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THE ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY: A NEW BLUEPRINT FOR DISCIPLINARY ENFORCEMENT

George Vernon*

The Illinois Supreme Court recently adopted an official Code of Professional Responsibility that governs the conduct of all Illinois attorneys. In this Article, Mr. Vernon highlights the fundamental themes interspersed throughout the Code, including confidentiality between attorneys and clients, the methods of attracting clients, professional responsibility regarding fees and other monetary issues, and conflicts of interest. Mr. Vernon offers an explanation and interpretation of problematic provisions of the Illinois Code and discusses certain significant departures from the American Bar Association's Model Code of Professional Responsibility. In conclusion, Mr. Vernon suggests that a working knowledge of the Code is essential to avoid difficult issues of professional ethics and attorney discipline.

The Illinois Supreme Court formally adopted the Illinois Code of Professional Responsibility on June 3, 1980. It thereby established the first official guidelines for the professional conduct of Illinois attorneys. The Code's scope is broad. While many of its rules are straightforward, others contain complexities that are incapable of definitive resolution. This Article discusses some of the major themes which cut across the various rules of the new Illinois Code, and provides an overview of its miscellaneous provisions.

ADVENT OF THE CODE

Administration and enforcement of lawyer discipline is the responsibility of the Illinois Supreme Court's Attorney Registration and Disciplinary Commission. Before the Commission's creation in 1973, special committees of

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2. For another general source, see Model Rules of Professional Conduct currently being prepared by the ABA's Commission on Evaluation of Professional Standards, the group appointed to rewrite the ABA Model Code. The Commission's Proposed Final Draft, dated May 30, 1981, contains thoughtful commentary and appropriate references on each area addressed by the Rules. The present timetable calls for the Commission's Proposed Final Draft to be considered by the ABA's House of Delegates at its 1982 midyear meeting. See also AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY (1979).

3. ILL. SUP. CT. R. 751 (codified at ILL. REV. STAT. ch. 110A, § 751 (1979)).
the Illinois State and Chicago Bar Associations, acting under the auspices of the supreme court, were responsible for investigating, prosecuting, and hearing disciplinary complaints brought against Illinois lawyers.4

When the Disciplinary Commission was established, the Administrator of the Commission was given the power to “investigate conduct of attorneys which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.”5 While better than no rule, this vague standard provided minimal guidance to lawyers in shaping their professional conduct. Both before and after establishing the standard, the court unofficially relied upon canons of ethics and disciplinary rules adopted by the organized bar in its disciplinary opinions.6 The court emphasized that these canons and rules, while “not binding obligations, nor enforceable by the courts as such, . . . constitute a safe guide for professional conduct and an attorney may be disciplined for not observing them.”7

Materials were available for lawyers seeking the “safe guide” described by the court in its disciplinary opinions. In the late 1960s, the American Bar Association codified the old canons of ethics into a Model Code of Professional Responsibility.8 In 1970, the Chicago Bar Association and the Illinois State Bar Association passed their own versions of the Model Code,9 each version differing in some material respects from the ABA Model Code.10

6. Although the principal guideline used by the states has been the ABA Model Code of Professional Responsibility and Code of Judicial Conduct (1980), the first code of professional ethics was drafted and adopted by the Alabama State Bar Association in 1887. H. Drinker, Legal Ethics 23 (1953) [hereinafter cited as Drinker]. In 1908, the American Bar Association formulated the Canons of Professional Ethics, based largely on the Alabama Code. The Canons were quickly adopted by a majority of states with little or no change. From 1908 until 1969, the original 32 Canons were amended and new Canons added on a piecemeal basis.
8. ABA Model Code of Professional Responsibility (1980) [hereinafter cited as ABA Model Code]. The ABA Model Code differs from the Canons both in substance and in form. For a discussion of the evolution of the Canons and the adoption of the ABA Model Code, see Preface to ABA Model Code, supra, at 1. The ABA Model Code consists of three separate, but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Canons, which bear no resemblance to the old Canons of Professional Ethics, state axiomatic norms that express in general terms standards of professional conduct. The Ethical Considerations are aspirational in nature and indicate the objectives toward which an attorney should strive. The Disciplinary Rules, however, are mandatory and an attorney may be disciplined for their violation. See Preamble and Preliminary Statement to ABA Model Code, supra, at 1.
Ultimately, only the Illinois Supreme Court had the authority to reconcile the conflicting provisions of the different codes. In 1978 Illinois was one of only three states in which the highest court had not yet adopted a comprehensive set of disciplinary rules.11

On May 12, 1978, the supreme court appointed a Committee on Professional Responsibility to make recommendations concerning the adoption of comprehensive rules.12 The Committee prepared a draft code, which was submitted to the court in December, 1978 and distributed for comment to bar associations and other interested parties. The court made revisions in the Committee's first draft and returned it to the Committee for additional study. Final decisions on content were made by the supreme court, which, on June 3, 1980, officially adopted the Illinois Code of Professional Responsibility.

The Committee used the Disciplinary Rules of the ABA Model Code as its principal guide and followed that code in drafting the majority of the Illinois Rules. A commentary, prepared by the Committee, accompanies the Illinois Code. The commentary not only explains departures from the ABA Model Code, but also provides unofficial interpretive guidance on the meaning and application of various Illinois Code provisions.

MAJOR THEMES IN THE ILLINOIS CODE

This Article concentrates on four fundamental themes interspersed throughout the various rules in the Illinois Code. The first theme is the confidential relationship existing between the attorney and any client, and the limitations imposed on that confidentiality. Next, the general area of attracting clients is discussed, with special emphasis on the departures from the ABA Model Code mandated by the United States Supreme Court's legitimization of professional advertising and solicitation. Third, the Article reviews some monetary problems of professional responsibility, including fees, litigation costs, and the segregation of client funds. Fourth, situations involving conflicts of interest are evaluated, with special attention given to activities of former government lawyers. Finally, miscellaneous provisions of the Illinois Code unrelated to its major themes are briefly addressed.

Client Confidences and the Lawyer’s Duty to Disclose Information

The familiar rule that an attorney may not disclose the confidences and secrets of past or present clients can present intractable ethical dilemmas. A lawyer representing a client with interests adverse to a present or former

11. Interview with Carl H. Rolewick, Esq., Administrator, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, in Chicago, Illinois (October 24, 1980) [hereinafter cited as Rolewick Interview].
12. See note 1 and accompanying text supra.
client may face strong temptation to reveal confidential information. Similarly, a lawyer who discovers information—such as the client's intent to commit a crime or to obstruct a judicial proceeding—can be torn between responsibilities to the client and to the system of administration of justice.

The Illinois Code addresses the problem of preserving client confidences in two ways. First, it limits the extent to which a lawyer may represent a client with interests adverse to those of a present or former client. Second, it permits or requires lawyers in some circumstances to disclose information in their possession. The source of the information to be disclosed may be an important factor in applying the Code's rules, because substantially greater protection is afforded to information obtained from confidential client communications.

As a point of departure, the Code prohibits lawyers from disclosing the "confidences or secrets" of their clients, or from using such confidences or secrets to the disadvantage of the client or to the advantage of the lawyer or some third person. A "confidence" is defined by the Code as information protected by the attorney-client privilege. A "secret" is a far broader concept, encompassing "other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing to or would likely be detrimental to the client." As a point of departure, the Code prohibits lawyers from disclosing the "confidences or secrets" of their clients, or from using such confidences or secrets to the disadvantage of the client or to the advantage of the lawyer or some third person. A "confidence" is defined by the Code as information protected by the attorney-client privilege. A "secret" is a far broader concept, encompassing "other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing to or would likely be detrimental to the client." 

The Code authorizes exceptions to the general rule of confidentiality in certain circumstances. For example, disclosure of confidences or secrets may be made at the discretion of the lawyer with the informed consent of the client; when necessary to establish or collect the lawyer's fee or defend the

13. ILL. CODE, supra note 1, Rule 5-105. See notes 122-162 and accompanying text infra.

14. ILL. CODE, supra note 1, Rules 4-104(c) and (d) provide for certain situations in which disclosure is discretionary. See notes 19-21 and accompanying text infra. Under Rules 4-101(c), 7-102(a)(3), 7-103(b), 7-106(b)(1), and 7-108(g) of the Illinois Code disclosure is mandatory. See notes 22-26 and accompanying text infra.

15. ILL. CODE, supra note 1, Rule 4-104 (Committee Commentary). Privileged information is not, however, completely immune from the disclosure provisions of the Code. Moreover, some of the limitations on the attorney-client privilege imposed by the law of evidence can have significant application to the kinds of situations addressed by the Code. See notes 33-37 and accompanying text infra. See generally Uniform Rules of Evidence 502 (1974); Fed. R. Evid. 501.

16. Rule 4-101(b) of the Illinois Code provides:

except when permitted under Rules 4-101(c) and (d), a lawyer shall not knowingly, during or after termination of the professional relationship to his client,

(1) reveal a confidence or secret of his client;

(2) use a confidence or secret of his client to the disadvantage of the client;

(3) use a confidence or secret of his client to the advantage of himself or of a third person, unless the client consents after full disclosure.

ILL. CODE, supra note 1, Rule 4-101.

17. Id. Rule 4-101(a).

18. Id.

19. Id. Rule 4-101(d)(1). "A lawyer may reveal (1) confidences or secrets with the consent of the client or clients, but only after a full disclosure to them; . . . " Id. See Shufeldt v. Barker, 56
lawyer against an accusation of wrongful conduct; and when permitted or required by the Code, a law, or a court order.21

The Illinois Code requires disclosure by lawyers in a number of circumstances without regard to whether the information was obtained by a privileged client communication. The special requirements in criminal discovery imposed on prosecutors by Brady v. Maryland22 and related cases, are incorporated into the Code in Rule 7-103(b).23 Rule 7-108(g) obliges the lawyer to reveal to a court information regarding improper conduct by a juror or venireman.24

Ill. 299 (1870) (one member of the client firm cannot release attorney from his obligation of secrecy). See generally Karris v. Water Tower Trust & Sav. Bank, 72 Ill. App. 3d 339, 389 N.E.2d 1359 (1st Dist. 1979) (attorney stands in fiduciary relationship with his corporate client); Ruggiero v. Attore, 51 Ill. App. 3d 139, 366 N.E.2d 470 (1st Dist. 1977) (law watches with particular care, and subjects to closest scrutiny, all transactions between attorney and his or her client during, or growing out of their relationship); Sherman v. Klopfer, 32 Ill. App. 3d 519, 336 N.E.2d 219 (1st Dist. 1975) (attorney breaches fiduciary obligation by reporting client to Internal Revenue Service); People v. Smith, 10 Ill. App. 3d 61, 293 N.E.2d 465 (3d Dist. 1973) (attorney may not waive legal rights guaranteed to client by law if contrary to client's "wish" or direction).

20. Ill. Code, supra note 1, Rule 4-101(d)(4). See Funk v. Mohr, 185 Ill. 395, 57 N.E. 2 (1900) (disclosure of confidential discussions regarding construction of provisions of contract negotiated between attorney and client is permitted in a trial where attorney is defending against misconduc allegation); Sokol v. Mortimer 81 Ill. App. 2d 55, 225 N.E.2d 496 (1st Dist. 1967) (to prohibit disclosure by attorney would allow attorney to be charged with conduct fatal to his cause of action, yet render him incompetent to answer in response to the attack upon his professional integrity). See generally C. McCormick, McCormick ON Evidence § 91, at 191 (2d ed. E. Cleary 1972) ("when client and attorney become embroiled in a controversy between themselves, as in an action by the attorney for compensation or by the client for damages for the attorney's negligence, the seal is removed from the attorney's lips"); cf. Uniform Rules of Evidence 502(d)(3) (1974) ("there is no privilege . . . to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer").

21. Ill. Code, supra note 1, Rule 4-101(d)(2). Chicago Bar Ass'n Comm. on Professional Responsibility, Opinions, No. 71-72-11 (attorney may testify before a grand jury respecting communications between himself and his client where he has been ordered to do so by a court order). See also Ill. State Bar Ass'n, Opinions, Nos. 180 (May 19, 1960) & 471 (Oct. 14, 1974). Cf. Uniform Rules of Evidence 502(d) (1974) (no attorney-client privilege exists in situations involving furtherance of a crime, breach of duty by either attorney or client, documents attested by the attorney, joint clients, or where parties claim through the same deceased client of the attorney).

22. 373 U.S. 83 (1963) (prosecutor's failure to honor defendant's request for material evidence favorable to defendant's position constitutes violation of due process).

23. Ill. Code, supra note 1, Rule 7-103(b) provides: "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, . . . of the existence of evidence, . . . that tends to negate the guilt of the accused or mitigate the degree of the offense."

24. Id. Rule 7-108(g) provides: "A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge." Accord, In re Kozlov, 156 N.J. Super. 316, 383 A.2d 1158 (1978) (attorney held in contempt for failing to reveal identity of client who informed attorney that a juror in a criminal case was intent on "getting even"; attorney-client privilege inapplicable); In re R, 276 Or. 365, 368, 554 P.2d 522, 524 (1976) (juror participating in
The foregoing instances of mandatory disclosure obligations track similar provisions in the ABA Model Code. The Illinois Code's Rule 4-101(c) incorporates a significant departure from familiar tradition and from the ABA Model Code. This rule directs a lawyer to disclose information necessary to prevent the client from committing an act that would result in death or serious bodily harm. The rule applies regardless of whether the information would otherwise be privileged from disclosure due to the attorney-client relationship, and is not expressly limited to criminal acts. Hence, the rule could be interpreted to require disclosure of prospective violations of civil or administrative standards that would result in death or serious bodily harm. The "serious bodily harm" provision does not appear in the present ABA Model Code, but was taken from the Discussion Draft of the proposed Model Rules of Professional Conduct. The justification for the provision, as discussed in the Commentary to the Illinois Code, is that when homicide or serious bodily injury is threatened, the interests of society and potential personal injury case was picked up while hitchhiking by the plaintiff in the same case). The Oregon court held that whenever an attorney is in doubt about his obligation to inform court of juror misconduct, this doubt should be resolved in favor of disclosure.

25. See also ILL. CODE, supra note 1, Rule 7-102(a)(3). The Rule provides: "In his representation of a client, a lawyer shall not . . . conceal or knowingly fail to disclose that which he is required by law to reveal." Id. See, e.g., People v. Beattie, 137 Ill. 553, 574, 27 N.E. 1096, 1103 (1891) (attorney's loyalty to his client tempered by duties as "ministers of justice"); In re Estate of Minsky, 59 Ill. App. 3d 974, 376 N.E.2d 647 (1st Dist. 1978) (as attorney and officer of court, attorney is under duty to inform court of any suspicion of fraud by client's executor); Semmens v. Semmens, 53 Ill. App. 3d 160, 368 N.E.2d 732 (4th Dist. 1977) (failure to disclose amendment to divorce settlement agreement is improper conduct by attorney, as it interferes with the court's ability to determine rights of parties). An additional effect of the Rule is to codify normal discovery obligations imposed by statute or court rule. See also note 168 infra.

26. Rule 4-101(c) of the Illinois Code provides: "A lawyer shall 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 to another person, and to the extent required by law or the rules of professional conduct." ILL. CODE, supra note 1, Rule 4-101(c).

27. The ABA Model Code permits, but does not require an attorney to reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." ABA Model Code, supra note 8, DR 4-101(c)(3). However, the ABA Model Code does not make special provision for acts involving "serious bodily harm," as the Illinois Code does.

28. ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (January 30, 1980 Discussion Draft). The ABA Draft suggested that when homicide or serious bodily injury is threatened, the loss to the potential victim is such that the lawyer is obligated to disclose privileged communications or information in order to prevent the harm. Id. The ABA Commission's Proposed Final Draft retreated from this position and made the disclosure discretionary rather than mandatory. See id. Rule 1.6(b) (May 30, 1981) (Proposed Final Draft). See also ABA STANDING COMM. ON ASS'N STANDARDS FOR CRIMINAL JUSTICE, STANDARDS FOR CRIMINAL JUSTICE 4-3.7(d) (2d ed. 1980), which states:

A lawyer may reveal the expressed intention of a client to commit crime and . . . must do so if the contemplated crime is one which would seriously endanger the life or safety of any person . . . and the lawyer believes such action on his or her part is necessary to prevent it.
victims outweigh the interests that justify the general rule in favor of the preservation of client confidences.29

A number of rules provide for mandatory disclosure of information possessed by the lawyer except when the information is received in a privileged communication. Rule 1-103(a), in conjunction with Rule 1-102, imposes an affirmative obligation to report to an appropriate tribunal or investigative authority any unprivileged knowledge that another lawyer has engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, or in illegal conduct involving moral turpitude.30 A related provision, Rule 1-103(b), makes clear that lawyers have no special right to resist a proper request by an investigative tribunal to disclose unprivileged knowledge regarding the misconduct of a lawyer or judge.31 Finally, Rule 7-102(b) of the Illinois Code tracks the ABA Model Code by mandating that a lawyer should call upon his or her client to rectify any fraud perpetrated by the client in the course of the representation. If the client refuses, both the Illinois and ABA Codes require the lawyer to disclose the fraud unless the lawyer's information is "protected as a privileged communication."32

Difficult ethical problems revolve around this exception which authorizes an attorney's refusal to disclose information received as a result of a "privileged communication." The scope of the exception is not necessarily defined by the substantive law of evidence relating to the attorney-client privilege. The ABA's Committee on Ethics and Professional Responsibility has interpreted it far more broadly, encompassing not only communications covered by the evidentiary privilege, but any communication disclosing "confidences or secrets" as defined by Rule 4-101.33 The ABA approach, however, would render virtually any information received from the client immune from disclosure. A number of courts have refused to follow the ABA approach when the information is related to perjured testimony.34

29. ILL. CODE, supra note 1, Canon 4 (Committee Commentary).
30. Id. Rule 1-103(a). The scope of the Illinois Code obligation is substantially narrower than that contained in the ABA Model Code, whose DR 1-103(A) requires the disclosure of unprivileged knowledge regarding the violation by another lawyer of any Disciplinary Rule. 31. Rule 1-103(b) of the Illinois Code states: "A lawyer possessing unprivileged knowledge . . . concerning another lawyer or judge shall reveal [that knowledge] fully." Id. Rule 1-103(b).
32. Rule 7-102(b)(1) of the Illinois Code provides:
A lawyer who receives information clearly establishing that (1) his client has, . . . perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses . . . he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.
33. ILL. CODE, supra note 1, Rule 7-102(b)(1). See note 34 and accompanying text infra.
34. ABA Comm. on Professional Ethics, Opinions, No. 341 (September 30, 1975).
35. When the discovered information involves a fraud by an individual other than the client, the tribunal shall be promptly notified. ILL. CODE, supra note 1, Rule 7-102(b)(2). For a discussion of the responsibility of an attorney to disclose the perjured testimony of a client, see Wolfram, Client Perjury, 50 So. Cal. L. Rev. 809, 864-66 (1977). See, e.g., In re Estate of Minsky, 59 Ill. App. 3d 974, 376 N.E.2d 647 (1st Dist. 1978) (as attorney and officer of the
If the ABA approach creates a general rule tilted too far toward nondisclosure, a rule based on the scope of the evidentiary privilege runs the opposite risk. It is well established that the evidentiary privilege does not extend to communications when the client’s purpose is the furtherance of a continuing or future crime or fraud. The situations addressed by Rule 7-102 would normally involve communications related to a fraud with continuing consequences, for which the attorney-client privilege provides no shield from disclosure.

Further complicating the problem is the effort by federal government agencies, principally the Securities and Exchange Commission, to enlist lawyers’ services as watchdogs over their regulated clients. These efforts are not limited to conduct in adjudicatory proceedings, and constitute a considerable extension of the more traditional applications of Rule 7-102(b). The limits of this proposed extension remain undefined. It is clear, however, that the SEC intends to press its position by attempting to regulate the lawyers who will practice before it. No general answer to the foregoing dilemma is likely to emerge soon. Rather, courts will continue to give specific

court, attorney for executor was under a duty to inform court of any suspicion of fraud by client/executor); In re Estate of Gullett, 92 Ill. App. 2d 405, 234 N.E.2d 551 (4th Dist. 1968) (attorney under a duty to inform the court of any wrongdoing apparent to him on the part of his client); In re Estate of Glenos, 50 Ill. App. 2d 89, 200 N.E.2d 65 (1st Dist. 1964) (attorney has a duty to inform the court of his suspicion of fraud on the part of his client). But see In re Malloy, 248 N.W.2d 43 (N.D. 1976) (when client commits perjury, as surprise to his counsel, attorney should urge client to disclose truth, and, if client refuses to do so, withdraw from the case, but attorney need not disclose the fraud to the court).

Less ambiguous than the duty to disclose perjured testimony is the duty to withdraw from the representation when the client insists on its use. According to Rule 7-102(a)(4) of the Illinois Code, “In his representation of a client, a lawyer shall not . . . (4) knowingly use perjured testimony or false evidence.” Ill. Code, supra note 1, Rule 7-102(a)(4). See, e.g., In re A, 276 Or. 225, 554 P.2d 479 (1976) (if a client refuses to correct a perjury, the attorney should withdraw from the case); In re Millers, 248 N.W.2d 43 (N.D. 1976) (client’s refusal to correct perjury should lead to attorney’s withdrawal).


37. 17 C.F.R. § 201.2(e) (1980) provides that the Commission may deny the privilege of appearing or practicing before it to any person found by the Commission

(i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provision of the federal securities laws.

Id. The Commission has brought section 2(e) proceedings against lawyers for matters such as negligent failure to detect false statements in underwriting documents. See generally March, Rule 2(e) Proceedings, 35 Bus. Law. 987 (1980).
answers on a case-by-case basis as they attempt to accommodate the strong competing values involved.

Attracting Clients

A number of provisions of the Illinois Code regulate the manner in which attorneys may hold themselves out to the public. The rules primarily concern advertising and solicitation, topics in which the Illinois Code significantly departs from the ABA Model Code. The departures were mandated by recent United States Supreme Court decisions which broadened the scope of constitutionally permissible conduct in the advertising and solicitation areas. In line with these decisions, the Illinois Code permits attorney advertising and recasts the traditional prohibition against in-person solicitation.

Advertising and Publicity

In Bates v. State Bar of Arizona, two lawyers operating a legal clinic advertised “legal services at very reasonable fees.” The advertisement quoted a fee for a number of “routine” services including uncontested divorces, personal bankruptcies and name changes. The attorneys, who were licensed members of the Arizona State Bar, were charged in a complaint filed by the State Bar's president with violating the state supreme court's disciplinary rule which prohibited attorneys from advertising in newspapers or other media.

The majority opinion began by analyzing the first amendment issue of attorney advertising as a form of commercial speech. Expanding upon earlier established principles that struck down regulations prohibiting advertisement of prescription drug prices, the Court held that the Arizona State Bar's prohibition of lawyer advertising was unconstitutional as applied to the advertising at issue. The Court emphasized that its holding did not extend to

38. See, e.g., In re Primus, 436 U.S. 412 (1978) (solicitation of clients by a non-profit organization is constitutionally protected); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (direct in-person solicitation by lawyer for pecuniary gain may constitutionally result in disciplinary action against lawyer); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (permitting the advertisement of routine legal services).


40. See id. Rule 2-103.

41. 433 U.S. 350 (1977). Prior to the Bates decision, the traditional ban on lawyer advertising and solicitation had remained substantially intact. Canon 27 of the ABA Canons of Professional Ethics stated that “solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional.” When the Canons were superseded by the ABA Model Code in 1969, solicitation and all but the most limited forms of advertising, such as letterheads and law lists, were still prohibited. ABA Model Code, supra note 8, DR 2-101 to -103 (1969). For an historical overview of the ban on advertising and solicitation prior to the adoption of the ABA Model Code, see DRinker, supra note 6.

42. 433 U.S. at 354. A copy of the advertisement challenged in Bates is reproduced at 433 U.S. at 385.

advertisements that incorporated claims related to the quality of legal services nor to problems associated with in-person solicitation. 44

The Court recognized that even for the "routine" services advertised by the Phoenix legal clinic some supplemental warning or disclaimer might be necessary to assure the advertisement was neither false, deceptive, nor misleading. 45 It also recognized that reasonable restrictions on the time, place, and manner of lawyer advertising might be imposed, especially in light of the special problems that could arise from advertising in the electronic broadcast media. 46 Hence, in its narrowest sense, Bates stands for the proposition that lawyers have the constitutional right to advertise in the print media, including the prices of certain routine legal services. Underlying the Bates decision, however, was the Court's conviction that a substantial majority of the American public is inadequately informed about the cost and availability of legal services. 47 Bates indicated that non-deceptive advertising by lawyers is a viable solution to that problem. 48

The advertising provisions of the Illinois Code do not reflect the narrow holding of Bates, but rather its underlying rationale. Rule 2-101 permits advertising "through any commercial publicity or other form of public communication," 49 subject to five conditions. First, Rule 2-101(a) limits the informative content of a legal advertisement to specified factual information about the attorney and other information "which a reasonable person might regard as relevant in determining whether to seek the attorney's services." 50

44. 433 U.S. at 366, 383-84.
45. Id. at 384.
46. Id.
47. Id. at 370. The Court cited statistics indicating that 70% of the American public are being inadequately served by the legal system. Id. at 376. Other statistics indicated that a majority of people surveyed agreed that people will not retain lawyers "because they have no way of knowing which lawyers are competent to handle their particular problems.” Id. at 370-71 & n.23.
48. The Bates Court found that advertising "is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange" and would facilitate the process of intelligent lawyer selection, particularly among "the not-quite-poor and unknowledgeable." Id. at 376-77. The Court, holding untenable the argument that legal advertising will raise the costs of legal services, stated:

Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising. It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer.

Id. at 377.


49. ILL. CODE, supra note 1, Rule 2-101. The Rule provides in relevant part: "A lawyer may publicize himself as a lawyer through any commercial publicity or other form of public communication (including any newspaper, magazine, telephone directory, radio, television, or other advertising) . . . . Id.
50. Id. Rule 2-101(a)(8).
Second, the Code prohibits the use of any false or deceptive statement, or the exclusion of any information necessary to make the advertisement true in content. Third, the information must be conveyed to the public in a direct, dignified, and readily comprehensible manner. Fourth, the advertisement must not imply that any court, tribunal, or other public official is subject to improper influence by the attorney. Finally, the Code requires that the lawyer approve and retain a prerecorded copy of any advertisement transmitted over radio or television.

The Illinois provisions on lawyer advertising reflect a significantly different approach from that adopted by the ABA Model Code. The ABA Code sets forth a comprehensive list of the kinds of information permissible in legal advertisements. The Illinois Code, while not open-ended, does not expressly limit the kinds of information that legal advertisements may contain. This approach should encourage experimentation to discover the techniques most conducive to the informed selection of attorneys by the public. At the same time, the limitations on advertising incorporated in the Illinois Code provide standards by which hard-sell, giveaway, or flamboyant advertising can be regulated by the court.

Solicitation

The Illinois Code provisions governing in-person solicitation were also enacted in response to recent United States Supreme Court decisions. Unfortunately, the Court's opinions to date have invited an approach to the regulation of solicitation conceptually different from that governing advertising. Enforcement problems will inevitably follow, in part because the distinction between advertising and solicitation is not always easy to ascertain.

51. Id. Rule 2-101(b).
52. Id. Rule 2-101(c).
53. Id. Rule 2-101(d). Such statements are prohibited generally by Rule 9-101(c).
54. Id. Rule 2-101(e).
55. ABA Model Code, supra note 8, DR 2-101(B)(1)-(25) (1980). The type of information permitted by the ABA Model Code is limited to certain basic, factual data, such as the lawyer's name, address, and telephone number, and specified information on fees, hourly rates, and fixed fees for specific services.
56. See note 38 and accompanying text supra.

Illinois courts have declined to provide a definition of solicitation applicable in all cases, but have frequently based findings of solicitation on the attorney's motives. See, e.g., Rhoades v. Norfolk & W. Ry., 78 Ill. 2d 217, 389 N.E.2d 969 (1979) (no unethical attorney solicitation where client initiates contact); In re Heirsch, 10 Ill. 2d 357, 140 N.E.2d 825 (1956) (solicitation exists where attorney paid runners and touters to visit and solicit accident victims in hospital).
The Illinois Code Rule 2-103 defines solicitation as a "private communication" as distinct from an announcement publicly transmitted by print or broadcast media. Another distinguishing feature is the selection of the potential client. Solicitation is typically directed at a person known by the lawyer to have an immediate legal need, such as an accident victim. Conversely, advertising is directed to the general public. Thus, mail campaigns addressed to the general public are more properly regulated under rules related to advertising rather than solicitation. It is conceivable, however, that direct mail or other sorts of contacts targeted to an audience such as the victims of a recent accident would qualify as a "private communication" as defined by the Illinois Code.

Another distinguishing factor between advertising and solicitation is the inherent potential for coercion present in solicitation situations. The potential, which increases when the communication is face-to-face, exists primarily because of the client's immediate need for legal representation. The Supreme Court, in *Ohralik v. Ohio State Bar Association,* emphasized that in-person solicitation may provide a one-sided presentation by the soliciting lawyer.

58. Rule 2-103 of the Illinois Code applies by definition to "Private Communications Recommending or Soliciting Professional Employment." Section 2-103(e) defines "private communication" to "include personal contact between a lawyer and an individual lay person, directly or by telephone, and may include other in-person and written communications."


60. See *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1977). The *Ohralik* Court stated that "[u]nlke a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Id.* at 457.

61. See, e.g., Bishop v. Committee on Professional Ethics of Iowa State Bar, 521 F. Supp. 1219 (S.D. Iowa 1981) (Iowa bar disciplinary rules proscribing direct mail advertising by attorneys and advertisements describing fees as "reasonable" or "moderate" violate the first amendment); *In re Madsen,* 68 Ill. 2d 472, 370 N.E.2d 199 (1977) (attorney's letter containing a request for address changes, a description of the firm's practice, and general legal advice held not improper solicitation); Kentucky Bar Ass'n v. Stewart, 508 S.W.2d 933 (Ky. 1978) (letters sent to real estate agencies describing handling and prices of routine legal services held not solicitation); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (direct mail solicitation of possible clients is protected commercial speech which may be regulated but not proscribed), *cert. denied,* ___ U.S. ___, 101 S. Ct. 1733 (1980). *Contra,* Florida Bar v. Schreiber, 50 U.S.L.W. 2269 ( Fla. Sept. 22, 1981) (letter sent by immigration lawyer to international trade company held improper solicitation); *In re Greene,* 50 U.S.L.W. 2269 (N.Y. Ct. App. Sept. 29, 1981) (distinguishing Koffler and holding improper "third party" solicitation directed to real estate brokers seeking to represent clients of the brokers); Allison v. Louisiana State Bar Ass'n, 362 S.2d 489 (La. 1978) (letters sent to employers describing a prepaid legal services plan offered by attorneys held improper solicitation). For a criticism of the Allison decision, see Note, *Constitutional Law—First Amendment—State Bar Association May Constitutionally Prohibit Attorneys From Soliciting Clients for Profit Through the Mail,* 53 Tul. L. Rev. 962 (1979). The United States Supreme Court has noted probable jurisdiction in a case which may serve to clarify the status of direct mail. *In re J,* 609 S.W.2d 411 (Mo. 1980), *prob. juris. noted,* ___ U.S. ___, 101 S. Ct. 3028 (1981).

attorney and thereby encourage speedy and perhaps uninformed decision making by the prospective client. In *Ohralik*, the respondent attorney visited an automobile accident victim in the hospital and pressed her to sign an agreement permitting him to represent her in future legal action. Although she refused, the attorney photographed her in the hospital and interviewed a passenger of the automobile. Both the victim and the passenger eventually retained the attorney's services, but both clients subsequently attempted to discharge him. Resisting discharge, the attorney withheld the insurance settlement on the passenger's claim and collected a full one-third of the victim's recovery even though she had retained a second lawyer to obtain the settlement. A unanimous Supreme Court held that the attorney's coercive conduct justified disciplinary action.

In a companion case, *In re Primus*, the respondent attorney was on retainer from the Carolina Council on Human Relations at whose request she spoke to a group of welfare recipients who had been sterilized as a precondition to receiving welfare benefits. Following the speech, the attorney advised one of the recipients by mail of the American Civil Liberties Union, and its interest in representing sterilized women in a class action. There was no evidence that the attorney received a referral fee or any compensation beside the retainer she had previously been paid by the Council on Human Relations. The *Primus* Court reversed the imposition of disciplinary sanctions because the attorney's conduct fell within "the generous zone of First Amendment protection reserved for associational freedoms."

The *Primus* decision affirmed the settled proposition that broader first amendment protection exists for political speech than for commercial speech. The decision left unresolved, however, the truly difficult question presented by the previous solicitation cases. That question is whether non-

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63. *Id.* at 457. The Court continued its discussion of the negative aspects of in-person solicitation stating: "there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual." *Id.*

64. 436 U.S. 412 (1978).

65. *Id.* at 430 n.24.

66. *Id.* at 431. The Court relied on its decision in NAACP v. *Button*, 371 U.S. 415 (1963), in holding that Primus' activities involved constitutionally protected expression and association. In *Button*, the Court held that the NAACP's activities in soliciting prospective plaintiffs in order to conduct civil rights litigation, constituted "association for the advancement of beliefs and ideas," which does not involve substantive evils sufficient to justify prohibition. *Id.* at 430.

67. 436 U.S. at 438-39. The Court held that although in-person solicitation for pecuniary gain may be prohibited if conducted under circumstances likely to result in deception or fraud, associational solicitation may only be burdened with "carefully tailored regulation that does not abridge unnecessarily the associational freedoms of nonprofit organizations, or their members, having characteristics like those of the NAACP or the ACLU." *Id.* at 439. See generally Pulaski, *In-Person Solicitation and the First Amendment: Was Ohralik Wrongly Decided?,* 1979 *Ariz.* St. L.J. 23; Comment, *In re Primus and Ohralik v. Ohio State Bar Association: A First Amendment Challenge to Prohibitions on Lawyer Solicitation,* 48 U. *Cin.* L. *Rev.* 886 (1979); Comment, *Attorney Solicitation: The Scope of State Regulation After Primus and Ohralik,* 12 *U. Mich. J.L. Ref.* 144 (1978).
coercive solicitation in furtherance of "commercial" goals is entitled to first amendment protection.  

Even less clear is the extent to which coercive or deceptive solicitation in support of associational goals may be constitutionally protected.

Moreover, as the Court conceded, the distinction between commercial and associational solicitation may in practice be difficult to draw. A non-commercial interest is usually advanced when a lawyer seeks to ensure that a private individual receives an adjudication of his or her claim through the judicial process. Few organizations besides the American Civil Liberties Union, litigate purely associational interests.

The ambiguities resulting from the Ohralik and Primus decisions were adopted by the Illinois Supreme Court in In re Teichner. Teichner involved two distinct solicitation situations, only one of which the court found improper. The instance in which the respondent's solicitation activities were constitutionally protected arose out of a railroad accident in Laurel, Mississippi. The respondent attorney traveled to Mississippi at the request of a local minister to advise accident victims and their families. Some of the potential clients had already been contacted by the claims agent for the railroad's insurer, who was attempting to negotiate settlements. Upon his arrival the respondent visited accident victims and their families accompanied by an aide of the minister. The visits, however, were not limited to members of the minister's congregation.

Although the Illinois Supreme Court found that the lawyer's activities constituted solicitation of legal business and that his motives were predominantly pecuniary, it held that his conduct was constitutionally protected.

After examining at length the Supreme Court's decisions in Ohralik and Primus, the Illinois court concluded that where associational values are implicated, in-person solicitation for pecuniary gain cannot be absolutely prohibited. Teichner, therefore, was not subject to discipline because,

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68. Justice Powell, who wrote the opinion of the Court in both Ohralik and Primus, suggests at one point that an absolute ban on in-person solicitation may be warranted because such solicitation is likely to be injurious to the client. 436 U.S. at 466. Elsewhere, however, his position on a flat ban is less clear. See, e.g., id. at 438-39. See generally Comment, Benign Solicitation of Clients by Attorneys, 54 WASH. L. REV. 671 (1979).

69. See, e.g., In re Primus, 436 U.S. 412, 438 & n.33, 439-40.

70. Id. at 438 n.32. "The line [between commercial and associational solicitation], based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw, ... but that is no reason for avoiding the undertaking." Id. (citing Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 787-88 (1976) (Rehnquist, J., dissenting)).

71. 436 U.S. at 441-42 (Rehnquist, J., dissenting). (criticizing as "lame" the Court's attempt to distinguish Primus' and Ohralik's protected solicitation).

72. 75 Ill. 2d 88, 387 N.E.2d 265 (1979).

73. Id. at 98, 387 N.E.2d at 267.

74. Id. at 99, 387 N.E.2d at 269.

75. Id. at 100-03, 387 N.E.2d at 269-71.

76. Id. at 103, 387 N.E.2d at 272.
despite his pecuniary motive, the effect of his conduct was to further the associational values of the community.\textsuperscript{77} The court also examined the respondent's conduct and concluded that there was not clear and convincing evidence of the "substantive evils against which the prohibition of in-person solicitation traditionally is directed."\textsuperscript{78}

The second series of events that led to disciplinary charges being brought against Teichner arose out of an explosion in Decatur, Illinois. The respondent went to Decatur and offered to pay cash to an airport auto rental employee in return for introductions to the explosion accident victims.\textsuperscript{79} Later, the respondent made an uninvited visit to a distraught victim and asked to be retained for a substantial contingent fee.\textsuperscript{80} In addition, he contacted various relatives of another accident victim, including the fiancee, mother, and divorced wife of the victim, and attempted to establish a joint representation. The \textit{Teichner} court imposed discipline for the respondent's conduct in this instance because the attorney's actions neither advanced associational rights nor furthered the "dissemination of truthful information about the availability of legal relief and legal services to members of the public . . . ."\textsuperscript{81}

In resolving \textit{Teichner} through the use of the \textit{Ohralik} and \textit{Primus} rationales, the Illinois Supreme Court created a complicated analytical framework for the future resolution of Illinois solicitation cases. This framework is incorporated into Rule 2-103 which imposes a ban on solicitation by means of a "private communication," except where the prospective client is a relative or close friend of the lawyer, or where the communication is associational.\textsuperscript{82} The rule also prohibits associational solicitation or that of friends and relatives where the communications are coercive, overreaching, or harassing.\textsuperscript{83}

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\textit{Id.} at 104-05, 387 N.E.2d at 271. The Court stated:
\begin{quote}
We find it crucial that, in turning to the respondent for help, [the minister] was not attempting to create a facade or device designed to facilitate the respondent's solicitation of remunerative employment . . . but rather was acting as part of a \textit{bona fide} relief effort created to further interests independent of the respondent's interest in remunerative employment. Thus, even though respondent's motives were predominantly pecuniary, his conduct served to further the interests of [the minister's] community, and a blanket prohibition of all contact between respondent and that community would not pass constitutional muster.
\end{quote}
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\textit{Id.} at 105, 387 N.E.2d at 272.
\textit{Id.} at 107, 387 N.E.2d at 273.
\textit{Id.} at 108-09, 387 N.E.2d at 273.
\textit{Id.} For a critical discussion of the \textit{Teichner} decision, see Note, \textit{Expanding Protection for Attorney Solicitation—In re Teich...r}, 28 DePaul L. Rev. 1189 (1979).
\textit{Id.} Rule 2-103(b)(2) of the Illinois Code provides that a lawyer may solicit employment "under the auspices of a public or charitable legal services organization or a \textit{bona fide} political, social, civic, charitable, religious, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services." ILL. Code, \textit{supra} note 1, Rule 2-103(b)(2).
\textit{Id.} Rule 2-103(c).
\end{flushright}
An alternative approach, suggested in Justice Marshall's concurring opinions in *Ohralik* and *Primus*, would have been simply to ban solicitation that involved misrepresentation, coercion, or harassment. A rule focusing on these factors clearly would deny protection to hospital visits, knocking on doors of accident victims, and other solicitation practices most in need of restriction. More importantly, the focus of disciplinary enforcement would be on the relatively straightforward inquiry of whether the potential client was harassed or coerced.

After *Ohralik*, *Primus*, and *Teichner*, the Illinois court will be required to make several inquiries when confronted with in-person solicitation. These inquiries include whether the lawyer's motives and function were "pecuniary" rather than "ideological"; whether apart from the lawyer's motives, the "effect" of his or her conduct renders it protected; whether the goals advanced by the solicited representation were "associational"; and whether these goals, if associational, were "bona fide."  

Other "Publicity" Requirements

Apart from the provisions regarding solicitation and advertising, the Illinois Code incorporates additional provisions governing how lawyers hold themselves out to the public. Rule 2-102 encompasses three specific prohibitions. First, lawyers who assume judicial, legislative, or other public posts may not permit their names to be used in the notices, business cards, or letterhead of their former firms. Second, firms that include lawyers licensed in different jurisdictions must make clear in all notices and letterheads the jurisdictional limitations on any firm members. Finally, lawyers who are also engaged in another profession or business may not advertise that fact, or indicate it on their letterhead or notices. Each of these provisions is a carry-over from the detailed provisions of the ABA Model Code, DR2-102. Most of the remaining detailed provisions of that rule were superseded by the Illinois Code's liberalized rule on advertising and publicity. Among the other superseded provisions was an ABA rule against practicing law under a "trade name."  

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84. *In re Teichner*, 75 Ill. 2d 88, 387 N.E.2d 265 (1979). The *Teichner* court interpreted *Primus* as suggesting that where the conduct of an attorney falls between the two extremes exemplified in *Primus* and *Ohralik*, "this court must first determine whether the attorney's motive and function entitle his speech and conduct to the greater protection afforded associational activity for the advancement of beliefs and ideas." *Id.* at 103, 387 N.E.2d at 271.

85. Clarification of the present state of the law in the advertising and solicitation areas may be forthcoming. The United States Supreme Court has noted probable jurisdiction of a case from Missouri that involves issues of advertising, solicitation, and representations regarding specialization. *In re J*, 609 S.W.2d 411 (Mo. 1980), *prob. juris. noted, ___ U.S. ___*, 101 S. Ct. 3028 (1981).

86. As the Commentary to the Illinois Code observes: "It is difficult to make a principled distinction between permitting a law firm to practice under the name of long-departed founding fathers, while at the same time prohibiting the use of other names, e.g. 'Law Clinic.'" *Ill. Code, supra* note 1, Rule 2-102 (Committee Commentary).
The matter of specialization is addressed in Rule 2-105, which generally provides that lawyers or firms may specify and publicize fields of law in which they concentrate, but may not hold themselves out as "certified" or as "specialists." This restriction is designed to permit the dissemination of information undeniably useful to potential clients, while avoiding the impression that the attorney's or the firm's credentials have been approved by the Illinois Supreme Court or other official certifying organization. The prohibition incorporated in Rule 2-105 would not appear to extend to the lawyer's listing of membership in bar groups or organizations such as the American Trial Lawyers Association. In keeping with the former practice under the ABA Model Code, Rule 2-105 does authorize patent, trademark, and admiralty attorneys to expressly designate themselves as such.87

**Fees, Costs, and Client Funds**

The Illinois Code contains a number of specific provisions regarding the source and handling of fees, litigation costs, and the security of client funds, and includes some significant departures from the provisions of the ABA Model Code.88

87. Rule 2-105 states:
(a) A lawyer shall not hold himself out publicly as a specialist, except as follows:
(2) A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney" or "Trademark Lawyer," or a combination of those terms, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or "Admiralty Lawyer," or a combination of those terms, in any form of communication otherwise permitted under Rules 2-101 through 2-104.
(3) A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as "certified" or a "specialist."

Id. Rule 2-105(a).

88. Disciplinary Rule 2-106 of the ABA Model Code prohibits the charging of "clearly excessive" fees, whereas, Illinois Rule 2-106 prohibits the charging of "excessive" fees. Rule 2-106 of the Illinois Code also sets out specific guidelines for contingent fee agreements where the ABA Code does not. These are designed to ensure that the lawyer and client understand the terms of their agreement. Ill. Code, supra note 1, Rule 2-106 (Committee Commentary).

Rule 2-107 of the Illinois Code expands the ABA provision for division of fees among attorneys and allows payment of a fee to the referring lawyer when that lawyer takes no part in the case. This practice of compensating the nonparticipating referring attorney is prohibited by the ABA rule. The departure from the ABA Model Code is to encourage lawyers to refer matters to those more skilled in a particular area. Id. Rule 2-107 (Committee Commentary).
Fees

Rule 2-106 prohibits agreements for an illegal or excessive fee, and lists a number of factors to be considered in determining whether a fee is "excessive." Included are a wide variety of factors, including the amount of time involved, the novelty and difficulty of the question presented, the customary fees in the locale for similar services, and the experience, reputation, and ability of the lawyer. A fee is defined as "excessive" by Rule 2-106(b) "when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." The Illinois Code prohibits a lawyer from acquiring a proprietary interest in the cause of action or subject matter of litigation which he is conducting unless such interest is an attorney's lien or a contingent fee agreement. Most litigation regarding this rule has arisen from the issue of whether a lawyer may serve as a member of a plaintiff class while he or a member of his firm also serves as counsel for the class.

89. Id. Rules 2-106(b)(1)-(8). The rules are identical to DR 2-106 of the ABA Model Code, with the exception of Illinois Rule 2-106(b)(2). DR 2-106(b)(2) of the ABA Model Code includes as a factor the likelihood that acceptance of the employment would preclude other employment by the lawyer only if that likelihood is apparent to the client. Rule 2-106 of the Illinois Code deletes this italicized language.

90. Guidelines similar to those set forth in Rule 2-106 have often been followed by Illinois courts, even before the advent of the ABA Model Code. See Entertainment Concepts, Inc., III v. Maciejewski, 631 F.2d 497, 508 (7th Cir. 1980); Bond v. Slanton, 630 F.2d 1231, 1234 (7th Cir. 1980); People ex rel. Chicago Bar Ass'n v. Pio, 308 Ill. 128, 139 N.E. 45 (1923); McMannomy v. Chicago, Danville & Vincennes R.R., 167 Ill. 497, 47 N.E. 712 (1897).

Naturally, inflation has caused a change in judicial attitudes towards specific dollar amounts, as evidenced by Harris v. Chicago Great W.R.R., 197 F.2d 829 (7th Cir. 1952) ($100 an hour fee is so unreasonable as to shock judicial conscience). The reasonableness of contingent fees is always subject to close scrutiny and supervision by the courts. Rosenthal v. First Nat'l Bank of Chicago, 127 Ill. App. 2d 371, 262 N.E.2d 262 (1st Dist. 1970).

91. See, e.g., Flynn v. Kucharski, 59 Ill. 2d 61, 319 N.E.2d 1 (1974) (reduced fees from $750,000 to $560,000 in class action proceeding); Donnelley v. Donnelley, 80 Ill. App. 3d 597, 400 N.E.2d 56 (1st Dist. 1980) (reduced aggregate allowance of $65,000 to $40,000 in divorce proceeding); In re Estate of Enos, 69 Ill. App. 3d 129, 386 N.E.2d 1147 (5th Dist. 1979) (total fee to attorney and executor reduced from $26,930 to $9,000). Such exercises of judicial supervision over fees such as those cited in this and the preceding note are not typically accompanied by disciplinary sanctions. Such sanctions would be the subject of a separate proceeding.

92. Ill. Code, supra note 1, Rule 5-103(a).

93. The courts have taken two approaches in deciding the impropriety of a lawyer serving as both a member of a plaintiff class and counsel for that class. In Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir. 1976), the court adopted a per se rule that an attorney-plaintiff class representative may not also serve as counsel for the class. Id. at 1090. See also Turoff v. May Co., 531 F.2d 1357 (6th Cir. 1976) (inherent conflict of interest for same individual to represent class both as plaintiff and counsel). A second approach was recognized in Susman v. Lincoln Am. Corp., 561 F.2d 86 (7th Cir. 1977). Susman rejected the per se rule in favor of a case-by-case method of determining the existence of a conflict. Id. at 93-94. See, e.g., Fischer v. International Tel. & Tel. Corp., 72 F.R.D. 170 (E.D.N.Y. 1976) (fact that attorney was plaintiff's son did not preclude him from representing class); Clark v. Cameron-Brown Co., 72
Like the ABA Model Code, the Illinois Code permits attorney compensation in whole or part by acquiring an interest in the right to publish books or articles on the subject of the case in which he was retained, but any "arrangement or understanding" as to this form of compensation cannot be made until the matter is fully concluded. This rule is a corollary to the broader prohibition of Rule 5-104(a) against a lawyer transacting business with a client when the two have conflicting interests and the client expects the lawyer to exercise his professional judgment for protection of the client.

On its face, the rule restricting acquisition of publication rights presents enormous difficulties. If acquisition of literary rights is contemplated, it is unrealistic to suppose that no "understanding" will be reached while the matter is pending. If there is such an understanding, the potential for a conflict of interest is clear. For example, the value of the publication rights may be increased by a decision to have the defendant stand trial rather than to plead guilty, or to testify rather than to remain silent. Although courts have deplored these inherent conflicts of interest, they have generally refused to find in them prejudice sufficient to warrant a new trial or other relief.

The Illinois Code's Rule 5-107(b) follows the lead of the ABA Model Code regarding the source of attorney fees, by prohibiting the undisclosed accept-
Arance of payment for legal services from anyone other than the client.97 A relevant application of Rule 5-107 arises when a lawyer defends an individual, but is paid by that person’s insurer. Such an arrangement is typically made after full disclosure to, and with the consent of, the insured.98 Illinois cases have held that an insured has the right to retain counsel of his or her own choosing, at the insurer’s expense, in a case in which a policy defense obligation is undertaken subject to a reservation of rights by the company.99 Whenever a lawyer is paid by someone other than the client, the Code prohibits the lawyer from allowing his or her professional judgment to be directed by the paying party.100

Rule 3-103 prohibits a lawyer from forming a partnership with a non-lawyer if any of the partnership activities will consist of the practice of law. A related rule, 5-107(d), prohibits formation of a professional corporation or association in which a nonlawyer owns stock or otherwise has the right to direct the conduct of the professional affairs of the corporation or association. Rule 3-102 prohibits a lawyer or law firm from sharing fees with a nonlawyer except in specified circumstances. Those circumstances include payment to the heirs of a decreased lawyer for completion of his or her unfinished work, and paying retirement benefits to a firm’s nonprofessional employees.

Division of fees among lawyers for work on a single matter is governed by Rule 2-107. When fees are to be split in proportion to the services performed, the rule requires full written disclosure of the basis of the division, and the client’s written consent to the arrangement. In addition, the total fee paid by the client must not exceed reasonable compensation for all of the legal services rendered by the lawyers involved.

In a significant departure from the ABA Model Code, the Illinois Code expressly sanctions payment of a referral fee even if the referring lawyer

97. Application of the Code’s “payment by another” provisions has occurred, for example, where attorneys representing witnesses before a grand jury have been compensated by the witness’ employer. In re Special February, 1975 Grand Jury, 406 F. Supp. 194 (N.D. Ill. 1975). The ABA Model Code has also been applied where one defendant pays for the representation of a codefendant. In re Murray, 266 Ind. 221, 362 N.E.2d 128 (1977) (paying defendant may not confer with and instruct witnesses for the codefendant). See ILL. STATE BAR ASS’N COMM. ON PROFESSIONAL ETHICS, OPINIONS, Nos. 261 (June 28, 1965), 272 (June 30, 1966) & 281 (Sept. 26, 1966).


99. See, e.g., Thornton v. Paul, 74 Ill. 2d 132, 384 N.E.2d 335 (1978) (when a conflict of interest prevents an attorney from representing both an insurer and its insured, the insured has a right to be represented by his own counsel and control his defense); Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976) (when an insurer has an obligation to defend but has a conflict of interest with its insured, the insured may control his own defense at the insurer’s expense).

100. ILL. CODE, supra note 1, Rule 5-107(c). See In re Murray, 266 Ind. 221, 362 N.E.2d 128 (1977). See also note 97 supra.
performs no services apart from the referral of the matter. Such an arrangement must meet several additional conditions. The disclosure signed by the client must specify the "extent and basis" of the "economic benefit" received by the referring lawyer. Furthermore, the referring lawyer must agree to assume the same legal responsibility for the work as if he or she were a partner of the receiving lawyer. The latter provision encourages the referring lawyer to devote at least administrative attention to the progress of the matter.

Rule 2-107(a)(4) broadly defines a referral fee as an "economic benefit." An "established practice" of reciprocal referrals between two lawyers is expressly included within this definition. When such a practice exists, all provisions of Rule 2-107 appear to apply to every matter referred, even if no other referral "fee" is paid in connection with any particular matter. Neither the Code nor the Commentary offers guidance as to what constitutes an "established practice" of reciprocal referrals.

Contingent fee agreements also cause occasional problems between attorney and client. Hence, the Code requires that they be in writing, and set forth the terms and conditions of the fee calculation as precisely as possible. For example, the agreement should specify the fee in the event of settlement, trial or appeal, and whether expenses are to be deducted before or after the fee calculation. The requirement that agreements be "in writing" is expressly made inapplicable to commercial collections and insurance company subrogation claims made in accordance with usual practices.

The Illinois Code continues the traditional prohibition against contingent fee arrangements in criminal cases. One rationale of this rule is to mini-

101. Rule 2-107(a)(2) of the Illinois Code is designed to eliminate the custom of providing referring lawyers "make-work" after referral, and to encourage the referral of matters to lawyers more skilled in the relevant area of practice. Ill. Code, supra note 1, Rule 2-107 (Committee Commentary).

102. Id. Rule 2-107(a)(1), (2).

103. Rule 2-107(a)(4) states:

For purposes of this rule, "economic benefit" shall include (a) the amount of participation in the fee received with regard to the particular matter; (b) any other form of remuneration passing to the referring lawyer from the receiving lawyer, whether or not with regard to the particular matter; and (c) an established practice of referrals to and from or from and to the receiving lawyer and the referring lawyer.

Id. Rule 2-107(a)(4).


105. Ill. Code, supra note 1, Rule 2-106(c)(2).

106. Id. Rule 2-106(c)(4).

107. Id. As noted in F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 52 (1964), little case law exists in the area of contingent fees in criminal cases. One case suggests that the rationale for the rule is the possible conflicting interests between attorney and client with regard to plea bargaining. United States ex rel. Simon v. Murphy, 349 F. Supp. 818 (E.D. Pa. 1972).
mize the risk of subornation or perjured testimony. This rationale has been
cogently criticized on the grounds that the same risk is tolerated in civil
litigation, and substantial incentives for perjury are implicit in criminal
defense regardless of how the defense lawyer is to be compensated.\textsuperscript{108} If
contingent fee arrangements may be justified to finance the meritorious
claims of lower income civil litigants, their use may be equally warranted to
finance the meritorious defenses of lower income criminal defendants. It is
true that a successful criminal defense does not generate a monetary recovery
from which the fee could be taken. However, this is more in the nature of a
practical reason why lawyers in such cases would not enter into contingent
fee agreements, rather than a proper basis for an ethical proscription against
them.

In the months following the passage of the Illinois Code, the question was
raised whether the Code has changed the former prohibition against contin-
gent fees in divorces and related proceedings. In \textit{In re Fisher},\textsuperscript{109} the Illinois
Supreme Court censured a lawyer for receiving an assignment from his client
of all alimony payments in excess of $100 per month, along with all rights in
her home, and all property settlement rights except those related to child
support.\textsuperscript{110} After receiving the assignments, the lawyer repeatedly applied
to the divorce court to increase the support payments, based on his client's
alleged increased needs.\textsuperscript{111} The beneficiary of these increased support pay-
ments would, of course, have been the lawyer, not the client.

The scam practiced by the respondent in \textit{Fisher} was far more invidious
than a simple contingent fee arrangement tying the lawyer's compensation to
a percentage of the support payments. Nevertheless, \textit{Fisher} has been widely
interpreted as imposing a general prohibition on contingent fee contracts in
divorce cases.\textsuperscript{112} Acting on the recommendation of the Committee on Pro-
fessional Responsibility, the supreme court in late June, 1981 voted to amend
Rule 2-106(c)(4) to incorporate an express prohibition of contingent fee
agreements in domestic relations cases. The prohibition does not extend to
post-decree matters such as collecting arrearages in maintenance or child
support.\textsuperscript{113}

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\textsuperscript{108} See F. MacKinnon, \textit{Contingent Fees for Legal Services} 52 (1964).
\textsuperscript{109} 15 Ill. 2d 139, 153 N.E.2d 832 (1958).
\textsuperscript{110} Id. at 155, 153 N.E.2d at 840.
\textsuperscript{111} Id. at 145-48, 153 N.E.2d at 837.
\textsuperscript{112} See Stoller v. Onuszko, 10 Ill. App. 3d 598, 295 N.E.2d 118 (1st Dist. 1973); See also
\textsuperscript{113} ILL. CODE, supra note 1, Rule 2-106(c)(4), as amended by Illinois Supreme Court Order,
Costs

The Illinois Code retains the ABA Model Code's prohibition on advancing "financial assistance" to a client in connection with pending litigation. The lawyer may, however, advance litigation expenses, including investigation expenses, and costs of obtaining and presenting evidence. Witness fees are covered by Rule 7-109(c), which provides that an attorney may pay witnesses' expenses and a reasonable compensation for their loss of time. Expert witnesses may be paid a reasonable fee for their professional services. The same rule prohibits witness compensation to be contingent on the content of their testimony or the outcome of the case.

The constitutionality of this rule was upheld in Person v. Association of the Bar of New York against a claim it denied litigants equal access to expert witnesses.

Segregation of Client Funds

While judicial opinions, bar commentators, and law review articles such as this debate the various niceties of ethical conundrums facing lawyers, the most serious disciplinary problem encountered by enforcement officials concerns the plain and simple conversion or commingling of client funds by their attorneys. Such cases constitute approximately one-third of the disciplinary proceedings heard by the Illinois Supreme Court.

Rule 9-102(a) of the Illinois Code requires that lawyers segregate, in a separate identifiable bank trust account, all client funds paid to the lawyer, other than advances for costs and legal expenses. Any portion of such funds

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114. Ill. Code, supra note 1, Rule 5-103(b). Courts have viewed this provision strictly in similar state codes, and have not made exceptions for indigent clients. See In re Berlant, 458 Pa. 439, 328 A.2d 471 (1974), cert. denied, 421 U.S. 964 (1975); In re Sandifer, 260 S.C. 633, 198 S.E.2d 120 (1973). Cf. Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437 (La. 1976) (contrary result should occur when the loans are made for a client's living expenses and client has guaranteed reimbursement).

115. Ill. Code, supra note 1, Rule 5-103(b).

116. Id. Rule 7-109(c). The rule tracks ABA Model Code DR 7-109(C). The prohibition of contingent fees for experts has received considerable criticism. See, e.g., Person v. Association of the Bar of New York, 414 F. Supp. 144 (E.D.N.Y. 1976); Note, Contingent Fees to Expert Witnesses—Is Disciplinary Rule 7-109(C) Dead?, 81 Dick. L. Rev. 655 (1977) (argues that it is unconstitutional to prohibit a lawyer from paying contingent fee to expert witnesses); Note, The Contingent Compensation of Expert Witnesses in Civil Litigation, 52 Ind. L.J. 671 (1977) (argues in favor of a court-appointed, impartial expert witness); Note, Contingent Fees for Expert Witnesses in Civil Litigation, 86 Yale L.J. 1680 (1977) (argues for court-determined contingent fees for expert witnesses). See also West Skokie Drainage Dist. v. Dawson, 243 Ill. 175, 182, 90 N.E. 377, 379-80 (1909) (expert witness' possible financial interest in the litigation's outcome is always an appropriate topic for cross examination); In re O'Keefe, 49 Mont. 369, 142 P. 638 (1914) (an attorney promised to pay material witnesses a sum of money in the event that his client obtained a favorable judgment).


118. Rolewick Interview, supra note 11.
belonging to the lawyer may be withdrawn only after giving reasonable notice to the client, and then only if there is no dispute about the lawyer's right to the funds.\textsuperscript{119} It is unclear whether a retainer for services to be provided constitutes the client funds as described by the rule. If the answer is yes, the value of a retainer as a security for future payment may be seriously eroded. Further, the rule requires that lawyers maintain "complete records" of client funds, securities, and other property, and be able to render appropriate accounts to the client.\textsuperscript{120}

There is no substitute for a good record-keeping system to ensure the segregation and protection of client funds and to prevent inadvertent commingling or unauthorized use of client funds by the lawyer. Accordingly, the Attorney Registration and Disciplinary Commission is presently considering the creation of a model system to provide guidelines to Illinois lawyers regarding the administration of client funds.\textsuperscript{121}

Conflicts of Interest

In the past several years there has been a marked increase in reported cases in which one party seeks the disqualification of the opposing lawyer or law firm because the opponent has breached the conflict of interest ethical norms.\textsuperscript{122} As these cases increase, so has judicial sensitivity to the potential complexities of disqualification decisions.\textsuperscript{123}

Perhaps reflecting on its own experience in the area, a majority of the United States Court of Appeals for the Seventh Circuit recently observed that

\textsuperscript{119} ILL. CODE, \textit{supra} note 1, Rule 9-102(b). Withdrawal without permission constitutes conversion, with the usual penalty of disbarment. See \textit{In re Smith}, 75 Ill. 2d 134, 387 N.E.2d 316 (1979) (power of attorney to endorse and negotiate checks does not give him the right to convert those funds to own use), \textit{cert. denied}, 444 U.S. 841 (1979); \textit{In re Broverman}, 40 Ill. 2d 302, 239 N.E.2d 816 (1968) (exculpatory agreement did not eliminate liability); \textit{In re Ahern}, 26 Ill. 2d 104, 185 N.E.2d 869 (1962) (wrongful conversion cannot be said to be mere carelessness or mistaken judgment).

\textsuperscript{120} ILL. CODE, \textit{supra} note 1, Rule 9-102(c)(3). On occasion, courts have been lenient regarding this provision. See \textit{In re Brunum}, 381 Ill. 139, 44 N.E.2d 833 (1942) (attorney's failure to promptly report receipt of money and account therefore, was not act of commission constituting moral turpitude); \textit{People ex rel. Ludens v. Harris}, 273 Ill. 413, 112 N.E. 978 (1916) (failing to report and account receipt of funds not conversion).

\textsuperscript{121} Rolewick Interview, \textit{supra} note 11. Other states have enacted guidelines for maintaining records of client's funds. See DELAWARE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, DR 9-102 (Interpretive Guideline No. 2); WIS. SUP. CT. Rule 11.05. See generally Comment, \textit{Attorney Misappropriation of Client's Funds: A Study in Professional Responsibility}, 10 U. Mich. J.L. Ref. 415 (1977).

\textsuperscript{122} For competing views as to existence and magnitude of the increase, see \textit{Armstrong v. McAlpin}, 625 F.2d 433, 437 n.9, 447 n.2 (2d Cir. 1980) (Mulligan, J., concurring in part and dissenting in part), \textit{vacated on other grounds, U.S., 101 S. Ct. 911} (1981).

\textsuperscript{123} See, e.g., \textit{Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.}, 518 F.2d 751, 753 (2d Cir. 1975) (when determining whether disqualification is appropriate, court must endeavor to preserve the delicate balance between the client's right to counsel of his or her choice and the legal profession's interest in maintaining the highest ethical standards); \textit{Government of India v.}
precise application of precedent is required in any judicial decision regarding ethical principles because the distinction between ethical and reprehensible conduct is often very fine. Particularly in matters involving "large law firms representing multi-billion dollar corporations in all segments of the economy and the governmental process, it is becoming increasingly difficult to insist upon absolute fidelity to rules prohibiting attorneys from representing overlapping legal interests." No other area of professional responsibility requires more familiarity with the case law which interprets the relevant provisions of the Code.

To begin with a simple case, it is clear that under the Code an individual lawyer may not represent two clients in a suit between them. Such dual representation would require the lawyer to violate the proscription of Rule 4-101(b)(2) against a lawyer's using "a confidence or secret of his client to the disadvantage of the client." Moreover, representing two opposing parties


124. The court held that:

when dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.

Novo Terapeutisk Laboratorium, A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186, 197 (7th Cir. 1979) (quoting Silver Chrysler Plymouth v. Chrysler Motors Corp., 518 F.2d 751, 753 n.3 (2d Cir. 1975)).


126. It should be noted that ethical questions regarding conflict of interest have typically been pressed by private litigants rather than by disciplinary agencies. One reason for this trend is that a successful disqualification motion may be an enormous tactical advantage to the prevailing party.

127. Illinois cases not decided under the Code but reflecting this traditional prohibition include In re LaPinska, 72 Ill. 2d 461, 381 N.E.2d 700 (1978) (city attorney is prohibited from representing simultaneously seller of a home in violation of zoning laws and buyer of such home who files a complaint against seller based on these violations); People ex rel. Scholes v. Keithley, 225 Ill. 30, 80 N.E. 50 (1906) (attorney who files a creditor's bill, on behalf of a client, seeking to set aside a deed, is not permitted to represent simultaneously the party who executed the deed, seeking to regain title); Beely v. Wm. Meyer Co., 332 Ill. App. 653, 75 N.E.2d 783 (1st Dist. 1947) (attorney is prohibited from representing majority stockholders and corporation in suit brought by minority stockholders to recover misappropriations). See also ILL. STATE BAR ASS'N COMM. ON PROFESSIONAL ETHICS, OPINIONS, Nos. 166 (Apr. 21, 1958) & 603 (Apr. 4, 1978).

128. See, e.g., In re Michal, 415 Ill. 150, 112 N.E.2d 603 (1953) (attorney who drafts antenuptial agreement is prohibited from subsequently representing his former client's spouse in an action to invalidate that agreement); People ex rel. Livers v. Hanson, 290 Ill. 370, 125 N.E. 268 (1919) (attorney who provided legal advice to persons seeking to consolidate school districts, cannot thereafter, in his capacity as state's attorney, file any information against such person on ground that consolidation was illegal); People v. Gerold, 265 Ill. 448, 107 N.E. 105 (1914) (attorney who receives confidences from client cannot thereafter testify against that client in a
would violate Rule 5-105(b), which states that a lawyer may not represent multiple clients “if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client...”129 Finally, such dual representation would raise obvious questions under the general precept of Canon 9 which provides that a lawyer should avoid “even the appearance of impropriety.”130 There is no serious question that a single law firm could not represent both clients in the foregoing circumstances. No matter how stringently the firm ensured that separate lawyers represented each client and that the respective attorneys were effectively screened from receiving an adverse party’s confidential information, such representation would violate Rule 5-105(d). This Rule prohibits any member of a lawyer’s firm from representing a client when the lawyer’s own representation would violate Rule 5-105.

A slightly more complicated situation occurs when a lawyer or firm seeks to represent client “A” in a suit against client “B” when it simultaneously represents client “B” in matters totally unrelated to the litigation.131 Here, there is little danger that client confidences obtained in the one representation will be relevant to the other. There is, however, substantial danger that the lawyer’s independent judgment may be compromised by pressures placed on him by client “B.” Assigning each matter to different lawyers within the

state criminal proceeding as to matter which formed basis of the indictment; King v. King, 52 Ill. App. 3d 749, 367 N.E.2d 1358 (4th Dist. 1977) (attorney who counseled client contemplating divorce is prohibited from subsequently representing former client’s spouse in action for separate maintenance).

129. ILL. CODE, supra note 1, Rule 5-105(b). See, e.g., Angell v. Petersen, 26 Ill. App. 2d 239, 167 N.E.2d 711 (2d Dist. 1960) (assistant state’s attorney who is prosecuting defendant for reckless homicide cannot also represent a victim of the automobile accident for which defendant is responsible in a suit for damages). The ABA Model Code proscribes simultaneous representation of “differing” interests. ABA MODEL CODE, supra note 8, DR 5-105(B). To the extent “differing” interests may be represented without “adversely affect[ing]” either, the Illinois Code is more permissive than the ABA Model Code. In a close case under either code, the preferred course is to obtain the consent of both clients after full disclosure. ILL. CODE, supra note 1, Rule 5-105(e); ABA MODEL CODE, supra note 8, DR 5-105(C). See In re Spencer, 68 Ill. 2d 496, 370 N.E.2d 210 (1977) (although attorney who represented both executor and beneficiary under a will was not found to have represented adverse interests, attorney was required to disclose his dual representation to his clients).

130. The “appearance of impropriety” standard is appropriate in borderline cases in which it is not clear that the attorney either revealed confidences of a former client to the disadvantage of that client or engaged in multiple representation to the disadvantage of a client. See, e.g., In re Williams, 57 Ill. 2d 63, 309 N.E.2d 579 (1974) (attorney who represented client wishing to change insurance policy beneficiary from his spouse to his children, following divorce decree, cannot therefrom represent the spouse in attempting to collect the proceeds of those insurance policies); In re Becker, 16 Ill. 2d 488, 158 N.E.2d 953 (1959) (attorney-alderman may not represent a client before a zoning board of appeals if the board’s actions are reviewable by the city council). As the body of disqualification law has grown, however, resort to the use of the vague “appearance of impropriety” standard has declined. See notes 122-125 and accompanying text supra and notes 137-162 and accompanying text infra.

131. See ILL. STATE BAR ASS’N COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 603 (Apr. 4, 1978).
firm and erecting a "Chinese Wall" between them is of limited efficacy. The risk is not that information will leak from one lawyer to the other, but that the firm itself will experience a conflict and its business interests be better served by "pulling its punches" for one client or the other. In these circumstances, Rule 5-105 is violated and both the lawyer and the lawyer's firm are disqualified from the dual representation.\textsuperscript{132}

The real difficulties begin when a lawyer ceases to represent a client, and then seeks to represent a different client in a matter that bears some relation to the representation of the former client. The risk is that secrets revealed by the first client to the lawyer may be used to the disadvantage of that client in the subsequent proceedings, thereby violating Rule 4-101(b). In cases of this sort, the question is whether there is a "substantial relation" between the subject matter of the two representations.\textsuperscript{133} That inquiry requires an analysis of the issues involved in both representations and of the likelihood that confidential information given to the lawyer in connection with the former representation would be relevant to the pending litigation.\textsuperscript{134} The party

\textsuperscript{132} See, e.g., International Business Mach. Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978) (firm disqualified from representing antitrust plaintiff in suit against IBM, for which it was handling labor relations representations). \textit{But see} Unified Sewerage Agency of Washington County, Ore. v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981) (rejecting per se ban on simultaneous representation of clients with adverse interests, in unrelated matters). \textit{Cf.} Westinghouse Elec. Corp. v. Rio Algom, Ltd., 448 F. Supp. 1284, 1287-88 (N.D. Ill.), \textit{aff'd in part sub nom.}, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.) (concurrent representation of petroleum trade association and plaintiff suing corporate members of the association for alleged price-fixing in the uranium industry prohibited), \textit{cert. denied}, 439 U.S. 955 (1978); People v. Grigsby, 47 Ill. App. 3d 812, 365 N.E.2d 481 (1977) (criminal case which held it to be reversible error for the trial judge to refuse to permit the withdrawal of defense counsel who had consulted with the complaining witness as a prospective client in an unrelated case). The \textit{Grigsby} court held that the disqualification of the lawyer involved compelled the disqualification of his entire firm under Illinois Rule 5-105.

\textsuperscript{133} The substantial relationship test initially was formulated in \textit{T.C. Theatre Corp. v. Warner Bros. Pictures}, 113 F. Supp. 265 (S.D.N.Y. 1953). Guidelines recently were enunciated in Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978), in which the court set forth a three-step test:

\begin{itemize}
  \item Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation.
  \item Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters.
  \item Finally, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.
\end{itemize}

\textit{Id.} at 225. \textit{See also} \textit{ILL. STATE BAR ASS'N COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 363 (June 26, 1971)}.

\textsuperscript{134} See, e.g., \textit{Trone v. Smith}, 621 F.2d 994, 998 (9th Cir. 1980) (law firm for bankruptcy trustee disqualified when it had formerly represented defendant corporation in a secondary offering of securities); Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978) (defendant's counsel disqualified for former representation of co-defendant on a substantially related matter); \textit{Cannon v. U.S. Acoustics Corp.}, 398 F. Supp. 209, 223-24 (N.D. Ill. 1975) (preparation of pre-organization subscription agreement for corporation did not prevent counsel from subsequently representing a plaintiff in a shareholders derivative suit against the corporation), \textit{modified}, 532 F.2d 1118 (1976).
seeking disqualification need not show that its former lawyer received confidential matter that might be used in the present litigation. Courts have consistently held that such a requirement unfairly imposes an obligation to disclose the very confidences that the moving party seeks to protect. Hence, a showing that the two matters are substantially related gives rise to an irrebuttable presumption that client confidences have been disclosed, thereby requiring disqualification of the lawyer from the subsequent litigation.

An additional layer of analysis is added to the foregoing example when the same law firm, but not the same individual lawyer, seeks to represent a client in a matter substantially related to its representation of a former client. In this area of "vicarious disqualification," courts have increasingly rejected inflexible norms—such as the Canon 9 mandate to avoid even the appearance of impropriety—in favor of careful analysis of the facts of each individual situation.

An illustrative case is *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.* In *Novo*, Baxter and Novo had been involved in patent interference litigation arising out of two competing patent applications. Attorney Granger Cook, while a member of the partnership designated by the court as the Hume firm, represented Baxter. Novo finally prevailed in this dispute in 1976, at which time Baxter anticipated that a patent infringement action would be instituted against it by Novo. Cook, while still a partner at Hume, conferred for several hours with Baxter attorneys regarding the prospect of such an action and the possibility of initiating a preemptive declaratory judgment proceeding against Novo. Before any litigation was instituted, Cook left the Hume firm taking the Baxter account with him. Two months after Cook's departure, Novo, now represented by the Hume firm, filed its infringement action against Baxter. Baxter's motion to disqualify the firm was denied by the trial court.

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135. See Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 224 n.3 (7th Cir. 1978); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973); T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 269 (S.D.N.Y. 1953). But see Mullaney, Wells & Co. v. Savage, 78 Ill. 2d 534, 554, 402 N.E.2d 574, 584 (1980). The Illinois Supreme Court denied the Savage defendant's motion to bar plaintiff's law firm from the case on an alleged conflict of interest, because the defendant failed to allege how he was prejudiced by being previously represented by plaintiff's law firm. Since the motion was also denied because not timely made, it is unclear whether a showing of specific confidences disclosed to the adverse party's counsel would be held a predicate to disqualification by the Illinois Supreme Court.


137. 607 F.2d 186 (7th Cir. 1979).

138. The firm was the Chicago patent law firm of Hume, Clement, Brinks, William, Olds & Cook, Ltd. Id. at 187.

139. Id.

140. Id. The trial court noted that the Hume firm's services constituted approximately two percent of Baxter's total representation. Id. at 187-88.
On appeal, the Seventh Circuit first found that a "substantial relationship" existed between the subject matter of the pending litigation and the conferences between Cook and the Baxter lawyers held prior to Cook's departure from Hume. As noted above, the finding of a substantial relationship gave rise to an irrebuttable presumption that client confidences were transmitted to Cook. Concerning the second question—whether Cook's knowledge should be imputed, thereby requiring the vicarious disqualification of the Hume firm from representing Novo—the panel, relying on "the direction of Canon 9," held that disqualification was proper regardless of whether confidential information was actually received by other members of the firm.

On rehearing, the Seventh Circuit reversed the panel and denied the motion to disqualify. The full court agreed that a substantial relationship existed between the two matters, and recognized as a consequence an irrebuttable presumption that confidential information had passed from Baxter to Cook individually. It held, however, that vicarious disqualification of Cook's former firm required at least some showing that confidential information had passed from Cook to his former partners. While the Court was willing to presume the transmittal of information within the firm, it held that this second level presumption was rebuttable. After consideration of the submitted affidavits, the court found that no showing had been made that any confidences imparted to Cook by Baxter had been passed on to any of Cook's former partners or associates. Hence, the district court's denial of disqualification was affirmed.

Novo only begins to suggest the complexities raised by vicarious disqualification. One problem not addressed by Novo, but recognized by the Second Circuit, involves a so-called "peripheral representation exception" to the substantial relationship test. The exception states that a lawyer marginally involved in representing one client—as in doing legal research while an associate at a law firm representing that client—does not carry with him the germs of automatic disqualification when he leaves that firm and joins another that represents clients with interests adverse to his former client. As the Second Circuit observed, "there is reason to differentiate for disqualification—

141. Denials of disqualification motions have since been held to be nonappealable interlocutory orders. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). Firestone expressly reserved the question whether orders granting disqualification are appealable. At least two circuits have subsequently held that they are. Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020 (5th Cir. 1981); In re Petroleum Prods. Antitrust Litigation, TRADE REG. REP. (CCH) ¶ 64,323 (9th Cir. 1981).
142. 607 F.2d at 192.
143. Id.
144. Id. at 197.
145. Id.
146. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 756 (2d Cir. 1975).
tion purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly and on the periphery for a limited and specific purpose related solely to legal questions." This exception was expressly designed to avoid unnecessary constriction of the careers of lawyers beginning their practices with large firms.

A second complication not addressed by *Novo* is the feasibility of screening procedures—such as the erection of a so-called “Chinese Wall”—between lawyers in the firm having actual knowledge of confidential information received from a client and those seeking to represent another client against the first client in a related matter. This question was not presented in *Novo* because there was no showing that any member of the Hume firm had actual knowledge of confidential information imparted by Cook.

Initially, the Seventh Circuit has taken a hostile view of the efficacy of the “Chinese Wall” as a means of preventing passage of confidential information relevant to related matters. A less absolute approach is developing elsewhere. In an opinion likely to be influential, the Second Circuit, sitting en banc, recently approved screening procedures implemented by the firm of a former SEC lawyer.

**Special Case of the Former Government Lawyer**

Policy concerns which apply to lawyers in general may also apply when a former government lawyer or his firm represents a private client in a matter relating to the lawyer’s responsibilities in his former government employment. Disciplinary Rule 9-101(B) of the ABA Model Code prohibits an attorney’s acceptance of “private employment in a matter in which he had substantial responsibility while he was a public employee.”

147. *Id.*
tion of the term “matter” incorporates some of the same considerations that underlie the previously discussed “substantial relationship” test.\textsuperscript{152}

The equivalent of the “peripheral representation exception” has not been articulated in the case law, but that exception is inherent in the wording of the ABA’s DR 9-101(B), which requires “substantial responsibility” on the part of the lawyer. There is some debate whether “personal” responsibility is tantamount to “substantial” responsibility.\textsuperscript{153} The Illinois Code expressly recognizes this distinction, and bars appearances by a lawyer before an agency only if he had “personal and substantial” participation in the matter while at the agency.\textsuperscript{154} A broader rule of disqualification is incorporated into the Illinois Code for lawyers who exercised supervisory responsibility in government. Those lawyers are disqualified from any subsequent appearance on matters that were under their “official responsibility,” even if their participation was neither personal nor substantial.\textsuperscript{155}

A second aspect of the former government lawyer problem has no analog in the problems faced by private lawyers. Public criticism of the so-called “revolving door” by which lawyers move in and out of public service does not stem entirely from the notion that these lawyers or their firms may represent both sides of the same or similar issues on the public and private side of the revolving door. Rather, the criticism is derived from a belief that a lawyer’s friendships and “connections” within a government agency make it appropriate to preclude a lawyer from appearing before an agency on any matter after his or her departure, not just on matters from which he was officially responsible.

Various federal agencies have drafted regulations to deal with this problem, and new federal legislation limits the activities of all former government employees, including lawyers.\textsuperscript{156} The legislation does not impose a flat ban on representation before the lawyer’s former agency, but does impose a two-year ban on appearances regarding any matter “actually pending under [the lawyer’s] official responsibility as an officer or employee within a period of one-year prior to the termination of such responsibility. . . .”\textsuperscript{157}

The Committee on Professional Responsibility also wrestled with the problem of an appropriate time-limited ban on appearances before the lawyer’s former agency. The Committee’s initial submission to the supreme court included a suggested Rule 9-101(c), establishing a ban on any appearance before the agency for a period of six months, and a ban on appearances for two years after the termination of the lawyer’s employment on any matter

\textsuperscript{152} See ABA Comm. on Ethics and Professional Responsibility, Opinions, No. 342 (Nov. 24, 1976). See notes 133-136 and accompanying text supra.


\textsuperscript{154} ILL. CODE, supra note 1, Rule 9-101(b).

\textsuperscript{155} Id.


\textsuperscript{157} Id. § 207(b)(3).
that was pending while he or she was employed by the public body. After the Committee's initial proposal was circulated, the Illinois State Bar Association suggested that the two-tiered system be replaced with an unconditional one-year ban on all appearances before the agency. This ban would be applied without regard to whether the matter had been pending before the agency or was one on which the lawyer had personal involvement or exercised supervisory responsibility while in the government. After the court's suggestion to take another look at the matter, the Committee decided to adopt the Illinois State Bar Association approach.

Ultimately, the court chose to approve neither the Committee's initial proposal, nor the Illinois State Bar modification. As adopted, Rule 9-101(b) prevents a lawyer from appearing before the body on any matter "in which during the public employment the lawyer participated personally and substantially or which was under his official responsibility." The rule does not ban appearances on matters for which the lawyer had no responsibility or involvement. The most significant definitional problem presented by this rule is the extent to which matters pending before a public body will be deemed to be under the "official responsibility" of lawyers employed by those bodies, particularly smaller agencies that are common in county and local governments.  

In dealing with vicarious disqualification of the former government lawyer's firm, the Illinois Code has deliberately narrowed the provision of the ABA Model Code, by eliminating automatic disqualification of the firm due to the lawyer's personal disqualification under Canon 9. The Illinois rule implicitly requires that the lawyer involved be screened from participation in the firm's representation. The ABA has sought to mitigate harsh applications of its own rule in an ethics opinion stating that firm disqualification is not necessary where screening procedures approved by the government agency insure that the government's former employee does not participate in the private representation. The more flexible approach incorporated in the Illinois Code may be finding increased receptivity in the courts.

158. Id. Rule 9-101(b) (Committee Commentary).

159. Compare ABA Model Code, supra note 8, DR 5-105(D) ("if a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule. . . .") (emphasis added) with Ill. Code, supra note 1, Rule 5-105(d) ("if a lawyer is required to decline employment or to withdraw from employment under Rule 5-105. . .") (emphasis added). See also Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (discussed in note 122 supra).

160. Ill. Code, supra note 1, Rule 9-101 (Committee Commentary).

161. ABA Comm. on Ethics and Professional Responsibility, Opinions, No. 342 (Nov. 24, 1976). In Kesselhaut v. United States, 555 F.2d 791, 794 (Ct. Cl. 1977), the court held that a government agency cannot unjustifiably withhold consent if the screening procedures appear sufficient.

162. See notes 149-150 and accompanying text supra.
The Illinois Code imposes additional requirements that do not fall neatly into the general categories previously discussed. Most of these requirements are contained in Canons 6, 7, and 8.

Rule 7-101 and 7-102 set out important limits on the lawyer's duty to zealously represent a client's interest. Rule 7-101 makes clear that zealous representation does not include discourtesy or offensive tactics. In addition, it authorizes a lawyer to refuse to participate in conduct that he believes to be unlawful, even if the conduct is arguably legal. Rule 7-102 adopts various prohibitions from the ABA Model Code including assertion of a position merely for purposes of harassment; knowingly advancing a claim or defense that is unwarranted under existing law, unless it can be supported by a good faith argument for modification of existing law; knowingly using false evidence or making false statements of law or fact; and counseling or assisting a client in conduct the lawyer knows to be illegal or fraudulent.

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163. See, e.g., Ruggiero v. Attore, 51 Ill. App. 3d 139, 366 N.E.2d 470 (1st Dist. 1977) (reasonable professional regard and civility should compel frank and open communication with successor counsel); George F. Mueller & Sons, Inc. v. Ostrowski, 19 Ill. App. 3d 973, 313 N.E.2d 684 (1st Dist. 1974) (responsibilities to client do not require a lawyer to disregard professional courtesies to opposing counsel, including adherence to local customary practices designed to assure substantial justice between the parties); People v. Miller, 130 Ill. App. 2d 637, 265 N.E.2d 175 (2d Dist. 1970) (a lawyer is obliged to represent his client diligently, courageously and vigorously, but must remain within bounds of proper conduct). But see In re Dellinger, 370 F. Supp. 1304 (N.D. Ill. 1973) (attorneys may be persistent, vociferous, contentious and imposing, even to the point of appearing obnoxious, when acting in behalf of a client), aff'd, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975).

164. ILL. CODE, supra note 1, Rule 7-102(a)(2). See, e.g., People v. Barnes, 14 Ill. App. 3d 989, 303 N.E.2d 775 (1st Dist. 1973) (attorney should not use frivolous points to defend his client which are contrary to the law and the facts).

165. See, e.g., United States v. Abrams, 427 F.2d 86, 91 (2d Cir.) (attorney convicted of knowingly making a false statement where he acted in reckless disregard of whether his client's statements were true, and with a conscious decision to avoid learning the truth), cert. denied, 400 U.S. 832 (1970); In re Sarelas, 360 F. Supp. 794 (N.D. Ill. 1973) (disbarment justified upon filing of defamatory and frivolous litigation, alleging conspiracy of state court judges, attorneys and individuals without supporting facts); In re Carr, 377 Ill. 140, 36 N.E.2d 243 (1941) (an attorney who on the basis of false evidence and false representations seeks to secure a decree, subjects himself to disbarment); Davis v. Davis, 13 Ill. App. 2d 459, 268 N.E.2d 491 (3d Dist. 1971) (court condemned attorney's assertion regarding the existence of documents which were actually nonexistent).

166. ILL. CODE, supra note 1, Rule 7-102(a)(7). See United States v. Grasso, 552 F.2d 46 (2d Cir. 1977) (disclosure of perjurious nature of prosecuting witnesses' testimony for purposes of dismissing complaint rather than for impeachment not an improper trial tactic when defense counsel was unaware of the perjury when witness was called to testify). Cf. Hawk v. Superior Court of Solano County, 43 Cal. App. 3d 108, 116-17, 116 Cal. Rptr. 713, 718 (1974) (attorney cited for contempt for advising client not to provide handwriting exemplar ordered by the court), cert. denied, 421 U.S. 1012 (1975). But see Maners v. Meyers, 419 U.S. 449 (1975) (attorney may not be penalized for good faith advice to client to disobey a court order in exercise of fifth amendment rights). See also notes 34 & 35 and accompanying text supra.
Rule 7-104 prohibits direct communication between a lawyer and a party to the case if the attorney knows that the party is represented by another lawyer. Similarly, Rule 7-110(b) prohibits direct ex parte communications between a lawyer and a judge without notice to the opponent. Rule 7-106 sets out additional rules of courtroom conduct, including a requirement that lawyers disclose to the court legal authority in the controlling jurisdiction known to be directly adverse to the position of his client and not disclosed by opposing counsel.

The prohibition against a lawyer's assertion of personal knowledge or opinion about facts in issue or the merits of litigation is related to the Code's more general prohibition against a lawyer representing a party in a proceeding in which the lawyer is to be called as a material witness. The rationale for these rules is the potential tension between the lawyer's role as an advocate and his role as a witness whose credibility on factual matters must be resolved by the trier of fact. The rule recognizes limited exceptions where the testimony will only relate to uncontested or formal matters, to the nature and value of the legal services rendered by the lawyer, or to any other matter if disqualification of the lawyer would work a substantial hardship on the client.

Rule 7-107 modifies the ABA Model Code's regulation regarding trial publicity, partially in response to criticism of the ABA provisions by the Seventh Circuit. As modified, the Rule prohibits extra-judicial statements.

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168. ILL. CODE, supra note 1, Rule 7-106(b)(1). See United States v. Ott, 489 F.2d 872 (7th Cir. 1973) (principle underlying rule concerning fraudulent, deceitful or otherwise illegal conduct by a participant in a proceeding is broad enough to encompass deceitful omission of counsel's failure to cite pertinent legal authority contrary to his position in court). Cf. People ex rel. Dealy v. Case, 241 Ill. 279, 89 N.E. 638 (1909) (attorney for complainant in divorce case must disclose prior adjudication between parties dismissing the bill for want of equity); Davis v. Davis, 131 Ill. App. 2d 459, 268 N.E.2d 491 (1st Dist. 1971) (attorney's assertion of facts on appeal as documented on the record, where no such documents existed construed as misleading the court); People v. Sleezer, 8 Ill. App. 2d 12, 110 N.E.2d 302 (2d Dist. 1955) (attorneys, as officers of the court, are under a duty to make full and frank disclosure of all matters and facts which court ought to know); State v. White, 94 Wash. 2d 498, 617 P.2d 998, 1001 (1980) (defendant's counsel must advise the court if aware that trial date is fixed beyond the sixty-day limit prescribed by court rule). But see ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinions, No. 314 (Apr. 27, 1965) (lawyer appearing before I.R.S. is under a duty not to mislead, but not under duty to disclose weakness in his client's case). See also note 25 supra.

169. ILL. CODE, supra note 1, Rules 7-106(c)(3)-(4).

170. Id. Rule 5-102.

171. See Comden v. Superior Court of Los Angeles County, 20 Cal. 3d 906, 145 Cal. Rptr. 576 F.2d 971, cert. denied, 439 U.S. 981 (1978); See also Enker, The Rationale of the Rule that Forbids a Lawyer to be Advocate and Witness in the Same Case, 1977 AM. B. FOUNDATION RESEARCH J. 455.

172. ILL. CODE, supra note 1, Rule 5-101(b)(1)-(4).

173. Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). In Bauer an association of Chicago lawyers challenged the constitutionality of
by lawyers that "pose a serious and imminent threat to the fairness of a trial
or administrative proceeding."174 In addition, for criminal matters, the
Rule lists information appropriate for disclosure to the press and public,175 as
well as information that normally should not be disclosed.176 Among the
information listed as not appropriate for disclosure is that concerning the
prior criminal record or character of the accused, the existence or content of
an accused's statement, and the identity of prospective witnesses.177 Disclo-
sure even of such listed information does not, however, constitute a per se
violation of the rule. The court must find that the disclosure did in fact
create a serious and imminent threat to the fairness of the trial. The scope of
Rule 7-107 extends to civil actions and administrative proceedings, pertain-
ing again to the release of information creating a serious and imminent
threat to the fairness of such proceedings.

Communications with jurors are prohibited by the Illinois Code not only
during the pendency of the trial, but also until the juror's venire has been
discharged.178 Hence, the Rule permits consultation with jurors for the
purpose of self-education, but only when such jurors cannot possibly serve
immediately thereafter on another panel before the same lawyer.

A lawyer cannot "give or lend any thing of value to a judge, official or
employee of a tribunal."179 So-called "tips" to clerical employees of the
courts, the subject of recent investigations in Cook County, clearly fall
within the scope of this Rule.180 An exception permits contributions by
lawyers to the campaign funds of candidates for judicial office.181 The
Committee on Professional Responsibility initially debated the propriety of
this exception on the basis that it is virtually impossible to keep the names of
contributors from candidates. In the end, however, policy as well as consti-
tutional considerations weighed against restrictions on contributions by law-

Rule 1.07 of the District Court's Criminal Rules, and Disciplinary Rule 7-107 of the American
Bar Association's Code of Professional Responsibility. The lawyers contended that the "reason-
able likelihood of interference with a fair trial" standard employed by these rules violated first
amendment rights and was vague and/or overbroad. The court found the standard to be
overbroad and applied the standard formulated in Chase v. Robson, 435 F.2d 1059, 1061-62 (7th
Cir. 1970), that only those comments which pose a "serious and imminent threat of interference
with the fair administration of justice" can be constitutionally proscribed. 522 F.2d at 249.
Nearly identical language is incorporated in Rule 7-107 of the Illinois Code.

174. ILL. Code, supra note 1, Rule 7-107(a).
175. Id. Rule 7-107(c).
176. Id. Rule 7-107(b).
177. Id. Rule 7-107(b)(1), (2), (4).
178. Id. Rule 7-108.
179. Id. Rule 7-110(a).
180. Counter clerks in the Circuit Court of Cook County were recently reprimanded for
helping lawyers choose judges in the divorce division in violation of court rules that specify
sequential assignment of judges. All implicated clerks passed lie detector tests designed to
determine whether any money was received in return for assisting lawyers. See Chicago Trib-
une, Mar. 11, 1981, § 2 at 1, col. 5.
181. ILL. Code, supra note 1, Rule 7-110(a).
182. Id. Rule 7-110 (Committee Commentary).
The conduct of a lawyer holding office as a public official is regulated by Rule 8-101(a). The Rule prohibits an official from using his office to attempt to influence a tribunal to act in his or his client's favor, accepting anything of value that is offered for the purpose of influencing his actions as a public official, or representing any client, including any public body, in promoting or opposing proposals pending before the public body of which he is a member.183

The Code addresses attorney competence in Rule 6-101. This Rule prohibits a lawyer's handling a matter that he knows he is not competent to manage without the association of a competent lawyer, handling a matter without adequate preparation or neglecting a matter entrusted to him.184 The three subparagraphs of Rule 6-101 provide relatively objective criteria as bases for disciplinary sanctions. After some debate, the Committee on Professional Responsibility elected not to recommend a more general proscription against negligent representation, and the court did not adopt such a rule on its own initiative.185 Rule 6-101 does not require establishment of a pattern of neglect to warrant imposition of discipline.186 The scope of enforcement and of sanctions is left to the Disciplinary Commission and, ultimately, to the court.187

The provisions of the Code do not supplant the standard of care owed by lawyers to their clients, nor the civil remedies that may be imposed for breaches of that standard. A single incident of neglect can clearly give rise to a civil cause of action, whether any disciplinary proceedings are ever undertaken. Rule 6-102 prohibits a lawyer from attempting to limit his liability to a client for malpractice. The Rule further provides that a lawyer may settle a malpractice claim with his client only after advising the client of his right to consult with another lawyer.

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183. See, e.g., In re Becker, 16 Ill. 2d 488, 158 N.E.2d 753 (1959) (an alderman should not appear as counsel before a zoning board of appeal when that board's decision is subject to review by the legislative body of which the alderman is a member). Cf. Lavin v. Civil Serv. Comm'n, 18 Ill. App. 3d 982, 310 N.E.2d 858 (1st Dist. 1974) (assistant attorney general acting as counsel for labor department should not become witness for department without withdrawing from case). See also Becker, Ethics in Public Life—A Challenge to the Lawyer, 2 DePaul L. Rev. 194 (1953).


185. Ill. Code, supra note 1, Rule 6-101 (Committee Commentary).


187. Ill. Code, supra note 1, Rule 6-101 (Committee Commentary).
Conclusion

The adoption of the Code of Professional Responsibility has filled a significant void in Illinois' disciplinary enforcement system. The issues addressed by the Code cut across all areas of practice and affect relationships with clients, other lawyers, tribunals and the general public. The range of potential ethical problems faced by lawyers is correspondingly broad. Familiarity with the rules of conduct does not guarantee sensitivity to ethical issues. Nevertheless, working knowledge of the rules is a necessary starting point. As the Commission drafting the proposed new ABA Rules of Professional Conduct has observed:

"The Rules . . . presuppose a larger legal context shaping the lawyer's role. That context includes court rules and other laws regulating the profession (such as admission to practice), laws defining specific obligations of lawyers (such as the attorney-client privilege), and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a legal structure for the ethical practice of law."188

With the adoption of the Illinois Code, the Supreme Court has provided Illinois attorneys with a definitive and officially sanctioned framework for responsible practice. Understanding and complying with these rules should be an important goal of members and prospective members of the bar.
