a person,” which is the only context in which “confirmed in writing” is defined!

Several important changes in the law reduce a lawyer’s duty to “protect” a client’s confidential information.\textsuperscript{137} Former IPRC 1.6 contained a general rule forbidding an Illinois lawyer from either revealing or using certain client information.\textsuperscript{138} By contrast, new Illinois Rule 1.6 only proscribes the revealing of client information, leaving for new Illinois Rule 1.8(b) to provide the narrower rule that, “[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.”\textsuperscript{139}

New Illinois Rule 1.6 also expands a lawyer’s obligation to reveal certain information. The old Rule only required a lawyer to disclose “information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.”\textsuperscript{140} Thus, under the old Rule, if the information

\begin{itemize}
\item 134. Id. R. 1.0(b).
\item 135. Id. R. 1.5.
\item 136. The ABA Model Rules, by contrast, expressly uses “confirmed in writing” in connection with a client’s “informed consent” on a number of occasions. See, e.g., ABA Model Rules of Prof’l Conduct R. 1.7(b)(4); 1.9(a), (b)(2); 1.11(a)(2) (2003).
\item 137. The Corrected Final Report argues that new Illinois Rule 1.6 actually expands the protection of client information by applying to “information relating to the representation of a client” rather than to client “confidences” and “secrets,” the terms used in former IRPC 1.6. See ISBA-CBA Joint Comm. on Ethics 2000, Corrected Final Report, supra note 17, at 14. Nonetheless, the force of this argument seems blunted by the broad definition the term secret as, “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.”
\item 138. Ill. Rules of Prof’l Conduct R. 1.6 (repealed Jan. 1, 2010) stated, “Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.”
\item 139. Ill. Rules of Prof’l Conduct R. 1.6(b) (2010) (emphasis added).
\item 140. Ill. Rules of Prof’l Conduct R. 1.6 (repealed Jan. 1, 2010) (emphasis added).
\end{itemize}
was a client confidence or secret, but was not "about the client" or was not about the client's future commission of an act, this exception would not have applied.\textsuperscript{141} New Rule 1.6 broadens the obligation to require disclosure of "information," whether or not "about the client." In addition, it requires disclosure "to the extent that the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm," omitting the language limiting the duty of disclosure to cases in which such consequences would result "from the client's future commission of an act."\textsuperscript{142} Of course, additional obligations to disclose do not lessen the standards that apply to the attorney, because they represent extra duties.

But new Illinois Rule 1.6 also provides lawyers with greater discretion to disclose confidential information. Although old Rule 1.6 permitted a lawyer to disclose a client's intention to commit any crime, new Rule 1.6 not only permits disclosure of information to prevent a client from committing a crime,\textsuperscript{143} but also permits disclosure, "to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."\textsuperscript{144} Furthermore, new Rule 1.6 breaks new ground by allowing a lawyer to disclose information "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."\textsuperscript{145}

New Rule 1.6 also expands a lawyer's right to disclose information to promote the lawyer's self-interest.\textsuperscript{146} Former Rule 1.6 authorized a

\textsuperscript{141} ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 15.

\textsuperscript{142} ILL. RULES OF PROF'L CONDUCT R. 1.6(c) (2010). The ISBA-CBA Joint Comm. on Ethics 2000, Corrected Final Report explains this change: "The Committee believes it would be incongruous in this context to require disclosure with respect to a client (the current Illinois rule) while merely permitting disclosure to prevent a similar harmful act by a non-client (the ABA rule). To correct this incongruity, the Committee recommends that new Rule 1.6(c) apply to the acts of non-clients as well as clients." ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 15.

\textsuperscript{143} ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2010).

\textsuperscript{144} Id. R. 1.6(b)(2) (2010). At first blush, however, it is unclear whether, as a practical matter, Rule 1.6(b)(2) provides a lawyer with any additional discretion. It seems likely that virtually any fraud covered by Rule 1.6(b)(2) would also constitute a crime, the prevention of which is authorized under Rule 1.6(b)(1). See, e.g., 720 Ill. Comp. Stat. 5/16H-1 (the "Illinois Financial Crime Law") and 720 Ill. Comp. Stat. 5/17-1 to 5/17-29 (various deceptive practices offenses).

\textsuperscript{145} ILL. RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2010).

\textsuperscript{146} Interestingly, unlike sub-sections (b) and (c), which provide for limitations on a lawyer's duty of confidentiality, Rule 1.6(d) expands the duty of confidentiality by defining information
lawyer to disclose certain information when “necessary to establish or collect the lawyer’s fee or to defend the lawyer or the lawyer’s employees or associates against an accusation of wrongful conduct.” 147 New Rule 1.6 allows such disclosures “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,” even if the controversy does not involve a fee dispute. It also permits a lawyer to disclose this information in order “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” 148

Surely one could suggest moral justifications for these changes. Unfortunately, although the Corrected Final Report offers considerable discussion regarding new Rule 1.6, it makes no reasoned case for the new provisions expanding a lawyer’s discretion for disclosing information. The Supreme Court Committee on Professional Responsibility recommended adoption of these provisions without any comment. 149 Perhaps the Joint Committee and the Supreme Court Committee on Professional Responsibility simply saw no “compelling reason” to provide less discretion than afforded by the ABA Model Rules of Professional Conduct. But the failure to address the pros and cons of this change is troubling. On numerous occasions, the need to satisfy or respond to a client’s expectations is flagged as an important concern. 150 Yet the various Reports do not even discuss the likelihood, let alone the possible significance, that a client would have strong expectations of confidentiality regarding their past actions.

Another example of a loosened standard arises in connection with fee-sharing agreements between attorneys not in the same firm. Former IPRC 1.5(f) and (g) have been replaced by new Illinois Rule 1.5(e). Former IPRC 1.5(f) allowed a division of fees that was not proportional to the services performed by each lawyer, but it only did

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147. ILL. RULES OF PROF’L CONDUCT R. 1.6 (repealed Jan. 1, 2010).
148. ILL. RULES OF PROF’L CONDUCT R. 1.6(b)(5) (2010).
149. The Supreme Court Committee on Professional Responsibility Report differed from the ISBA-CBA Joint Committee on Ethics 2000, Corrected Final Report by recommending that certain additional information be treated as confidential, and the Supreme Court adopted that recommendation. See Redmond, supra note 5, at Exhibit B.
150. See, e.g., ILL. RULES OF PROF’L CONDUCT R. 1.4(a)(5); 1.2 cmt. 13; 1.7 cmts. 21, 24; 1.8 cmt. 3 (2010).
so if the client consented thereto in a writing, containing specified disclosures, that was signed by the client.\textsuperscript{151} New Rule 1.5(e) permits an agreement providing a non-proportional allocation, with essentially the same provisos as former Rule 1.5(e), so long as it is confirmed in writing.\textsuperscript{152} However, under new Rule 1.5(e) there is no requirement that this writing be signed by the client. Neither the Corrected Final Report nor the Supreme Court Committee on Professional Responsibility Report explains why it was appropriate to dispense with the requirement that the writing be signed by the client.

One last example involves a lawyer's right to terminate representation of a party. Former IPRC 1.16(b) stated that unless a lawyer was obligated to terminate the representation under IPRC 1.16(a), the lawyer could not withdraw from representing a party, and in a matter before a tribunal could not ask the tribunal for permission to withdraw, unless one of various conditions was satisfied.\textsuperscript{153} A lawyer was not permitted to withdraw simply because her withdrawal would not have a materially adverse impact on the client's interests. By contrast, new Illinois Rule 1.16(b)(1) allows such a withdrawal if it "can be accomplished without material adverse effect on the interests of the cli-

\begin{itemize}
  \item[151.] ILL. RULES OF PROF'L CONDUCT R. 1.5(f) (repealed Jan. 1, 2010).
  \item[152.] ILL. RULES OF PROF'L CONDUCT R. 1.5(e) (2010). Rule 1.5(e)'s requirement that each of the attorneys assume "financial responsibility" for the matter rather than old Rule 1.5(f)'s reference to simple "responsibility" is consistent with the way in which old Rule 1.5(f) had been judicially construed. See ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 62 (citing In re Storment, 786 N.E.2d 963, 971 (2002)).
  \item[153.] ILL. RULES OF PROF'L CONDUCT R. 1.16 (repealed Jan. 1, 2010). Specifically, it prohibited such withdrawal unless:
    \begin{itemize}
      \item[(1)] the client:
        \begin{itemize}
          \item[(A)] insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law;
          \item[(B)] seeks to pursue an illegal course of conduct;
          \item[(C)] insists that the lawyer pursue a course of conduct that is illegal or that is prohibited by these Rules;
          \item[(D)] by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;
          \item[(E)] insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer although not prohibited by these Rules; or
          \item[(F)] substantially fails to fulfill an agreement or obligation to the lawyer as to expenses or fees;
        \end{itemize}
      \item[(2)] the lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;
      \item[(3)] the client consents to termination of the lawyer's employment after disclosure; or
      \item[(4)] the lawyer reasonably believes that a tribunal will, in a proceeding pending before the tribunal, find the existence of other good cause for withdrawal.
    \end{itemize}
\end{itemize}

\textit{Id.}
Neither the Rule nor the Comments provide any guidance as to what constitutes a "material adverse effect." In many cases, however, when one lawyer withdraws, her replacement will have to repeat some of the work that was already done — or will have to spend additional time becoming familiar with the results of the work that was already done. Consequently, if the first attorney received payment for such work, her withdrawal would certainly seem to impose duplicative costs on the client. It would be useful if the Illinois Supreme Court would have made its intentions in such a case clearer.

IV. THE BROADER FAILURE OF THE PROCESS TO AMEND THE ETHICS RULES

Many actors play formal or informal roles in the regulation of legal ethics in Illinois. These include, among others, the Illinois Supreme Court and other Illinois courts, the Committee on Professional Responsibility, the ARDC, the ISBA, and the CBA. This article does not aspire to be a comprehensive evaluation of the manifold and interrelated functions of these institutional agents. Nevertheless, this article recommends a number of relatively simple, but significant, initiatives for improving Illinois’ legal ethics regulatory scheme. Most of these measures are not novel. But their serious consideration by Illinois officials, and, indeed, their adoption, are long overdue.

First, under the status quo, there is no mechanism for obtaining a timely authoritative opinion as to the proper response to a particular ethical problem. Although the ISBA and, to a lesser degree, the CBA, sometimes issues opinions, they are not authoritative and following non-authoritative opinions, in some jurisdictions at least, have led to attorneys being disciplined. Technological and practice changes seem to have ushered in an ever-growing number of serious ethics questions, and the need for a timely mechanism for obtaining authoritative responses is increasingly acute. Reliance on the ABA

155. Illinois State Bar Association opinions include the following disclaimer:
   ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice. See, e.g., Ill. Bar Ass'n Adv. Op. on Prof'l Conduct, Op. 05-01 (Jan. 2006).
156. Some jurisdictions, however, expressly protect attorneys who in good faith rely on certain non-authoritative ethics opinions issued within the jurisdiction.
Model Rules is unavailing, because jurisdictions with similarly worded ethics codes often reach differing conclusions. Indeed, the ABA itself sometimes reverses its own opinions.158

Although the ARDC Ethics Inquiry Panel is a response to attorneys' recognized need for answers to ethics questions, this initiative, too, offers no authoritative help – and no safe harbor for attorneys who seek such answers. In a number of states, such as Georgia,159 Hawaii,160 Kentucky,161 Missouri,162 New Jersey,163 Rhode Island,164 and Texas,165 either the State Supreme Court or a unit thereof approves the issuance of authoritative opinions. Although these agencies may not issue many opinions per year, the opinions that are issued provide authoritative guidance to numerous attorneys. A number of commentators have suggested that the highest courts of other jurisdictions become similarly involved in the issuance of authoritative advisory opinions.166 It is time for the Illinois Supreme Court to seriously consider creating a mechanism for the issuance of authoritative opinions.167

A system for issuing authoritative ethics opinions could be proactive. Such a system could facilitate a timely and effective response to contemporary developments. The plethora of ethics opinions issued by various bodies in the years since the ABA's adoption of the recom-

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159. See Interpreting the Standards of Conduct, Ethical Considerations (ECs) and/or Directory Rules (DRs), STATE BAR OF GA., http://gabar.org/handbook/supreme_court_of_georgia/ (last visited Nov. 25, 2010).


161. See KY. SUP. CT. R. 3.530.

162. See MO. SUP. CT. R. 5.30.

163. See N.J. SUP. CT. R. 1:19-1.

164. These are issued by issued by an Ethics Advisory Panel established by the Rhode Island Supreme Court in 1986 to give private advice to attorneys. Interestingly, attorneys are not obligated to abide by the opinions rendered by the Ethics Advisory Panel, but if the attorney does rely on the opinion he or she "is fully protected from any subsequent charge of impropriety." See Ethics Advisory Panel, JUDICIARY OF R.I., http://www.courts.state.ri.us/supreme/ethics/defaultethics.htm (last visited Nov. 25, 2010).

165. Opinions of the Texas Supreme Court Ethics Commission are available at TEX. ETHICS COMM'N, http://www.ethics.state.tx.us/ (last visited Nov. 25, 2010).


167. Of course, such a system could be structured in various ways. It could, for instance, begin with an ethics committee composed not only of lawyers but also of non-lawyers.
mendations of its Ethics 2000 Commission and the failure of these opinions to consistently agree with one another make it clear that numerous important questions cannot be unambiguously resolved from the language of the Rules and Comments alone.

Of course, any such system could include a variety of valuable features. Consider, for instance, the New Jersey model. The New Jersey Supreme Court appoints eighteen members, fifteen lawyers and three non-lawyers, to its Advisory Committee on Professional Ethics (the "Advisory Committee").168 Any member of the New Jersey bar, any local, county or state bar association in New Jersey, and the New Jersey Supreme Court itself may submit inquiries to the Advisory Committee.169 Although the Advisory Committee may generally refuse to issue an opinion in response to an inquiry, it may not refuse to issue an opinion in response to an inquiry by the New Jersey Supreme Court.170 Interestingly, and importantly, there is a review process whereby "any aggrieved member of the [New Jersey] bar, bar association or ethics committee"171 may challenge an ethics opinion issued by the Advisory Committee by filing a timely petition for review.172 This review process is designed as an adversarial procedure that helps to assure a thorough and comprehensive consideration of the relevant ethical considerations.173 Several other states have differing processes involving state supreme court review of ethics opinions.174

By establishing a system in which it is involved in the issuance of authoritative ethics opinions, the Illinois Supreme Court can assume the mantle of leadership in helping to shape the development of ethical norms.175

Second, if, in fact, the Illinois Supreme Court is serious about deferring to the ABA Rules and Comments and concerns regarding uniformity, then it should consider announcing an "amnesty rule" for anyone who reasonably and in good faith relies on an ABA Opinion interpreting language that has been incorporated into the Illinois Rules. Of course, the Illinois Supreme Court could always prospec-

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169. Id. R. 1:19-2 (as to members of the bar and bar associations); R. 1:19-5 (as to the New Jersey Supreme Court).
170. Id. R. 1:19-5.
171. Id. R. 1:19-8(a).
172. Id.
173. See Hellman, supra note 157, at 1001-005 (discussing the New Jersey procedure in some detail).
174. See Joy, supra note 166, at n.109 (describing the processes of other states).
175. Id. at 381 (arguing that making ethics opinions authoritative "enhances the value and function of ethics opinions in shaping ethical norms").
tively interpret the language of its Rule differently, which would make continued reliance on a contrary ABA Opinion unreasonable.

Third, the Illinois Supreme Court needs to pay attention to the legal ethics problems that confront Illinois law students who work as summer law clerks during and between academic years. There is currently no effective system in place for advising such students with respect to ethical problems that arise in the workplace. Do the legal ethics rules apply to law students when they work for an attorney? In some circumstances, the answer is “yes,” while in others, depending on what function the law student serves, the answer is unclear. But even if the answer right now happens to be “no,” it would be appropriate for the Illinois Supreme Court to determine whether this ought to be changed. When a law student works for a lawyer, even if she only performs research rather than appears in court, it might be appropriate for her to work within the parameters of some, if not all, of the legal ethics rules.

Moreover, if, while working in a firm, a student witnesses a lawyer violate new Illinois Rule 8.4(a) or Rule 8.4(b), should the student have a duty to report under new Illinois Rule 8.3? Interestingly, although attorneys on the ARDC Ethics Inquiry Panel, though not providing “legal advice,” will at least talk to Illinois attorneys about ethics issues, they are not authorized to speak with law students about ethics issues that the students encounter. The Illinois Supreme Court needs to take the lead, rather than merely follow the ABA, in establishing ethics rules relating to Illinois law students. In addition, the Illinois Supreme Court should establish an institutional mechanism for advising law students regarding any such obligations.

V. Other Highlights of the 2010 Changes

Before discussing a few additional substantive changes to the legal ethics rules, a few comments are in order regarding materials that

176. See In re Hatcher, 150 F.3d 631, 636 (7th Cir. 1998): Rule 711 carves out a set of legal services that third-year law students are permitted to perform, under the specified circumstances. In our view, this is just another way of saying that a third-year law student may act as a lawyer within the limitations imposed by the rule. As such, she bears the same ethical responsibilities to her client and to the court that a full-fledged member of the bar would have, just as an associate in a law firm does despite working under the supervision of a partner.

Id. Nevertheless, this decision does not seem to address a myriad of other ethical dilemmas a student law clerk could confront. For example, a lawyer who is an associate in a firm may need to report another lawyer in the firm who suffers from disability or impairment. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 03-431 (2003). What is a student law clerk’s responsibility if she observes such a disability or impairment in an attorney at the firm? Would it matter whether the student law clerk did work for that particular attorney?
have been made available by the Illinois ARDC and the Illinois Supreme Court. These materials must be used with care. For example, the ARDC website provides what purports to be a red-lined document comparing the new Illinois Rules to the old Illinois Rules. Nevertheless, the red-lined document completely omits the texts of new Rules 1.0, 1.18, 2.4, 3.9, and 6.5. In addition, although one of the major changes to the Rules was the adoption of Comments to the Rules that provide a guide to how the rules are to be interpreted and applied, the ARDC's red-lined document does not include the Illinois Comments.

The ARDC and the Illinois Supreme Court web sites, however, do provide the complete text of the new Rules and their Comments online. Each Illinois attorney must examine and carefully consider these documents. Many of these provisions are of especial interest to business and commercial lawyers. Although this article covers a number of important changes, reading it is not an adequate alternative for studying the new Rules themselves.

First, we will consider new Rules that have no direct predecessors. Then we will consider some of the important changes within each of the eight divisions of Rules. This Part V will not discuss Rules already addressed in Parts II through IV.

A. New Rules without Direct Predecessors

It is not always clear whether a particular provision constitutes a new rule without a direct predecessor and when it is simply a change or addition to an existing rule. Nevertheless, it seems fair to say that there are at least four independently numbered Rules that are "new

178. Id.
180. Reading the ISBA-CBA Joint Committee on Ethics 2000, Corrected Final Report or the Illinois Supreme Court Committee on Professional Responsibility Report, while certainly useful, may at times be materially misleading. The rules actually adopted by the Illinois Supreme Court sometimes differ significantly from those set forth in those documents.
181. The Illinois Rules of Professional Conduct (2010), just as the old rules, are divided into eight divisions, each with its own number of rules.
rules”: Rule 1.18, 2.4, 3.9 and 6.5. Although there was no prior Rule 1.0, new Rule 1.0, which defines a number of terms, was preceded under the old Rules by an unnumbered section on terminology and will not receive separate attention in this article.

1. Rule 1.18 – Duties to Prospective Client

Attorneys sometimes have preliminary interactions with prospective clients. A “prospective client” is “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” These interactions raise questions regarding confidentiality and conflicts of interest. The former Rules did not expressly address these concerns. Under new Rule 1.18, a lawyer may not use or reveal information acquired during a consultation with a prospective client except in circumstances in which the lawyer could reveal information of a former client under Rule 1.9. In addition, a lawyer who consulted with a prospective client may not represent a client with interests “materially adverse” to those of the prospective client “in the same or a substantially similar matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.” Nevertheless, a lawyer is not disqualified if both the prospective client and the affected client give their informed consent. There is no requirement that this consent be confirmed in writing. Even if a particular lawyer is disqualified, new Rule 1.18 provides that the lawyer’s firm is not disqualified if “the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.”

182. Strangely, the ARDC web site provides a document entitled, “Highlights from the New Illinois Rules of the [sic] Professional Conduct,” which is available at https://www.iardc.org/New%20Rule%20Highlights.pdf, which, under “1) New Rules,” includes New Rule 4.4(b), which is not a “stand-alone” provision, but does not list Rule 6.5 as a “New Rule.” Instead, that document includes Rule 6.5 as number “3)” on its list, while referring to it as “new Rule 6.5.” On the other hand, in its red-lined version of the rules, the ARDC includes the text of New Rule 4.4(b), but excludes the text of New Rule 6.5. See ARDC Clerk’s Office, supra note 2.

183. ILL. RULES OF PROF'L CONDUCT R. 1.18(a) (2010).

184. Id. R. 1.18(b).

185. Id. R. 1.18(c).

186. Id. R. 1.18(d)(1).

187. Id. R. 1.18(d)(2).
2. Rule 2.4 - Lawyer Serving as a Third-Party Neutral

A lawyer "serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them."\(^{188}\) Thus, an arbitrator, a mediator, or the like may be a third-party neutral. A lawyer who is a third-party neutral must make it clear to the parties that the lawyer is not representing them as their attorney. He must also explain "the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."\(^{189}\) The extent of this explanation depends on the "particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected."\(^{190}\) An attorney who represents a party in an alternative dispute resolution process is governed by the Illinois Rules of Professional Conduct.\(^{191}\) If the process "takes place before a tribunal," as defined by new Rule 1.0(m), Rule 3.3 governs the lawyer's duty of candor.\(^{192}\) Otherwise, Rule 4.1 governs the lawyer's duty of candor both as to the third-party neutral and as to other parties.\(^{193}\)

3. Rule 3.9 - Advocate in Nonadjudicative Proceedings

New Rule 3.9 obligates a lawyer who represents a client "before a legislative body or administrative agency in a nonadjudicative proceeding" to disclose that he or she is appearing in a representative capacity.\(^{194}\) In addition the lawyer must conform to Rule 3.3(a), (b) and (c), and Rule 3.5,\(^{195}\) even if non-lawyers who act as such representatives would not need to do so.\(^{196}\) According to the pertinent Comments, these Rules only apply to a lawyer's representation of a client in connection "with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument."\(^{197}\) The Rule does not apply when a lawyer represents a client in "a negotiation or other bilateral transaction with a governmental agency," in an "application for a license or other privilege," in relation to "the client's compliance with

\(^{188}\) ILL. RULES OF PROF'L CONDUCT R. 2.4(a) (2010).
\(^{189}\) Id. R. 2.4(b).
\(^{190}\) Id. R. 2.4 cmt. 3.
\(^{191}\) Id. R. 2.4 cmt. 5.
\(^{192}\) Id.
\(^{193}\) ILL. RULES OF PROF'L CONDUCT R. 2.4 cmt. 5 (2010).
\(^{194}\) Id. R. 3.9(a).
\(^{195}\) Id. R. 3.9(b).
\(^{196}\) Id. R. 3.9 cmt. 2.
\(^{197}\) Id. R. 3.9 cmt. 3.
generally applicable reporting requirements," or in connection with a
governmental "investigation or examination of the client’s affairs."\textsuperscript{198}

4. New Rule 6.5 – Non-Profit and Court-Annexed Limited
Legal Services Programs

Courts, legal service organizations, and other non-profit organiza-
tions offer various programs through which lawyers provide short-
term, limited legal services – such as the provision of advice or the
filling out of forms – to aid people with their legal problems without
the lawyers or the people so helped anticipating the creation of an
ongoing relationship.\textsuperscript{199} Nevertheless, even the limited provision of
services creates a client-lawyer relationship.\textsuperscript{200} Many of these pro-
grams, "such as legal-advice hotlines, advice-only clinics or \textit{pro se}
counseling programs," are operated in such a way that it is not feasible
for the lawyers to "systematically screen for conflicts of interest."\textsuperscript{201}
Not wanting to unduly reduce the availability of such services, new
Rule 6.5 states that a lawyer who provides such services under the
auspices of such organizations is not subject to Rules 1.7 and 1.9(a)
unless the lawyer actually knows that the representation involves a
conflict of interest.\textsuperscript{202} Similarly, a lawyer providing these sorts of lim-
ited, short-term services is only subject to Rule 1.10 if the lawyer
knows that another member of the lawyer’s firm is disqualified under
Rule 1.7 or 1.9(a).\textsuperscript{203}

New Rule 6.5 also limits the scope of Rule 1.10 so that the fact that
a lawyer has provided limited, short-term legal services to one person
through a particular program does not disqualify other members of
the lawyer’s firm from representing a client with interests adverse to
other persons being serviced by that program.\textsuperscript{204} Similarly, Rule 6.5
limits Rule 1.10 so that the fact that one lawyer providing services
under a program is personally disqualified from providing services to
a particular client does not prevent other lawyers participating in the
program from providing services to that client.\textsuperscript{205}

\textsuperscript{198} \textit{Ill. Rules of Prof’l Conduct} R. 3.9 cmt. 3 (2010).
\textsuperscript{199} \textit{Id.} R. 6.5 cmt. 1.
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.} R. 6.5(a)(1).
\textsuperscript{203} \textit{Ill. Rules of Prof’l Conduct} R. 6.5(a)(2) (2010).
\textsuperscript{204} \textit{Id.} R. 6.5(a)(2); R. 6.5 cmt. 4.
\textsuperscript{205} \textit{Id.} R. 6.5.
B. Other New Rules According to Their Respective Categories

1. Client-Lawyer Relationship

New Rule 1.4 requires a lawyer to inform a client of facts or circumstances that affect matters as to which the client’s informed consent is required and provides that a lawyer must consult with the client regarding the means to be used to pursue the client’s objectives.\(^{206}\)

New Rule 1.8 differs from former Rule 1.8 in several important ways. First, for a lawyer to enter into a business transaction with or acquire an interest adverse to a current client, new Rule 1.8(a) requires, among other things, that (1) the terms of the transaction or acquisition be explained in a clearly understandable writing; (2) the client must be advised of the right to seek independent legal counsel regarding the matter and given a reasonable opportunity to obtain such counsel; and (3) the client must give written consent, in a writing signed by the client, to the essential terms of the matter, and the writing must state whether the lawyer is representing the client in the matter.\(^{207}\) Former Rule 1.8(a) simply required client consent after disclosure.\(^{208}\)

New Rule 1.8(c) provides not only that a lawyer generally may not prepare a document, including a testamentary document, that provides the lawyer or certain relatives of the lawyer a substantial gift, but it also prohibits a lawyer from simply soliciting a substantial gift for himself or certain relatives.\(^{209}\) Nevertheless, new Rule 1.8(c) continues an exception for cases in which the client and the lawyer (or the recipient of the gift) are closely related.\(^{210}\)

New Rule 1.10 differs from former Illinois Rule 1.10 by refusing to impute a particular lawyer’s disqualification to the other lawyers in the firm if the disqualification is “based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”\(^{211}\) Where new Rule 1.10 requires consent from affected persons, the consents do not need to be confirmed in writing.

New Rule 1.13 is especially important to lawyers who represent organizations such as corporations or limited liability companies. First, it imposes certain duties to report particular types of problems to higher-ups within the client organization. One such duty arises if the

\(^{206}\) Id. R. 1.4.
\(^{207}\) Id. R. 1.8.
\(^{208}\) ILL. RULES OF PROF’L CONDUCT R. 1.8(a) (repealed Jan. 1, 2010).
\(^{209}\) ILL. RULES OF PROF’L CONDUCT R. 1.8(c) (2010).
\(^{210}\) Id.
\(^{211}\) Id. R. 1.10(a).
lawyer: (1) knows; (2) that an agent, officer or other person associated with the organization; (3) intends to act or refuses to act as to a matter related to the representation; (4) and that the act or refusal constitutes a crime, fraud or other violation of law; (5) that can reasonably be imputed to the organization; and (6) will likely cause substantial harm to the organization.\textsuperscript{212} In such a case the lawyer must “proceed as is reasonably necessary in the best interest of the organization.”\textsuperscript{213} Specifically, the lawyer must refer the matter to a higher authority within the organization and, if necessary, to the highest such authority, unless the lawyer reasonably believes that doing so is not necessary in the best interests of the organization.\textsuperscript{214}

But suppose the lawyer has fulfilled his obligation of reporting to the highest authority within the organization, and that authority either insists upon, or fails to redress, the problematic action or failure to act. If the action or failure to act is a crime or fraud which the lawyer reasonably believes is reasonably certain to cause the organization substantial injury, then Rule 1.13 expressly permits the lawyer to disclose information, including information related to the representation of the organization, to a person or entity outside of the organization, but only to the extent that it is necessary to prevent substantial harm to the organization.\textsuperscript{215}

New Illinois Rule 1.13 also provides that if a lawyer reasonably believes that he was discharged because he took actions required or permitted by Rule 1.13, the lawyer “shall proceed” as he reasonably believes necessary to ensure that the organizational client’s highest authority is informed of the discharge.\textsuperscript{216} The Rule requires a lawyer to proceed in the same manner if he withdraws from the representation under circumstances in which new Rule 1.13 requires or permits the lawyer to make disclosures.\textsuperscript{217}

The merit of Rule 1.14, which addresses a lawyer’s responsibility as to a client with diminished capacity, is questionable. On the one hand, it explicitly states that a lawyer is impliedly authorized under Rule 1.6(a) to disclose otherwise confidential information when taking protective action on behalf of the client.\textsuperscript{218} But a strong case could be made that expressly stating this Rule was unnecessary and is of little advantage. On the other hand, new Rule 1.14 arguably makes it more

\begin{itemize}
\item \textsuperscript{212} Id. R. 1.13(b).
\item \textsuperscript{213} Id.
\item \textsuperscript{214} ILL. RULES OF PROF’L CONDUCT R. 1.13(b) (2010).
\item \textsuperscript{215} Id. R. 1.13(c).
\item \textsuperscript{216} Id. R. 1.13(e).
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Id. R. 1.14(c).
\end{itemize}
difficult for a lawyer to protect persons of diminished capacity. Former Rule 1.14 permitted a lawyer to take protective action when the lawyer reasonably believed "that the client cannot adequately act in the client's own interest." New Rule 1.14(b) seems to introduce additional restrictions: "When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action . . . ." The old formulation of the Rule appears to authorize action to protect the client from harm without the need to determine whether that harm was "substantial."

Comment 9 to new Illinois Rule 1.14 differs from Comment 9 to ABA Model Rule 1.14. Both versions of Comment 9 permit a lawyer to take action on behalf of a person, "where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm" even if "the person is unable to establish a client-lawyer relationship," so long as the person or someone else "acting in good faith" on the person's behalf "has consulted the lawyer." Nevertheless, Comment 9 to ABA Model Rule 1.14 states that even under such circumstances, a lawyer "should not act unless the lawyer reasonably believes that the person [with seriously diminished capacity] has no other lawyer, agent or other representative available." Comment 9 to new Illinois Rule 1.14 qualifies this rule, stating that it does not apply "when that representative's actions or inaction threaten immediate and irreparable harm to the person."

New Illinois Rule 1.16 eliminates the provision of old Illinois Rule 1.16 that required a lawyer to withdraw if the lawyer knows or reasonably should know that the client is bringing the legal action "merely for the purpose of harassing or maliciously injuring any person." The ISBA-CBA Corrected Final Report explains that it is inappropriate for the attorney to withdraw based on the lawyer's judgment regarding the client's "psychological motivation." Nevertheless, new Illinois Rule 1.16 does state that the lawyer must withdraw if failing to

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220. ILL. RULES OF PROF'L CONDUCT R. 1.14(b) (2010).
221. Id. R. 1.14 cmt. 9; MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 9 (2003).
223. ILL. RULES OF PROF'L CONDUCT R. 1.14 cmt. 9 (2010).
224. Id. R. 1.16; ILL. RULES OF PROF'L CONDUCT R. 1.16 (repealed Jan. 1, 2010).
225. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 22.
do so will violate other applicable Rules, which would include new Illinois Rule 3.1, which prohibits frivolous actions.226

New Illinois Rule 1.16(b)(1) follows ABA Model Rule 1.16(b)(1) by permitting a lawyer to withdraw, provided the lawyer complies "with applicable law requiring notice to or permission of a tribunal when terminating a representation," if "withdrawal can be accomplished without material adverse effect on the interests of the client."227 Neither Illinois Rule 1.16 nor the Comments thereto address whether a client’s need to pay a new lawyer to become familiar with work that the first lawyer was already paid for constitutes a material adverse effect on the interests of the client.

Interestingly, new Illinois Rule 1.16(b)(7), also following ABA Model Rule 1.16(b)(7), provides that a lawyer may withdraw if "other good cause for withdrawal exists."228 Given that the list of reasons justifying discretionary withdrawal are disjunctive, it therefore appears that "if other good cause for withdrawal exists," new Illinois Rule 1.16(b)(7) and ABA Model Rule 1.16(b)(7) allow withdrawal even if withdrawal cannot be accomplished without material adverse effect on the interests of the client. Of course, new Illinois Rule 1.16(d) and ABA Model Rule 1.16(d) require the lawyer to "take steps to the extent reasonably practicable to protect a client’s interest."229

New Illinois Rule 1.17 permits the sale of a law practice on four conditions. First, the entire practice must be sold to one or more lawyers or law firms. Second, the lawyer selling the practice must retire from the private practice of law in the geographic area in which the practice was conducted. Third, the sale cannot result in increased fees being charged to the clients. The fourth condition may be satisfied in either of two ways. It may be satisfied, for example, by the seller’s giving written notice of the proposed sale to the practice’s clients, informing them that they have the right "to retain other counsel or to take possession of the file" and advising them that "the client’s consent to the transfer of the client’s files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice."230 If it is not possible to provide clients with such notice, then the fourth condition may be satisfied by

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226. ILL. RULES OF PROF’L CONDUCT R. 1.16 (2010).
227. Id. R. 1.16(b)(1); MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(1) (2003).
229. ILL. RULES OF PROF’L CONDUCT R. 1.16(d) (2010); MODEL RULES OF PROF’L CONDUCT R. 1.16(d) (2003).
obtaining an order of a court of competent jurisdiction that authorizes the sale.\textsuperscript{231}

2. Counselor

Old Illinois Rule 2.3 permitted a lawyer to provide an evaluation for a third party if (1) the lawyer reasonably believed that doing so was “compatible with other aspects of the lawyer’s relationship with the client”; and (2) the client consented.\textsuperscript{232} New Illinois Rule 2.3 retains the first requirement, but states that the client’s “informed consent” is only necessary “[w]hen the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely.”\textsuperscript{233} Thus, aside from the reference to “informed consent” instead of “consent,” Rule 2.3 lowers the requirements for a lawyer’s making of an evaluation for a third party.

3. Advocate (Rules 3.1 to 3.9)

Old Illinois Rule 3.3 imposed duties on a lawyer only when the lawyer was “appearing in a professional capacity before a tribunal.”\textsuperscript{234} By contrast, new Illinois Rule 3.3 applies to the lawyer in whatever capacity the lawyer relates to the tribunal, including, for instance, as a witness or as a party.\textsuperscript{235}

Old Illinois Rule 3.3 provided no guidance as to when, if at all, the duties it imposed would terminate. By contrast, new Illinois Rule 3.3(c), following ABA Model Rule 3.3, makes it clear that the lawyer’s duties under new Illinois Rule 3.3(a) and (b) terminate at “the conclusion of the proceeding.”\textsuperscript{236}

New Illinois Rule 3.3(a)(1) adds a provision prohibiting a lawyer from knowingly failing “to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”\textsuperscript{237} Furthermore, new Illinois Rule 3.3(a)(3) expressly authorizes an attorney to refuse to offer evidence, other than the client’s own testimony as a criminal defendant, if the lawyer reasonably believes the evidence to be false.\textsuperscript{238}

\begin{footnotes}
\item[231] Id.
\item[232] ILL. RULES OF PROF'L CONDUCT R. 2.3 (repealed Jan. 1, 2010).
\item[233] ILL. RULES OF PROF'L CONDUCT R. 2.3 (2010).
\item[234] ILL. RULES OF PROF'L CONDUCT R. 3.3 (repealed Jan. 1, 2010).
\item[235] ILL. RULES OF PROF'L CONDUCT R. 3.3 (2010).
\item[236] ILL. RULES OF PROF'L CONDUCT R. 3.3(c) (2010); MODEL RULES OF PROF'L CONDUCT R. 3.3 (2003).
\item[237] ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2010).
\item[238] Id. R. 3.3.
\end{footnotes}
New Illinois Rule 3.4 specifies a few additional proscriptions not expressly mentioned in old Illinois Rule 3.4. Thus, it forbids a lawyer: (1) from knowingly disobeying “an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;” (2) in pretrial procedure, from making a frivolous discovery request or from failing to make a reasonably diligent effort to comply with an adversary’s proper discovery request; and (3) in trial, from (a) alluding to a matter “that the lawyer does not reasonably believe to be relevant or that will not be supported by admissible evidence”; (b) asserting personal knowledge of facts, other than when serving as a witness; (c) stating a personal opinion regarding “the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.”

New Illinois Rule 3.5 is considerably streamlined, with some provisions moved to other Rules, such as new Illinois Rule 8.4, and others, such as some of the “exceptions” to the prohibition against ex parte communications, being eliminated.

New Illinois Rule 3.6 regarding trial publicity retains the Illinois standard that only restricts public statements that “would pose a serious and imminent threat to the fairness” of a proceeding. ABA Model Rule 3.6, by contrast, uses a standard that is more restrictive of speech. It prohibits a lawyer from making statements that the lawyer knows or reasonably should know “will have a substantial likelihood of materially prejudicing” a proceeding. Old Illinois Rule 3.6(b) listed examples of statements that would be proscribed under the “serious and imminent threat” standard. New Illinois Rule 3.6 does not contain these examples, but they appear in Comment 5 thereto.

Under old Illinois Rule 3.7, if a lawyer was disqualified because the lawyer was a witness in a case, the lawyer was completely disqualified. Not only could the lawyer not serve as an advocate in court, but the lawyer could not work on the case outside of court either. New Illinois Rule 3.7, following ABA Model Rule 3.7, only disqualifies such a lawyer from serving as a party’s advocate in court.

239. Id. R. 3.4.
240. The rule of old Illinois Rule 3.5(h) dealing with gifts or loans to judges or other court officials was moved to New Illinois Rule 8.4(f).
241. ILL. RULES OF PROF’L CONDUCT R. 3.6(a) (2010).
243. ILL. RULES OF PROF’L CONDUCT R. 3.6(b) (repealed Jan. 1, 2010).
244. ILL. RULES OF PROF’L CONDUCT R. 3.6 cmt. 5 (2010).
245. ILL. RULES OF PROF’L CONDUCT R. 3.7 (repealed Jan. 1, 2010).
Old Illinois Rule 3.7 applied different criteria to disqualify a lawyer based on whether the lawyer was to appear as a witness for the client or as a witness called by the client’s adversary. New Illinois Rule 3.7 eliminates this distinction.

New Illinois Rule 3.8 is considerably different from old Illinois Rule 3.8. While old Rule 3.8 imposed duties not only on prosecutors but on other government lawyers, at least those involved in criminal prosecution, new Illinois Rule 3.8 applies only to prosecutors. The ISBA-CBA Corrected Final Report states that, “[new Illinois Rule 3.8] differs from the current Illinois rule in being limited to prosecutors, because other government lawyers may not share the prosecutor's special responsibilities.” Given that Illinois had previously taken the position that other government lawyers did share some basic Rule 3.8 responsibilities, it seems that new Rule 3.8, by retreating from this position, may represent a step in the wrong direction.

As to prosecutors, however, new Illinois Rule 3.8 adds a number of specific restrictions. Thus, a prosecutor must make reasonable efforts to ensure that an accused has been advised of the right to counsel and of how to obtain counsel and has been afforded a reasonable opportunity to do so. In addition, a prosecutor must seasonably disclose to the defense all information known to him that either “tends to negate” the accused’s guilt or “mitigates the offense” and, as to sentencing, must disclose to the defense and to the tribunal all unprivileged mitigating information known to him unless a protective order of the tribunal provides otherwise. New Illinois Rule 3.8 also provides that a prosecutor may not seek to obtain a waiver of important pretrial rights from an unrepresented accused.

New Rule 3.8 also imposes conditions on a prosecutor’s ability to issue a subpoena to a lawyer in a grand jury or other criminal proceeding to testify about a past or present client. Specifically, a prosecutor may only issue such a subpoena if the prosecutor reasonably believes: (1) the information sought is not protected by any applicable privilege; (2) the information is essential to a successful investigation or prosecution; and (3) the information cannot otherwise be feasibly ob-

247. ILL. RULES OF PROF'L CONDUCT R. 3.7 (repealed Jan. 1, 2010).
248. ILL. RULES OF PROF'L CONDUCT R. 3.7 (2010).
250. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 30 (emphasis added).
251. ILL. RULES OF PROF'L CONDUCT R. 3.8(b) (2010).
252. Id. R. 3.8(d).
253. Id. R. 3.8(c).
Since 1992, old Illinois Rule 3.8 had contained no restrictions on a prosecutor's issuance of a subpoena in such circumstances.255

4. Transactions with Persons Other Than Clients (Rules 4.1 to 4.4)

New Illinois Rule 4.1 prohibits a lawyer, in the course of representing a client, from knowingly making a false statement of material fact or law, whereas old Illinois Rule 4.1 forbade a lawyer from making a statement of material fact or law that the lawyer "knows or reasonably should know is false."256 Thus, under the new language, if a lawyer makes a false statement without actually knowing it was false, the lawyer does not violate new Rule 4.1 even though, based on the circumstances, the lawyer should have known the statement was false. Thus, in this respect, new Rule 4.1 lowers the ethics standards.

New Illinois Rule 4.2 generally prevents a lawyer, in the course of representing a client in a matter, from communicating about "the matter" with a "person" whom he knows to be represented in the matter.257 By contrast, old Illinois 4.2 referred to a "party," suggesting the possibility that the prohibition was restricted only to situations involving litigation.258

In addition, new Illinois Rule 4.2 eliminates the rule forbidding a lawyer from causing "another" to communicate on a particular matter with a person the lawyer knows to be represented in the matter. Indeed, Comment 4 to new Illinois Rule 4.2 points out that, "[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." This new Comment 4, however, is problematic when it states that, "[a] lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a)." Although the ISBA-CBA Corrected Final Report lauds Comment 4 as clarifying the interrelationship between Rule 4.2 and Rule 8.4(a),259 this supposed clarification is illusory. If a lawyer advises a

254. Id. R. 3.8(e).
255. From 1991 to 1992, the Illinois Supreme Court had adopted a rule that required judicial approval of such a subpoena only after the opportunity of an adversarial hearing on the matter. After prosecutors objected to this provision, the Court, in 1992, deleted it. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 34.
258. ILL. RULES OF PROF'L CONDUCT R. 4.2 (repealed Jan. 1, 2010).
259. The ISBA-CBA Corrected Final Report states: "Comment [4] explains the appropriate scope of that concept, pointing out that Rule 8.4(a) prohibits a lawyer's communication through the acts of another, a matter not stated in current IRPC 8.4. The Comment also clarifies the
client regarding what the client should or should not say to another person, it becomes quite difficult to distinguish the client’s communication from “a communication” by the lawyer through the acts of the client.

Comment 7 to new Illinois Rule 4.2 provides specific guidance as to a lawyer’s ability to communicate with present and former constituents of a represented organization. According to Comment 7, Rule 4.2 only “prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter [in question] or whose act or omission in connection with the matter may be imputed to the organization for purpose of civil or criminal liability.” The Corrected Final Report praises Comment 7 as providing “needed and reasonable guidance concerning which constituents of a represented organization are persons represented by counsel under the Rule. Illinois lawyers currently labor under conflicting interpretations of that issue.” In fact, however, Comment 7 represents a change from the rule articulated by an Illinois appellate court in *Fair Automotive v. Car-X Service Systems*, which only limited a lawyer’s communications with a represented organization’s “control group.” The only conflicting authority cited by the Corrected Final Report was the interpretation of a federal district court in Illinois. It is possible that the standard articulated in Comment 7 is a good one, but it does seem to represent a change.

New Illinois Rule 4.3 adds a specific rule that, when a lawyer deals with an unrepresented person, the lawyer may not give the person legal advice, other than to obtain counsel, “if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”

New Illinois Rule 4.4 adds a provision pertaining to situations in which a lawyer receives a document relating to the representation of a

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260. ILL. RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2010).
261. ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 31.
263. See ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 31 (citing Weibrecht v. S. Ill. Transfer, Inc., 241 F.3d 875, 881-83 (7th Cir. 2001) (affirming the federal district court’s right to interpret its own rules, which had incorporated the Illinois ethics rules, rather than to be bound by the construction given to those rules by an Illinois appellate court)).
Comment 2 explains that the Rule applies also to the receipt of e-mails and "other electronic modes of transmission." Ethics authorities and commentators in various jurisdictions have reached different opinions regarding a lawyer's responsibilities in these cases. New Illinois Rule 4.4 takes a minimalist position, simply requiring that the lawyer promptly notify the sender that the document was received. Interestingly, Comment 3, which is identical to Comment 3 to ABA Model Rule 4.4, goes beyond merely providing guidance as to how to interpret the Rule. Instead, it seems to assert a new rule as to a lawyer's discretion regarding such inadvertently sent documents:

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

5. Law Firms and Associations (Rules 5.1 to 5.7)

New Illinois Rule 5.1(a) imposes on partners in a firm and on lawyers who, individually or together with others, have managerial authority in a law firm, the duty to take reasonable efforts to ensure that the firm puts into effect reasonable measures to reasonably ensure that lawyers in the firm comply with applicable ethics rules. Old Illinois Rule 5.1(a) placed this duty only on partners. The new Rule properly recognizes that this responsibility should be a consequence of managerial authority and not only a consequence of the ownership of a partnership interest.

New Illinois Rule 5.1(c) adds a provision stating that a lawyer with managerial authority is liable for a violation of the Illinois Rules of Professional Conduct if the lawyer with managerial authority knows

265. Id. R. 4.4(b).
266. Id. R. 4.4 cmt. 2.
268. ILL. RULES OF PROF'L CONDUCT R. 4.4(b) (2010).
270. ILL. RULES OF PROF'L CONDUCT R. 5.1(a) (2010).
271. ILL. RULES OF PROF'L CONDUCT R. 5.1(a) (repealed Jan. 1, 2010).
of the other attorney's conduct at a time when its effects "can be avoided or mitigated but fails to take reasonable remedial action." 272

Like new Illinois Rule 5.1, new Illinois Rule 5.3 imposes on lawyers possessing managerial authority in a firm the same responsibilities that its predecessor imposed only upon lawyers who were partners in a firm. 273 New Illinois Rule 5.4 permits a lawyer to share "court-awarded fees with a nonprofit organization that employed, retained or recommended employment of the lawyer." 274 New Illinois Rule 5.4 forbids a lawyer from practicing with a professional corporation or association in which a nonlawyer is a corporate officer and does not contain old Illinois Rule 5.4's exception regarding situations in which a nonlawyer serves as secretary possessing only ministerial duties. 275

New Illinois Rule 5.5 introduces several new rules regarding the practice of law in Illinois by lawyers licensed in other states. A lawyer who is not licensed to practice in Illinois may not hold himself or herself out as licensed to practice in Illinois. 276 Nor may such a lawyer establish an office or any other "systematic presence" in Illinois for the practice of law. 277 Nevertheless, a lawyer licensed in another United States jurisdiction, and not disbarred or suspended from the practice of law in any jurisdiction, may, in four situations, provide legal services in Illinois on a temporary basis. First, the lawyer may provide such services in association with another lawyer who is licensed in Illinois and who actively participates in the representation. 278 Second, the lawyer may provide such services if they are in or "reasonably related to a pending or potential proceeding before a tribunal . . . if the lawyer, or a person the lawyer is assisting, is authorized by law to appear in such proceeding or reasonably expects to be so authorized." 279 Third, the lawyer may provide such services if (a) they are in or reasonably related to a pending or potential alternative dispute resolution proceeding, (b) they arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted, and (c) are not legal services for which Illinois requires pro hac vice admission. 280 Fourth, the lawyer may provide such services if they are not reasonably related to a pending or potential proceeding

272. ILL. RULES OF PROF'L CONDUCT R. 5.1(c) (2010).
273. Id. R. 5.3(a).
274. Id. R. 5.4(a)(4).
275. Id. R. 5.4(d).
276. Id. R. 5.5(b)(2).
278. Id. R. 5.5(c)(1).
279. Id. R. 5.5(c)(2).
280. Id. R. 5.5(c)(3).
before a tribunal or to a pending or potential alternative dispute resolution proceeding, if the services "arise out of or are reasonably related to the lawyers' practice in a jurisdiction in which the lawyer is admitted to practice."281

Furthermore, new Rule 5.5 provides two bases on which a lawyer licensed in another United States jurisdiction, and not disbarred or suspended from the practice of law in any jurisdiction, but not admitted to practice law in Illinois, may nonetheless practice law in Illinois on an ongoing basis. First, the lawyer may do so if the services are provided to the lawyer's employer and are not services for which Illinois requires *pro hac vice* admission.282 Thus, under this Rule, such a lawyer could provide a variety of legal services to the lawyer's employer, including the drafting of contracts, leases, and other documents, and the conducting of negotiations and the like. In addition, such a lawyer could provide legal services that the lawyer is authorized to provide in Illinois by virtue of federal or other law.283

New Illinois Rule 5.6 prohibits a lawyer from participating in various types of agreements that would restrict a lawyer's right to practice law.284 It differs from old Illinois Rule 5.6 primarily by including several additional types of agreements to the list of agreements that may not restrict a lawyer's right to practice law.285

Although both the ISBA-CBA Joint Committee Corrected Final Report and the Supreme Court Committee on Professional Responsibility Report recommended adoption of ABA Model Rule 5.7, which addresses "responsibilities regarding law-related services," the Illinois Supreme Court did not adopt that Rule.286 Instead, Illinois Rule 5.7 is "reserved" for possible future action.287

6. Public Service (Rules 6.1 to 6.5)

Both the ISBA-CBA Joint Committee Corrected Final Report and the Supreme Court Committee on Professional Responsibility Report recommended that Illinois not adopt ABA Model Rule 6.1.288 The

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281. *Id.* R. 5.5(c)(4).
283. *Id.* R. 5.5(d)(2).
284. *Id.* R. 5.6.
286. *See ISBA-CBA Joint Comm. on Ethics 2000, Corrected Final Report, supra* note 17, at 161-63; Redmond, *supra* note 5, at Exhibit B.
288. *See ISBA-CBA Joint Comm. on Ethics 2000, Corrected Final Report, supra* note 17, at 164; Redmond, *supra* note 5, at Exhibit B.
Illinois Supreme Court accepted this recommendation. Instead, Illinois Rule 6.1 is “reserved” for possible future action. New Illinois Rules 6.2, 6.3, and 6.4 are essentially the same as their predecessors. New Illinois Rule 6.3, which refers to a lawyer’s membership in certain legal service organizations, differs from ABA Model Rule 6.3 in that the Illinois Rule only permits a lawyer to be a director, officer or member of a “not-for-profit” legal service organization. Although the ISBA-CBA Corrected Final Report had recommended adoption of the ABA Model Rule, which was not restricted to “not-for-profit” legal service organizations, the Illinois Supreme Court Committee on Professional Responsibility recommended that the restriction be retained, and the Illinois Supreme Court agreed.

New Illinois Rule 6.5, which has no predecessor, has already been discussed.

7. Information About Legal Services (Rules 7.1 to 7.6)

New Illinois Rule 7.1 succinctly states the basic rule against the making of false or misleading statements regarding a lawyer or a lawyer’s services. New Illinois Rule 7.1 is shorter than its predecessor, because some of the specific rules that were included in old Illinois Rule 7.1 now appear in the Comments to new Illinois Rule 7.1.

New Illinois Rule 7.2, as to advertising, broadly permits advertising through “written, recorded or electronic communication.” The new Rule importantly eliminates the obligation to maintain a copy or recording of any advertisement or written communication for three years after its last dissemination. In an era when a website might constitute such a “communication” and every change to the website might constitute a new “communication,” such a record-keeping requirement could easily be overwhelming. Yet new Illinois Rule 7.2 contains another “leniency” which might be questionable. Old Illinois Rule 7.2 required that every advertisement had to contain the name of at least one attorney responsible for its content. New Illinois Rule 7.2 requires that each advertisement contain “the name and office ad-

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291. See ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 168; Redmond, supra note 5, at Exhibit B.
292. See supra notes 170-74 and accompanying text.
295. ILL. RULES OF PROF’L CONDUCT R. 7.2(a) (2010).
dress of at least one lawyer or law firm responsible for its content.”297 Thus, it is sufficient if the advertisement contains the name and address of the law firm, and not of any individual lawyers. This may make it more difficult to hold individual lawyers accountable for advertisements that violate the Rules. New Illinois Rule 7.2(b)(4) provides for the possibility of reciprocal referral agreements.298

New Illinois Rule 7.3 does not permit in-person, live telephone, or real-time electronic solicitations of professional employment from a prospective client unless the prospective client is a lawyer or “has a family, close personal, or prior professional relationship with the lawyer.”299 In addition, it requires that every written, recorded or electronic solicitation from a lawyer to a prospective client “known to be in need of legal services in a particular matter shall include the words ‘Advertising Material’ on the outside envelope,” unless the prospective client is a lawyer, or has a family, close personal, or prior professional relationship with the lawyer.300 Nevertheless, new Illinois Rule 7.3 permits a lawyer to participate in a prepaid or group legal service plan if it is operated by an organization not owned or directed by the lawyer that does use in-person or telephone contact “to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.”301

New Illinois Rule 7.4 differs from ABA Model Rule 7.4 in several respects. For example, it does not permit the use of terms “certified,” “specialist,” “expert,” or the like even to identify “any certificates, awards or recognitions issued by any agency, governmental or private, or any group, organization or association” unless two conditions are satisfied.302 First, the reference must be truthful, verifiable and not misleading.303 Second, the reference must include a statement “that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.”304 In adopting a version of new Illinois Rule 7.4 that does not permit a lawyer practicing trademark law to use the designation “Trademark attorney,” and

297. ILL. RULES OF PROF'L CONDUCT R. 7.2(c) (2010).
298. Id. R. 7.2(b)(4).
299. Id. R. 7.3(a)(2).
300. Id. R. 7.3(c).
301. Id. R. 7.3(d).
304. Id. R. 7.4(c)(2).
that does not permit a lawyer engaged in admiralty law to use the designation "Proctor in Admiralty," or the like, the Illinois Supreme Court followed the recommendation of its Committee on Professional Responsibility rather than the Corrected Final Report.\textsuperscript{305}

8. Maintaining the Integrity of the Profession (Rules 8.1 to 8.5)

New Illinois Rule 8.1 forbids bar admission applicants and lawyers, in connection with a bar admission application or a disciplinary matter, from knowingly making a false statement of material fact, from failing to disclose a fact necessary to correct a misapprehension the person knows to have arisen, and from knowingly failing to respond to a lawful demand for information by admissions or disciplinary authorities.\textsuperscript{306} New Illinois Rule 8.1 differs from old Illinois Rule 8.1, which only required disclosure to correct a "material" misapprehension.\textsuperscript{307} In addition, new Illinois Rule 8.1 eliminates the old Illinois Rule 8.1 language providing that an attorney may not "further the application for admission to the bar of another person known by the lawyer to be unqualified in respect to character, education, or any other relevant attribute."\textsuperscript{308}

New Illinois Rule 8.5 expands the disciplinary jurisdiction of Illinois so that it applies to a lawyer who is not licensed to practice law in Illinois if the lawyer provides legal services in Illinois.\textsuperscript{309} Comment 1 to new Illinois Rule 8.5 differs from Comment 1 to ABA Model Rule 8.5. The Illinois Comment is worded so as to eliminate the suggestion "that parallel reciprocal discipline should be automatic."\textsuperscript{310}

VI. CONCLUSION

The Illinois Supreme Court and the Illinois Bar, generally, have largely refused to accept moral responsibility for the ethics rules governing the practice of law. Disappointingly, they have implicitly delegated their responsibility to the ABA. In following the ABA's lead, they failed to justify many of their decisions. They even failed to acknowledge many of their decisions by misrepresenting the significance

\textsuperscript{305} See ISBA-CBA JOINT COMM. ON ETHICS 2000, CORRECTED FINAL REPORT, supra note 17, at 179; Redmond, supra note 5, at Exhibit B.

\textsuperscript{306} ILL. RULES OF PROF'L CONDUCT R. 8.1 (2010).


\textsuperscript{309} ILL. RULES OF PROF'L CONDUCT R. 8.5(a) (2010).

\textsuperscript{310} Compare ILL. RULES OF PROF'L CONDUCT R. 8.5 cmt. 1 (2010), with MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 1 (2003).
of the official comments that were adopted. In addition, the Illinois Supreme Court adopted standards that fell short of those established by the ABA. Very disturbingly, throughout this lengthy process, the Illinois Supreme Court failed to exhibit the initiative to adopt a number of important measures that could have provided increased ethical guidance to Illinois attorneys and law students.