

Ethics at the Speed of Business

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James A. Doppke, Jr.*

ABSTRACT

This paper discusses several ways in which the Illinois Rules of Professional Conduct, and the Illinois Supreme Court Rules, construct barriers that prevent lawyers and businesses from accomplishing reasonable commercial goals. Often, those barriers arise from outdated concepts, or terminology that does not reflect current business realities. The paper argues for the amendment of specific Rules to enhance lawyers' and businesses' respective abilities to conduct their affairs more efficiently, without sacrificing public protection in the process.

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I. INTRODUCTION

Except as provided in this Rule 7.3, or as permitted by Rule 7.2, a lawyer shall not, directly or through a representative, solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain. The term "solicit" means contact with a person other than a lawyer in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient.

-Rule 7.3 of the Illinois Rules of Professional Conduct (1990)

The quote above was the basic rule governing lawyers' solicitation of legal business from 1990 through 2010. The presence of the word "telegraph" in the rule has been a laugh line in ethics-related speeches and MCLE presentations for many years, even before its removal in 2010. Chuckles over the anachronism have been plentiful. Surely that term must have been an inadvertent leftover from a prior rule!

The predecessor to the 1990 Rules was the 1980 Code of Professional Responsibility. The Code represented the first official guidelines for the professional conduct of Illinois attorneys ever enacted.¹ Think of that: before 1980, Illinois lawyers had no professional standards other than the Canons of Ethics of the Chicago and State bar associations, which did not have the force of law. The Canons were "not binding obligations, nor enforce[ea]ble by the courts as such," but they were said to "constitute a safe guide for professional conduct," and an attorney could be subject to discipline for not observing them.²

The 1980 Code was thus a sea change in Illinois legal regulation. But was it – or was the 1969 ABA Model Code, the basis for our 1980 Code – the source of our amusingly anachronistic "telegraph" reference? Amazingly, it was not. Sections 2-103 and 2-104 of the 1980 Code regulated attorney advertising and contained prohibitions against solicitation,³ but they did not refer to the telegraph (which, though obviously already long abandoned as a form of communication technology, had already vastly changed business, governance, and the practice of law beginning in the mid-19th century).⁴

1. See ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY, Ill. Sup. Ct. . R. 771, Article VII, ILL. REV. STAT. ch. 110A, § 771; George Vernon, *The Illinois Code of Professional Responsibility: A New Blueprint for Disciplinary Enforcement*, 30 DePaul L. Rev. 365 (1981)

2. *In re Heirich*, 10 Ill.2d 357 (1956); *In re Krasner*, 32 Ill.2d 121 (1965).

3. See 1969 ABA Model Code of Professional Responsibility, available at https://www.law.cornell.edu/wex/code_of_professional_responsibility.

4. "Lincoln was the first President to make extensive and effective use of instant electronic communication in the form of the telegraph. The telegraph functioned like an early form of e-mail, carrying with it many of the features and dangers of e-mail itself: speed, the ability to break

But why did the 1990 Rules refer to antiquated technology that even the 1980 Code had eschewed? Because lawyers and lawyer regulators use antiquated words. It is practically second nature to us. We begin law school reading 18th- and 19th-century cases. We learn words like “remittitur,” “demurrer,” “*res ipsa loquitur*.” When we begin practicing, we are taught ways of doing things that – whether simple or utterly complex – are foreign to us, and we (or many of us) feel foreign to them. So, we embrace the ways we are taught to work, and we embrace them tightly. Change becomes problematic, in word and deed.

Our overuse of antiquated, jumbled, complicated language is one of our professional peccadilloes. We have been mocked for it for as long as we, in a legal profession, have done it.⁵ But we must change outdated language, outdated rules, and outdated mindsets – and not just to avoid mockery. “Telegraph” is not the only anachronism in our rules, and as incongruous as it was, it did not impede enforcement of the rule in which it appeared. Nor did it hold back any improvements to the rule or its enforcement. That is not the case with other antiquated terms, ideas, and structures in our rules today. They function not simply as references to bygone days, but rather as codifications of methods that hold lawyers back from being able to conduct business in efficient and modern ways.

In this article, I will discuss several professional and business problems posed by rules that do not sufficiently address modern business and practice methods. Part II will address how modifying Supreme Court Rule 705 could enhance lawyer mobility. Part III proposes adopting ABA Model Rule 5.7 to benefit both lawyers who operate law-related businesses and the legal profession at large. Part IV explores ways in which Rule 1.6 could be modified and modernized to assist lawyers in coping with unfair or untrue negative online reviews.

It is not to say that professional standards are too constraining in and of themselves, that they restrain business and trade so much that they must be abandoned. It is also not to denigrate the work of the

through layers of bureaucracy, lack of visual and auditory feedback (facial expression and tone of voice)—not to mention interception and downed lines. Lincoln, already a master of verbal communication, became a master at the telegraph.” Hirsch and Van Haften, “Law Practice from Abraham Lincoln to Now,” *The Federal Lawyer* (March 2012).

5. *Driftwood*: Alright it says the, uh. . .”The first part of the party of the first part shall be known in this contract as the first part of the party of the first part, shall be known in this contract. . .” Look. Why should we quarrel about a thing like this? We’ll take it right out, eh? [tears off sections of contract] *Fiorello*: Ha ha! It’s too long anyhow! [tears up more of the contract] Wood, S. (Director). (1935). *A Night at the Opera* [Film]. Metro-Goldwyn-Mayer.

many dedicated professionals who have worked to craft our present rules. Rather, the argument, and the purpose of this article, is to suggest that lawyers and regulators should always be careful to ensure that professional codes should recognize, and seek to enable rather than restrain, modern ways of doing business.

II. SUPREME COURT RULES 705 AND 716: ENHANCING LAWYER MOBILITY IN A MODERN WAY

Lawyer mobility has been a topic of discussion within the profession for some time. Our Supreme Court Rules 705 and 716 are intended to address and facilitate lawyer mobility, but one does so in a more modern and complementary way.

Rule 716 allows lawyers licensed outside of Illinois to obtain a limited license to serve as “house counsel,” *i.e.*, a lawyer whose sole employment is for a business entity that does not provide legal services.⁶ The lawyer must meet certain qualifications, and she must apply for the limited in-house license within 90 days following the commencement of their employment.⁷ The requirements are overall not stringent, as is appropriate. The rule is designed to allow businesses to hire and employ the lawyers they want, and to relax the otherwise burdensome requirements of obtaining a new license in another state. That, in turn, can make Illinois a more attractive destination for businesses, even in a small way. Businesses may need to contend with other, more substantive regulations, but they can ordinarily be confident that their in-house lawyers will not face significant burdens in beginning and performing their work.

One snag that lawyers and businesses sometimes hit is the 90-day requirement; that is, they blow it. They set about having the lawyer do her work, and either do not know of the 90-day requirement or simply miss it. In that case, the lawyer may worry that she has lost her ability to apply for or receive the limited in-house license – a business problem with potentially significant ramifications. But that is not the case. She can file a motion with the Supreme Court to waive the 90-day requirement set forth in the Rule, setting forth the reason for the missed deadline. The Board of Admissions is given an opportunity to respond to the motion, and it typically does not file an opposition or otherwise recommend to the Court that the motion be denied. Thus, the Court typically grants the motion, and the lawyer can proceed to apply for, and ultimately obtain, the limited license. The Court often

6. Ill.Sup.Ct.R. 716.

7. Ill.Sup.Ct.R. 716(1).

requires that the lawyer pay an additional fee to the Board of Admissions as part of the process – effectively a fine for missing the 90-day deadline, but one which most lawyers and businesses are able and happy to pay to ensure that the remainder of the process goes smoothly.

If the Rule 716 admissions process were to go awry, the potential consequences to the lawyer and the business could involve complex problems. If the 90-day deadline were to be more strictly observed, with no waiver process available, all parties would face difficult decisions. The business would have to consider whether it could continue to employ the lawyer, whose remaining option would be to explore admission on motion pursuant to Rule 705, a more complicated and vexing process (see *infra*). Moreover, the question would arise: has the lawyer now *de facto* engaged in the unauthorized practice of law? Does the lawyer face disciplinary exposure as a result? Is the lawyer's Illinois work void or voidable, or otherwise rendered unreliable?

The practical application of Rule 716 answers all those questions in the negative, and it enables the corporation to continue to employ the lawyer. The Court's order waiving the 90-day requirement does not speak to the lawyer's prior work for the employer; it does not explicitly ratify that work or otherwise affirmatively state that nothing unauthorized has occurred. But in effect, the order means just that. No further scrutiny is applied to the lawyer's prior unintentional disregard of the Rule's requirements. That, again, results in both the lawyer and the business having the ability to conduct their affairs smoothly, with a minimum of regulatory red tape. That is a significant advantage compared to the regulatory burdens arising from the other licensure or disciplinary regimes that could be imposed.

Rule 705 allows qualified out-of-state lawyers to become licensed in Illinois "on motion," *i.e.*, without a requirement of taking or passing the Illinois bar examination.⁸ In contrast to the relative simplicity of the procedures under Rule 716, the procedures for obtaining admission on motion are byzantine. The application is lengthier and the qualifications and requirements are more stringent. For example, while a Rule 705 applicant must submit "character verifications" – forms in which the applicant's acquaintances certify their knowledge of the applicant's good character – a Rule 716 applicant need not do so.⁹

8. Ill.Sup.Ct.R. 705.

9. See <https://www.ilbaradmissions.org/browseapplication.action?id=5> (Rule 716 application); <https://www.ilbaradmissions.org/browseapplication.action?id=3> (Rule 705 application).

Most confusing of all are the provisions of Rule 705 that require that the applicant to “provide [] documentary evidence satisfactory to the Board that for at least three of the five years immediately preceding the application, he or she was engaged in the active, continuous, and lawful practice of law.”¹⁰ The Rule goes on to define the terms “practice of law” and “active and continuous” in detailed, exhaustive ways, only to plunge headlong into distinctions between applicants seeking to count their practice “performed physically without Illinois”¹¹ toward the three years referenced in Rule 705(e). If the practice was “either physically within a jurisdiction in which the applicant was licensed or physically within a jurisdiction in which a lawyer not admitted to the bar is permitted to engage in such practice,” then the lawyer may count it as part of their “active, continuous, and lawful” practice.¹² Somehow, the analysis becomes more complicated from there:

If an applicant who temporarily engaged in practice performed physically outside of the jurisdiction where the applicant was licensed demonstrates, to the satisfaction of the Board, that such practice was devoted primarily to matters governed under the law of the jurisdiction where the applicant was licensed, for the benefit of clients or entities physically located within the jurisdiction where the applicant was licensed, such practice shall be considered lawful practice for a period not to exceed two months.¹³

Any out-of-state lawyer who has practiced for any length of time could and should be forgiven for having difficulty parsing all of that. But the problem is not just the complex prose; it is the insistence on assigning meaning to the physical whereabouts of the out-of-state lawyer and her clients, and to the lengths of time during which services were provided in one location or another. The purpose of Rule 705 is to establish a framework by which an out-of-state lawyer can demonstrate that she should not be required to take the Illinois bar examination, *i.e.*, that she is qualified to provide legal services to Illinois consumers or businesses even without taking our bar examination. That much is clear enough, and even those who seek greater expansion of multijurisdictional practice (or contraction of the scope of lawyer regulation) acknowledge that there must be some criteria that an out-of-state lawyer should be required to meet in order to begin practicing here.

10. Ill.Sup.Ct.R. 705(e).

11. Ill.Sup.Ct.R. 705(i).

12. Ill.Sup.Ct.R. 705(i).

13. *Id.*

But the convoluted phraseology of Rule 705 is emblematic of the too-high barriers it seeks to erect. Lawyers applying for admission to the Illinois Bar under Rule 705 may not be solely associated with one business entity, like the lawyers applying under Rule 716. But they might be; and in any event, they are lawyers with experience that could benefit Illinois consumers and businesses. They have followed different paths to the point at which they seek Illinois admission. Not all those paths necessarily involve a great deal of intentionality concerning the physical location of the lawyer's practice. Lawyers may have planned to work in a particular location, only to have those plans foiled by governmental restrictions, their own health concerns, or both. Should lawyers in that context – and after all, many lawyers are in that context just by virtue of the widespread nature of remote work – be forced to account for our physical location, upon pain of being denied admission on motion?

The answer that is friendlier to lawyers and businesspeople is: no. There is virtue in being friendlier to lawyers and businesspeople in this context. Rule 716 allows in-house or corporate lawyers to provide legal services in Illinois by meeting relatively minimal requirements. For Rule 705's requirements to be somewhat more stringent is not controversial, but it is burdensome and less than justifiable for them to be as stringent as they are, particularly given the realities of modern practice and business.

The principal commercial reality disregarded by the current text of Rule 705 is the ease, ubiquity, and necessity of remote work. The profession met one of the challenges of the COVID-19 pandemic by promulgating numerous ethics opinions affirming that lawyers licensed in a particular state do not engage in the unauthorized practice of law when they perform legal work relating to their state of licensure, even when they themselves are located in a different state.¹⁴ That was a salutary development, even if it should not have taken a pandemic for it to occur. The tricky if-this-then-that-but-not-that-except-on-the-third-Tuesday-of-odd-numbered-months structure of Rule 705 works against the commonsensical mindset of those more recent ethics opinions. In short, it unreasonably hampers lawyers, consumers, and businesses in accomplishing their commercial goals.

14. See, e.g., Daniel and George, "Twin ABA Ethics Opinions Cover What You Need to Know About Remotely Practicing Law," ABA Journal (May 15, 2021), <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/practice/2021/twin-aba-ethics-opinions-cover-what-you-need-to-know-about-remotely-practicing-law/>

III. LAWYERS' ANCILLARY BUSINESSES: HOW REGULATED IS REGULATED?

Lawyers who have expertise in businesses other than law, and perhaps an entrepreneurial bent, sometimes seek to operate both a law practice and a so-called "ancillary business."¹⁵

How regulated are Illinois lawyers in their ancillary businesses, and how regulated should they be? ABA Model Rule 5.7 governs the operation of ancillary businesses, but Illinois did not adopt that Model Rule in enacting the 2010 Illinois Rules of Professional Conduct. Consequently, we do not have a rule that directly addresses lawyers' operation of ancillary businesses.¹⁶ In one sense, Illinois lawyers have a regulatory environment that facilitates, rather than restricts, their ability to do business.

The Illinois Supreme Court's holding in *In re Karavidas*, 2013 IL 115767 (2013) further suggests that the Court does not mean for ethical rules to restrain lawyers in doing non-legal business.¹⁷ *Karavidas* was a disciplinary action in which the Administrator of the Attorney Registration and Disciplinary Commission (ARDC) alleged that the respondent had engaged in conversion of funds, breach of fiduciary duty, and dishonesty while acting as the trustee of a family trust.¹⁸ In declining to discipline the respondent, the Court held, *inter alia*, that "[p]ersonal misconduct that falls outside the scope of the Rules of Professional Conduct may be the basis for civil liability or other adverse consequences, but will not result in professional discipline."¹⁹

The Court also noted that the concepts of "breach of fiduciary duty" and "conversion" were rooted in tort, rather in the Rules of Professional Conduct.²⁰ Sensibly holding that disciplinary charges should

15. *Common examples include* a title company, or a wealth management or investment consulting firm.

16. Nevertheless, Model Rule 5.7 has formed a basis for some analysis of Illinois lawyers' obligations with respect to ancillary businesses. For example, Illinois State Bar Association (ISBA) Ethics Opinion 98-03 grounded its analysis of ancillary businesses in Model Rule 5.7:

Model Rule 5.7 states generally that a lawyer shall be subject to the Rules of Professional Conduct with respect to law-related services provided by the lawyer or by a separate entity controlled by the lawyer, *in circumstances that are not distinct from the lawyer's provision of legal services to clients, if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services.* [emp. added.]

The opinion suggests that in that respect, Model Rule 5.7 does, and should, provide guidance to lawyers operating ancillary businesses.

17. *In re Karavidas*, 2013 IL 115767 (2013).

18. *Karavidas*, 2013 IL 115767, pars. 1, 10.

19. *Karavidas*, 2013 IL 115767, par. 103.

20. *Karavidas*, 2013 IL 115767, pars. 28, 30; but see *id.* at par. 62, in which the Court noted that "In the context of a disciplinary proceeding where an attorney-client relationship is in-

only be rooted in the Rules, the Court ended the practice of charging non-Rules-based violations in disciplinary cases.²¹

Karavidas thus represented a sea change in the regulation of the practice of law in Illinois. It removed great swaths of attorney conduct from the realm of potential ethical prosecution. Given the lack of an Illinois counterpart to Model Rule 5.7, and the holding in *Karavidas*, Illinois lawyers who operate “dual profession” businesses can anticipate that they will not face disciplinary investigation or prosecution based on conduct that a) solely involves their non-legal business, and b) does not otherwise violate the Rules.²²

One important caveat to that conclusion is that some Rules do not hinge on the presence of an attorney-client relationship, or the performance of legal services. Rule 8.4(c), for example, prohibits lawyers from engaging in any conduct involving “dishonesty, fraud, deceit, or misrepresentation.”²³ Even after *Karavidas*, lawyers can be reported to the ARDC for conduct that the complainant claims to have been dishonest, whether or not the conduct occurred in connection with the practice of law or during the representation of a client. If the ARDC determines that sufficient evidence exists to warrant the filing of formal disciplinary charges, then the attorney can be disciplined for that conduct.²⁴

Even considering the continued risk of being reported for an alleged violation of Rule 8.4(c), *Karavidas* still represented a freeing moment for lawyers. One that seemed to lead to a firmly business-friendly conclusion. Apart from potentially being accused of fraud in business dealings, lawyers could now move with a free hand in their ancillary business transactions – at least in theory. The reality, however, is more confusing and messier in a way that again demonstrates how ethics rules can be roadblocks to efficient business..

involved, we use the term ‘conversion’ as a term of art and focus on the attorney’s conduct with respect to the property or funds of the client or third party, not on the circumstances that would be necessary to give rise to a claim in tort by the rightful owner.”

21. *Karavidas*, 2013 IL 115767, par. 79.

22. To the extent that ISBA Opinion 98-03, *supra*, suggests otherwise, it is important to remember that it was promulgated well prior to *Karavidas*. Its analysis may therefore have been predicated to some degree on the then-current belief that lawyers could be disciplined for conduct arising out of relationships and transactions that did not involve the practice of law or otherwise violate the Rules. Following *Karavidas*, that is no longer the case.

23. Ill. Sup. Ct. R. Prof'l Conduct, R 8.4(c).

24. In *Karavidas* itself, the respondent-attorney was charged with dishonest conduct in connection with his handling of his family’s estate and trust matters. The Hearing Board found, and the Court ultimately affirmed, that there was insufficient evidence to support that charge. However, had there been sufficient evidence, *Karavidas* could have been disciplined for that conduct, even though his conduct did not otherwise violate the Rules.

It is neither uncommon nor necessarily improper for lawyers operating ancillary businesses to offer or provide legal services to customers of their non-legal business, and vice-versa. Even if the ordinary operation of the ancillary business is insulated from ethical regulation, several Rules of Professional Conduct are implicated in such situations.

Rule 1.7 prohibits engaging in representations that give rise to “concurrent conflicts of interest,” *i.e.*, those that involve direct adversity between clients, or those in which there is a “significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”²⁵ In the context of most ancillary businesses, a “material limitation” conflict would be more likely to arise than a “direct adversity” conflict. For example, a “material limitation” conflict may arise if the lawyer can be deemed to have a personal interest in receiving fees from a law client for non-legal services.

If a conflict does arise, the lawyer may still be able to continue with the legal representation if (A) she reasonably believes that she will be able to provide competent and diligent representation to each affected client; (B) the representation is not prohibited by law; (C) the representation does not involve the assertion of a claim by one client against another client; and (D) each affected client gives informed consent.²⁶

Furthermore, a lawyer providing services to a legal client through an ancillary business must satisfy the requirements of Illinois Rule 1.8(a). That Rule forbids entering business transaction with a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.²⁷

25. Ill. Sup. Ct. R. Prof'l Conduct, R 1.7(a)(2).

26. Ill. Sup. Ct. R. Prof'l Conduct, R 1.7(b).

27. Ill. Sup. Ct. R. Prof'l Conduct, R 1.8(a).

To address potential and actual conflicts under Rules 1.7(a)(2) and 1.8(a), lawyers must provide written disclosures to the client setting forth the nature and terms of any transaction, including and most importantly the basis for any fee the lawyer will receive in connection with the transaction. Pursuant to Rule 1.8, the disclosure must also advise the client that they can seek other counsel with respect to the arrangement, and it must allow for a reasonable time for the client to do so.²⁸

Providing a written conflict disclosure to a client (or non-legal customer) is not a steep hill to climb, and to do it allows for the smooth functioning of the lawyer's dual businesses. But it is a kind of regulatory barrier, that can create delay (if the client elects to seek another lawyer's advice concerning the transaction) or even raise trust issues (if the client begins to wonder why they would need to have a lawyer look at an agreement with a lawyer). Further, not all practitioners recognize the need for Rule 1.7 and 1.8 compliance in ancillary business transactions. Failure to recognize that need and act accordingly can result in disciplinary exposure even if no client experiences any harm.

A. *Ancillary Business Advertising May Subject Lawyers to Legal Ethics Regulation*

The burdens of conflict-related disclosures are not the only regulatory incursions on a lawyer's operation of an ancillary business. Another regulatory question that commonly arises is the manner in which the lawyer may advertise those businesses. Advertisements relating to the lawyer's non-legal businesses are generally not subject to regulation under the Rules of Professional Conduct. But if an advertisement refers to the lawyer as offering legal services, then the advertisement likely comes within the ambit of Rules 7.1 through 7.5 of the Rules of Professional Conduct.

How could an ethics regulator determine that a lawyer's ancillary business advertisement is subject to the Rules? ISBA Ethics Opinion 90-32 suggests that those Rules apply if the lawyer's advertisement identifies her as a lawyer, an overly broad interpretation.²⁹ Rule 7.2 indicates that it applies when lawyers "advertise services," and it seems possible to refer to one's status as a lawyer without "advertising services." Nevertheless, a regulator could conclude that a reference to "lawyer" status in the context of ancillary business entities may in fact constitute an offer of legal services.

28. *Id.*

29. Ill. Ethics Op. 90-32 (May 15, 1991).

As such, lawyers should review Rules 7.1 through 7.5 in connection with any advertisements they may create or use, including advertisements for ancillary business (and not legal) services. As is the case with effecting compliance with Rules 1.7 and 1.8, reviewing the advertising rules tends to be a simple and small task with little risk of disciplinary exposure for a failure to do it (unless there is a claim that a client or potential client was somehow misled). But it is yet another way— even in a post-*Karavidas* world — our ethics rules do regulate lawyers' non-legal or "personal" business.

B. Rule 7.2: Lawyers Could Face Ethics Regulation Even for Non-Legal Referral Relationships

Lawyers operating ancillary businesses may wish to enter into referral agreements with other professionals, including other lawyers. Rules 1.2(e), 1.5(e), and 7.2 of the Rules of Professional Conduct govern the kinds and terms of referral relationships that lawyers may enter into regarding legal services, but in general they do not explicitly restrict or regulate such relationships relating to ancillary businesses.

Generally, lawyers may enter into ongoing referral relationships with lawyers and other professionals, as long as they are non-exclusive, reciprocal, disclosed to clients, and "not otherwise prohibited under the [] Rules."³⁰ However, Rule 7.2 presumes that there will be nothing of value given for the referrals, other than the referrals themselves. No non-lawyer professional can be compensated for a referral, other than by whatever value is conferred, or may be conferred, by a reciprocal referral.³¹

Rule 7.2 provides a way for lawyers to have non-legal business relationships that are not subject to regulation, but in practice, it does not exclude reciprocal referral arrangements from regulation so much as it provides a framework for investigating them. If a reciprocal referral arrangement is directed to the attention of legal ethics regulators, the regulator will scrutinize those relationships for any indication that the lawyer is providing anything of value, in a manner inconsistent with the general rule of Rule 7.2(b). Even if a referral relationship is strictly between the lawyer (as an ancillary businessperson) and another non-lawyer professional, the lawyer must act with care in providing compensation for referrals or engaging in other common business practices. Legal ethics regulators might construe such circumstances against the lawyer, potentially suggesting that the lawyer was

30. Ill. Sup. Ct. R. Prof'l Conduct, R 7.2(b)(4).

31. Ill. Sup. Ct. R. Prof'l Conduct, R 7.2(b).

generating leads for legal business by giving things of value in exchange for referrals of nonlegal business.

Illinois' rules and systems thus present a quandary for lawyers seeking to operate ancillary businesses, and for the clients, customers, and professionals who may engage with those businesses. Our system seems to back off from regulating such things, but in reality, the lawyers involved have professional obligations that could give rise to investigation or discipline. They can, and do, take the necessarily arduous steps to protect themselves and their business associates. But, the risk of a formal disciplinary prosecution – in an era in which few such proceedings are filed in a given year – may not be high.

C. Adoption of Model Rule 5.7 Would Provide Lawyers and the Legal Profession with Greater Clarity

A better way to streamline the functioning of lawyers' ancillary businesses would be for the Court to adopt ABA Model Rule 5.7.³² Under this rule, a lawyer would clearly know that their provision of "law-related services" would be subject to the Rules if those services were provided

- (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
- (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.³³

Model Rule 5.7 also furnishes lawyers with a more explicit definition of "law-related services" than presently exists in Illinois: "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."³⁴

The comments to Model Rule 5.7 clarify that the lawyer should communicate the distinct nature of the non-legal services to a client "preferably in writing," and, importantly, that a referral of a law client to an ancillary business controlled by the lawyer would require com-

32. ABA Model Rule 5.7, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_7_responsibilities_regarding_law_related_services/

33. ABA Model Rule 5.7, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_7_responsibilities_regarding_law_related_services/

34. *Id.*

pliance with Rule 1.8 – *i.e.*, fairness in the transaction, disclosure of its terms, and an opportunity to secure other legal advice.

Even with that caveat, the Model Rule 5.7 framework would allow lawyers to operate an ancillary business freer of ethical regulation than Illinois' present model. The task of ensuring that their provision of that business' services is "distinct" from their provision of legal services appears less burdensome than strict compliance with Rules 1.7 and 1.8. In most, if not all cases, this also means fewer delays and smoother, less complicated transactions. Best of all, adoption of Rule 5.7 would help to remove uncertainty about whether the Rules apply to the lawyer's conduct – an uncertainty which could be deterring lawyers from engaging in ancillary businesses that could otherwise be helpful or successful in Illinois.

IV. RESPONSES TO NEGATIVE ONLINE REVIEWS: MODERNIZING RULE 1.6

The level of activity within the Illinois disciplinary system has decreased sharply in two ways in recent years: the Administrator of the ARDC has filed fewer formal disciplinary cases, and legal consumers (or other complainants) have filed fewer requests for investigation of Illinois attorneys. During that same time, online reviews of lawyers have become ubiquitous across several platforms, including social media sites, Google, Yelp, and Avvo.

Websites offer consumers the ability to write and publish such reviews on the assumption that the consumers are or were clients of the lawyer whose good-faith opinions or viewpoints will assist other consumers, thereby bolstering the reputation of the website as a trustworthy source of information (or at least one that is worthy of repeat visits). Yet no review website takes responsibility for vetting the reviews that are published – *i.e.*, for verifying that the authors of the reviews really were or are the lawyer's clients, or that their claims are in any way true. The review form is simply a blank slate upon which can be written any kind of smear, insult, half-truth, or falsehood.

The authors of the reviews may or may not receive tangible benefits from having written the reviews. If they truly are former or current dissatisfied clients, then they can receive the satisfaction of insulting or aggravating the lawyer, or potentially forcing the lawyer into better communication. If the reviewers are instead non-clients who want to damage the lawyer under cover of a false identity, opposing parties looking for vengeance, or competitors looking to grab some of the

lawyer's market share, they may benefit if their review succeeds in lowering the lawyer's star rating or overall positive image.³⁵

Some lawyers receive value from the existence of online reviews; they build a robust practice of successfully encouraging satisfied clients to post positive reviews, and they enjoy reputational and commercial benefits from the resulting glowing online profile. But lawyers who cultivate that phenomenon also bear a heightened risk that malevolent actors may disrupt the process via false negative reviews. Even lawyers who generally eschew much online marketing can be hurt by a phony reviewer's poison pen.

Worse, there is little a lawyer can do to mitigate the damage. Lawyers understandably wish to respond to negative reviews, most often with an instinct and desire to correct misstatements and thereby repair their reputation. Yet they face a significant hurdle: Rule 1.6, which requires lawyers to avoid using or revealing any information relating to their representation of a client.³⁶ Rule 1.6 does, of course, contain exceptions. The primary one allowing use or revelation of information if the client gives informed consent.³⁷ But the lawyer responding to an online review is unlikely to be able to avail herself of that exception. A dissatisfied client would never consent, preferring instead the heads-I-win-tails-you-lose upper hand. More, if the reviewer is in fact not a client but an opponent looking to wreak revenge, the lawyer is then in the position of asking the client to consent to the use of information to engage in an online flame war – an unappetizing prospect that promises little benefit to the client.

Lawyers are therefore forced to either not respond to negative reviews at all, or to respond with anodyne throat-clearing: “While ethical rules constrain me from responding substantively. . .” by which point a potential client has likely stopped reading, perhaps feeling more persuaded by the strong and emotive language of the putative reviewer. Faced with those possible courses of action, lawyers sometimes believe that Rule 1.6(b)(5), and the comments thereto, provide them with authority to respond in a more fulsome way. The Rule provides:

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

35. They also benefit by achieving those goals with minimal investment: rather than complain to the ARDC and begin a bureaucratic process that may net them nothing, they need only spend five minutes typing a rant into their phone.

36. Ill. Sup. Ct. R. Prof'l Conduct, R 1.6.

37. Illinois Rules of Professional Conduct, R 1.6(a).

- (5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, 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[.]³⁸

If the argument is that the negative review creates a “controversy between the lawyer and client,” Rule 1.6(b)(5) provides the lawyer with an opportunity to use client information to rebut the claims in the review.³⁹ Again, this presumes that the reviewer is the client or former client. A reviewer posing as a client or former client cannot generate a controversy between the lawyer and client, and the lawyer must – at first blush – realize and remember that nothing online is guaranteed to be what it appears to be. Responding in kind using client information, only to find that the reviewer was not the client, could result in disciplinary exposure.

But even assuming the genuineness of the review, it is not clear whether an online review constitutes a “controversy” within the meaning of Rule 1.6(b)(5). Comment 10 to Rule 1.6 states:

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together.⁴⁰

The comment clearly addresses Rule 1.6's reference to a “proceeding,” and it contemplates no other context in which a lawyer can use protected client information to respond to a negative remark. An online review is neither a legal claim nor a disciplinary charge. Confusingly, however, the comment goes on to state:

Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.⁴¹

In the above context, “such complicity” refers to an assertion that the lawyer and client acted together to defraud someone. But earlier

38. Illinois Rules of Professional Conduct, R 1.6(b)(5).

39. *Id.*

40. Illinois Rules of Professional Conduct, R 1.6, Cmt. 10.

41. *Id.*

in the same comment, the reference to that assertion was only an example. Does Comment 10 mean that lawyers can “establish” a “defense” using protected client information by “responding directly to a third party” only when the accusation is one of lawyer-client complicity in fraud? Or is the authority conferred by the Comment and the Rule broader than that? Neither the Rule nor any of its comments answer those questions, leaving the lawyer seeking to respond to a negative online review uncertain of whether she has a safe harbor to act.

The Restatement (Third) of the Law Governing Lawyers articulates the scope of the lawyer’s safe harbor by stating:

A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes necessary to defend the lawyer or the lawyer’s associate or agent against a charge or threatened charge by any person that the lawyer or such associate or agent acted wrongfully in the course of representing a client.⁴²

Thus, according to the Restatement, the right to use or disclose confidential information can arise in response to a “charge” by “any person” of “wrongful[]” conduct in the course of representing a client. That is not the permissive interpretation of Rule 1.6(b)(5) that it may appear to be at first blush. It is not clear that a negative review is either a “charge” or a “threatened charge.” Moreover, confining the right to respond to accusations that the lawyer acted “wrongfully in the course of representing a client” leaves the lawyer unable to respond using any client-related information to a review that says, simply: “THIS LAWYER IS CROOKED!! DO NOT HIRE!!!” That is, the lawyer would not be able even to say: “I regret that Mr. X is dissatisfied with my representation” – because that comment is a revelation of the fact that Mr. X was the lawyer’s client, which the lawyer is not entitled to disclose.

Here, again, the ethical rules work to constrain lawyers from dealing effectively with a commercial reality. It is impossible to know how long we can expect online reviews, social media forums, or other venues for negative commentary about lawyers to exist in their current forms. But they have existed for years; they continue to be backed by significant capital; and they remain powerful. There is no reason for the profession to behave as if online reviews are a trend that will disappear, or somehow be neutralized, without a need for modifications to Rule 1.6.

42. Restatement (Third) of the Law Governing Lawyers § 64.

For example, Rule 1.6 could be amended to eliminate the vague word “controversy,” or at least to contain an itemized definition of that term. The Rule could clarify that a lawyer would have authority to disclose protected client information in a limited, reasonable, tailored way in response to:

- an “allegation” of ethical misconduct or legal malpractice, i.e., an accusation made in a pleading or similar document;
- any statement made to a disciplinary authority concerning the lawyer’s conduct; and
- a specific accusation of misconduct or malpractice, including dishonesty, made by any person in an online review or other publication.

Further, the Rule could clarify that any responsive disclosure to an online review must be limited to:

- an affirmation that the representation occurred; and
- general factual disclosures, whether affirmations or denials.

For example, in response to an allegation that the lawyer did not timely file a case on behalf of a client, the lawyer could respond: “That statement is not correct. We did represent Mr. X in the matter he is referring to, and we took all appropriate action on his behalf.” The lawyer would not be permitted to respond with particular details relating to the content of the filing, the date the proceeding was filed, the venue in which it was filed, and the like.

In addition, or in the alternative, Rule 1.6 could be modified to clarify that it is not a violation for a lawyer to state whether they did or did not represent a client, or to provide limited information based on which the lawyer has concluded that the author of an online review is not a client. Occasionally, lawyers can respond to an online review with such an assertion under the current Rule, but many fear doing so as it may draw them into an online battle with no clear path to victory. A modification to the Rule specifically allowing the lawyer to state “this is not my client,” “I am not the lawyer referred to,” or “this review is false” would assist lawyers greatly in mitigating the damage of negative reviews. Failing to modify the Rule in any of the ways suggested here leaves lawyers twisting in the wind, some suffering tangible harm to well-curated positive images, and others making the ill-considered, but understandable, decision to respond to negative reviews to stave off harm (or simply tell off a liar).

Our older Rules’ reference to the telegraph conjured a long-dead technology as if it were being used in the practice of law at the time. Our current Rule 1.6 and its comments contain no reference to online reviews or the Internet at all, as if the predominant method of com-

munication in our time had no relevance to a rule pertaining to lawyers' responsibilities regarding information. The inclusion of the ancient term can be seen as slightly silly. The exclusion of the latter is emblematic of a greater problem: the inability of the Rules in their present form to keep pace with modern business realities.

V. CONCLUSION

The Illinois Supreme Court Rules and the Rules of Professional Conduct seek to ensure the protection of the public and the profession from lawyers who engage in misconduct; but they also have significant effects on the transaction of business in Illinois. In some cases, the regulation of the legal profession requires certain limitations on the way business can be conducted; but in other ways, the relevant Rules can and should be amended to allow lawyers and businesses to accomplish their goals more efficiently and effectively.

For example, out-of-state lawyers seeking admission to Illinois on motion should be freed of Supreme Court Rule 705's focus on their previous physical location, and they should instead be allowed to demonstrate that the experience they garnered from their prior practice would serve Illinois clients well no matter where it was performed. Lawyers operating ancillary businesses – especially those offering law-related services – should have clarity concerning the ethical regulation of those businesses; Model Rule 5.7 would provide that. And lawyers across many different practice settings would benefit from revisions to Rule 1.6 reflecting the ubiquity and potency of on-line reviews, allowing lawyers a safer harbor for responses than the current Rule provides. Such amendments would take better stock of modern commercial realities than the Rules presently do, and they would allow lawyers and businesses to better cope with those realities.

