ILLINOIS CREDITORS BARS ASSOCIATION

SPRING SEMINAR

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FEBRUARY 17, 2020 | 8:30 AM - 2:30 PM

CANDIDATES FORUM | 3:00 PM

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AGENDA

8:30 - 8:50 a.m.	**Continental Breakfast & Networking**
8:50 - 9:00 a.m.	**Welcome and Introductions** *Michael L. Starzec, ILCBA President*
9:00 – 10:00 a.m.	**Session One** **A View from the Bench - Best Practices** *The Honorable James E. Hanlon, Jr., Circuit Judge, Municipal Division District 1* *The Honorable Michael B. Betar, Circuit Judge, 19th Judicial Circuit*
10:00 – 10:15 a.m.	**Exhibitor Announcement followed by Break**
10:15 – 11:15 a.m.	**Session Two** **Ethical Issues in Collection Cases** *Robert G. Markoff, Partner, Markoff Law, LLC* *Sari W. Montgomery, Partner, Robinson, Stewart, Montgomery & Dopple, LLC*
11:15 – 11:30 a.m.	**Exhibitor Announcement followed by Break**
11:30 – 12:30 p.m.	**Session Three** **Common Bankruptcy Pitfalls** *Kyle A. Lindsey, Attorney, Johnson Legal Group, LLC*
12:30 – 1:30 p.m.	**Lunch and Networking**
1:30– 2:30 p.m.	**Session Four** **Fraudulant Conveyances - Everything You Need to Know** *Douglas C. Giese, Attorney, Markoff Law, LLC* *Michael R. Polk, Attorney, Offices of Michael R. Polk* *Joshua D. Greene, Attorney, Springer Brown, LLC*
3:00 p.m.	**Candidates Forum - Cook County Circuit Court Clerk** *Moderator: Michael Matek, Partner, Matek and Mazar, LLC* *Candidates: Barbara Belar, Richard Boykin, Michael Cabonargi, Iris Martinez, Jacob Meister*

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TABLE OF CONTENTS

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SPEAKER BIOS

The Honorable Michael B. Betar, 19th Judicial Circuit Court, IL

Judge Michael Betar was appointed as an Associate Judge to the Nineteenth Judicial Circuit (Lake County) in February, 2008, after 16 years in private practice concentrating in collections and civil litigation.

He was assigned to the Post-Judgment Collection and Forcible Entry and Detainer call in C-307 from November, 2012 through July, 2014; January, 2016 through June, 2016; and from July, 2018 through the present.

The Honorable James E. Hanlon, Jr., Circuit Court of Cook County

Jim Hanlon was sworn in as an Associate Judge on June 29, 2018. He is currently assigned in the First Municipal District, Room 1401 (Post-Judgment Remedies). Immediately prior to joining the bench, Jim served as the Acting Bureau Chief of the Civil Actions Bureau of the Cook County State's Attorney's Office, having also served as the Chief of the Special Litigation Division of that Office. Jim's practice prior to that was as a commercial litigator with significant experience in financial services litigation, antitrust, and corporate control matters. Jim served as Director of Client Services for Novus Law, LLC, a professional services firm serving corporate legal departments. Jim was a member of the Litigation Department and an Equity Partner at Katten Muchin Rosenman LLP (1984-2002) and at Howrey LLP (2002-2008).

Jim is a member and active in the Chicago Bar Association (serving as the Co-Chair of the Commercial Litigation Committee for 2019-20), Women's Bar Association, Chicago Council of Lawyers, and North Suburban Bar Association.

Jim graduated from DePaul University College of Law, J.D. with Honors, in 1984, where he was a member of the Law Review. Jim obtained his undergraduate degree in Finance from DePaul University in 1981.

SPEAKER BIOS

Robert G. Markoff, Partner, Markoff Law, LLC

Robert G. "Bob" Markoff graduated from University of Illinois and received his law degree from DePaul University College of Law. Bob has been practicing for 44 years, most of which he has concentrated on creditors' rights, judgment enforcement, and commercial litigation. His publications are many, from his volunteer work with Illinois Institute for Continuing Legal Education, state bills including Public Act 95-0661: Amendments to Illinois Code of Civil Procedure. He is founding member of the ILCBA and past president of NARCA, and the Creditors Bar Coalition of Illinois.

Sari W. Montgomery, Partner, Robinson, Stewart, Montgomery & Doppke LLC

Sari W. Montgomery has devoted her career to the law of lawyering, legal ethics and professional responsibility for more than twenty-five years.

After more than a decade as Litigation and Senior Litigation Counsel at the Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC), where she conducted hundreds of investigations and prosecuted dozens of cases before the ARDC Hearing Board, Sari decided to apply her extensive knowledge of the ARDC and legal ethics to helping lawyers who may be facing disciplinary proceedings or who otherwise need guidance on ethics matters. Since 2010, she has successfully represented lawyers at every stage of the disciplinary process from investigation and hearing, to appeals before the ARDC Review Board and the Illinois Supreme Court. Sari also represents judges before the Judicial Inquiry Board and bar applicants in navigating Character and Fitness process.

In addition to defending lawyers and judges, Sari provides preventative consulting services and legal advice to lawyers regarding all manner of ethical and practice management issues. She has issued opinion letters on behalf of lawyers, law firms, government agencies, and law-related businesses to assist in clarifying their ethical obligations and to ensure their business models and procedures are consistent with the Rules of Professional Conduct. Sari also serves as an expert witness in legal malpractice and fee litigation.

SPEAKER BIOS

Kyle A. Lindsey, Attorney, Johnson Legal Group, LLC

Before joining Johnson Legal Group in 2012, Kyle concentrated his practice in helping individuals. He spent a brief amount of time in a family law firm before deciding to concentrate his practice in bankruptcy. He practiced in a consumer debtor bankruptcy firm in the Eastern District of Wisconsin for 3 years until moving to Illinois.
Kyle joined Johnson Legal Group to expand his practice to creditor side representation, bankruptcy, commercial litigation, and collection.

Kyle was awarded a J.D. from Marquette University Law School in 2006. He graduated from the Honors College at Ball State University, earning his B.A. in Japanese in 2003. Kyle is licensed in the State of Illinois and is licensed to practice before the Federal and Bankruptcy Courts for the Northern District of Illinois. He is a Board Member of the IllinoisCreditor's Bar Association, and a member of the Chicago Bar Association.

Joshua D. Greene, Attorney, Springer Larsen Greene, LLC

Joshua D. Greene is a member of Springer Larsen Greene, LLC, located in Wheaton, Illinois. Springer Larsen Greene focuses its practice in bankruptcy law and insolvency. He graduated from Middle Tennessee State University in 2004 and from Depaul Law School in 2007. Mr. Greene has focused his practice in bankruptcy law, insolvency and bankruptcy litigation for over ten years and represents debtors, creditors and bankruptcy trustees in chapter 7 and 11 bankruptcy proceedings.

SPEAKER BIOS

Douglas C. Giese, Attorney, Markoff Law, LLC

Mr. Giese has been a general commercial and civil litigator throughout his career, with an emphasis for more than a decade on both obtaining judgments and enforcing then through the ethical collection of the judgment and recovery of property on behalf of his clients, and to ensuring a solid foundation for creditors' positions throughout the State of Illinois. His professional focus is concentrated on representing the rights of private clients and commercial businesses including banks, credit unions, finance companies, debt buyers, and municipalities. In addition, he represents clients in various other areas of litigation, including corporate law, bankruptcy and mechanics lien litigation. He has represented clients in civil litigation before the state and federal courts in Illinois, including the Illinois appellate court, as well as administrative proceedings before the Illinois Departments of Labor and Employment Security. Prior to joining Markoff Law, LLC, Mr. Giese represented clients involved with corporate transactional matters and personal injury litigation, including resolution of liens.

Mr. Giese has handled all types of business disputes, many of which have been litigated in federal and state courts, or resolved through arbitration. His experience includes matters involving contracts, real estate (mortgage foreclosure, mechanic's lien, eviction/forcible entry and detainer, distress for rent, purchase and sale) and obtaining and enforcement of judgments.

Michael R. Polk, Attorney Law Offices of Michael R. Polk

Admitted to practice since 1982, Michael Polk is the principal of Law offices of Michael R. Polk. He is also currently the Secretary of the Illinois Creditors Bar Association. Mr. Polk continues to handle step up work in northeastern Illinois and thanks the Seventh Circuit Court of Appeals for his continued employment.

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SESSION ONE

A View From the Bench – Best Practices

The Honorable James E. Hanlon, Jr.
Circuit Judge, Municipal Division District 1

and

The Honorable Michael B. Betar
Circuit Judge, 19th Judicial Circuit

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A VIEW FROM THE BENCH – BEST PRACTICES

Hon. Michael B. Betar
Circuit Court for the 19th Judicial Circuit (Lake County)
&
Hon. James E. Hanlon, Jr.
Circuit Court of Cook County

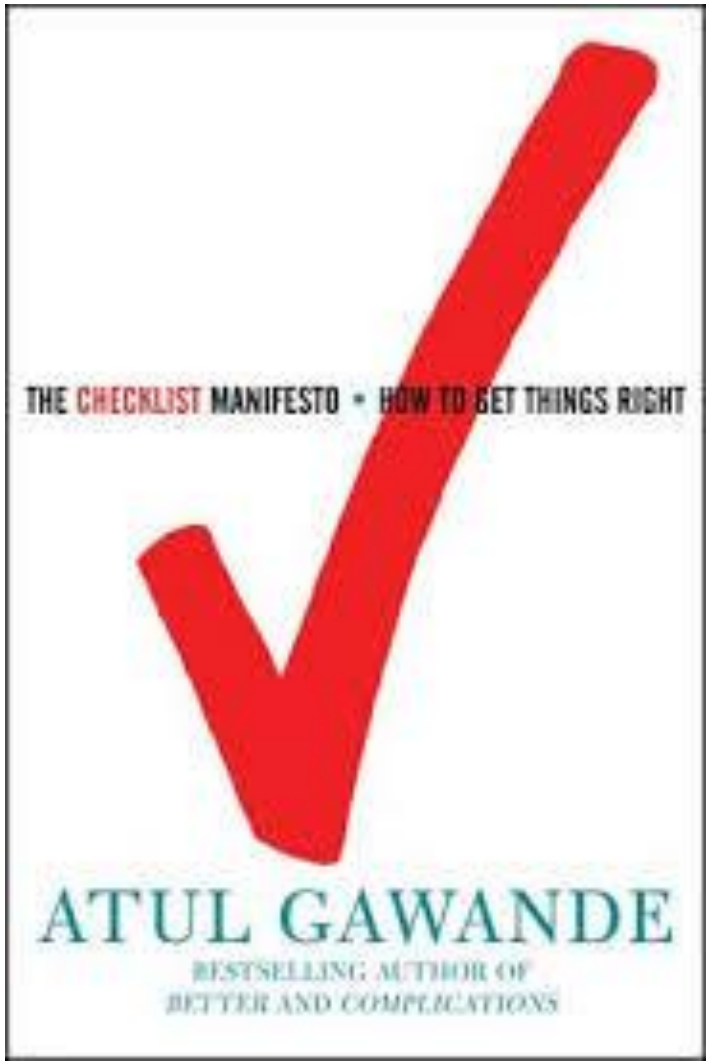
A View from the Bench

- Procedural Law issues
  - Notice to Adverse Claimants
    - A defect in the legislative scheme?
  - Banks' recent practice of not sending their Answer to Judgment Creditors
    - May violate the rules Ill. S. Ct. Rules 13 and 104(b)
    - Certainly does a dis-service to its customers (accounts may stay frozen longer than necessary)
  - Section 203.1 Service
  - Revivals (what must the Petition recite)
  - Rule 288 installment payment Orders versus amended Wage Deduction Orders
- Substantive Law issues

A View from the Bench

- *Nat'l Life Real Estate Holdings, LLC v. Scarlato*, 2017 IL App (1st) 161943, 83 N.E.2d 44
  - Applied in *Taylor v. Battee*, 17 M1-716481
- Piercing the corporate veil in Supplementary Proceedings
  - Legal issues
    - *JP Morgan Chase Bank v. PT Indah Kiat Pulp and Paper*, 2012 WL 2254193 (N.D. Ill. June 14, 2012)
    - Robert G. Markoff, ed. *Creditors' Rights in Illinois* §2.54 (IICLE™ 2019)
    - *Bean Properties, LLC v. Jackson*, 13 M1-709274
  - Practical issues
    - Really a new lawsuit within a Supplementary Proceeding
    - Perhaps treat such claims as Bankruptcy Court treats Adversary Claims

The Value of Process Maps/Checklists



A View from the Bench

QUESTIONS, COMMENTS, CRITICISMS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT—FIRST DISTRICT

BEAN PROPERTIES, LLC, Plaintiff/Counter-Defendant v. JACQUELINE JACKSON and ALL UNKOWN OCCUPANTS Defendants/Counter-Plaintiff and CHOCOLATE GIRL EXPLOSION, INC.; AH-HA CHOCOLATES, FUDGE, AND ICE CREAM CORP.; and LUCRATIVE KNOWLEDGEABLE REAL ESTATE, Third-Party Citation Respondents	)	**No. 2013 M1 709274**

MEMORANDUM OPINION and ORDER

This matter comes before the Court on two related motions: (a) Plaintiff's Petition to Pierce the Corporate Veil of Third Party Respondents Chocolate Girl Explosion, Inc., Ah-Ha Chocolates, Fudge, and Ice Cream [Corp.], and Lucrative Knowledgeable Real Estate [Inc.] and For Turnover of Corporate Funds ("Plaintiff's Petition" or "Petition"), and (2) Defendant's corresponding Motion to Strike Plaintiff's Petition. For the reasons discussed below, the Court denies Plaintiff's Petition as such, grants Defendant's Motion to Strike, but gives Plaintiff leave to pursue traditional supplementary proceeding remedies against the three Third-Party Citation Respondents to the extent Plaintiff can establish that any or each of those corporate entities hold assets or funds that belong to the judgment debtor.

I. Procedural Background

Plaintiff brought the underlying action in forcible entry and detainer, joined with a money claim for rent, arising from a commercial lease between the parties. The premises consisted of a storefront where Defendant, Jacqueline Jackson, operated an ice cream and chocolate goods store as a franchisee of Kilwin's Chocolates Franchise Inc. ("Kilwin's"). Significantly, the lease was between Plaintiff and Defendant, individually, and not with any of Defendant's wholly-owned corporate entities at issue here.[1] To be sure, Plaintiff negotiated for a Guaranty of 12 months' post-breach rent from Defendant's franchisor, Kilwin's.

After a significant period of litigation in this 2013 case, the trial court granted Plaintiff's Motion for Summary Judgment on April 7, 2017. Because it was undisputed that the Defendant had abandoned the premises, and the court had dismissed Defendant's Counterclaim (related to store fixtures), the only issue before the trial court was damages (rent, less an offset for a settlement on Kilwin's Guaranty) as well as attorneys' fees and costs allowable under the Lease. The trial court entered judgment in favor of Plaintiff and against Defendant in the amount of $96,846.50 plus $16,864.50 in attorneys' fees and $1755.62 in costs.

During the course of supplementary proceedings—through a Citation directed to the Defendant—Plaintiff learned of the three corporate entities named as Respondents here. Plaintiff then served a Citation on each of the three Respondents. Though there seems to be some factual dispute about Defendant's percentage ownership of those corporate entities, Plaintiff contends that the Defendant is the sole stockholder of each. Plaintiff further asserts that the Defendant often makes transfers between the Respondents' and her personal bank accounts, pays personal expenses with corporate funds, and otherwise commingles the assets of the Respondent corporations as her own (*e.g.*, by paying her mortgage with corporate funds). Plaintiff contends that the

[1] It is not clear from the record before this Court whether any of the three Respondents were involved in the ice cream/candy store operated in the premises, though a check of the Illinois Secretary of State's website reveals that two of the entities, Ah-Ha Chocolates and Chocolate Girl Explosion, were formed two and six years, respectively, after the date of the lease at issue.

dominion and control Defendant exercises over the Respondents justifies treating the Defendant and her three corporate entities, the Respondents here, as one.

On the basis of these assertions, Plaintiff seeks to pierce the corporate veils of the three Respondents, in reverse, so that the assets of the Respondents can be reached to satisfy Plaintiff's judgment against the Defendant. Plaintiff's Petition raises the following issues: (1) does the Supplementary Proceeding Act allow a judgment creditor to bring a Petition to pierce the corporate veil, and, if so, (2) does that authority extend to a reverse piercing (which raises a predicate issue of whether Illinois law permits a reverse piercing at all)? If the answer to any one of these questions is "no" then the Petition cannot proceed. Because this Court concludes that the answer to at least one of these questions is "no," this Court grants Defendant's Motion to Strike and denies Plaintiff's Petition. That does not preclude Plaintiff from pursuing assets held by the Respondents that "belong" to the judgment debtor. Plaintiff is free to seek a Turnover Order of any such assets (subject to proof of the necessary predicate that one or more of the Respondents holds assets that belong to Defendant). In addition, Plaintiff also has the right to seek a Turnover Order to transfer the stock of the Respondents to Plaintiff, as the stock of each corporate Respondent is an asset of the judgment debtor, the Defendant.

II. Analysis

Supplementary proceedings allow a judgment creditor to "compel any person cited . . . to deliver up any assets [of the judgment debtor] so discovered. 735 ILCS 5/2-1402(b)(3). But that permission to reach assets belonging to a judgment debtor that are in the possession of third parties is also a limitation. A "supplementary proceeding is not an appropriate vehicle to impose a judgment against a third party who does not possess assets of the judgment debtor." *Lange v. Misch*, 232 Ill.App.3d 1077, 1081, 598 N.E.2d 412, 414 (4th Dist. 1992).

In *Pyshos v. Heart-Land Dev. Co*., 258 Ill. App. 3d 618, 630 N.E.2d 1054 (1st Dist. 1994), the appellate court noted that "an action to pierce the corporate veil does not require any allegations that assets of the judgment debtor corporation are in the hands of the third–party shareholders or directors." 258 Ill. App.3d at 623, 630 N.E.2d at

1058. The court concluded then that a judgment creditor could not attempt to pierce the corporate veil in a supplementary proceeding. *Id*. That logic was reaffirmed in *Miner v. Fashion Enterprises, Inc*., 342 Ill.App.3d 405, 415, 794 N.E.2d 902, 912 (1st Dist. 2003).

The Supplementary Proceedings Act was amended in 2007 to add the following language: "[a] judgment creditor may recover a *corporate judgment debtor's* property on behalf of the judgment debtor for use of the judgment creditor by filing a petition within the citation proceedings." 2007 Ill. Legis. Serv. P.A. 95-661, sec. 5 (emphasis added). In *JP Morgan Chase Bank v. PT Indah Kiat Pulp and Paper*, No. 2012 WL 2254193 at p. 3 (N.D. Ill. June 14, 2012), Judge Holderman observed that "one commentator has opined that the amendment 'permits the court to hear a petition to pierce the corporate veil in the context of a citation proceeding rather than forcing the creditor to file a new action as was required by *Lange* and *Pythos*.'" (Citing Robert G. Markoff, ed. *Creditors' Rights in Illinois* §2.53 (rev. 2011)(the 2019 edition makes that same point at § 2.54).

Even if the added language in the Supplemental Proceedings Act now permits a petition to pierce the corporate veil to be filed within a supplementary proceeding, the Petition here still fails. Two reasons exist for this.

First, the amendment permits a piercing of a "corporate judgment debtor." But we do not have a corporate judgment debtor here. Rather, we have an individual defendant whose assets include three corporations. It is the veil of those corporations that Plaintiff seeks to pierce to bring the corporations' assets into the hands of the Defendant. That would be a reverse piercing. Yet the language of the amendment to the Supplemental Proceedings Act does not, on its face, contemplate or permit reverse piecing, as the language speaks only of a right to pursue a petition involving a corporate judgment debtor (such as, perhaps, a traditional piercing). We can presume that the Illinois legislature, when making the amendment to the Supplementary Proceedings Act, knew that Illinois case law did not permit reverse piercing (as discussed below). *See, e.g*., *People v. Jones*, 214 Ill. 2d 187, 199, 824 N.E.2d 239, 291 (2005)("It is presumed that, in enacting new legislation, the legislature acts with full knowledge of previous judicial decisions addressing the subject matter of that legislation.") Thus, the added

language describing the right to bring a petition with respect to a corporate judgment debtor should be presumed intentional and thus excludes a reverse piercing.

Second, Illinois courts that have considered whether to permit a reverse piercing at all have ruled that reverse piercing is not allowed.[2] See *Forsythe v. Clark USA Inc*., 224 Ill.2d 274, 297, 864 N.E.2d 227, 241 (2007)(ruling that a piercing "must never be made in favor of a corporation or its shareholders"); *Selcke v. Hartford Fire Ins. Co. (In re Centaur Ins. Co.),* 158 Ill.2d 166, 632 N.E.2d 1015 (1994) (declining to "expand the doctrines of alter ego and piercing the corporate veil to include a subsidiary's bringing an action against its parent corporation.") To be sure, these decisions involved an effort by subsidiaries or shareholders seeking to benefit from the piercing and did not arise in the context of a creditor seeking that remedy. But in *Trossman v. Phillipsborn*, 373 Ill. App. 3d 1020, 1053, 869 N.E.2d 1147, 1174 (1st Dist. 2007) our Appellate Court described the *Centaur* and *Forsythe decisions* as representing a "broad-based and explicit rejection of reverse piercing." Applying Illinois law, the Bankruptcy Court for the Northern District of Illinois recently dismissed claims creditors brought seeking a reverse piercing where the creditors alleged that the individual debtor used various corporations he controlled to shield his assets from his creditors. *In re Glick*, 568 B.R. 634, 666 (N.D. Ill. 2017) (Illinois law does not permit reverse piercing even if the claim is brought by creditors).

There are cases in other states that distinguish between the sorts of self-reverse piercing that our Supreme Court declined to permit and cases that permit a reverse-piercing remedy in favor of creditors (or at least the type of creditors, such as tort judgment creditors, who did not have the opportunity to negotiate to include guarantees or direct obligations of the shareholder's corporate entities). Illinois is not among those states, though the issue has not been squarely confronted in any reported decision by an Illinois state court.[3]

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[2] Because each of the Respondents was incorporated under Illinois law, Illinois substantive law applies. *Westmeyer v. Flynn*, 382 Ill. App. 3d 952, 957, 889 N.E.2d 671, 676 (1st Dist. 2008).

[3] For a good discussion of the law of reverse piercing and the different contexts where it is favored or disfavored, see *In re Glick*, 568 B.R. 634, 658-66 (N.D. Ill. 2017); see also Nicholas

That does not leave Plaintiff without a remedy for what it considers the Defendant's shell game with her assets (using her three wholly-owned corporations as the shells, coincidentally just as the street version of the shell game uses three shells). Plaintiff can seek a turnover order forcing Defendant to transfer to Plaintiff the stock in her three companies (though the record is not fully developed, it appears to be Defendant's position that those entities do not have much value, and thus may be inadequate themselves to satisfy the judgment here). Plaintiff may regard that turnover as a Pyrrhic victory, as the value of those corporations may evaporate without Defendant being in control of their respective business. Alternatively, Plaintiff may attempt to establish that funds held by the Respondents are, in fact, Defendant's funds. That is a traditional supplementary proceeding remedy. See *Golfwood Square LLC v. O'Malley*, 2018 IL App (1st) 172220-U, ¶¶ 30-33. Should Plaintiff pursue that alternative, the Court will conduct a prompt evidentiary hearing on the issue.

III. Conclusion

For all the foregoing reasons, the Court denies Plaintiff's Petition and grant's Defendant's responsive Motion to Strike (because the denial of the Petition is not on the merits but rather on the basis that there is no authority to pursue a Petition seeking a reverse piercing). The parties are directed to meet and confer about further proceedings on the pending Citations in a manner consistent with this Order.

Dated: March 5, 2019

/s/ James E. Hanlon, Jr.
James E. Hanlon, Jr., Associate Judge

B. Allen, Note, *Reverse Piercing of the Corporate Veil: A Straightforward Path to Justice*, 85 St. John's Law Review 1147 (2011).

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT—FIRST DISTRICT

THEODORE TAYLOR	)	
	)	
Plaintiff	)	
	)	
v.	)	**No. 2017 M1-716481**
	)	
KENNETH BATTEE, individually and d/b/a AP DELI	)	
	)	
Defendant	)	
	)	
JP MORGANCHASE BANK, N.A.	)	
	)	
Citation Respondent,	)	

MEMORANDUM OPINION and ORDER

This matter comes to be heard on Citation Respondent, JP Morgan Chase Bank, N.A.'s ("Chase"), Motion to Vacate Turnover Orders entered on February 6, 2018. Plaintiff, Theodore Taylor ("Taylor"), obtained a $23,0000 judgment against Kenneth Battee ("Battee") in an eviction action relating to commercial property where Battee operated the AP Deli as a sole proprietor. Three months after entry of the judgment, Taylor served a Citation to Discover Assets on Chase. The Rider to the Citation identified six business (corporate) accounts for which Battee had signature authority. Battee held a debit card for each of those corporate accounts. Battee also maintained personal accounts at Chase.

Chase answered the Citation and listed only the balances in Battee's personal accounts, and that was less than $200. Chase did not identify the corporate accounts for which Battee had signature authority (and apparently sole signature authority). Nor

did Chase put a lien on, or freeze, the funds in those corporate accounts, but in response to the Citation did produce to the judgment creditor statements for those corporate accounts.

In his Motion for Turnover, Taylor identified a check made payable to Battee, personally, in the amount of $4,414.86 that Battee deposited into one of the corporate accounts listed in the Citation's Rider. Taylor also identified several cash withdrawals totaling $17,670.05 Battee made (either at the bank, personally, or through the debit cards Battee held) from corporate accounts identified in the Citation's Rider. Those withdrawals occurred after Taylor had served Chase with the Citation. Under the theory that those withdrawals violated the restraining provisions on the Citation, Taylor sought a Turnover from Chase in an amount equal to the cash withdrawals. Taylor also sought a Turnover Order for the $4414.86 in personal funds Battee deposited into one of the corporate accounts. Taylor served his Motion for Turnover on Chase at the same address used to serve the Citation on Chase. Chase did not appear on Taylor's Motion for Turnover. This Court granted Taylor's Motion for Turnover both for the $4,414.86 in personal finds Battee deposited into one of his corporate accounts and the $17,670.05 in cash withdrawals Battee made from the corporate accounts he controlled at Chase.

Three weeks later Chase moved to Vacate the two Turnovers Orders. Chase challenges those Orders on both procedural and substantive grounds. Because neither ground provides a basis for vacating the Turnover Orders, the Court denies Chase's motion.

Discussion

Chase identified about $200 as "belonging to the judgment debtor or to which he or she may be entitled or which may thereafter be acquired by or become due to him or her." 735 ILCS 5/2-1402(f)(1). Chase argues that the proper procedure on a motion for turnover of funds beyond the funds in Battee's personal accounts that Chase identified in its Citation response would have been to enter a conditional judgment against Chase. Chase argues that procedure would then allow Chase to respond and argue why the cash withdrawals Battee made from his corporate accounts and the check made payable to Battee that he deposited into one of the corporate accounts did not "belong to" Battee, citing 735 ILCS 5/12-706 and 5/1402(g) and (k-3). Chase is wrong.

Section 5/12-706 provides for a conditional judgment when a Citation respondent has not answered. It is an enforcement mechanism to gain jurisdiction over the Citation respondent and obtain an answer. Chase answered, so section 5/12-706 does not apply. If Chase believes the conditional judgment process is a necessary part of due process to afford it an opportunity to avoid turnover order directed to it, Chase had that opportunity. Taylor served Chase with the Motion for Turnover, allowing Chase the (due process) notice and opportunity to make the arguments it says it would have made in response to a conditional judgment (which are the very substantive arguments it makes here).[1] See *Bank of Aspen v. Fox Cartage, Inc.*, 126 Ill. 2d 307, 317 (1989) (the Citation

[1] Chase asserts that *Xcel Supply LLC v. Horowitz*, 2018 IL App. (1st) 162986 establishes that a conditional judgment followed by service of a summons to confirm the conditional judgment is the proper procedure for Citations directed to third parties. But *Xcel* involved a Citation respondent that failed to answer or otherwise appear. That triggered the conditional judgment

respondent received due process where it received a "fair and timely hearing" on its objections).

Turning to Chase's substantive objection to the Turnover Order, Chase's argument is that the funds at issue did not "belong to" Battee and therefore the restraining provision of the Citation did not reach those funds. The Court finds that the funds that are the subject of the Turnover Orders are within the definition of funds that "belong to" the judgment debtor, Battee. Following the Appellate Court's decision in *Nat'l Life Real Estate Holdings, LLLC v. Scarlato*, 2017 IL App (1st) 161943, 83 N.E.3d 44, the scope of funds deemed to be within reach of a Citation is broader than perhaps banks have traditionally accounted for. The court in *Scaralato* held that loan proceeds distributed at the direction of the judgment debtor was "'property . . . belonging to the judgment debtor or to which he or she may be entitled . . .' such that the [loan] advance and disbursement of said proceeds constitutes a violation [of the restraining provision of the citation.]" at 16. That was the outcome despite that none of the loan proceeds went to the judgment debtor in *Scarlato*.

Chase argues that its obligation under the Citation was to hold only funds in accounts "owned by" Battee (that is, the funds in the personal accounts held in Battee's name). But that draws Chase's obligation more narrowly than does section 2-1402. The restraining language of 735 ILCS 5/2-1402(f)(1) is as follows:

> You are PROHIBITED from making *or allowing any transfer or other disposition of*, or interfering with, any property not exempt from enforcement of a judgment, a deduction order or garnishment, property belong to the judgment debtor or *to which s/he may be entitled* or

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requirement of section 12-706. By its own language, section 12-706 applies only to respondents who have failed to appear and answer. Here, Chase did appear and answer.

> which may thereafter be acquired by or become due to him or her, *and from paying over* or otherwise disposing of any monies not so exempt, which are due to the judgment debtor.

735 ILCS 5/2-1402(f)(1) (emphasis added). That is broader than funds "owned" by a judgment debtor, as Chase would have it read.

The lesson of *Scarlato* is that when a judgment debtor has control over the distribution of funds, those funds "belong to" the judgment debtor for purposes of section 2-1402 and its prohibition on allowing transfer of those funds. For Chase, that means any account that Battee had control of were subject to the Citation's transfer prohibition. Having authority over those funds through signature authority, particularly sole signature authority, means the funds in the corporate accounts at issue "belong to" Battee.

Chase argues that *Scarlato* is distinguishable because *Scarlato* involved a loan (a) made by the respondent bank to the judgment debtor and (b) created after the bank had been served with a Citation. Neither distinction makes the funds here any less of property "belonging to" the judgment debtor and subject to the Citation than was the case in *Scarlato*. A loan for which the judgment debtor is an obligor and over which he has signature authority to disburse (though none of the proceeds went to him) looks less like funds that "belong to" the judgment debtor than corporate demand accounts over which the judgment debtor has complete dominion and control (through his sole signature authority).[2] And yet the *Scarlato* decision held that the loan proceeds did

[2] The Turnover Orders were limited to funds Battee personally obtained through cash withdrawals as well as Battee's personal funds that he deposited into one of his corporate accounts. The Court has determined that those funds "belong to" Battee. For this reason, Chase's argument that the Turnover Orders reflected a judgment piercing the corporate veils of Battee's corporate entities is factually and procedurally incorrect.

"belong to" the judgment debtor. And section 1402(f)(1)'s transfer prohibition applies with equal force to accounts and funds in place when the Citation was served as well as funds (such as by a loan in *Scarlato*) that come to be held that the Citation respondent after the Citation was served. The timing of when the funds that "belong to" a judgment debtor come to be held by a Citation respondent is irrelevant to the analysis.

Finally, Chase argues that a turnover is not a mandatory remedy for violating the Citation. As support, Chase says the Appellate Court in *Scarlato* remanded the case to the trial court to determine whether the Citation respondent should be punished (by a judgment or turnover or otherwise) for permitting the transfer of the loan proceeds in violation of the Citation's restraining provision. But that remand was necessary in *Scarlato*, though, because the trial court did not address the appropriate remedy because it did not find that the bank had violated the restraining provision (the trial court had ruled that the loan proceeds were not property "belonging to" the judgment debtor). The Appellate Court could not evaluate a remedy that the trial court did not order, thus the need for remand in *Scarlato*. Here, the Court has ruled that Chase violated the restraining provision of the Citation when it allowed funds "belonging to" Battee to leave the bank (specifically paid to Battee) while the Citation was in place, putting those funds out of Taylor's reach.

In this Court's view, the most effective remedy to give the judgment creditor the benefit of the protection afforded by a Citation is to order a turnover of the funds disbursed in violation of the restraining provision. The Supplementary Proceedings Act provides for that remedy. 735 ILCS 5/2-1402(c)(3-4) and (f)(1). See also *Bank of Aspen v. Fox Cartage, Inc.*, 126 Ill. 2d 307, 321 (1989) (contempt is to compel compliance, and

a judgment is the more appropriate remedy against a citation respondent that has "disposed of the property in violation of the prohibition of the citation"). The Court did that here.

Conclusion

The funds that Chase allowed Battee to withdraw while the Citation was in place are funds that "belong to" Battee as much as the loan proceeds in *Scarlato* were funds that "belong to" the judgment debtor in that case. The same is true of Battee's personal funds deposited into one of his corporate accounts at Chase. None of the operative facts necessary to reach this decision are in dispute. As between Chase, which allowed funds that "belong to" Battee to leave the bank, and Taylor, who had a right to have those funds held under the Citation for his benefit, Chase should bear the consequences. A simple contempt finding, with no monetary consequence, would be an inadequate remedy. Chase's Motion to Vacate the Turnover Orders is denied. Judgment is entered on the Turnover Orders against Chase and in favor of Taylor.

Dated:June 11, 2019

2216

James E. Hanlon, Jr., Associate Judge

Associate Judge James E. Hanlon, Jr.

JUN 11 2019

Circuit Court-2216

SESSION TWO

Ethical Issues in Collection Cases

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and

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ILCBA
ILLINOIS CREDITORS BAR ASSOCIATION
EDUCATION • LEGISLATION • VISION

WHEN PRACTICE COLLIDES WITH THE RULES:

Ethical Issues in the Collection Practice

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Problem 1
Multiple Claims Against the Same Debtor

It is not an ethical violation for a lawyer to represent two creditors at the same time when each holds a claim against the same debtor provided:

- A. The lawyer observes the First In First Out (FIFO) Rule by collecting the claim that was first placed with the lawyer for collection before collecting the second claim.
- B. The claims are factually unrelated and the client's interests are only economically adverse and the lawyer obtains written informed consent from both clients.
- C. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to both clients and obtains written informed consent from both clients.
- D. It is not okay to represent both clients under this scenario inasmuch as a concurrent conflict of interest exists, the interest of each client are adverse due to the risk that debtor's assets are finite.

Discussion

Questions

- Do you have a system that checks for conflicts?
- Now that you have identified the conflict, how should you handle it?
- May you share information learned from one client with the other?
- What happens if the debtor sends in a check?

Answer Location- Illinois Rules of Professional Conduct (IRPC), Rules 1.4, 1.6 and 1.7.

Problem 2
Trust Accounts

May an attorney allow some "seed" money to remain in the account to prevent it from being overdrawn?

- A. Absolutely not. The ABA Model rules prohibit such action because there is to be no co-mingling of funds between that of an attorney and his/her client.
- B. Yes, trust accounts are set up to protect the client, if the attorney wants to be stupid and tie up their own money to avoid bounced checks they can.
- C. No, while seed money is allowed, it is not allowed for this purpose.
- D. Yes, IOLTA accounts now have unlimited FDIC protection so you can put as much money into your client's IOLTA account for any purpose.

Discussion

Questions

- Are these accounts truly IOLTA funds?
- What happens when a check is returned as NSF and there is no money in the account?
- May an attorney allow some "seed" money to remain in the account to prevent it from being overdrawn?
- Are any rules violated by having other signatories on the account that are not attorneys or members of the law firm?

Answer Location- IRPC , Rule 1.15; ARDC Client Trust Account Handbook.

Problem 3
Fee Splitting

You want to motivate a collector to collect more money. To do this, you should:

- A. Offer the collector a set percentage from each collection she makes on a case by case basis.
- B. Offer the collector a set percentage from all her recoveries for the entire month.
- C. Offer the collector a set sum as bonus for reaching a goal.
- D. Give a bonus in a method other than cash, like a gift or gift card, time off or a year-end holiday gift.

Discussion

Questions

- Is giving a staff member a "piece of the action" proper?
- If not, is it ever proper to give a collector a bonus?

Answer Location- IRPC, Rule 5.4; Matter of Struthers, 179 Ariz. 216, 877 P.2d 789 (1994); In re Discipio, 163 111.2d 515, 645 N.E.2d 906 (1994).

Problem 4
Advancing Court Costs

Your ship has come in. The biggest debt buyer in America wants you to be their exclusive collection attorney in your state. However, as part of the deal, they want you to advance and pay all the court costs, which they will not reimburse you unless and until you successfully collect on the claim. What do you tell your client to be consistent with the current Rules of Professional Conduct?

- A. No problem! You will do anything for your best client. Who cares if you don't recover all the cost you laid out when you both will be rolling in the bucks? We are lawyers, we write the laws.
- B. It is against the rules to pay court costs from your own pocket as that would give your firm an unfair advantage over other firms who are unwilling or unable to do so.
- C. You can lay out all the court costs initially, however, they must all be fully repaid by the client whether you are successful in the litigation or not.
- D. Take a hike you lousy cheapskate. It's clients like you who get us honest attorneys into trouble and are ruining the reputation of the industry

Discussion

Questions

- Do you know the rules?
- Do you advance costs and bill?
- Is it proper to advance costs and only recover them If suit is successful?
- Do you receive cost advances?
- If so, where do you deposit the checks? Operations? IOLTA accounts?

Answer Location- IRPC1 Rule 1.8(e).

Problem 5
Extortion Litigation

A collection attorney files suit and the consumer's lawyer raises improper venue as a defense. The lawyer threatens to file a Federal FDCPA claim against the collection attorney. However, if the collection attorney will dismiss the case against the consumer and release the consumer from the debt, the lawyer will drop the FDCPA claim. Given this situation, collection attorney should:

- A. Continue to sue the consumer as the FDCPA claim against has nothing to do with the handling of the collection matter.
- B. Notify the client, in writing, of the FDCPA claim and advise the client to obtain new counsel since continued representation is prohibited as a conflict.
- C. Notify the client, in writing, of the FDCPA claim and let them decide If you should continue your representation In the collection matter.
- D. Immediately notify the ARDC of the consumer lawyer's threats against you to achieve an unethical advantage in the underlying collection matter.

Discussion

Questions

- Do you see a conflict between the attorney and client?
- What should one do upon receipt of such a threat?

Answer Location- IRPC, Rules 1.4, 1. 7(a), 8.4(g).

Problem 6
Missed Deadlines

Your staff missed a deadline. You knew that the statute was about to run out, but the case was lost in processing. You may:

- A. Tell your client that the case was lost because the judge is prejudiced against debt purchasers.
- B. Tell your client that you settled the case within your authority and then remit based on the “settlement.”
- C. Tell your client that you settled for the full amount of the claim then remit based upon the “recovery.”
- D. None of the above.

Discussion

Questions

- Is it permissible to make a payment to your client and proceed as if the claim was paid?

Answer Location- IRPC, Rules 1.4, 1.8(h) and 8.4(c).

Problem 7
Meaningful Involvement and the Delegation of Responsibilities

The use of paralegals in law offices has increased in recent years. Is it permissible to allow a paralegal, collection staff member or other non-attorneys to determine if a lawsuit should be filed if the claim meets predetermined criteria?

- A. Yes, with electronic placement, acknowledgment, suit generation and electronic signatures, attorneys no longer have to come to the office at all.
- B. Yes, attorneys may delegate staff and staff can set up the pre-determined criteria for a lawsuit. The key is that the attorney did the delegation
- C. No, an attorney must do every step of the collection process.
- D. No, disciplinarians tend to treat non-attorney staff (collection staff and paralegals) in the same manner as disbarred attorneys and state that they cannot be used to make "attorney decisions".
- E. Yes, but attorneys must have the direct supervisory authority for those criteria and a lawyer is liable for the actions of his/her staff.

Discussion

Questions

- Is it permissible to allow a paralegal, collection staff member or other non attorney to determine if a law suit should be filed if the claim meets predetermined criteria?
- May the attorney delegate settlement responsibilities to collectors?
- How should the careful attorney stay involved with her staff?
- How much is too much delegation of an attorney's responsibility?

Answer Location- IRPC, Rules 5.3 and 5.5(a); In re Yamaguchi, 118 111.2d 417, 515 N.E.2d 1235 (1987); In re Discipio, 163 111.2d 515, 645 N.E.2d 906 (1994).

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations–depending on both the importance of the action under consideration and the feasibility of consulting with the client–this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls should be promptly returned or acknowledged.~~ A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain

the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

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

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~or~~

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest if the revealed information would not prejudice the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

~~**Detection of Conflicts of Interest**~~

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (c) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows from information relating to a representation that a client or other person has accidentally discharged toxic waste into a town's water must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[6A] Paragraph (b)(1) preserves the policy of the 1980 Illinois Code of Professional Responsibility and the 1990 Illinois Rules of Professional Conduct that permitted a lawyer to reveal the intention of a client to commit a crime. This general provision would permit disclosure where the client's intended conduct is a crime, including a financial crime, and the situation is not covered by paragraph (c).

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Like paragraph (b)(1), paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, but the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person

can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Even limited information should be disclosed only to the extent reasonably necessary. Moreover, the disclosure of any information is prohibited if it would prejudice the client (e.g., disclosure would compromise the attorney-client privilege; the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[153] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected

against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[164] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[175] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(67). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), and 8.1. Rules 3.3 and 8.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Withdrawal

[157A] If the lawyer's services will be used by a client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). The lawyer may give notice of the fact of withdrawal regardless of whether the lawyer decides to disclose information relating to a client's representation as permitted by paragraph (b). The lawyer may also withdraw or disaffirm any opinion or other document that had been prepared for the client or others. Where the client is an organization, the lawyer must also consider the provisions of Rule 1.13.

Acting Competently to Preserve Confidentiality

[186] Paragraph (e) requires a ~~A~~ lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[197] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the

communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20~~18~~] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lawyers' Assistance and Court Intermediary Programs

[21~~19~~] Information about the fitness or conduct of a law student, lawyer or judge may be received by a lawyer while participating in an approved lawyers' assistance program. Protecting the confidentiality of such information encourages law students, lawyers and judges to seek assistance through such programs. Without such protection, law students, lawyers and judges may hesitate to seek assistance, to the detriment of clients and the public. Similarly, lawyers participating in an approved intermediary program established by a circuit court to resolve nondisciplinary issues among lawyers and judges may receive information about the fitness or conduct of a lawyer or judge. Paragraph (d) therefore provides that any information received by a lawyer participating in an approved lawyers' assistance program or an approved circuit court intermediary program will be protected as confidential client information for purposes of the Rules. See also Comment [5] to Rule 8.3.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

Adopted July 1, 2009, effective January 1, 2010.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For a definition of "informed consent" see Rule 1.0(e).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and (4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take

steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, *e.g.*, as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that

client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

[20] Reserved.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, *e.g.*, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a

conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the

lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege generally does not attach. Hence, it should generally be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or *nolo contendere* pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses;

and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the lawyer inform the client in writing that the client may seek the advice of independent legal counsel and provide a reasonable opportunity for the client to do so. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent). The common law regarding business transactions between lawyer and client may impose additional requirements, such as encouraging the client to seek independent legal counsel, in lawyer liability and other nondisciplinary contexts.

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or *nolo contendere* plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

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

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.15: SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person. For the purposes of this Rule, a client trust account means an IOLTA account as defined in paragraph ~~(i)(2)~~ (j)(2), or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in paragraph (f). Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Other, tangible property shall be identified as such and appropriately safeguarded. Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

Maintenance of complete records of client trust accounts shall require that a lawyer:

(1) prepare and maintain receipt and disbursement journals for all client trust accounts required by this Rule containing a record of deposits and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited, and the date, payee and purpose of each disbursement;

(2) prepare and maintain contemporaneous ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the date of each deposit, the names of all persons for whom the funds are or were held, the amount of such funds, the dates, descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed;

(3) maintain copies of all accountings to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them;

(4) maintain all client trust account checkbook registers, check stubs, bank statements, records of deposit, and checks or other records of debits;

(5) maintain copies of all retainer and compensation agreements with clients;

(6) maintain copies of all bills rendered to clients for legal fees and expenses;

(7) prepare and maintain reconciliation reports of all client trust accounts, on at least a quarterly basis, including reconciliations of ledger balances with client trust account balances;

(8) make appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

Records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced, and the records are readily accessible to the lawyer.

Each client trust account shall be maintained only in an eligible financial institution selected by the lawyer in the exercise of ordinary prudence.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the lawyer. An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term "advance payment retainer" to describe the retainer, and states the following:

(1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;

(2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;

(3) the manner in which the retainer will be applied for services rendered and expenses incurred;

(4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;

(5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) All funds of clients or third persons held by a lawyer or law firm which are nominal in amount or are expected to be held for a short period of time, including advances for costs and expenses, and funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more IOLTA accounts, as defined in paragraph ~~(i)(2)~~ (j)(2). A lawyer or law firm shall deposit all funds of clients or third persons which are not nominal in amount or expected to be held for a short period of time into a separate interest- or dividend-bearing client trust account with the client designated as income beneficiary. Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Each IOLTA account shall comply with the following provisions:

(1) Each lawyer or law firm in receipt of nominal or short-term client funds shall establish one or more IOLTA accounts with an eligible financial institution authorized by federal or state law to do business in the state of Illinois and which offers IOLTA accounts within the requirements of this Rule as administered by the Lawyers Trust Fund of Illinois.

(2) Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility guidelines, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account.

(3) An IOLTA account that meets the highest comparable rate or dividend standard set forth in paragraph (f)(2) must use one of the identified account options as an IOLTA account, or pay the equivalent yield on an existing IOLTA account in lieu of using the highest-yield bank product:

(a) a checking account paying preferred interest rates, such as money market or indexed rates, or any other suitable interest-bearing deposit account offered by the eligible institution to its non-IOLTA customers.

(b) for accounts with balances of $100,000 or more, a business checking account with automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government securities as defined in paragraph (h).

(c) for accounts with balances of $100,000 or more, a money market fund with, or tied to, check-writing capacity, that must be solely invested in U.S. Government securities or securities fully collateralized by U.S. Government securities, and that has total assets of at least $250 million.

(4) As an alternative to the account options in paragraph (f)(3), the financial institution may pay a "safe harbor" yield equal to 70% of the Federal Funds Target Rate or 1.0%, whichever is higher.

(5) Each lawyer or law firm shall direct the eligible financial institution to remit monthly earnings on the IOLTA account directly to the Lawyers Trust Fund of Illinois. For each individual IOLTA account, the eligible financial institution shall provide: a statement transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent; the account number; the remittance period; the rate of interest applied; the account balance on which the interest was calculated; the reasonable service

fee(s) if any; the gross earnings for the remittance period; and the net amount of earnings remitted. Remittances shall be sent to the Lawyers Trust Fund electronically unless otherwise agreed. The financial institution may assess only allowable reasonable fees, as defined in paragraph ~~(i)(8)~~ (j)(8). Fees in excess of the earnings accrued on an individual IOLTA account for any month shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account.

(g) A lawyer or law firm should exercise reasonable judgment in determining whether funds of a client or third person are nominal in amount or are expected to be held for a short period of time. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's or law firm's exercise of reasonable judgment under this rule or decision to place client funds in an IOLTA account or a non-IOLTA client trust account on the basis of that determination. Ordinarily, in determining the type of account into which to deposit particular funds for a client or third person, a lawyer or a law firm shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be held and the likelihood of delay in the relevant transaction or proceeding;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of the financial institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

(h) All trust accounts, whether IOLTA or non-IOLTA, shall be established in compliance with the following provisions on dishonored instrument notification:

(1) A lawyer shall maintain trust accounts only in eligible financial institutions that have filed with the Attorney Registration and Disciplinary Commission an agreement, in a form provided by the Commission, to report to the Commission in the event any properly payable instrument is presented against a client trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days notice in writing to the Commission. The Commission shall annually publish a list of financial institutions that have agreed to comply with this rule and shall establish rules and procedures governing amendments to the list.

(2) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; and

(b) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(3) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(4) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by paragraph (h) of this Rule. Fees charged for the reasonable cost of producing the reports and records required by paragraph (h) are the sole responsibility of the lawyer or law firm, and are not allowable reasonable fees for IOLTA accounts as those are defined in paragraph ~~(i)(8)~~(j)(8).

(i) A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts to identify and return the funds to the rightful owner. If after 12 months of the discovery of the unidentified funds the lawyer determines that ascertaining the ownership or securing the return of the funds will not succeed, the lawyer must remit the funds to the Lawyers Trust Fund of Illinois. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (i).

· A lawyer who either remits funds in error or later ascertains the ownership of remitted funds may make a claim to the Lawyers Trust Fund, which after verification of the claim will return the funds to the lawyer.

~~(i)~~(j) Definitions

(1) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders or sales drafts, and electronic fund transfers.

(2) "IOLTA account" means a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of nominal or short-term funds of clients or third persons as defined in paragraph (f) and from which funds may be withdrawn upon request as soon as permitted by law.

(3) "Eligible financial institution" is a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Securities and Exchange Commission that agrees to provide dishonored instrument notification regarding any type of client trust account as provided in paragraph (h) of this Rule; and that with respect to IOLTA accounts, offers IOLTA accounts within the requirements of paragraph (f) of this Rule.

(4) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(5) "Money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund or the equivalent of a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act.

(6) "U.S. Government securities" refers to U.S. Treasury obligations and obligations issued by or guaranteed as to principal and interest by any AAA-rated United States agency or instrumentality thereof. A daily overnight financial repurchase agreement ("repo") may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

(7) "Safe harbor" is a yield that if paid by the financial institution on IOLTA accounts shall be deemed as a comparable return in compliance with this Rule. Such yield shall be calculated as 70% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first business day of the calendar month.

(8) "Allowable reasonable fees" for IOLTA accounts are per-check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment ("sweep") fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.

(9) "Unidentified funds" are amounts accumulated in an IOLTA account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

~~(j)~~(k) In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15 if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds, has deposited such funds into a REFA, and:

(1) is acting as a closing agent pursuant to an insured closing letter for a title insurance company licensed in the State of Illinois and uses for such funds a segregated REFA maintained solely for such title insurance business; or

(2) has met the "good-funds" requirements. The good-funds requirements shall be met if the bank in which the REFA was established has agreed in a writing directed to the lawyer to honor all disbursement orders drawn on that REFA for all transactions up to a specified dollar amount not less than the total amount being deposited in good funds. Good funds shall include only the following forms of deposits: (a) a certified check, (b) a check issued by the State of Illinois, the United States, or a political subdivision of the State of Illinois or the United States, (c) a cashier's check, teller's check, bank money order, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government, (d) a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state, (e) a personal check or checks in an aggregate

amount not exceeding $5,000 per closing if the lawyer making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the REFA, (f) a check drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. § 202.2, (g) a check from a title insurance company licensed in the State of Illinois, or from a title insurance agent of the title insurance company, provided that the title insurance company has guaranteed the funds of that title insurance agent. Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.

Adopted July 1, 2009, effective January 1, 2010; amended July 1, 2011, effective September 1, 2011; amended April 7, 2015, eff. July 1, 2015.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more client trust accounts. Client trust accounts should be made identifiable through their designation as "client trust account" or "client funds account" or words of similar import indicating the fiduciary nature of the account. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis complete records of client trust account funds as required by paragraph (a), including subparagraphs (1) through (8). These requirements articulate recordkeeping principles that provide direction to a lawyer in the handling of funds entrusted to the lawyer by a client or third person. Compliance with these requirements will benefit the attorney and the client or third party as these fiduciary funds will be safeguarded and documentation will be available to fulfill the lawyer's fiduciary obligation to provide an accounting to the owners of the funds and to refute any charge that the funds were handled improperly.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed. Specific guidance concerning client trust accounts is provided in the Client Trust Account Handbook published by the Illinois Attorney Registration and Disciplinary Commission as well as on the website of the Illinois Attorney Registration and Disciplinary Commission.

[3A] Paragraph (c) relates to legal fees and expenses that have been paid in advance. The reasonableness, structure, and division of legal fees are governed by Rule 1.5 and other applicable law.

[3B] Paragraph (c) must be read in conjunction with *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007). In *Dowling*, the Court distinguished different types of retainers. It recognized advance payment retainers and approved their use in limited circumstances where the lawyer and client agree that a retainer should become the property of the lawyer upon payment. Prior to *Dowling*, the Court recognized only two types of retainers. The first, a general retainer (also described as a "true," "engagement," or "classic" retainer) is paid by a client to the lawyer in order to ensure the lawyer's availability during a specific period of time or for a specific matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. The second, a "security" retainer, secures payment for future services and expense, and must be deposited in a client trust account pursuant to paragraph (a). Funds in a security retainer remain the property of the client until applied for services rendered or expenses incurred. Any unapplied funds are refunded to the client. Any written retainer agreement should clearly define

the kind of retainer being paid. If the parties agree that the client will pay a security retainer, that term should be used in any written agreement, which should also provide that the funds remain the property of the client until applied for services rendered or expenses incurred and that the funds will be deposited in a client trust account. If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.

[3C] An advance payment retainer is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client with the lawyer's own property. However, any portion of an advance payment retainer that is not earned must be refunded to the client. An advance payment retainer should be used sparingly, only when necessary to accomplish a purpose for the client that cannot be accomplished by using a security retainer. An advance payment retainer agreement must be in a written agreement signed by the client that contains the elements listed in paragraph (c). An advance payment retainer is distinguished from a fixed fee (also described as a "flat" or "lump-sum" fee), where the lawyer agrees to provide a specific service (*e.g.*, defense of a criminal charge, a real estate closing, or preparation of a will or trust) for a fixed amount. Unlike an advance payment retainer, a fixed fee is generally not subject to the obligation to refund any portion to the client, although a fixed fee is subject, like all fees, to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee.

[3D] The type of retainer that is appropriate will depend on the circumstances of each case. The guiding principle in the choice of the type of retainer is protection of the client's interests. In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account, pursuant to this Rule.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] Paragraphs (a), (f) and (g) requires that nominal or short-term funds belonging to clients or third persons be deposited in one or more IOLTA accounts as defined in paragraph ~~(i)(2)~~(j)(2) and provides that the interest earned on any such accounts shall be submitted to the Lawyers Trust Fund of Illinois. The Lawyers Trust Fund of Illinois will disburse the funds so received to qualifying organizations and programs to be used for the purposes set forth in its by-laws. The purposes of the Lawyers Trust Fund of Illinois may not be changed without the approval of the Supreme Court of Illinois. The decision as to whether funds are nominal or short-term shall be in the reasonable judgment of the depositing lawyer or law firm. Client and third-person funds that are neither nominal or short-term shall be deposited in separate, interest- or dividend-bearing client trust accounts for the benefit of the client as set forth in paragraphs (a) and (f).

[7] Paragraph (h) requires that lawyers maintain trust accounts only in financial institutions that have agreed to report trust account overdrafts to the ARDC. The trust account overdraft notification program is intended to provide early detection of problems in lawyers' trust accounts, so that errors by lawyers and/or banks may be corrected and serious lawyer transgressions pursued.

[8] Paragraph (i) applies when accumulated balances in an IOLTA account cannot be documented as belonging to an identifiable client or third party, or to the lawyer or law firm. This paragraph provides a mechanism for a lawyer to remove these funds from an IOLTA account when, in the lawyer's reasonable judgment, further efforts to account for them after a period of 12 months are not likely to be successful. This procedure facilitates the effective management of IOLTA accounts by lawyers; addresses situations where an

IOLTA account becomes the responsibility of a lawyer's successor, law partner, or heir; and supports the provision of civil legal aid in Illinois.

The Lawyers Trust Fund of Illinois will publish instructions for lawyers remitting unidentified funds. Proceeds of unidentified funds received under paragraph (i) will be distributed to qualifying organizations and programs according to the purposes set forth in the by-laws of the Lawyers Trust Fund. When a lawyer learns that funds have been remitted in error or later identifies the owner of remitted funds, the lawyer may make a claim to the Lawyers Trust Fund for the return of the funds. After verification of the claim, the Lawyer Trust Fund will return the funds to the lawyer who then ensures the funds are restored to the owner.

Paragraph (i) relates only to unidentified funds, for which no owner can be ascertained. Unclaimed funds in client trust accounts—funds whose owner is known but have not been claimed—should be handled according to applicable statutes including the Uniform ~~Distribution~~ Disposition of Unclaimed Property Act (765 ILCS 1025 et seq.).

~~[8]~~[9] Paragraph ~~(i)~~(j) provides definitions that pertain specifically to Rule 1.15. Paragraph (1) defines expansively the meaning of "funds," to include any form of money, including electronic fund transfers. Paragraph (2) defines an IOLTA account and paragraph (3) defines an eligible financial institution for purposes of the overdraft notification and IOLTA programs. Paragraph (4) defines "properly payable," a term used in the overdraft notification provisions in paragraph (h)(1). Paragraphs (5) through (8) define terms pertaining to IOLTA accounts. Paragraph (9) defines "unidentified funds" as that term is used in paragraph (i).

~~[9]~~[10] Paragraph ~~(j)~~(k) applies only to the closing of real estate transactions and adopts the "good-funds" doctrine. That doctrine provides for the disbursement of funds deposited but not yet collected if the lawyer has already established an appropriate Real Estate Funds Account and otherwise fulfills all of the requirements contained in the Rule.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE~~TS~~

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

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

[~~2~~1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts ~~to establish internal policies and procedures designed to provide~~ to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters ~~will~~ act in a way compatible with the professional obligations of the lawyer. ~~with the Rules of Professional Conduct.~~ See Comment [6] to Rule 1.1 and Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over ~~the work of a nonlawyer.~~ such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of ~~a nonlawyer~~ such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[~~1~~2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1, 1.2, 1.4, 1.6, 5.4(a), and 5.5(a). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Adopted July 1, 2009, effective January 1, 2010.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or admitted or otherwise authorized to practice in a foreign jurisdiction, and not disbarred orsuspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized ~~to provide~~ by federal ~~law~~ orother law or rule to provide in ~~of~~ this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-

related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*. See Supreme Court Rule 137(e) (lawyer may help draft a pleading, motion or other paper filed by a *pro* se party). See also Supreme Court Rule 13(c)(6) (lawyer may make a limited scope appearance in a civil proceeding on behalf of a *pro se* party).

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold outto the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted or otherwise authorized to practice in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the other jurisdiction ~~in which the lawyer is admitted~~ and excludes a lawyer who while technically admitted is not authorized to practice~~, because, for example, the lawyer is on inactive status~~.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the

services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also ~~as well as~~ provide legal services in this jurisdiction on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See Illinois Supreme Court Rules 706(f), (g), 716, and 717 concerning requirements for house counsel and legal service program lawyers admitted to practice in other jurisdictions who wish to practice in Illinois.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how

lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

[22] Paragraph (e) recognizes the importance of the structure and procedures of the legal system in a foreign jurisdiction in assuring that a foreign lawyer is qualified to practice in Illinois. Application of paragraph (e) requires recognition that structure and procedures vary among foreign jurisdictions. Where members of the profession in the foreign jurisdiction are admitted or authorized to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, paragraph (e) is satisfied. Where the legal system does not have such structure and procedures, other attributes of the system must be considered to determine whether they supply assurances of an appropriate legal background. In addition, a foreign lawyer must satisfy the requirements of Illinois Supreme Court Rule 716 to be admitted as house counsel.

Adopted July 1, 2009, effective January 1, 2010; amended June 14, 2013, eff. July 1, 2013; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(d) engage in conduct that is prejudicial to the administration of justice.

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. Nor shall a lawyer give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge's family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good-faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Adopted July 1, 2009, effective January 1, 2010.

DECISION FROM DISCIPLINARY REPORTS AND DECISIONS SEARCH

163 Ill.2d 515, 206 Ill.Dec. 654, 645 N.E.2d 906 (1994)

In re **FRANCIS M. DISCIPIO**, Attorney, Respondent
No. 76460.
Supreme Court of Illinois.

Dec. 1, 1994
Rehearing Denied Jan. 30, 1995.

After recommendation of Review Board in attorney discipline proceeding, the Supreme Court, McMorrow, J., held that improperly dividing legal fees with nonlawyer and aiding in unauthorized practice of law warrants two-year suspension from practice of law.

Suspension ordered.

[1] ATTORNEY AND CLIENT k37.1

45k37.1

For purposes of attorney disciplinary rule prohibiting aiding in unauthorized practice of law, definition of term "practice of law" defies mechanistic formulation. Code of Prof.Resp., DR 3-101(a), Ill.Rev.Stat.1989, ch. 110A, foll. P 776.

[2] ATTORNEY AND CLIENT k37.1

45k37.1

It is character of acts themselves that determines issue of whether activity was "practice of law" for purposes of determining whether attorney aided in unauthorized practice of law. Code of Prof.Resp., DR 3-101(a), Ill.Rev.Stat.1989, ch. 110A, foll. P 776.

[3] ATTORNEY AND CLIENT k37.1

45k37.1

In determining whether attorney aided in unauthorized practice of law, focus of inquiry as to whether activity was "practice of law" must be on whether activity in question required legal knowledge and skill to apply legal principles and precedent. Code of Prof.Resp., DR 3-101(a), Ill.Rev.Stat.1989, ch. 110A, foll. P 776.

[4] ATTORNEY AND CLIENT k57

45k57

Although factual findings of Hearing Board are generally entitled to deference in attorney discipline proceeding, it is Supreme Court's duty to determine whether attorney's actions amounted to violation of Code of Professional Responsibility. Code of Prof.Resp., DR 1-101 et seq., Ill.Rev.Stat.1989, ch. 110A, foll. P 776.

[5] ATTORNEY AND CLIENT k49

45k49

Purpose of attorney discipline is not to punish attorney, but to protect public, maintain integrity of bar, and safeguard administration of justice.

[6] ATTORNEY AND CLIENT k58

45k58

Each attorney discipline case must be considered on its individual facts and merits.

[7] ATTORNEY AND CLIENT k58

45k58

Supreme Court's selection of sanction in attorney discipline proceeding may appropriately consider deterrent value of attorney discipline and need to impress upon others significant repercussions of errors.

[8] ATTORNEY AND CLIENT k58

45k58

Improperly dividing legal fees with nonlawyer and aiding in unauthorized practice of law warrants two-year suspension from practice of law. Code of Prof.Resp., DR 3-101(a), DR 3-102(a), Ill.Rev.Stat.1989, ch. 110A, foll. P 776.

****907 *516** Deborah M. Kennedy, Chicago, for Administrator of the Attorney Registration and Disciplinary Commission.

Ralph W. Miller, Jr., Oak Brook, for respondent.

Justice McMORROW delivered the opinion of the court:

In this attorney discipline case, respondent, Francis M. Discipio, concedes that he violated the Code of Professional Responsibility (the Code) when he improperly divided his legal fees with Jerome Ruther, a disbarred attorney. However, respondent disputes whether he aided Ruther in the unauthorized practice ***517** of law when he permitted Ruther to gather preliminary factual information from workers' compensation clients and obtain the clients' signatures to pertinent documents. We conclude that respondent's actions aided Ruther in the unauthorized practice of law. For respondent's violations of the Code, we suspend respondent's license to practice law for a period of two years.

I

Respondent, Francis Discipio, has been licensed to practice law in this State since 1948. Most of his practice has been devoted to representing clients in workers' compensation claims. From 1957 to 1973, respondent had a working arrangement with Jerome Ruther, also then a licensed Illinois attorney, whereby Ruther referred workers' compensation clients to respondent. In exchange for these referrals, respondent divided his legal fees with Ruther. Approximately 50% to 60% of the fee was retained by respondent, and the remainder was paid to Ruther. In addition to the referral, Ruther provided respondent with facts and information relating to the case. When a case was filed with the Industrial Commission, both respondent and Ruther were specified as attorneys of record for the claimant.

In October 1971, Ruther was indicted in the United States District Court for the Northern District of Illinois. (United States v. Ruther (N.D.Ill.1981), 71-CR-992.) He was charged with having filed fictitious and fraudulent claims against an insurance company. Ruther pled guilty to one count of mail fraud, and in April 1972, he was sentenced to six months and one day in Federal prison. He served approximately two months of the sentence and was paroled for the remainder of his term. In January 1973, Ruther was disbarred by order of this court, on his motion that his name be stricken from the roll of attorneys.

Respondent learned of Ruther's disbarment shortly *518 after its announcement in 1973. Respondent was also aware that the Federal conviction was the basis for Ruther's disbarment. Respondent never made inquiries of Ruther about his Federal conviction or his disbarment.

The arrangement between Ruther and respondent to refer workers' compensation claims in exchange for a portion of the fee continued notwithstanding Ruther's disbarment. Ruther continued to gather preliminary **908 information from the client and forward this information to respondent. Ruther also had the client sign various documents which were sent to respondent. Respondent would then meet with and consult the client, complete the necessary forms and documents, and pursue the matter to completion. After Ruther's disbarment, respondent was specified as the only attorney of record for the claimant in suits filed before the Industrial Commission. When clients indicated that they believed Ruther was an attorney, respondent advised that he was not an attorney. Respondent also advised the clients not to pay Ruther because respondent would pay Ruther for his services. However, respondent did not inform the clients how much he would pay Ruther.

Ruther continued to refer clients to respondent until 1986. From 1973 to 1986, respondent's firm received approximately 200 referrals from Ruther, and paid Ruther approximately $170,000 in fees. Respondent always submitted 1099 tax forms to the Internal Revenue Service to report the monies he had paid to Ruther. Although respondent knew that Ruther had tried but failed to gain reinstatement to the practice of law on three occasions between 1976 and 1986, respondent did not ask Ruther why the efforts had been unsuccessful.

The Administrator of the Attorney Registration and Disciplinary Commission filed a complaint against respondent alleging that his arrangement with Ruther amounted to: (1) conduct prejudicial to the administration *519 of justice in violation of Rule 1-102(a)(5) of the Code (107 Ill.2d R. 1-102(a)(5)); (2) aiding the unauthorized practice of law in violation of Rule 3-101(a) of the Code (107 Ill.2d R. 3-101(a)); (3) sharing legal fees with a nonlawyer in violation of Rule 3-102(a) of the Code (107 Ill.2d R. 3-102(a)); and (4) conduct which tends to defeat the administration of justice and brings the courts or legal profession into disrepute in violation of Supreme Court Rule 771 (107 Ill.2d R. 771).

In his own defense, respondent testified that he served in the Air Corps from 1942 to 1945. He graduated from DePaul Law School and received his law license in 1948. After several years' employment with Travelers Insurance Company, respondent started his own practice, concentrating on workers' compensation claims. In his years of practice, respondent has been active in several bar associations. He has made numerous contributions over the years to several charitable organizations and has raised a family. Respondent testified that he had a previously untarnished and unblemished legal career. He cooperated fully with the Administrator's investigation of this case.

Respondent also offered the stipulated testimony of August M. Mangoni, a licensed attorney professionally and personally acquainted with respondent. Mangoni stated that respondent has a reputation as a competent, ethical and conscientious attorney and that he has an excellent reputation for honesty, trustworthiness and integrity in the legal community in which he practices. Mangoni's opinion of respondent was in no way diminished by his knowledge of the contents of the Administrator's complaint against the respondent. The same representations were made in the stipulated testimony of Ralph W. Miller, Jr., who has held numerous legal positions, including that of Commissioner of the Illinois Industrial Commission from 1981 to 1986. Miller stated *520 that respondent "demonstrate[d] only the highest standards of ethical advocacy and professional behavior." To the same effect was the stipulated testimony of Richard H. Williams, a licensed attorney of long-standing professional acquaintance with the respondent.

Following an evidentiary hearing on the Administrator's charges against the respondent, the Hearing Board determined that the Administrator had proven that respondent's working arrangement with Ruther amounted to improper fee-splitting with a nonlawyer in violation of Rule 3-102(a) of the Code, and also determined that respondent's conduct brought the legal profession into disrepute in violation of Rule 771. The Hearing Board concluded that the Administrator had failed to prove by clear and convincing

evidence that respondent had aided Ruther in the unauthorized practice of law. The Board did not make a finding with respect to whether respondent's actions violated Rule 1-102(a)(5) regarding conduct that tends to defeat **909 the administration of justice. Considering the evidence in mitigation, the Hearing Board recommended that respondent be censured. The Review Board sustained the findings of the Hearing Board and also recommended the disciplinary sanction of censure.

The Administrator takes exception to two aspects of the recommendations of the Hearing and Review Boards. First the Administrator argues that the evidence demonstrated that the respondent aided Ruther in the unauthorized practice of law. Second, the Administrator contends that the respondent should receive a three-month suspension rather than censure.

II

We consider first whether respondent aided Ruther in the unauthorized practice of law. According to evidence presented to the Hearing Board, after Ruther was disbarred, Ruther interviewed workers' compensation *521 clients in order to obtain basic information called for in a standard workers' compensation form entitled "Application for Adjustment of Claim." A representative copy of a blank application is attached to this opinion as an appendix. Information called for on the application pertained, generally, to the client's background and employment history, a description of the accident or illness, and the type of injuries or damages the client had sustained. The application also asked questions such as the following: "Is Petitioner currently receiving Temporary Total Disability Benefits in the proper amount?" "Is Petition for Immediate Hearing attached?" "How did Employer get Notice of Accident?" "Was Employee given Industrial Commission Information Handbook?" The application carried a cautionary instruction to the claimant that read: "This is a legal document. Be sure all the above blanks are filled in correctly and that you have read and understood the statements below before you sign." At the bottom of the application, there appears a statement that "Disclosure of this information to the Industrial Commission is done voluntarily under Il.Rev.Stat. ch. 48.138.6." Ruther would fill in the information called for on a copy of the application, and had the client sign several blank applications for adjustment of claims.

Ruther also had the clients execute medical authorization forms and an attorney representation agreement. The purpose of the attorney representation agreement was to formalize the understanding that the attorney specified in the agreement would represent the client in his or her workers' compensation claim. In the event that the client recovered workers' compensation benefits, the agreement specified the amount of fees to which the attorney would be entitled. The agreement further stated, "It is * * * agreed that this agreement is subject *522 to and governed by the Illinois Workers' Compensation Act, Section 16a, including in particular the limitation of attorneys' fees in death cases, total permanent disability cases and partial disability cases." In addition, the agreement recited that the client "has read and understood this Attorney Representation Agreement." Representative blank copies of the medical authorization form and attorney representation agreement are also attached as an appendix to this opinion.

Once Ruther had obtained sufficient information from the client and the forms had been signed, Ruther delivered the documents to respondent. Respondent then consulted with the client and asked the client if he or she wanted respondent to act as counsel in the workers' compensation claim. Respondent emphasized to the client that he would be the sole attorney acting in the client's behalf. If the client indicated that he or she wanted to retain respondent as counsel in the workers' compensation claim, respondent obtained the necessary information from the client, verified the information provided by Ruther and obtained additional facts not disclosed on the preliminary documents Ruther had provided. Respondent then completed an application for adjustment of claim and completed the attorney representation agreement. Respondent never asked the client what advice or information he or she had received from Ruther. Respondent also did **910 not ask Ruther how he had learned of the client's claims.

Respondent never permitted Ruther to use the firm's stationery or the firm's office space. Once clients were referred to respondent, they were told not to contact Ruther any further in the handling of their

claims. Ruther was allowed follow-up contact with a client only when the client could not be located by respondent. If a client told respondent that he or she thought Ruther was an attorney, respondent answered that Ruther was not a lawyer.

[1][2][3] ***523** At issue is whether Ruther's completion of the pertinent forms and his gathering of the information necessary to those forms amounted to the practice of law. Definition of the term " 'practice of law' " defies mechanistic formulation. (People ex rel. Chicago Bar Association v. Barasch (1950), 406 Ill. 253, 256, 94 N.E.2d 148, quoting People ex rel. Illinois State Bar Association v. Schafer (1949), 404 Ill. 45, 50, 87 N.E.2d 773.) As this court has noted, "it is the character of the acts themselves that determines the issue" (Chicago Bar Association v. Quinlan & Tyson, Inc. (1966), 34 Ill.2d 116, 120, 214 N.E.2d 771). The focus of the inquiry must be on whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent. See In re Yamaguchi (1987), 118 Ill.2d 417, 426-27, 113 Ill.Dec. 928, 515 N.E.2d 1235; People ex rel. Chicago Bar Association v. Goodman (1937), 366 Ill. 346, 351, 8 N.E.2d 941.

On the present record, we conclude that respondent's arrangement with Ruther aided Ruther in the unauthorized practice of law. Respondent argues that the evidence failed to show that Ruther did, in fact, provide services to clients that amounted to the practice of law. Respondent argues that the services provided by Ruther were comparable to those performed by a law clerk or paralegal. On this basis, respondent contends that he did not aid Ruther in the unauthorized practice of law. We disagree. As this court stated in In re Krasner (1965), 32 Ill.2d 121, 204 N.E.2d 10, regarding a charge that an attorney allowed others to solicit legal business in his behalf: "Anchoring his argument to the frequently expressed principle that charges in a disciplinary proceeding must be sustained by clear and convincing proof [citation] respondent contends there is no proof that Vogele, Skidmore or any other person actually solicited any cases, or that respondent had any knowledge they were doing so, and as a consequence no evidence that business was ever solicited by respondent or by others in his behalf. His theory seems to be that without direct testimonial evidence ***524** of solicitation * * *, the proof against him is neither clear nor convincing. We do not agree. Circumstantial evidence is legal evidence and neither the commissioners nor this court are required to be naive or impractical in appraising an attorney's conduct. In this particular case, we need not remain blind or insensitive to the reasonable and clear cut intendments arising from respondent's own admissions and business records." (Emphasis added.) (Krasner, 32 Ill.2d at 127, 204 N.E.2d 10.) Similarly, in the present cause, the reasonable inferences that can be drawn from the nature of Ruther's activities with the clients demonstrate that respondent's arrangement with Ruther permitted Ruther to engage in the unauthorized practice of law. Although a law clerk or paralegal may possess the skills necessary to aid a client in filling out the workers' compensation forms at issue in the present cause, the circumstances surrounding respondent's working arrangement with Ruther were vastly different from the typical lawyer-paralegal or lawyer-law clerk relationship.

It is particularly significant that the working arrangement between respondent and Ruther began and continued for several years while Ruther was still licensed to practice law in this State. Once Ruther was disbarred, the arrangement continued unabated with only a minimal adjustment to reflect the fact that Ruther could no longer explicitly claim to be a licensed attorney in this jurisdiction. Consequently, the formal appearance of their working arrangement was modified so that Ruther was never referred to as an attorney in any documents filed with the Industrial Commission, and ****911** clients were advised, when they inquired, that Ruther was not a lawyer. However, the substance of Ruther's activities for respondent did not change after Ruther was disbarred. Ruther continued to locate the clients; Ruther continued to perform the initial interview of the clients; Ruther continued to gather pertinent information from the clients; Ruther continued to ***525** ensure that the clients signed and executed the appropriate documents. And, when there was a recovery in the client's case, Ruther continued to receive approximately half of the fees paid over to the respondent. We note that law clerks or paralegals are not traditionally paid half of the fee recovered by an attorney who formally represents a client.

The documents that Ruther submitted to the workers' compensation clients required a degree of legal skill and knowledge for their comprehension and completion. For example, the application for adjustment

of claim specifically stated that it was a "legal document" and called for information regarding legal rights such as temporary total disability and petitions for immediate hearing. The attorney representation agreement was intended to create a binding attorney-client relationship and was without question a document of significant legal import. Both the application for adjustment of claim and the attorney representation agreement contained express references to provisions of the Workers' Compensation Act (Ill.Rev.Stat.1985, ch. 48, par. 138.1 et seq.). It is not unreasonable to infer that Ruther was called upon to explain to clients the significance of these statutory references. Such explanation required legal expertise in order to ensure that clients understood the statutory and legal principles referenced in the documents. In our view, the forms at issue here were more complicated than an agreement with respect to earnest money used to purchase a home, a type of form in the real estate industry which this court found acceptable for brokerage completion in Quinlan & Tyson, 34 Ill.2d 116, 214 N.E.2d 771.

We also note that some of Ruther's clients actually thought and believed that Ruther was a licensed attorney, and told respondent of their perceptions. This court has previously cautioned members of the bar not ***526** to employ disbarred or suspended attorneys. (See In re Schelly (1983), 94 Ill.2d 234, 68 Ill.Dec. 502, 446 N.E.2d 236; In re Kuta (1981), 86 Ill.2d 154, 56 Ill.Dec. 56, 427 N.E.2d 136.) In fact, our Rule 764(b) specifically requires a disciplined attorney to "cause the removal of any indicia of the disciplined attorney as lawyer, counsellor at law, legal assistant, legal clerk, or similar title." (134 Ill.2d R. 764(b); see also In re Parker (1992), 149 Ill.2d 222, 237, 172 Ill.Dec. 188, 595 N.E.2d 549.) The reasons for this rule are substantial and bear repeating here: "Without a doubt, a disbarred or suspended attorney should not serve as a law clerk or a paralegal during his disbarment or suspension. The line of demarcation between the work that a paralegal or a law clerk may do and those functions that can only be performed by an attorney is not always clear and distinct. The opportunity for a disbarred or suspended attorney who is serving as a paralegal or a law clerk to violate that line of demarcation is too great and too inviting. Also, the public is not aware of the differences between the work of a paralegal and that of an attorney. For a disbarred attorney to be seen performing what the public may perceive as legal functions can only lessen the public's regard for the effectiveness of our attempt to discipline errant attorneys, and would foment the belief that the public was not being protected from unethical attorneys." Kuta, 86 Ill.2d at 161-62, 56 Ill.Dec. 56, 427 N.E.2d 136.

The Kuta case serves as a strong warning to attorneys in this State to be especially circumspect about entering into a business or professional arrangement with a lawyer whose license has been suspended or revoked by this court. The spirit of Rule 764(b) is to discourage arrangements that allow a disciplined attorney to engage in the unauthorized practice of law. (Kuta, 86 Ill.2d at 161-62, 56 Ill.Dec. 56, 427 N.E.2d 136.) The instant cause does not fall precisely within the ambit of Rule 764, since Ruther did not perform his workers' compensation services in respondent's law office. However, we do not believe the objective of the rule can be avoided by the mere ***527** expediency of having ****912** the suspended or disbarred attorney provide legal services from a location other than the law offices of an attorney who is still licensed to practice law in this State. In the present case, the use of respondent's office or stationery was not necessary in order to facilitate Ruther's unauthorized practice of law.

Our conclusion is not altered by the circumstance that respondent independently consulted with all of the clients and completed a final copy of the application for adjustment of claim and the attorney-client agreement. We also are not persuaded by respondent's argument that he did not depend upon Ruther for any legal advice or skill in his handling of the matter on behalf of the clients, or that Ruther had no further contact with the clients. As we noted previously, the arrangement between respondent and Ruther allowed Ruther to continue to provide the same services that he performed before he was disbarred, in exchange for a portion of the fee paid to respondent from the client's eventual recovery. The fact that Ruther did not appear before any tribunal on behalf of the workers' compensation clients does not diminish the fact that he engaged in the unauthorized practice of law in his consultations with clients referred to respondent.

[4] The Hearing Board determined that the Administrator's evidence failed to prove that respondent aided Ruther in the unauthorized practice of law. Although the factual findings of the Board are generally entitled to deference, it is this court's duty to determine whether the respondent's actions amounted to a

violation of the Code. (In re Owens (1991), 144 Ill.2d 372, 377, 163 Ill.Dec. 479, 581 N.E.2d 633; In re Chatz (1989), 131 Ill.2d 499, 505, 137 Ill.Dec. 668, 546 N.E.2d 613.) Based upon the extent, nature, and duration of the services provided by Ruther; the fact that there was no cognizable difference in the working arrangement between Ruther and respondent before and after Ruther's disbarment (other than the ***528**fact that, once Ruther was disbarred, he was no longer shown as an attorney of record in claims filed before the Industrial Commission); the substantial fees that were generated by Ruther's arrangement with respondent and the fact that Ruther received approximately half of any fees paid to the respondent; and the fact that legal documents with legal significance were being completed and executed by Ruther with respondent's acquiescence, we are persuaded to conclude that respondent aided Ruther in the unauthorized practice of law, in violation of Rule 3-101(a) of the Code (107 Ill.2d R. 3-101(a)).

This analysis brings us, then, to a determination of the appropriate sanction for respondent's misconduct. As noted, the Hearing and Review Boards found that respondent's actions constituted improper fee-splitting and amounted to conduct that brought the legal profession into disrepute (107 Ill.2d Rules 3-102(a), 771). Respondent does not challenge these findings.

[5][6][7] Principles that guide our decision are well established. The purpose of attorney discipline is not to punish the respondent but to protect the public, maintain the integrity of the bar, and safeguard the administration of justice. (In re Timpone (1993), 157 Ill.2d 178, 197, 191 Ill.Dec. 55, 623 N.E.2d 300.) It is vital that this court preserve public confidence in the integrity of the legal profession. Also, although a degree of uniformity and consistency has been acknowledged as appropriate, each case must be considered on its individual facts and merits. (In re Joyce (1989), 133 Ill.2d 16, 31, 139 Ill.Dec. 720, 549 N.E.2d 232.) Our selection of a sanction may appropriately consider the deterrent value of attorney discipline and the need to impress upon others the significant repercussions of errors such as those committed by respondent in the present cause. In re Imming (1989), 131 Ill.2d 239, 261, 137 Ill.Dec. 62, 545 N.E.2d 715.

This court has previously imposed suspension as an appropriate sanction for an attorney's division of his fees with a nonlawyer (see, e.g., In re Cetwinski (1991), ***529** 143 Ill.2d 396, 158 Ill.Dec. 532, 574 N.E.2d 645; Krasner, 32 Ill.2d 121, 204 N.E.2d 10) and for aiding the unauthorized practice of law (Yamaguchi, 118 Ill.2d 417, 113 Ill.Dec. 928, 515 N.E.2d 1235; Schelly, 94 Ill.2d 234, 68 Ill.Dec. 502, 446 N.E.2d 236). We have determined that the respondent aided Ruther in the unauthorized practice of law, and have noted the dangers of allowing a disciplined ****913**attorney to engage in law-related activities that amount to unauthorized legal practice.

In addition, the respondent's arrangement with Ruther was unquestionably an unethical sharing of legal fees with a nonattorney, in violation of the Code (107 Ill.2d R. 3-102(a)). Improper fee-splitting is a serious transgression that harms both the public and the legal profession. This court observed in O'Hara v. Ahlgren, Blumenfeld & Kempster (1989), 127 Ill.2d 333, 130 Ill.Dec. 401, 537 N.E.2d 730, that fee-sharing between attorneys and nonlawyers can readily lead to a variety of harms: "[It] provides an incentive for a layperson to recommend the services of an attorney with whom he or she will share the fees. Because the nonattorney assumes no responsibility for the case, the referral will more likely be based on the layperson's desire to share a fee than on the layperson's concern for the legal welfare of the client. [Citations.] The public is best served, however, by recommendations uninfluenced by financial considerations. [Citation.] * * * Second, [a] fee-sharing agreement * * * creates the possibility that the clients' rights may be adversely affected. Because the attorneys must share a portion of the fees received from certain clients, but not others, they may be tempted to devote less time and attention to the cases of the clients whose fees they must share. Any reduction in the quality of legal services rendered by an attorney to a client creates a risk that the rights of the client may not be fully protected and results in prejudice to the client." O'Hara, 127 Ill.2d at 342-43, 130 Ill.Dec. 401, 537 N.E.2d 730.

[8] The record does not reveal that respondent's legal representation of the workers' compensation clients was adversely affected or inhibited by respondent's division of his fees with Ruther. However, in view of the serious ***530** potential for harm that arises from fee-splitting arrangements such as that proven in the instant cause, and in light of our conclusion that respondent aided Ruther in the unauthorized

practice of law, we conclude that respondent's law license should be suspended for a period of two years. We believe that this sanction will ensure public trust and confidence in the legal profession and will maintain the integrity of the bar. We also find this sanction necessary in order to emphasize to respondent and other attorneys in this State that it is folly to accept referrals from a disciplined attorney under an arrangement similar to that agreed to by respondent and Ruther, and to divide a portion of one's legal fee with a disciplined attorney, especially where, as here, the attorney was disbarred and was repeatedly refused reinstatement to legal practice.

Respondent fully and candidly admits that he knew it was wrong to continue his association with Ruther once Ruther was disbarred. Respondent also admits that he knew it was wrong to share a portion of his fees with Ruther. Nevertheless respondent failed to end the arrangement after Ruther's law license was revoked. In addition, respondent failed to terminate the professional association even though he was aware that Ruther had repeatedly attempted, unsuccessfully, to gain reinstatement to the practice of law. Ruther's failure to gain reinstatement should have placed respondent on notice of the precarious nature of his continued association with Ruther.

We also find it significant that respondent's firm garnered considerable fees over the years because of respondent's association with Ruther. We discern no valid reason or explanation for the immense lapse of sound judgment that occurred in this case. Respondent is hereby suspended from the practice of law for a period of two years.

Respondent suspended.

***531** CHIEF JUSTICE BILANDIC and JUSTICE FREEMAN took no part in the consideration or decision of this case.

End of Document

113 Ill.Dec. 928, 515 N.E.2d 1235, 118 Ill.2d 417, Yamaguchi, In re, (Ill. 1987)

---------- Page 515 N.E.2d 1235 follows ----------

118 Ill.2d 417, 113 Ill.Dec. 928, 515 N.E.2d 1235

In re **Jiro YAMAGUCHI,** Attorney, Respondent.
No. 64463.
Supreme Court of Illinois.

Nov. 16, 1987.

Disciplinary proceeding was brought. The Supreme Court, Cunningham, J., held that signing taxation valuation complaints, which were either blank or not inspected, and transmitting complaints to nonlawyer under circumstances where attorney knowingly aids unauthorized practice of law and deceives tribunal and public, warrants six months suspension.

Suspension ordered.

1. **ATTORNEY AND CLIENT k53(1)**

45 ----
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k53 Evidence
45k53(1) In general.

Ill. 1987.

Rules of evidence applicable in ordinary civil proceeding need not be strictly applied in disciplinary proceeding.

2. **ATTORNEY AND CLIENT k53(1)**

45 ----
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k53 Evidence
45k53(1) In general.

Ill. 1987.

Attorney's failure to respond to request for admission of truth of his prior testimony did not preclude hearing panel in disciplinary proceeding from considering both prior statement and live testimony; technicalities of evidence would not be invoked either to shield attorney from discipline or to prevent him from establishing legitimate defense.

3. **ATTORNEY AND CLIENT k38**

45 ----
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k38 Character and conduct.

Ill. 1987.

"Fraud" within meaning of disciplinary rule prohibiting dishonest, deceitful or fraudulent conduct includes anything calculated to deceive, including suppression of truth and suggestion of what is false. Code of Prof.Resp., DR1-102(a)(4), S.H.A. ch. 110A, foll. p 774.

4. **ATTORNEY AND CLIENT k11(11)**

45 —
45I The Office of Attorney
45I(A) Admission to Practice
45k11 Practitioners Not Admitted or Not Licensed
45k11(11) Tax practice.

Ill. 1987.

Completion of tax valuation complaint of real estate agent, including setting forth on valuation complaint results of legal analysis of facts which real estate agent deemed to justify tax reevaluation, and agent's appearing for oral argument before tax court, constituted "unauthorized practice of law".

See publication Words and Phrases for other judicial constructions and definitions.

5. **ATTORNEY AND CLIENT k38**

45 —
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k38 Character and conduct.

Ill. 1987.

Code of professional responsibility is not binding on courts, but canons of ethics contained therein do constitute safe guide for professional conduct, and attorney may be disciplined for not observing them.

6. **ATTORNEY AND CLIENT k58**

45 —
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k58 Punishment.

Ill. 1987.

Signing taxation valuation complaints, which were either blank or not inspected, and transmitting complaints to nonlawyer under circumstances where attorney knowingly aids unauthorized practice of law and deceives tribunal and public, warrants six months suspension. Code of Prof.Resp., DR1-102(a)(4, 5), DR3-101(a), DR7-102(b)(2), S.H.A. ch. 110A, foll. p 774.

---------- Page 515 N.E.2d 1236 follows ----------

[113 ILLDEC 929] [118 ILL2D 420] Thomas P. Sukowicz, Atty. Registration and Disciplinary Com'n, Chicago, for administrator.

Sidney Z. Karasik, Chicago, for respondent-appellant.

Justice CUNNINGHAM delivered the opinion of the court:

This action involves a complaint which the Administrator of the Attorney Registration and Disciplinary Commission (Administrator) filed against respondent, Jiro Yamaguchi, alleging that he had (a) engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 1-102(a)(4) of the Code of Professional Responsibility (Code) (107 Ill.2d R. 1-102(a)(4)); (b) engaged in conduct that is prejudicial to the administration of justice in violation of Rule 1-102(a)(5) of the Code (107 Ill.2d R. 1-102(a)(5)); (c) aided a nonlawyer in the unauthorized practice of law in violation of Rule 3-101(a) of the Code (107 Ill.2d R. 3-101(a)); and (d) failed to reveal to a tribunal information in his possession clearly establishing that a person other than his client had perpetrated a fraud upon that tribunal in violation of Rule 7-102(b)(2) of the Code (107 Ill.2d R. 7-102(b)(2)). The Administrator requested that respondent be disbarred.

The hearing panel found that respondent was careless and indifferent to the prevention of the unauthorized practice of law but that respondent neither harmed nor intended to harm anyone. The hearing panel recommended[118 ILL2D 421] a reprimand. The Review Board thought a reprimand insufficient and recommended a six-month suspension. Both parties filed exceptions to the Review Board's recommendations.

The record contains much contradictory testimony. The contradictions are largely between respondent's testimony before the hearing panel and his testimony given previously at the trial of Albert Ebert (United States v. Ebert (N.D.Ill.1981), No. 80-CR-518), a real estate broker whom respondent is accused of aiding in the unauthorized practice of law. The hearing panel considered both the testimony which respondent and Ebert gave at the disciplinary hearing and the testimony which respondent previously had given in the Ebert trial. We herein summarize the evidence which the hearing panel considered.

Respondent was licensed to practice law over 40 years ago (in 1946) and has since then primarily conducted a general practice, which includes substantial real estate work. For over 25 years he has been a friend of Albert Ebert.

Beginning sometime prior to 1975, Ebert began filing real estate valuation complaints (valuation complaints) before the board of appeals of Cook County (tax board). Pursuant to rule 9 of the tax board, such valuation complaints must be signed by an attorney (or by the property owner himself). In fact, the valuation complaints contain a portion prominently entitled "Attorney's Appearance and Affidavit of Compliance with Rule 9," in which the attorney affirms that he has read the valuation complaint and that he has personal knowledge that the contents thereof are accurate. The testimony indicated that, at least prior to 1975, the tax board did not strictly enforce this rule, and that in fact Ebert signed his own name to many such complaints before then.

---------- **Page 515 N.E.2d 1237 follows** ----------

[113 ILLDEC 930] [118 ILL2D 422] In 1975, a tax board employee told Ebert that an attorney's name must be used on any valuation complaint filed with the tax board, unless the property owner represents himself in such matter. Ebert then consulted respondent regarding using respondent's name on valuation complaints filed with the tax board. Respondent acknowledged at the hearing that during that conversation he signed numerous valuation complaints completed by Ebert's staff and numerous blank valuation complaints, which he gave to Ebert. Respondent told the hearing panel that he was not merely permitting Ebert to use his name, but that he took full responsibility for the valuation complaints which he signed and that he tried to attend the hearings on all of those valuation complaints. However, in the Ebert trial respondent acknowledged that he does not know what became of the initial valuation complaints and that he was not asked to attend the hearings on any valuation complaints handled by Ebert's office until 1978. (Prior to that time Ebert appeared at the hearings on many of the valuation complaints himself.)

Respondent acknowledged at the hearing that from 1975 through 1979 vast numbers of valuation complaints which contain his name were signed by Ebert or his secretary and that Ebert used stationery containing respondent's name and Ebert's address. Respondent told the hearing panel that he discovered this practice in 1977 and ordered it stopped. However, the fact that the practice continued until 1979, during which time respondent appeared before the tax board handling what may have been the same complaints which contained

his forged signature, casts doubt on respondent's assertion in this respect. Further, during the Ebert trial respondent testified that he would not have objected to Ebert's signing of respondent's name to the complaints.

[118 ILL2D 423] Evidence was also conflicting as to whether respondent was compensated for either his services or the use of his name. In Ebert, respondent testified that he refused to pay a bill which Ebert sent him for unrelated services, since respondent viewed Ebert's use of respondent's name as fair compensation for Ebert's services. Respondent also stated in the Ebert trial that he had received cash from Ebert for the use of his name. Respondent told the hearing panel that this statement was in error.

The parties disagree as to what facts can be discerned from the above testimony. This disagreement arises in part from a dispute regarding the use of respondent's Ebert testimony. The Administrator sought to use respondent's Ebert testimony as admissions. The Administrator's basis for this position was that he served upon respondent, pursuant to Supreme Court Rule 216 (107 Ill.2d R. 216), a request for admission of facts and genuineness of documents. In the request he asked respondent to admit, inter alia, that the transcript of the Ebert testimony was a correct record of the testimony given in Ebert and that respondent's testimony therein was made under oath and was true.

Respondent failed to reply to the request within the 28 days specified by Rule 216, and the Administrator argued that therefore the truth of respondent's testimony contained in Ebert was admitted. Respondent argued that he had not intended to stipulate to the truth of his prior testimony, but only to the accuracy of the transcript as a compilation of the testimony. Respondent further argued that even if his failure to respond to the request was an admission of the truth of the prior testimony, the prior testimony could still be contradicted, and the hearing panel could then consider both the live testimony and respondent's Ebert testimony in determining the relevant facts.

[1, 2] [118 ILL2D 424] The hearing panel allowed respondent to contradict his prior testimony. This ruling does not comport with Rule 216 and in a standard civil proceeding would be erroneous. Under Rule 216, a party who admits a fact cannot in the same proceeding deny the same. (See City of Champaign v. Roseman (1958), 15 Ill.2d 363, 155 N.E.2d 34 (involving Supreme Court Rule 18, the predecessor to Supreme Court Rule 216).) However, the rules of evidence applicable in an ordinary civil proceeding need

---------- Page 515 N.E.2d 1238 follows ----------

[113 ILLDEC 931] not be strictly applied to a disciplinary proceeding. (In re Silvern (1982), 92 Ill.2d 188, 65 Ill.Dec. 272, 441 N.E.2d 64.) Since a disciplinary action's primary purpose is to protect the public from unqualified or unethical practitioners (In re Nesselson (1966), 35 Ill.2d 454, 220 N.E.2d 409), technicalities will not be invoked either to shield an attorney from discipline (In re Czachorski (1969), 41 Ill.2d 549, 244 N.E.2d 164) or to prevent him from establishing a legitimate defense (In re Ashbach (1958), 13 Ill.2d 411, 150 N.E.2d 119). Therefore, we find that the hearing panel did not err in weighing all of respondent's testimony (including his Ebert testimony) to help determine the true facts.

This court bears the responsibility for determining the sanction appropriate to the facts of this case. In determining those facts, however, the findings of the hearing panel, the body best positioned to evaluate the credibility of the witnesses, are entitled to great weight. In re Hopper (1981), 85 Ill.2d 318, 53 Ill.Dec. 231, 423 N.E.2d 900.

Accordingly, we accept the hearing panel's limited factual findings, which are clearly supported by the evidence. These findings include that (1) respondent signed some complaints in blank and gave them to Ebert, (2) Ebert's secretary signed respondent's name on some of the valuation complaints, (3) there was insufficient evidence that respondent received consideration for the use of his name, (4) respondent failed to use diligence in discovering and preventing the use of his name in proceedings before the tax board in which he did not participate, [118 ILL2D 425] (5) respondent was careless and indifferent to the prevention of the unauthorized practice of law, and (6) there was no evidence of any harm to anyone or any intent to harm anyone.

Although we accept the hearing panel's factual findings, we consider those findings in conjunction with other clearly established facts as to which the hearing panel did not make express findings. This case involves an attorney with many years' experience who signed en masse a vast number of form valuation complaints, some of which were blank. With respect to the completed valuation complaints which he signed, respondent made no effort to ascertain whether the contents of those complaints were accurate and made no inquiry as to the propriety of the theory of relief. (Reevaluations could be based on any of numerous theories, such as an income producing basis or a market value basis.) Further, although respondent stated that he did not know whether all of the valuation complaints which he signed were actually filed, it is inconceivable that Ebert, who was during much of this same period permitting his secretary to sign Ebert's name on numerous valuation complaints, did not also use the numerous signed valuation complaints which respondent made readily available to him. Moreover, respondent had no way of knowing whether he actually appeared at the hearing on any of those complaints, and it is evident that Ebert himself appeared at the hearings between 1975 and 1978.

[3] We find that, in view of the hearing panel's factual findings and the other clearly established facts, the Administrator has established each of the alleged violations of the Code. Specifically, respondent violated Rule 1-102(a)(4) of the Code (107 Ill.2d R. 1-102(a)(4)), which prohibits dishonest, deceitful or fraudulent conduct. By signing valuation complaints without first reviewing them or supervising their completion, respondent deceived[118 ILL2D 426] both the tribunal and property owners into thinking that the complaints had been evaluated by a licensed attorney. Fraud includes anything calculated to deceive, including the suppression of truth and the suggestion of what is false (In re Alschuler (1944), 388 Ill. 492, 58 N.E.2d 563), and respondent's conduct is thus clearly fraudulent.

This same conduct was also prejudicial to the administration of justice, and respondent thus violated Rule 1-102(a)(5) of the Code (107 Ill.2d R. 1-102(a)(5)). The tribunals of this State rely upon the honesty, candor and diligence of the attorneys of record in the matters before them, attributes to which attorneys are by oath committed.

---------- Page 515 N.E.2d 1239 follows ----------

[113 ILLDEC 932] [4] Respondent also clearly violated Rule 3-101(a) of the Code (107 Ill.2d R. 3-101(a)), which prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law. There can be no doubt that Ebert's conduct (which respondent condoned and furthered) was, in fact, the unauthorized practice of law. Although we have previously permitted, in Chicago Bar Association v. Quinlan & Tyson, Inc. (1966), 34 Ill.2d 116, 214 N.E.2d 771, a real estate broker to fill in factual data on certain form contracts, the completion of a valuation complaint is quite unlike the completion of a form contract. The insertions which Ebert was making on the form valuation complaints did not involve mere factual data. Rather, Ebert, without the supervision of an attorney, was setting forth on the valuation complaints the results of his legal analysis of the facts which he deemed justified a tax reevaluation. Further, after Ebert or his secretary filed those valuation complaints, Ebert was appearing for oral argument before the tax board. Both the unsupervised completion of the complaint and the appearance before the administrative tribunal constituted the unauthorized practice of law.

Respondent's conduct is analogous to the conduct proscribed in People ex rel. Chicago Bar Association v. [118 ILL2D 427] Goodman (1937), 366 Ill. 346, 8 N.E.2d 941, wherein a nonlawyer was held in contempt for representing others in workers' compensation claims before the Industrial Commission. (See also Chicago Bar Association v. United Taxpayers of America (1941), 312 Ill.App. 243, 38 N.E.2d 349 (holding that the preparation and presentation of Retail Occupation Tax refund claims before the Department of Finance was the practice of law).) As we stated in Goodman (366 Ill. 346, 357, 8 N.E.2d 941), it is not the tribunal involved (e.g., a court or administrative agency) but the character of the work which is determinative of whether the practice of law is involved.

In evaluating Ebert's practice of completing valuation complaints and appearing before the tax board, we find no justification in the assertion that the conduct was widely adopted by realty brokers and acquiesced in by the tax board. As we stated in Chicago Bar Association v. Quinlan & Tyson, Inc. (1966), 34 Ill.2d 116, 120, 214 N.E.2d 771, if by their nature acts require a lawyer's training for their proper performance, it does not matter that there

may have been widespread disregard of the requirement or that considerations of business expediency would be better served by a different rule.

Finally, respondent has himself stated that when he learned of Ebert's misconduct he took no action other than to ask Ebert to halt the misconduct. Consequently, respondent has violated Rule 7-102(b)(2) of the Code (107 Ill.2d R. 7-102(b)(2)) by failing to reveal to a tribunal information in his possession clearly establishing that a person other than his client has perpetrated a fraud upon that tribunal.

[5] The canons of ethics contained in the Code constitute a safe guide for professional conduct, and an attorney may be disciplined for not observing them. (In re Taylor (1977), 66 Ill.2d 567, 6 Ill.Dec. 898, 363 N.E.2d 845.) In determining the appropriate discipline, we bear in mind that, although fairness requires[118 ILL2D 428] a reasonable degree of consistency and predictability, each disciplinary matter is unique and must be decided on its own facts. In re Hopper (1981), 85 Ill.2d 318, 53 Ill.Dec. 231, 423 N.E.2d 900.

[6] In the instant case the evidence that respondent actually authorized a nonlawyer to sign his name is inconclusive, and the hearing panel found insufficient evidence of that allegation. Because discipline can be invoked only for offenses which are clearly established (In re Bossov (1975), 60 Ill.2d 439, 328 N.E.2d 309), we do not base our sanction upon this allegation. However, it is indisputable that respondent signed a vast number of valuation complaints (some of which were blank and others of which he did not even inspect) and gave them to a nonlawyer under circumstances whereby respondent knowingly aided the unauthorized practice of law and deceived a tribunal and the public. This proven conduct warrants substantial discipline

---------- **Page 515 N.E.2d 1240. follows** ----------

[113 ILLDEC 933] to protect the public and preserve the integrity of the profession.

Fairness dictates, however, that in imposing discipline we consider mitigating circumstances. (In re Neff (1980), 83 Ill.2d 20, 46 Ill.Dec. 169, 413 N.E.2d 1282.) In this respect we note that, although respondent presented no character witnesses on his behalf, he did represent that throughout his many years of practice no other disciplinary action for dishonesty has been initiated against him. We also note that the Administrator failed to establish that respondent personally profited or attempted to profit from his misconduct. We further note the hearing panel's finding that respondent neither harmed nor intended to harm anyone. By mentioning these considerations we most assuredly do not mean to condone respondent's conduct, but we do believe that such circumstances must be considered in evaluating the gravity of the offense.

Disbarment is the utter destruction of an attorney's professional life, his character and his livelihood, and [118 ILL2D 429] therefore a court should use disbarment in moderation. (In re Power (1950), 407 Ill. 525, 96 N.E.2d 460.) Considering both the nature of the conduct and the limited mitigating circumstances, we find that disbarment is unwarranted. Rather, we believe that the appropriate sanction is the six-month suspension which the Review Board recommended.

Although we determine the appropriate sanction herein based upon this case's unique facts, we note that the sanction which we are imposing is not inconsistent with sanctions which this court and courts in other States have imposed in cases involving the intentional aiding in the unauthorized practice of law. For example, in In re Schelly (1983), 94 Ill.2d 234, 68 Ill.Dec. 502, 446 N.E.2d 236, this court suspended an attorney for three months for facilitating the unlicensed practice of law. In Kentucky Bar Association v. Tiller (Ky.1982), 641 S.W.2d 421, the Kentucky Supreme Court suspended an attorney for six months where the attorney had lent his name to nonlawyers, and had prepared form complaints and letters which were utilized by the nonlawyers upon their own determination of whether legal action should be taken. An attorney was also suspended in Smallberg v. State Bar of California (1931), 212 Cal. 113, 297 P. 916. In Smallberg, the California Supreme Court suspended an attorney for one year where the attorney prepared and signed complaints although a nonattorney, with the knowledge and approval of the attorney, performed every essential step in the transaction, including the procurement of the business, the ascertainment of the facts which were to form the basis of the complaints, and the meeting with the complainants.

Respondent's misconduct fully justifies his suspension for six months, and a six-month suspension is hereby ordered.

Respondent suspended.

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Disciplinary Proceedings Against Weigel, Wis., June 29, 2012

179 Ariz. 216
Supreme Court of Arizona, In Banc.

In the Matter of a Member of the State Bar of Arizona, Andrew Leeroy STRUTHERS, Respondent.

No. SB-93-0035-D.
|
Disc. Comm. Nos. 90-1272, 90-1323, 90-1450, 90-1757, 90-1785, 90-1830, 90-1863, 91-0301, 91-0310, 91-0375, 91-0386, 91-0416, 91-0528, 91-0631, 91-0707, 91-0884, 91-0926, 91-0949, 91-0966, 91-0967, 91-0982, 91-1058, 91-1072, 91-1089, 91-1188, 91-1278, 91-1314 and 91-1497.
|
July 12, 1994.

Synopsis
State Bar brought original proceeding for disciplinary action against attorney. The Supreme Court, Feldman, C.J., held that disbarment is appropriate sanction for attorney who commits numerous ethical violations by breaching responsibilities regarding nonlawyer assistants, charging improper fees, mishandling funds, sharing legal fees with nonattorneys, failing to act with reasonable diligence and promptness in representing clients, and failing to give client access to file following termination of attorney's representation.

Disbarred.

West Headnotes (17)

[1] **Attorney and Client**
Review

In attorney discipline proceedings, Supreme Court is independent trier of both fact and law.

Cases that cite this headnote

[2] **Attorney and Client**
Character and Conduct

Attorney's abandonment of responsibility for running his office to nonattorneys, and complete failure to exercise oversight over them, violates ethical rule providing that attorney make reasonable efforts to ensure that firm has in effect measures giving reasonable assurance that nonattorney assistants conduct themselves according to rules for attorneys. 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 5.3(c).

Cases that cite this headnote

[3] **Attorney and Client**
Character and Conduct

Although there may often be some question of what is reasonable effort to ensure proper conduct by nonlawyer employees, at a minimum the lawyer must screen, instruct, and supervise. 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 5.3(c).

Cases that cite this headnote

[4] **Attorney and Client**
Misappropriation and Failure to Account

Attorney violates ethical rule requiring attorneys to maintain trust accounts according to certain accounting guidelines, when attorney signs pages of blank checks for employees to complete in his absence so as to allow nonattorneys to decide whether and how much to pay clients, and when some clients are paid more from trust accounts than has been deposited on their behalf. 17A A.R.S. Sup.Ct.Rules, Rule 43, State Bar Trust Account Guideline 1.

Cases that cite this headnote

[5] **Attorney and Client**
Misappropriation and Failure to Account

Allowing unchecked control of attorney's trust account by untrustworthy subordinates for six months is serious breach of ethical

rules. 17A A.R.S. Sup.Ct.Rules, Rule 43, State Bar Trust Account Guideline 1.

Cases that cite this headnote

[6] **Attorney and Client**
Misappropriation and Failure to Account

Even assuming that initial payments received from debtors in debt collection actions belong to attorney the moment he receives them, under contingency fee arrangement in which attorney keeps one hundred percent of all payments received until his entire contingency payment has been paid, and only then forwards payments in excess of contingency fee to client, attorney's failure to notify clients of receipt of funds and to account for them violates rule requiring attorney to notify client of receipt of client's funds, and to account for such funds. 17A A.R.S. Sup.Ct.Rules, Rule 44(b); 17A A.R.S. Sup.Ct.Rules, Rule 43, State Bar Trust Account Guideline 2, subd. a.

Cases that cite this headnote

[7] **Attorney and Client**
Misconduct as to Client

Provision in fee agreement that attorney retain any court-awarded attorney's fees in addition to his contingency fee constitutes violation of ethical rule governing fees. 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 1.5(a).

3 Cases that cite this headnote

[8] **Attorney and Client**
Misconduct as to Client

Fee agreement which allows attorney to keep all funds collected on client's behalf in child support collection action until attorney's preset fee is paid in full constitutes violation of ethical rule governing fees, where attorney's written agreements are ambiguous, factors outside written agreement tend to mislead clients, and clients are misled as to fee arrangement. 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 1.5(c).

1 Cases that cite this headnote

[9] **Attorney and Client**
Requisites and Validity of Contract

While it is possible for lawyer to agree with sophisticated client that lawyer will receive preset contingency fee and that all funds collected will be applied to fee, that rule cannot be applied in every case.

1 Cases that cite this headnote

[10] **Attorney and Client**
Contracts for Compensation

Fee agreement between lawyer and client is not ordinary business contract.

1 Cases that cite this headnote

[11] **Attorney and Client**
Value of Services

Fees charged by attorney must be reasonably proportional to services rendered and to situation presented.

Cases that cite this headnote

[12] **Attorney and Client**
Character and Conduct

Attorney's agreement with debt collection agency, under which attorney turns over all fees that attorney receives from debtors to agency, with subsequent distribution of profit, violates rule prohibiting attorney from sharing fees with nonattorney. 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 5.4.

Cases that cite this headnote

[13] **Attorney and Client**
Misconduct as to Client

Attorney violates rule requiring attorneys to act with reasonable diligence and promptness

in representing clients when attorney fails to promptly notify clients when he receives funds on their behalf, fails to promptly pay clients, fails to consult with client regarding what demands to make in petition for arrearage judgment, delays in responding to clients' inquiries, delays in giving clients access to their files on request, and delays in preparing and filing paperwork. 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 1.3.

Cases that cite this headnote

[14] **Attorney and Client**
Misconduct as to Client

Attorney's failure to give former client access to client's file following client's termination of attorney's representation constitutes violation of ethical rule requiring client to surrender papers and property to which client is entitled upon termination of representation, where attorney has collected more than a fair fee and thus has no lien and no arguable right to retain client's file. 17A A.R.S. Sup.Ct.Rules, Rule 42, Rules of Prof.Conduct, ER 1.16(d).

1 Cases that cite this headnote

[15] **Attorney and Client**
Defenses

Fact that attorney requests but does not receive Bar's advice during investigation of alleged ethical violations does not compel finding that attorney should not be subject to discipline, where attorney's request for information comes only after he has already committed numerous violations and several clients have complained to Bar.

Cases that cite this headnote

[16] **Attorney and Client**
Disbarment;Revocation of License
Attorney and Client
Mishandling of Trust Account or Client Funds

Disbarment is appropriate sanction for attorney who commits numerous ethical violations by breaching responsibilities regarding nonlawyer assistants, charging improper fees, mishandling funds, sharing legal fees with nonattorneys, failing to act with reasonable diligence and promptness in representing clients, and failing to give client access to file following termination of attorney's representation.

2 Cases that cite this headnote

[17] **Attorney and Client**
Nature and Form in General

Professional discipline protects public, legal profession, and justice system, and deters other lawyers from engaging in like conduct.

Cases that cite this headnote

Attorneys and Law Firms

****791** ***218** State Bar of Arizona by Yigael M. Cohen, Allen B. Shayo, Phoenix, for State Bar of Arizona.

Andrew L. Struthers, pro se.

OPINION

FELDMAN, Chief Justice.

The matter of Andrew Leeroy Struthers ("Struthers") first came before this court on April 26, 1991, when the State Bar of Arizona (the "Bar") filed a motion seeking Struthers' interim suspension, pending resolution of complaints against him. *See* Ariz.R.Sup.Ct. (hereinafter "Rule ___") 52(c)(2). We directed the superior court to conduct a hearing into those allegations. Rule 52(c)(6). Based on the court's findings of fact and conclusions of law, we ordered Struthers' interim suspension on June 13, 1991.

A hearing committee (the "Committee") later concluded that Struthers committed 143 violations of the Rules of Professional Conduct (Rule 42) and other rules of this court, and recommended Struthers' disbarment.

The Disciplinary Commission (the "Commission") unanimously adopted the Committee's findings and recommendation. Struthers filed an appeal in this court opposing disbarment. We have jurisdiction to decide this matter pursuant to Rule 53(e) and Ariz. Const. art. 6, § 5(3).

FACTS

Child Support Collections ("CSC"), a debt collection agency, retained Struthers in December 1989 to work with another lawyer who had been handling CSC's cases. The following day, the first lawyer resigned. Struthers took over her pending cases. CSC specialized in collecting overdue child support payments from divorced parents. The agency typically started its collection efforts with letters and telephone calls to the debtor. If these tactics failed, the agency turned over the accounts to the attorney. CSC worked on a contingency fee basis, retaining as its fee twenty percent of any amounts collected.

When Struthers started with CSC, the agency was owned by Robert Hydrick and run in large measure by John Star, neither of whom was an attorney. Shortly after joining CSC, Struthers sent letters to its clients, notifying them that CSC's previous lawyer had resigned and that their files had been assigned to him. These letters also stated that each client's existing agreement with CSC would be "honored in full."

In January 1990, at Struthers' suggestion, Hydrick dissolved CSC. This occurred during an investigation by the State Banking Department into allegations of irregularities in CSC's handling of client funds and that Star was falsely holding himself out as an attorney. Struthers knew about and even represented Star and Hydrick in these matters.

When Hydrick dissolved CSC, Struthers superficially converted its operations into a law practice. In reality, however, CSC simply continued to operate. Star and Hydrick formed a new entity called MIROVI Inc., which was supposed to act as a managing company, providing support personnel and services for Struthers' practice. Star and Hydrick became Struthers' "legal assistants."

Many clients were subsequently required to sign new agreements raising the fee to twenty-five percent of funds collected. The new agreement also called for a small retainer fee and specified that Struthers would receive any court-awarded attorneys' fees in addition to-and not applied to-the retainer and his contingency fee.

From the beginning of Struthers' association with CSC, he had a very large case load. At first he took over from his predecessor about 250 cases, but this number later rose to nearly 750. Although Struthers nominally maintained his status as an independent attorney, CSC (now MIROVI) staff ran his office, his accounting system, and performed ****792** ***219** other tasks, such as conducting client interviews. Star and Hydrick performed essentially the same functions as they had in CSC. Under these circumstances, many of the formalities of a law firm were abandoned, giving rise to a number of the violations discussed below.

DISCUSSION

[1] In disciplinary proceedings, this court is an independent trier of both fact and law. *In re Castro*, 164 Ariz. 428, 429, 793 P.2d 1095, 1096 (1990). However, due to the large number of violations in this case, it is impractical to discuss each act charged as a violation. Rather, we follow the Commission's findings and address only those acts and charges that warrant discussion.

The Committee, whose findings the Commission adopted, concluded that Struthers committed the following violations of the Rules of the Supreme Court and the Ethical Rules ("ER") of the Code of Professional Conduct:

	Number of Violations
Trust account violations (Rules 43 and 44)	31
ER 1.2 (scope of representation)	1

ER 1.3 (diligence)	10
ER 1.4 (communication)	26
ER 1.5 (fees)	25
ER 1.15 (safekeeping property)	26
ER 1.16 (terminating representation)	1
ER 5.3 (nonlawyer assistants)	14
ER 5.4 (professional independence)	1
ER 8.1 and Rule 51 (disciplinary investigations)	8

We examine in detail some of the more egregious violations. For ease of discussion, we address them in four categories: (A) nonlawyer assistants; (B) improper fees and mishandling of client funds; (C) client contact and communications; and (D) the Bar investigation.

A. Responsibilities regarding nonlawyer assistants

[2] It is important to note that lawyers are often responsible for the actions of their nonlawyer assistants. Ethical Rule 5.3(a) provides that a lawyer in Struthers' position shall "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance" that nonlawyer assistants conduct themselves according to the rules for lawyers. In addition, ER 5.3(c) holds a lawyer responsible for an employee's misconduct if the lawyer ratifies that conduct or fails to mitigate its consequences when possible.

In the present case, however, Struthers virtually abandoned responsibility for running his office to Star and Hydrick. Although Struthers knew the Banking Department had charged Star and Hydrick with serious improprieties, he gave them total control of his office and unfettered access to his trust fund. He exercised no oversight, but now argues that he "had no indication of dishonesty on the part of Mr. Hydrick or Mr. Star, only that their record keeping was not adequate." We reject this argument, as did the Commission, on both a factual and a legal basis.

[3] Struthers' argument is factually flawed because his own admissions prove he knew about Star's dishonesty early in their relationship. Struthers admitted to the Committee that although Star told him he was an attorney licensed in other states, Struthers knew from the start this was not true. He also admitted he was physically afraid of Star. Given these facts, in conjunction with the charges brought before the Banking Department, Struthers did not meet his obligation to ensure that his nonlawyer assistants complied with his professional obligations. ER 5.3(b) and Comment thereto. Although there may often be some question of what is a reasonable effort to ensure proper conduct by nonlawyer employees, at a minimum the lawyer must screen, instruct, and supervise. *In re Galbasini,* 163 Ariz. 120, 124, 786 P.2d 971, 975 (1990). Struthers did little but close his eyes.

Moreover, even if Struthers had been unaware that he placed untrustworthy persons in charge of his affairs, he still violated ER 5.3(c) by knowingly ratifying many of their ethical lapses and by failing to mitigate their consequences. For example, although he knew Hydrick had commingled his own funds with those in Struthers' trust account, Struthers did nothing to stop this.

[4] Struthers' conduct also violated Rule 43, which requires lawyers to maintain trust accounts according to certain accounting ****793** ***220** guidelines. In relevant part, these guidelines require that:

> b. Employees and others assisting the attorneys in the performance of [trust account duties] must be competent and properly supervised.
>
> c. Internal controls within the lawyer's office must be adequate under the circumstances to safeguard funds or other property held in trust.
>
> d. All transactions must be recorded promptly and completely.

Rule 43, State Bar of Arizona Trust Account Guidelines (1) (rev. May 1, 1984).

The Commission found that Struthers violated this rule "when he allowed incompetent and untrustworthy employees to manage his trust account, and then failed to properly supervise them to ensure they were complying with the Trust Account Guidelines." We agree. For example, Struthers routinely signed pages of blank checks for his employees to complete in his absence. As a result, Star and Hydrick were free to decide whether and how much to pay clients, and often based their decisions on which clients they favored.

In addition, many trust account checks were payable to "cash." Some were for as much as $1,900, with one $600 trust account check written to cover the living expenses of an employee's mother. Struthers' trust account was often overdrawn, in some months by as much as $20,000. Further, some clients were paid more from the trust account than had been deposited on their behalf. This occurred because Hydrick, with Struthers' knowledge, commingled his personal funds in the trust account to pay his former clients. Star also instructed employees to minimize the amount of money in the trust account to avoid paying interest to the Bar. *See* Rule 44(c)(2). In numerous instances, Struthers' employees kept no proper internal records for the trust account.

Struthers admits that for the first six months he was "lax" in monitoring his trust account. He tries to minimize this by pointing out that he eventually hired a certified public accountant to correct the trust account problems. He blames the subsequent problems on the accountant's failure to live up to her promises.

[5] We find no excuse for the violations. First, even if the accountant had been successful, that would not excuse the violations in the first six months. Allowing unchecked control of an attorney's trust account by untrustworthy subordinates for six months is itself a serious breach of the rules. *Cf. Galbasini,* 163 Ariz. at 124, 786 P.2d at 975 (attorney has independent duty to supervise subordinates). Second, Struthers did not give the accountant sufficient independence and authority to solve the trust account problems. Rather, he placed her under Star's direct control. Star thwarted her ability to properly manage the account. Given Struthers' knowledge of Star, this should have come as no surprise. Finally, the accountant testified that she informed Struthers directly on more than one occasion that the trust account routinely had a negative balance. Under these circumstances, we conclude that the Bar has sufficiently proven the violations of Rule 43.

B. Improper fees and mishandling of funds

The Committee and the Commission found that Struthers' fee arrangements and handling of client funds violated Rule 44 and ER 1.5, 1.15, and 5.4.

1. Rule 44 and ER 1.15

[6] The Commission found that Struthers violated Rule 44 in twenty-six instances. These charges stem mainly from the unusual contingency fee agreements Struthers employed. Many of Struthers' agreements with clients purported to allow Struthers to keep one hundred percent of all payments he collected until twenty-five percent of the total arrearage had been paid in full. Thus, for example, if a client's former spouse owed $10,000 in back child support, Struthers' fee was set from the beginning at $2,500, although it was contingent on actually being collected. If he succeeded in collecting any amount up to $2,500 from the former spouse, he kept it all, with the client getting nothing. Only after Struthers' fee was paid in full was the client, in Struthers' view, entitled to any of the child support the ex-spouse sent.

**794 *221 Some of the agreements that Struthers had clients sign contained two seemingly contradictory provisions. One said that his fee would be "25% of any and all amounts *received* on behalf of client" (emphasis added). The other stated that:

> Any amount of funds received will be applied first to Court Costs, then to Court awarded Attorneys' fees, and when these amounts are paid, the remainder of funds received *shall be paid to Attorney until the full amount of agreed to contingent fees is paid in full*....

(Emphasis added.) These agreements also stated the contingency fee as a specific dollar amount equal to twenty-five percent of the entire unpaid child support owed the client.

Under Struthers' interpretation, these provisions meant that clients were not to be paid any of the child support monies collected until he himself received twenty-five percent of the full arrearages, plus all costs.[2] Thus, because many of the debtors never paid more than a small proportion of their arrearages, Struthers effectively retained one hundred percent of the money collected on those clients' behalf. Moreover, acting under this view of the agreement, Struthers did not notify clients when he received payments on their behalf but simply kept all monies until his fees and all costs were paid in full.

Rule 44(b) requires a lawyer to:

> 1. Promptly notify a client of the receipt of his funds, securities, or other properties.
>
> * * * * * *
>
> 3. Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his clients regarding them.
>
> 4. Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties which the client is entitled to receive.

The Commission determined that Struthers violated Rule 44 "when he failed to notify clients immediately upon receipt of their funds, failed to promptly deliver client funds, failed to ensure that accurate trust account records were kept, and failed to ensure that client funds were deposited in his trust account." Similarly, the Commission concluded that Struthers violated ER 1.15 in twenty-six instances "when he failed to notify clients of his receipt of payments on their behalf, and failed to deposit those payments and maintain them in his trust account."

Struthers argues that because his fee agreement allowed him to keep all monies paid to his clients until his fee-twenty-five percent of the entire debt-was paid, he had no obligation to notify clients that he received payments because "the client had no interest in funds received on their behalf until such time as the contingent fee had been paid in full." In other words, Struthers would have us conclude that all money collected on his clients' behalf belonged to him the moment he received it, and thus created no obligations under Rule 44. We disagree, to put it mildly.

Even if Struthers' interpretation that all first monies belonged to him were correct, the clients had a sufficient interest in these funds to warrant notification of their receipt and an accounting of their use. These funds usually originated as child support payments by an ex-spouse to one of Struthers' clients. As such, the funds belonged, at least initially, to the client and only became fees when distributed to Struthers according to the contingency fee agreement. This distribution itself necessitated client notification and an accounting, even if one hundred percent of the received funds were allocated to attorney's fees. *Cf. In re Lochow,* 469 N.W.2d 91, 98 (Minn.1991) (retainer received for future services may only be withdrawn from trust fund after client has been given notice and an accounting).

The Trust Account Guidelines of Rule 43 also recognize this fact. Guideline 2(a) states that a lawyer shall render timely reports disclosing the status of "any trust assets held for the client, including *any final distribution* **795 *222 *of such assets.*" (Emphasis added.) *See also Castro,* 164 Ariz. at 430-31, 793 P.2d at 1097-98 (discussing failure of attorney to account for payments made by client). Therefore, Struthers' failure to notify clients of receipt and to account for these funds violated Rule 44, even if, as he claims, the money was his, a proposition with which the Committee and the Commission strongly-and properly-disagreed.

2. ER 1.5

The Commission concluded that Struthers' conduct resulted in twenty-five violations of ER 1.5. Many of these violations resulted from specific acts, such as failing to convey a written contingency fee agreement to a client and charging contingency fees that were unreasonably high in relation to the amount of work performed. *See In re Swartz,* 141 Ariz. 266, 274, 686 P.2d 1236, 1244 (1984).

Struthers also represented some clients without written fee agreements and charged some clients on an hourly basis although the clients had agreed only to a contingency fee. Obviously, these practices violated ER 1.5(c). We agree with the Commission's conclusions on this point, mentioning them only summarily, and turn to the more important issue.

[7] One violation of ER 1.5 particularly merits attention: the Commission's conclusion that Struthers' fee agreement

was inherently improper. The Commission's finding focused on two particular aspects of the agreement. The first is the provision that Struthers retain any court-awarded attorney's fees in addition to his contingency fee. As the Commission noted, this allowed for double recovery of fees. [3]

Such an arrangement would tend to mislead the awarding court as to Struthers' fee agreement, because a court would not award attorney's fees if it knew that the award would result in double recovery for the attorney and no benefit to the client. The purpose of awarding fees to a successful litigant is not to provide the lawyer with a double payment bonus but to defray the client's litigation expenses. *See, e.g.,* A.R.S. § 12-341.01(B) (award of reasonable attorney's fees in a contract case is "to mitigate the burden of the expense of litigation to establish a just claim or a just defense"). Although Struthers argues that he never used the provision, we hold that it is not reasonable and is facially improper as a violation of ER 1.5(a). *See, e.g., In re Douglas,* 158 Ariz. 516, 523, 764 P.2d 1, 8 (1988) (double billing for legal fees violated earlier ethical rule that was the equivalent of ER 1.5). We believe, further, that its very inclusion in the fee agreement was inherently and seriously improper. *Swartz,* 141 Ariz. at 273, 686 P.2d at 1243 (clearly excessive fees are grounds for discipline).

[8] The second improper aspect of the fee agreement was that it could be interpreted as allowing Struthers to keep all funds collected on a client's behalf until his pre-set fee was paid in full. Such a provision in child support cases is highly suspect. It withholds money from children who have already been without adequate support for a considerable period of time and who, in most cases, must have badly needed the money. It is unlikely that a client who fully understood such terms would have agreed to this arrangement, except when in desperate straits. We therefore believe this kind of provision is inherently suspect and is improper unless both parties fully understood and freely agreed to this arrangement. Such was not the case here.

First, Struthers' written agreements were ambiguous. For example, in the agreement quoted above, one section spoke of Struthers' fee as being a percentage of "amounts received," while another spoke of Struthers retaining all funds received on a client's behalf "until the amount of the contingent fee is paid in full." Yet another section stated the contingency fee as a specific dollar amount. In light of these conflicting provisions, we believe it was not sufficiently clear to the client whether Struthers' fee was to be twenty-five percent of the amount actually received ****796 *223** or twenty-five percent of the total arrearage.

Second, factors outside the written agreement tended to mislead the clients. Many of Struthers' clients were former CSC clients, and CSC based its fees only on funds actually received. Shortly after Struthers became associated with CSC, he mailed clients a letter saying that CSC's contract would be "honored in full." Thus, an unsuspecting client could easily have believed that, although the new agreement raised the fee from twenty to twenty-five percent, the fee would still be calculated on the amount actually paid rather than on the full arrearage.

Finally, Struthers' employees often misled clients into thinking that the fee would be a part of each payment Struthers collected, with the remainder going to the client. Moreover, in an open letter to his clients mailed in Spring 1991, Struthers stated, "We accept this case on a contingent fee basis, which means if we obtain money for you, we retain a *percentage* of it." (Emphasis added.) We do not believe Struthers' clients would have taken this to mean that Struthers was to keep one hundred percent of the payments until his fee was paid in full.

In sum, we agree with the Commission's conclusion that Struthers' fee agreements violated ER 1.5. Insofar as they allowed double payment of fees, the fees were unreasonable and thus in violation of ER 1.5(a). Insofar as they purported to allow Struthers to retain all monies until his fee was paid in full, the agreements did not state the method by which the fees would be calculated with sufficient clarity to satisfy ER 1.5(c).

[9] **[10]** **[11]** Before leaving the subject, however, we must mention the inherent overreaching of these agreements. While it is entirely possible for a lawyer to agree with a sophisticated client that the lawyer will receive a pre-set contingency fee and that all funds collected will be applied to the fee, that rule cannot possibly be applied in every case. What is good for General Motors is certainly not good for a needy parent seeking to recover overdue child support. This, indeed, was the typical client that Struthers represented. We have stated before and state again: "a fee agreement between lawyer and client is not an ordinary business contract." *Swartz,* 141 Ariz. at 273,

686 P.2d at 1243. Although the lawyer is certainly free to consider his own interests, the primary concerns are those of the client. Fees must be reasonably proportional to the services rendered and to the situation presented. *Id.*

Given the financial situation of Struthers' clients, a provision entitling him to keep for himself all of the monies collected when, in many of the cases, it was to be expected that there would be no further recoveries for some time, if ever, is so clearly unfair to the clients that we find it overreaching as a matter of law. We condemn and will not tolerate such practices. The license to practice law gives a lawyer both the ability and the obligation to help the disadvantaged. It is not a tool to be used to prey on those most in need of the lawyer's help. For this reason, too, we hold the agreement violated the reasonable fee provisions of ER 1.5(a).[4]

3. *ER 5.4*

[12] Ethical Rule 5.4(a) provides that a "lawyer ... shall not share legal fees with a nonlawyer...." Struthers' agreement with MIROVI, however, required him to turn over all fees that he received to MIROVI, with any profit left after paying expenses to be "distributed by agreement of the parties." The Commission concluded that this conduct violated ER 5.4.

Struthers apparently concedes that this amounted to fee splitting with nonlawyers, but argues:

> **797 *224 Respondent is of the opinion that had one additional step been in place, there would have been no perceived violation of this ER. Monies due Respondent were directly transferred to a MIROVI account from Respondent's trust account. Had Respondent transferred funds from his trust account to his operating account and then transferred funds from his operating account to the MIROVI account, all would have been in order.

Respondent's Opening Brief at 28. Struthers also points out that the monies transferred to MIROVI did not fully cover his office expenses.

Struthers' argument is both incorrect and irrelevant. It is incorrect because merely transferring all fees into an operating account before conveying them in bulk to a nonlawyer would not have prevented the arrangement from being a fee-splitting arrangement. For example, if the creditor had been a plumber instead of MIROVI, it would have been proper upon transferring fees from the trust account to an operating account to then pay the plumber's bill for specific services rendered. However, it would be improper for a lawyer to agree to simply transfer all of the lawyer's fees to the plumber and then split what remained after paying costs. *Peterson v. Anderson,* 155 Ariz. 108, 111, 745 P.2d 166, 169 (Ct.App.1987) (fee-splitting agreements with nonlawyers are contrary to public policy and unenforceable). This is what Struthers did with MIROVI.

Moreover, Struthers' argument is irrelevant. The contemplated steps were not taken in the present case, and the Commission was correct in finding that the agreement violated ER 5.4.

C. Client contacts and communications

Struthers and his staff engaged in numerous acts that violated ER 1.3, 1.4, and 1.16.

1. *ER 1.3 and 1.4*

[13] The Committee found that Struthers committed ten violations of ER 1.3, which requires a lawyer to "act with reasonable diligence and promptness in representing a client." Examples of Struthers' violations of ER 1.3 abound, including failure to promptly notify clients when he received funds on their behalf, to promptly pay clients, and to consult with a client regarding what demands to make in a petition for an arrearage judgment. He also delayed in responding to clients' inquiries, in giving clients access to their files on request, and in preparing and filing paperwork. His office failed in some cases to return telephone calls from clients, and sometimes gave false excuses for not paying clients. We believe the Commission correctly found that these and other acts violated ER 1.3. *In re Bowen,* 178 Ariz. 283, 872 P.2d 1235 (1994).

The Commission also found twenty-six instances in which Struthers violated ER 1.4, which requires an attorney to "keep a client reasonably informed about the status of a matter, and promptly comply with reasonable requests for information." The facts amply support these

findings. Struthers admits that some clients' requests for information were neglected. He states in his brief to this court that although he directed his staff to give the desired information, he accepts full responsibility for their failure to do so. He notes further that although such delays did occur, he did not delay the clients' court cases.

We accept Struthers' admission of responsibility for these violations. We note, however, that it is no excuse that he overburdened himself with so many cases that he was unable to properly supervise his employees.

2. ER 1.16

[14] The Commission found that Struthers violated ER 1.16(d) in one instance "when, after one client terminated his representation, he refused the client and her new attorney access to her file."

Ethical Rule 1.16(d) provides:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled.... The lawyer may retain papers relating to the client to the extent permitted by other law.

****798** ***225** Struthers takes contradictory positions regarding this charge. He admits in one section of his brief that he violated this rule but in another he argues:

> It is quite clear in the case law of Arizona that an attorney has lien rights in the file of a client in order to secure payment for fees. Under the fee agreement this client executed, there were fees due upon the termination of representation prior to the successful conclusion of the matter. Respondent attempted to negotiate these fees and costs due, but the client and her new counsel refused to address this issue.

Respondent's Opening Brief at 25. Whether an attorney can use a claim of lien rights to the client's detriment is a difficult subject. *See National Sales & Serv. Co. v. Superior Court,* 136 Ariz. 544, 547-48, 667 P.2d 738, 741-42 (1983) (Feldman, J., specially concurring). We need not, however, address the issue.

In the disputed instance, the agreement between Struthers and the client provided that the total contingency fee for successful completion of the matter would be $500, "which amount shall be due and payable to Attorney should client desire to cease representation by Attorney." The Commission found, however, that Struthers' assistant orally misrepresented the agreement's terms to the client. He told her the fee would be twenty-five percent of all monies received, plus costs and a $100 retainer.

Respondent collected a total of $513 for the client before she terminated the representation. None of this money was disbursed to the client, although some disbursements were made for costs.

Based on our previous discussion, we believe that the term purporting to set Struthers' fee was inherently improper and thus invalid. In addition, Struthers drafted the agreement in an ambiguous way, and it should have been construed against him. Moreover, Struthers' assistant made oral misrepresentations to the client, which would raise an estoppel issue. Under these circumstances, we believe that Struthers collected more than a fair fee and thus had no lien and no arguable right to retain the client's file. We therefore agree with the Commission that he violated ER 1.16.

D. Other matters concerning the State Bar investigation

The Commission found that Struthers committed other rule violations. We conclude that the Bar adequately proved its allegations and need not discuss them at length. We turn instead to Struthers' claims.

In addition to his arguments on the specific charges, Struthers faults the Bar in three respects regarding its conduct during this investigation. Two of his arguments are that the Committee violated Rule 53(c)(4) by taking seventy-eight days to file its report, rather than sixty days, and that the Bar violated Rule 61(a) by giving an interview to a newspaper on Struthers' case. We do not consider it necessary to address these contentions because, even if true, neither allegation explains or mitigates Struthers' conduct.

[15] The allegation that could have some bearing on this case is that Struthers requested the Bar's advice on two of the major issues during the investigation of this case. In October 1990, Struthers asked the Bar to render an ethics opinion regarding the propriety of his fee agreements and his financial dealings with MIROVI. Struthers argues that, had the Bar given him such an opinion, he could have corrected or mitigated his violations before discipline was imposed.

However, Struthers' request for information came only after he had used the agreements for some time and had already committed numerous violations. It also came only after several clients complained to the Bar. Moreover, although Bar counsel was without power to render a formal opinion, Struthers admitted under oath that Bar counsel informed him that the fee agreements might violate the Rules of Professional Conduct. Even so, Struthers continued to use the agreements. We therefore conclude that Struthers' argument is meritless.

E. Sanction

[16] Struthers argues that he should not be disbarred for the violations discussed above, although he admits that many of them did, in fact, occur. He contends that his rule violations were unintentional and that, because he has already been suspended for a ****799** ***226** long period of time, disbarment would serve no further purpose. He claims that if allowed to practice law again, he would be "in no position to bring any harm to the public."

[17] We disagree. Professional discipline protects the public, the legal profession, and the justice system and deters other lawyers from engaging in like conduct. *In re Neville,* 147 Ariz. 106, 116, 708 P.2d 1297, 1307 (1985); *Swartz,* 141 Ariz. at 277, 686 P.2d at 1247. We believe that a lawyer who flagrantly disregards the Rules of Professional Conduct, as Struthers did, is a continuing and significant danger to the public.

In determining what sanction is appropriate in a professional discipline case, this court generally looks to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1991) ("*Standards* "); *In re Tarletz,* 163 Ariz. 548, 554, 789 P.2d 1049, 1055 (1990). Also, we often consult similar cases in an attempt to assess proportionality. *In re Levine,* 174 Ariz. 146, 174-75, 847 P.2d 1093, 1121-22 (1993).

In most cases, consideration of the *Standards* and the sanctions imposed in similar cases is necessary to preserve some degree of proportionality, ensure that the sanction fits the offense, and avoid discipline by whim or caprice. *Standards,* § 3.0. This case, however, is somewhat different. We deal here with a lawyer who, by premeditated scheme, has demonstrated that his practice is not designed to serve the public but, rather, to prey on those most in need of his help. He has demonstrated that he is indeed a danger to the public. To allow him to resume active practice would be to ignore our obligation to that public.

CONCLUSION

Accordingly, Andrew Leeroy Struthers is disbarred, effective on the date this opinion is filed. In addition, he is assessed the costs incurred by the State Bar of Arizona in the sum of $17,215.51.

MOELLER, V.C.J., and CORCORAN, ZLAKET and MARTONE, JJ., concur.

All Citations

179 Ariz. 216, 877 P.2d 789

Footnotes

1 The Banking Department subsequently issued two Cease and Desist Orders. One directed John Star to cease acting as a collection agent until he obtained a license. The other ordered Hydrick to comply with certain trust account obligations.

2 These agreements could be interpreted differently. Moreover, other agreements were phrased in other ways. Following long-established principle, we evaluate Struthers' conduct using the interpretation he willingly adopted in dealing with his clients and this court. *See Matthew* 26:52 (King James).

3 While the provision as discussed above violated ER 1.5, Struthers' agreements went farther, potentially allowing Struthers to collect both the contingency fee and any court-awarded attorney's fee *from his client* if the client discharged Struthers.

4 We note that ER 1.5(d), in relevant part, states: "A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon ... the amount of ... support...." However, the Bar, the Committee, and the Commission apparently believe that ER 1.5(d) does not apply to lawyers pursuing support arrearages, either because attorneys should have an incentive to help those not receiving support (*see* Tamar Lewin, *Child-support Bounty Hunters a Sign of 'Broken System'*, ARIZONA DAILY STAR, May 30, 1994, at A1) or because collection of past due support is not a "domestic relations matter." *See* State Bar of Arizona Ethics Opinion No. 93-04 (March 27, 1993).

End of Document

SESSION THREE

Common Bankruptcy Pitfalls

Kyle A. Lindsey

Johnson Legal Group, LLC

Helping Your Creditor's Claim Survive Their Debtor's Bankruptcy

- Kyle A. Lindsey
- Johnson Legal Group, LLC

Modifying the Automatic Stay

- Why Modify the Automatic Stay?
  - Upon filing a bankruptcy, the debtor receives the benefit of a stay of all collection actions against him or her.
  - Any efforts by a creditor to continue to collect on their debt is a violation of the automatic stay, and the debtor can go after the creditor for violations of the stay.
  - In stay violation proceedings, attorney's fees are often shifted from the debtor when the creditor is found to have violated the stay.

First Ask if There is a Stay

- Look at any past Bankruptcy filings of the debtor.
  - If a debtor has not previously had a bankruptcy dismissed within the one-year period prior to the current bankruptcy filing, then at the instant the bankruptcy case is filed, the automatic stay goes into effect. 11 U.S.C. §362(a).
  - On a second or greater filing within the one-year period before the present Bankruptcy, it becomes more complicated. The automatic stay in a second case within one year expires 30 days after the filing of the second case. 11 U.S.C. §362(c)(3)(A).

- The automatic stay does not go into effect if two or more cases were pending within the one-year prior to the current filing. 11U.S.C.§362(c)(4)(A)(i).

- In both of these instances, the debtor may be able to get the stay imposed, but must file a motion seeking such relief within 30 days of the current filing and make an affirmative showing of good faith as to the creditors in the new bankruptcy. 11 U.S.C. §362(c)(4)(b).

- Remember that the stay only operates with respect to property of the estate, and does not protect property of the debtor. You may still need to file a motion to modify the stay as a comfort order if you are proceeding in another court.

Procedure to Modify the Automatic Stay

- Relief is obtained by motion Federal Rule of Bankruptcy Procedure 4001(a)(1).
  - The Northern District of Illinois, requires a coversheet when the motion is filed.
  - You must serve all parties and the DEBTOR personally even when represented by counsel.
    - You still serve their attorney. Fed.R.Bankr.P. 9014.

Timeline of the Motion

- The bankruptcy court must hold a hearing as to the motion within 30 days of the filing of its filing if the debtor is an individual and a debtor under Chapter 7, 11 or 13. 11 U.S.C. §362(e)(1).
- Additionally, the court must render a final decision on that motion within 60 days of it's being filed. 11 U.S.C. §362(e)(2).
- However, the court can extend the time for hearing and ruling beyond the deadlines above as long as it determines there is good cause. 11 U.S.C. §362(e)(2)(B)(ii).
- A creditor can waive its right to have the hearing within 30 days, and may specifically waive its right to a decision within the 60 days. 11 U.S.C. §362(e)(2)(B)(i).
  - If there is need for an evidentiary hearing, there may be no way to avoid receiving a decision beyond 60 days.

- There is an automatic 14-day waiting period once an order granting relief from the stay has been entered before the creditor may act on the order unless the waiting period is waived by the bankruptcy court. Fed.R.Bankr.P. 4001(a)(3).
- Some judges regularly waive the automatic 14-day stay if the creditor requests that in the motion, and there has been no objection. Some judges, however, require a showing of cause why the 14-day stay should not be imposed.
  - A common 'cause,' is that the creditor will suffer irreparable harm if the 14-day stay is not waived.

Grounds for Relief

- Showing Cause
- Lack of Adequate Protection
- Lack of Equity and Property Not Necessary for an Effective Reorganization

Showing Cause

- You have to demonstrate cause to get relief from the automatic stay. 11 U.S.C. §362(d)(1).
- Cause is demonstrated by balancing the costs and benefits of continuing the automatic stay. *In re Udell*, 18 F.3d 403, 410 (7th Cir. 1994)
  - The prejudice to the debtor or the bankruptcy estate from allowing the non-bankruptcy litigation to continue,
  - the relative hardship to the debtor and to the creditor seeking relief, and
  - the creditor's probability of prevailing on the merits.

Lack of Adequate Protection

- Adequate protection means that the value of the creditor's interest in the collateral must be protected from diminution while the property is being used or retained in the bankruptcy case.
- Usually, a lack of adequate protection arises when the debtor fails to make continuing payments necessary to maintain the property.
  - For instance, if the subject is a car that a debtor wishes to keep while in a chapter 13 plan, the debtor must maintain car insurance so that the risk of loss by the creditor is eliminated.

- It is important to note that excess equity can constitute adequate protection. It is not always necessary that a payment be made representing adequate protection. *Northern Trust Co. v. Leavell (In re Leavell)*, 56 B.R. 11, 14 (Bankr. S.D.Ill. 1985).
- A list of what may constitute adequate protection can be found in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 98 L.Ed.2d 740, 108 S.Ct. 626 (1988).

Property Not Necessary for an Effective Reorganization and Lack of Equity

- It is not enough to show only one of these two elements. Without both, cause does not exist to grant the relief. 11 U.S.C. §362(d)(2).
- If the motion is contested, most likely an evidentiary hearing is necessary.
  - Creditor must prove the value of its lien, and
  - Must present an appraised value for the property.
  - Will require expert testimony.
  - Debtor has burden of proof on all other issues.

Not Necessary for an Effective Reorganization

- If the debtor has filed a Chapter 7 case, no reorganization is occurring.
  - A creditor only has to allege this element in its motion in order to succeed on it as a matter of law. *See In re McGaughey,* 24 F.3d 904 (7th Cir. 1994).

- In a Chapter 13 case, a creditor can make the argument that a particular piece of property is not necessary for an effective reorganization because it can be replaced with another piece of a similar type.
  - This often arises when the debtor wishes to make payments in the plan on an expensive vehicle.
  - The creditor's argument here is that any vehicle would serve the same function, and that a more affordable one would be appropriate.
  - However, this is a tough argument to win because the debtor most likely needs a vehicle to go to and from work so that he or she is able to fund the plan.
  - The court may conclude that while it is not ideal, it is not so easy to replace a vehicle with a lower expense version.

Annulling the Stay

- Necessary when a creditor has taken actions after the bankruptcy petition was filed, but was unaware of the filing.

- Normally arises because the debtor failed to schedule the creditor.

- For Example, a renter files bankruptcy but fails to include his landlord though he is two months behind on rent pre-petition. Post-petition, the debtor continues to fail to make payments of his rent to the landlord. Not long after the bankruptcy is filed, the landlord files an eviction action seeking not only possession of the property, but also a judgment for the unpaid rent. The landlord serves the lawsuit, and, for the first time, is made aware of the bankruptcy.

- In this instance, because the landlord took an action against the debtor after the bankruptcy was filed without prior permission of the court, it would need the stay annulled so that those actions are not invalid.

- If the stay is annulled, the landlord can continue his action for eviction, and doesn't have to start over with the lawsuit.

- However, any efforts to pursue a judgment will likely be restricted in the order annulling the stay.

Objection to Confirmation

- A creditor may object to the confirmation of a plan proposed by a debtor. 11 U.S.C. §1324(a).
  - The objection must be filed before the hearing date set for confirmation.

Grounds to Object

- Found in 11 U.S.C. §1325.
  - Plan was not proposed in good faith.
  - The creditors would receive more in a chapter 7 liquidation.
  - The debt owed to the creditor has not been handled properly in the plan.
  - The plan proposes unequal monthly payments on a secured debt.
  - The debt is secured by personal property, and the payments are not enough to provide adequate protection to the creditor during the plan.
    - Does not apply to vehicles secured by PMSI that is older than 910 days. It can be “crammed down.”

Grounds to Object

- Found in 11 U.S.C. §1325.
  - Debtor does not have consistent employment/income from which to pay the plan payments.
  - Debtor did not file the bankruptcy petition in good faith
  - The debtor is not current on domestic support obligations.
  - Debtor has not filed at least one tax return during the prior four years.

Plan Can be Confirmed Despite Objection

- The court can confirm a plan even when there has been an objection when:
  - The objection is by an unsecured creditor.
  - The plan proposes to pay the claim of the objecting party in full according to the claim it filed, or
  - All of the debtor's projected disposable income is committed to the plan.

Common Reasons for Objection to Confirmation

- Objection is almost always necessary when the debtor has schedule a secure debt as unsecure, and proposes to treat the debt as unsecured in the plan.
- Arises normally when the creditor has obtained a lien of some type against the debtor's homestead.
- If the debtor has even a single dollar of equity, then the debt is secured and needs to be accounted for in the plan as secure.
- If the creditor doesn't object, then it will be paid a pro rata share like an unsecured creditor and the remainder will be discharged.
- Once confirmed, the plan controls.

Results of Objection to Confirmation

- The debtor will often see that they have made an error, and amend their plan.
- If they fail to correct the error, the court will not confirm the plan and the trustee will not recommend confirmation in some instances.
- If the plan sits too long, the trustee may move to dismiss the case because the debtor has not proposed a feasible plan.

Objection to Discharge and Non-dischargeability Adversary

- What's the difference?
  - Objection to discharge prevents the discharge of all debts that the debtor owes.
    - It is normally based upon some misdeed committed either in filing the bankruptcy or during the bankruptcy.
  - A non-dischargeability adversary seeks a determination by the court that solely the complaining creditor's debt will not be discharged.
    - Based on how the debt came to be, and usually deals with misdeeds in obtaining the obligation.

Objection to Discharge

- Found in 11 U.S.C. § 727(c)
  - The trustee, a creditor, or the US trustee can object to the discharge of the debtor
  - Creditors may also petition the court to have the trustee examine whether grounds exist to deny the discharge.
- Must be filed by adversary. FRBP 7001(4).
  - Objections based on §§ 727(a)(8), (9), and 1328(f) are brought by motion.

Risks of Objection to Discharge

- Objection to discharge is an extreme remedy.
- The trustee cannot be compelled to file an action to object to the debtor's discharge.
- If a creditor files, the court may not allow a settlement of the matter.
  - If settlement is allowed, it must be for the benefit of all creditors.
    - In other words, the creditor does all the work, and takes on all of the expense of the action, and all of the other creditors will share in the settlement proceeds.

Adversary to Determine Non-dischargeabiltiy

- Actions to determine dischargeability must be brought by adversary. FRBP 7001(6).
- Very few debts are automatically non-dischargeable.
  - Student loans are automatically non-dischargeable.

Non-dischargeable Debts

- Found in 11 U.S.C. § 523(a) and § 1328(a)(2).
  - Be careful. Although § 1328(a)(2) incorporates § 523(a) in large part, it does not do so completely.
    - For instance, a debt arising from a willful and malicious injury by the debtor is non-dischargeable under chapter 7, but can be discharged in a chapter 13.
    - An obligation arising from a marital property division is dischargeable in chapter 13 but not in chapter 7.

Typical Bases for Non-dischargeability Adversaries

- Debt was obtained under false pretenses.
- Arose due to fraud or defalcation while in a fiduciary capacity.
- Due to willful and malicious injury by the debtor.
- Death or personal injury due to unlawful use of a vehicle related to DUI.

Deadlines to File Objections to Discharge

- Per FRBP 4004, objections to discharge based on § 727(a)(8) and (9) must be brought prior to 60 days from the date first set for the § 341 Meeting of Creditors.
  - This deadline may be extended on motion for cause, but the motion must be brought before the time expires.
    - However, you can bring a motion to extend the deadline if the facts giving rise to the objection were not learned of until after the discharge entered, and those facts would have provided a basis to object to the discharge.

Deadlines to File Adversaries for Non-dischargeability

- Per FRBP 4007, adversaries to determine dischargeability based on § 523(a)(2), (4), or (6) must be brought prior to 60 days from the date first set for the § 341 Meeting of Creditors.
  - This deadline may be extended on motion for cause, but the motion must be brought before the time expires.
    - Ongoing investigation as to the claim can be cause to extend the deadline.
- All other adversaries regarding non-dischargeability may be brought at any time.

SESSION FOUR

Fraudulent Conveyances – Everything You Need to Know

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FEBRUARY 17, 2020

Fraudulent Conveyances - Everything You Need to Know

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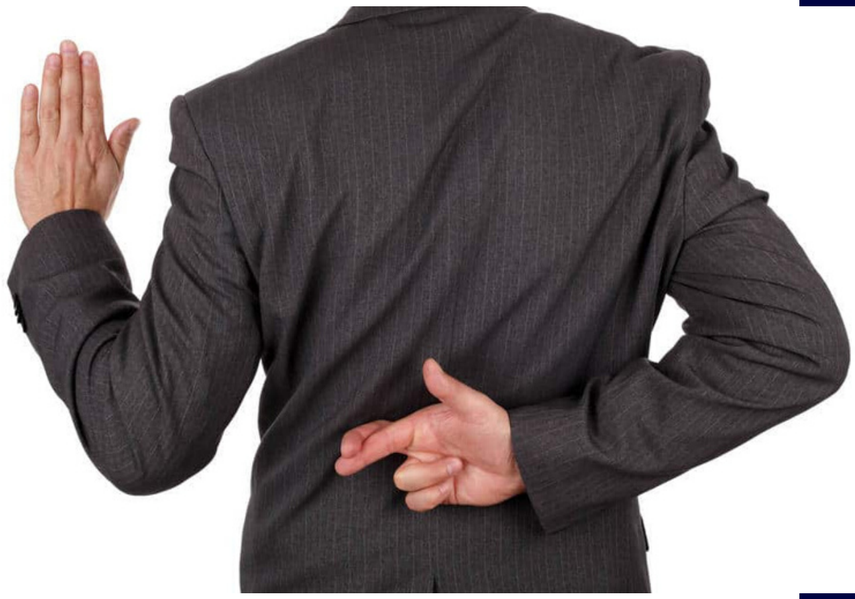
Presentation Outline

TOPICS

Fraud in Fact
Preferential Transfer to Insider
Fraud in Law
Remedies
Procedure of Prosecuting Fraudulent Conveyance Cases
Statute of Limitations
Application in Bankruptcy Cases
735 ILCS 5/2-1402 (c)
Questions



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Fraud in Fact

Intent and Badges of Fraud

Defenses

Good Faith

Reasonably Equivalent Value

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Preferential Transfer to Insider

Fraud In Law

SOLVENCY ISSUES

Balance Sheet Approach
Inability to Pay Debts Approach

CONSIDERATION

DEFENSES-SECTION 9(E)

REMEDIES
Value of Property at Time of Transfer

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Procedure of Prosecuting Fraudulent Conveyance Cases

Statute of Limitations

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Application in Bankruptcy Cases

POWERS OF TRUSTEE

SECTION 544 AND 548

DISCHARGEABILITY

INSIDER DEFINITION

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735 ILCS 5/2-1402(c): Post-Judgment Fraudulent Conveyance Action

Questions?

Ability to Assert a Post-Judgment Fraudulent-Conveyance Claim WITHOUT the Need to File a Separate or New Action

735 ILCS 5/2-1402(c):

- ***Provides authority for a Creditor to enforce an action to recover Fraudulently Conveyed property from a Third-Party without the need to file a separate cause of action when:***
  - Assets are held under ***circumstances where an action filed by Judgment Debtor would allow for recovery of assets*** *in specie* ***or entry of a Judgment for proceeds or value for conversion or embezzlement*** (*see* 5/2-1402(c)(3)); or,
  - Where the Court has been provided ***satisfactory proof that a Third-Party is indebted to a Judgment Debtor***, the Court is then empowered to ***authorize a Judgment Creditor to maintain an action against any such Third-Party for the recovery of the debt*** (*see* 5/2-1402(c)(6)).

NATURE OF THE ACTION

- Plaintiff sought to enforce a Judgment obtained against Defendant General Contractor, a since-dissolved Illinois business entity (“Entity”).
- Through post-judgment proceedings, Lower Collection Court entered and confirmed Conditional Judgments against individual Third-Party Citation Respondents CAIN and ABLE, both of whom are Principals of Entity, for failure to comply with the requirements of 735 ILCS 5/2-1402.

735 ILCS 5/2-1402 §§ (c)(3) and (c)(6):
When "assets or income of the judgment debtor not exempt from the satisfaction of a judgment, a deduction order or garnishment are discovered, <u>the court may,</u> by appropriate order or judgment:

(3) Compel any person cited, other than the judgment debtor, to deliver up any assets so discovered, to be applied in satisfaction of the judgment, in whole or in part, ***when those assets are held under such circumstances that in an action by the judgment debtor he or she could recover them in specie or obtain a judgment for the proceeds or value thereof as for conversion or embezzlement***. A judgment creditor may recover a corporate judgment debtor's property on behalf of the judgment debtor for use of the judgment creditor by filing an appropriate petition within the citation proceedings.

735 ILCS 5/2-1402 §§ (c)(3) and (c)(6):
When "assets or income of the judgment debtor not exempt from the satisfaction of a judgment, a deduction order or garnishment are discovered, <u>the court may</u>, by appropriate order or judgment:

(6) ***Authorize the judgment creditor to maintain an action against any person or corporation that, <u>it appears upon proof satisfactory to the court</u>, is indebted to the judgment debtor, for the recovery of the debt***, forbid the transfer or other disposition of the debt until an action can be commenced and prosecuted to judgment, direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of the action be delivered to the creditor or impounded in court, and provide for the disposition of any moneys in excess of the sum required to pay the judgment creditor's judgment and costs allowed by the court."

735 ILCS 5/2-1402(k-3) provides:

- ***A Court may enter any order upon or judgment against the respondent cited that could be entered in any garnishment proceeding under Part 7 of Article XII of this Code [735 ILCS 12/700, et seq].***

- ***This subsection (k-3) shall be construed as being declarative of existing law and not as a new enactment.***

BACKGROUND FACTS

- Judgment entered against ENTITY
- Post-Judgment proceedings issued against ENTITY and Third-Parties CAIN and ABLE, Principals of ENTITY
- Court considered CAIN and ABLE to be insiders and principals of ENTITY

Facts obtained during Citation Examination of ABLE

- ***ABLE served as project manager for ENTITY;***
- ***All Funds received were deposited into single bank account;***
- ***ENTITY received four (4) checks from Plaintiff;***
- ***ENTITY did not maintain separate bank accounts for individual projects;***
- ***ABLE had access and the ability to write checks;***
- ***ABLE executed "inconsistent" Sworn Contractor Statements***
- ***Final Sworn Statement transferred "credit" for work performed by and paid-to ENTITY to various other contractors;***
- ***Conduct of ABLE divest ENTITY of its own assets to the detriment of Plaintiff;***
- ***All actions of ABLE were authorized and approved by CAIN, President of ENTITY.***

Post–Examination Issues

After the Examinations of ABLE, Plaintiff:

- Sought Examination of CAIN
- Demanded production of an Accounting of all funds received and paid-out by ENTITY
- Counsel for ENTITY and CAIN objected, claiming:
  - ✓ ***ABLE is the person with the most knowledge regarding ENTITY Operations***
  - ✓ ***Request for an accounting is not proper in post-judgment proceeding***

Post–Examination Issues

- Motion for Conditional Judgment filed against CAIN and ABLE pursuant to 735 ILCS 5/2-1402
- Post-Judgment Court Granted Motion and entered Conditional Judgments v. CAIN and ABLE
- CJs became Final Judgments v. CAIN and ABLE when they failed to Provide an Accounting
- Motion to Reconsider Denied – ***Final Judgments Stood***
- Appeal Filed by CAIN and ABLE

Appellate Opinion

Plaintiff is not entitled to a Judgment against Third-Party Respondents who have answered the Citations, ***despite the fact that such answers were incomplete*.**

***Plaintiff's recourse is via contempt proceedings to address dissatisfaction with Respondents' attempts at compliance*.**

TAKE-AWAYS #1

- ✓ This is NOT a Rule 23 Opinion
- ✓ Opinion provides a guideline for the process of addressing the conduct of recalcitrant Defendants and Respondents as related to the Citation Process.
- ✓ When similar issued arise, make sure **ALL ORDERS** are as **specific** and as **detailed as possible.**

TAKE YOUR TIME

WHEN DRAFTING ORDERS

TAKE-AWAYS #2

IDENTIFY THE FOLLOWING:

- ✓ ***Date of Service of Citation;***
- ✓ ***Respondent's failure to appear or respond on or before the return date;***
- ✓ ***Continuance Date;***
- ✓ ***If Respondent fails to respond prior to or appear on the Continued Return Date, that a Conditional Judgment may enter against the Respondent; and,***
- ✓ ***A copy of the Order shall be provided to the Respondent as required by local or State Rules, along with the Rule to show Cause.***

ANY QUESTIONS OR COMMENTS?

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FIRST DISTRICT
SIXTH DIVISION
January 24, 2020

No. 1-19-0476

MICHELLE HAYWARD and JEREMY ANDERSON,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Citation Petitioners-Appellees,	)	
v.	)	
ESTHER SCORTE, Individually; TEOFIL SCORTE, Individually; and 2XFORM, Inc.,	)	No. 17 L 4543
Defendants,	)	
(Esther Scorte and Teofil Scorte,	)	Honorable Alexander P. White and Michael F. Otto,
Citation Respondents-Appellants.)	)	Judges Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Justices Cunningham and Connors concurred in the judgment and opinion.

OPINION

¶ 1 Citation respondents, Esther and Teofil Scorte, appeal from the circuit court's order entered pursuant to third-party citations to discover assets, filed by plaintiffs, Michelle Hayward and Jeremy Anderson. On appeal, respondents contend that the trial court erred by (1) entering a conditional judgment against them where respondents appeared and answered the citations and (2) entering judgment against them in a citation proceeding where there was no evidence that respondents held assets of defendant corporation 2XForm, Inc. (2XForm) or that they transferred any assets after the citations issued. For the following reasons, we reverse and remand for further proceedings.

¶ 2 I. JURISDICTION

¶ 3 The trial court entered its judgment against respondents on August 23, 2018. Respondents filed a motion to reconsider, which the court denied on February 7, 2019. They filed their notice of appeal on March 7, 2019. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) and Rule 303 (eff. July 1, 2017), governing appeals from final judgments entered below.

¶ 4 II. BACKGROUND

¶ 5 Plaintiffs hired 2XForm to be their contractor on a home remodeling project. Esther Scorte was the president of 2XForm and her husband Teofil served as the project manager. During the project, a dispute arose and both parties filed a demand for arbitration before the American Arbitration Association Construction Industry Arbitration Tribunal. The arbitrator found that 2XForm "substantially breached" its contract with plaintiffs, and awarded damages in the amount of $444,844.04, plus judgment interest and court costs. The award was converted to a judgment on October 26, 2016.

¶ 6 On November 23, 2016, plaintiffs served citations to discover assets upon 2XForm as the judgment debtor and citations to discover assets to a third party upon Esther and Teofil, each individually. The third-party citations commanded that respondents produce the documents listed on the citation rider and appear in court. The citations stated that respondents' answers "will inform the Court as to property you may hold belonging to 2X FORM, INC." When 2XForm filed for bankruptcy on November 23, 2016, plaintiffs' citation proceeding was stayed. Their proceeding was reinstated on June 12, 2017, after the bankruptcy case closed.

¶ 7 On September 20, 2017, respondents filed answers to the citations. Esther's answer objected to requests for her, as an individual, to provide information or documentation she maintained in her capacity as director and officer of 2XForm, where 2XForm received an identical citation to discover assets and would comply with that citation in due course. Esther further answered that information sought from persons "other than the Judgment Debtor *** falls outside the scope of permitted discovery, as it is overly broad and not likely to lead to discoverable assets and/or information leading to assets of the Judgment Debtor." Teofil answered similarly, and he also stated that he had none of the information sought by the citation.

¶ 8 In response to the citation, 2XForm produced documents and presented Teofil for examination as its designated agent with the most knowledge of the issues, facts, and circumstances regarding the matter. Teofil was also examined pursuant to the citation served upon him personally. Teofil stated that he was one of the project managers and that money received by 2XForm from any project was deposited into 2XForm's PNC bank account. The company did not maintain separate accounts for each of its projects. Teofil had access and the ability to write checks on the PNC account. During plaintiffs' project, Teofil stored materials, including concrete tread stairs and light fixtures, off-site at a location maintained by Halo Construction. After 2XForm was locked out of plaintiffs' project, Teofil allowed the materials to be discarded regardless of whether plaintiffs had paid for them. 2XForm received payment for services performed and, after being locked out of plaintiffs' project, transferred or assigned "credit" for such work to various other contractors. Teofil was paid for work performed for 2XForm but did not recall how much he received as a salary, nor was there a predetermined amount.

¶ 9 After Teofil's examination, Plaintiffs' counsel received additional documents, including copies of checks issued by 2XForm, 2XForm's checking account ledger, W-2 statements issued for 2014, and invoices for work performed by 2XForm. Plaintiffs' counsel requested examination of Esther, both as an individual and as an officer of 2XForm. 2XForm refused to present Esther, stating that Teofil is the one with the most knowledge of the matter.

¶ 10 Plaintiffs filed their motion for conditional judgment against Esther and Teofil, individually, on March 29, 2018. The motion further requested that Esther and Teofil "show cause why such Conditional Judgment should not be converted to a Final Judgment against each of them, jointly, severally and individually, as a result of their wrongful conduct in converting or mismanaging both the operation and assets of 2XFORM to benefit themselves or others." In support, the motion alleged that plaintiffs obtained a judgment against 2XForm for $444,844.04. It further alleged that 2XForm submitted a false sworn contractor's statement that it had made a payment of $32,655.01 to Graybill, one of the suppliers for windows, which was never sent to Graybill.

¶ 11 The motion also alleged that 2XForm submitted inconsistent and improper sworn contractor statements. Specifically, sworn statement #1 indicated that 2XForm was the only contractor on site who completed work, including demolition, as of March 10, 2014. However, sworn statement #2, dated May 12, 2014, indicated that other contractors actually performed the work and the percentage of work performed by 2XForm between March 10, 2014, and May 12, 2014, was reduced. Sworn statement #5, dated September 4, 2014, indicated that 2XForm transferred or assigned "credit" for work it performed on plaintiffs' project to other contractors.

Plaintiffs alleged that as a result, 2XForm, through respondents, "improperly and fraudulently divested itself of its own assets to the detriment of" plaintiffs.

¶ 12 After plaintiffs filed their motion for conditional judgment, counsel for respondents offered to make Esther available for examination but plaintiffs' counsel did not take her examination at that time.

¶ 13 Respondents filed a response opposing the motion, arguing that plaintiffs failed to allege "that Mr. and Mrs. Scorte were in possession of property belonging to [2XForm] or wrongfully conveyed said property to third parties, after they were served with citations to discover assets." They argued, among other things, that "[n]o authority exists under Section 5/2-1402 [(735 ILCS 5/2-1402 (West 2016))] for the imposition of a personal conditional judgment against a third-party respondent who has never controlled or possessed any property of a judgment debtor after being served with a citation." Furthermore, they argued that plaintiffs are required to file a separate petition to recover a corporate judgment debtor's property from other parties, on behalf of the judgment debtor, for use by plaintiffs. See 735 ILCS 5/2-1402(c)(3) (West 2016).

¶ 14 The trial court found that entry of a conditional judgment was proper because "Esther refused to sit for her citation examination and Teofil provided false Sworn Contractor Statements and further failed to provide an accounting of how Plaintiffs' funds were spent." The fact that Esther failed to sit for her examination "provides the Court with sufficient grounds to enter a Conditional Judgment against Esther." The court found sufficient grounds to enter a conditional judgment against Teofil "for his failure to fully and completely respond to the Citations." The court reasoned that plaintiffs have the right in citation proceedings to ask questions of third parties in order to discover assets of the judgment debtor, and "[i]t is not enough for the Respondents to

say they do not have assets." The court concluded that "[t]he only way Plaintiff[s] will be provided enough information to request turnover from Teofil and Esther here, pursuant to Section 2-1402(c)(3) is if they comply with their third party citations and Esther sit for a personal examination."

¶ 15 The court also found that plaintiffs have shown that "both Respondents are indebted to Plaintiffs" by converting funds that belonged to plaintiffs and by having 2XForm divest itself of its own assets by transferring credit for work it performed "to various other contractors." The court determined that plaintiffs "have presented a *prima facie* case that they are entitled to a Judgment for all proceeds *** as a result of the conversion or embezzlement of Respondents, both of whom are admitted-to-be agents of" 2XForm. The trial court found it had the authority to enter the judgments under sections 2-1402(c)(3) and (6). Plaintiffs issued and served a summons after conditional judgment against both Esther and Teofil. On August 23, 2018, after they failed to appear in court, the trial court entered separate final judgments against Esther and Teofil for the full underlying judgment amount of $537,095.33 plus costs.

¶ 16 Respondents filed a motion to reconsider the final judgments.[1] The trial court denied the motion to reconsider, finding that although respondents appeared and answered the citations, "appear and answer means fully answer. And here the point of the conditional judgment was to put citation respondents on notice that the court did not believe that they had fully answered." The court found that section 2-1402(k)(3) provided a basis for the judgments against Esther and Teofil as individuals.

[1]Although Judge White issued the conditional and final judgment orders, Judge Otto heard and decided the motion to reconsider because Judge White retired.

¶ 17 III. ANALYSIS

¶ 18 The trial court entered judgment against respondents because they (1) did not fully answer the citations and (2) converted assets that belonged to plaintiff and transferred credit for work 2XForm performed to other contractors. The issue here is whether section 2-1402 authorized the trial court to enter the conditional judgment below. This issue involves a question of statutory interpretation that we review *de novo*. *National Life Real Estate Holdings, LLC v. Scarlato*, 2017 IL App (1st) 161943, ¶ 19.

¶ 19 Plaintiffs obtained a $444,844.04 judgment against 2XForm in the underlying action. As judgment creditors, plaintiffs chose to enforce their judgment through supplementary proceedings pursuant to section 2-1402 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1402 (West 2016)). The legislature enacted section 2-1402 to provide an efficient and expeditious process for the discovery of a judgment debtor's income and assets and to compel application of those assets to the payment of the judgment. *Bank of Aspen v. Fox Cartage, Inc.*, 126 Ill. 2d 307, 314 (1989).[2] These proceedings also allow plaintiffs to find any assets of the judgment debtor being held by third parties and apply those assets to satisfy the judgment. *R&J Construction Supply Co. v. Adamusik*, 2017 IL App (1st) 160778, ¶ 7. To initiate supplementary proceedings against third parties, they are served with a citation to discover assets. 735 ILCS 5/2-1402(a) (West 2016).

¶ 20 Our primary objective in construing a statute is to ascertain and give effect to legislative intent. The best indicator of that intent is the plain and ordinary meaning of the statutory language. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 25. Section 2-1402 does not explicitly authorize

[2]The supreme court in *Bank of Aspen* looked at section 2-1402(d)(1) of a prior version of the statute, which is now section 2-1402(f)(1).

the trial court to enter conditional judgments against third party citation respondents. Plaintiffs contend, however, that the trial court had the authority to enter conditional judgments against respondents pursuant to section 2-1402(k-3), where Esther failed to submit to an examination and Teofil did not fully answer the citations. Subsection (k-3) provides that a court "may enter any order upon or judgment against the respondent cited that could be entered in any garnishment proceeding under Part 7 of Article XII of this Code." 735 ILCS 5/2-1402(k-3) (West 2016).

¶ 21 In a garnishment proceeding, "[w]hen any person summoned as garnishee fails to appear and answer as required by Part 7 of Article XII of this Act, the court may enter a conditional judgment against the garnishee for the amount due upon the judgment against the judgment debtor." *Id.* § 12-706(a). This nonfinal conditional judgment may be confirmed later if the garnishee fails to answer and appear after served with a summons containing notification of the default. *Id.* However, "[i]f the garnishee appears and answers, the same proceedings may be had as in other cases." *Id.* Thus, if the garnishee appears and answers after being served with the summons, he or she is not barred by the prior default and is entitled to further proceedings. *Scalise v. Zarate*, 303 Ill. App. 3d 718, 724 (1999). " '[T]he single purpose served by the conditional judgment is the protection of a garnishee from the consequences of one oversight.' " *Id.* (quoting *Coleman Financial Corp. v. Schuddekopf*, 89 Ill. App. 2d 150, 153 (1967)). When the garnishee does appear and answer, there is no oversight. *Id.*

¶ 22 We are mindful that the garnishment statute is distinct from section 2-1402, and the remedies available in one statute cannot be invoked in proceedings under the other without following "the necessary steps set out by the statute." *National Home, Inc. v. American National Bank & Trust Co. of Chicago*, 16 Ill. App. 2d 111, 116 (1958). Furthermore, although section 2-

1402(k-3) authorizes the trial court to enter any order or judgment that could be entered in any garnishment proceeding under Part 7 of Article XII of the Code, the subsection does not grant the trial court broader powers than it would have in a garnishment proceeding. Subsection (k-3) explicitly states that it "shall be construed as being declarative of existing law and not as a new enactment." 735 ILCS 5/2-1402(k-3) (West 2016). It follows that if the trial court did not have the authority to enter a conditional judgment against respondents under the garnishment statute, it could not do so pursuant to 2-1402(k-3).

¶ 23 Here, the trial court acknowledged that respondents filed an appearance and answered the citations. Thus, there was no oversight on the part of respondents, and they were not in default pursuant to section 12-706(a) of the Code. Although the trial court found that respondents failed to give full and complete answers to the citations, section 12-706(a) states only that the court may enter a conditional judgment against a garnishee who "fails to appear and answer" the summons. *Id.* § 12-706(a). Courts will enforce clear, unambiguous statutory language as written and will not read into its exceptions, conditions, or limitations not expressed by the legislature. *Ryan v. Board of Trustees of the General Assembly Retirement System,* 236 Ill. 2d 315, 319 (2010).

¶ 24 Furthermore, another section of the statute addresses this precise situation. Section 12-711(a) provides that "[t]he judgment creditor or judgment debtor may contest the truth or sufficiency of the garnishee's answer and the court shall immediately, unless for good cause the hearing is postponed, proceed to try the issues." 735 ILCS 5/12-711(a) (West 2016). Courts view all provisions of a statute as a whole; when two or more provisions relate to the same subject, they "are presumed operative and harmonious and should be construed with reference to each other to give effect to all the provisions if possible." *People v. Chapman*, 2012 IL 111896, ¶ 27. Read

together, in a garnishment proceeding, the court may enter a conditional judgment if a garnishee fails to appear and answer the summons. If the garnishee does appear and answer, but the judgment creditor or debtor contests the truth or sufficiency of the answer, the trial court "shall immediately *** proceed to try the issues."

¶ 25 The trial court below entered conditional judgments against respondents pursuant to subsection (k-3) because it found that although respondents appeared and answered, they did not fully answer the citations. The unambiguous language of the garnishment statute, however, does not authorize the trial court to enter a conditional judgment where a party appears and answers, but his answer is insufficient or incomplete. Since there is no allowance for a conditional judgment under these circumstances in the garnishment statute, the trial court had no authority to enter the judgment pursuant to section 2-1402(k-3).

¶ 26 The trial court also found that it had the authority to enter judgment against respondents under sections 2-1402(c)(3) and (6). When assets of the judgment debtor are discovered, the court may compel a third party

> "to deliver up any assets so discovered, to be applied in satisfaction of the judgment, in whole or in part, when those assets are held under such circumstances that in an action by the judgment debtor he or she could recover them in specie or obtain a judgment for the proceeds or value thereof as for conversion or embezzlement." 735 ILCS 5/2-1402(c)(3) (West 2016).

Section 2-1402(c)(6) authorizes the judgment creditor to maintain an action against a third party, if there is evidence that the party is indebted to the judgment debtor, for recovery of that debt. *Id.* § 2-1402(c)(6). Although these actions are authorized against third parties, the focus in a citation

proceeding is on the discovery of the judgment debtor's assets and compelling third parties indebted to the judgment debtor to deliver those assets. *Business Service Bureau, Inc. v. Martin*, 306 Ill. App. 3d 907, 910-11 (1999).

¶ 27 Accordingly, these provisions concern certain identifiable assets of the judgment debtor held by third parties. Subsection (c)(3) applies to converted or embezzled assets, or "the proceeds or value thereof," which the judgment debtor may recover from the third party in a conversion or embezzlement action. 735 ILCS 5/2-1402(c)(3) (West 2016). If there is evidence that the third party is indebted to the judgment debtor, subsection (c)(6) authorizes the creditor to maintain an action against the third party "for the recovery of the debt." *Id.* § 2-1402(c)(6). These provisions do not authorize the court to enter the full underlying judgment against third parties without finding that the amount represented certain converted or embezzled assets of the judgment debtor or an amount the third party was indebted to the judgment debtor. The trial court made no such findings here. Rather, the court merely determined that plaintiffs "have presented a *prima facie* case that they are entitled to a Judgment for all proceeds *** as a result of the conversion or embezzlement of Respondents." The trial court erred in entering judgment against respondents pursuant to sections 2-1402(c)(3) and (c)(6).

¶ 28 Section 2-1402 explicitly sets forth only one circumstance in which the court may enter the full unpaid amount of the underlying judgment against a third party. When the citation is directed against a third party, the underlying judgment becomes a lien "upon all personal property belonging to the judgment debtor in the possession or control of the third party." *Id.* § 2-1402(m)(2). Subsection (f)(1) prohibits a third party from transferring or disposing of, or interfering with, property belonging to the judgment debtor that is not exempt from enforcement

of the underlying judgment. *Id.* § 2-1402(f)(1). The court may punish a party who violates this restraining provision by "enter[ing] judgment against him or her in the amount of the unpaid portion of the judgment *** or in the amount of the value of the property transferred, whichever is lesser." *Id.* Subsection (f)(1) ensures that such person who

> " 'attempt[s] to impede the administration of justice, and places the [judgment debtor's] property beyond the reach of the court, *** will be punished either by having a judgment entered against him for the amount of the judgment creditor's claim or the value of the property, whichever is less, or may be punished as and for contempt.' " *Bank of Aspen*, 126 Ill. 2d at 314 (quoting Ill. Ann. Stat., ch. 110, ¶ 2-1402, Historical and Practice Notes, at 867 (Smith-Hurd 1983)).

¶ 29 The trial court found that 2XForm transferred or assigned "credit" for work it performed on plaintiffs' project to other contractors, thus "improperly and fraudulently divest[ing] itself of its own assets to the detriment of" plaintiffs. Transfers of a judgment debtor's assets, after citations are issued, violate the restrictive provisions of the citations. *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 113178, ¶ 24. However, the lien established under section 2-1402 "does not affect the rights of citation respondents in property prior to the service of the citation upon them." 735 ILCS 5/2-1402(m) (West 2016). Where a property transfer occurs prior to the initiation of citation proceedings, that evidence cannot support a finding that the respondent possessed those assets under section 2-1402. See *Schak v. Blom*, 334 Ill. App. 3d 129, 133-34 (2002). The citations to discover assets were issued to respondents on November 23, 2016. Plaintiffs based their allegations of improper transfer on information contained in sworn contractor statements dated May and September of 2014. There is no evidence that the transfer or assignment of credit took place after

the commencement of citation proceedings. As such, subsection (f)(1) does not support entering judgment against respondents in the amount of the unpaid portion of the underlying judgment.

¶ 30 Finally, there is no evidence that Esther or Teofil possessed the assets of 2XForm. The relevant inquiry in a citation proceeding is whether third parties possess "assets of the judgment debtor that should be applied to satisfy the judgment." *Id.* at 133. If the record contains some evidence that the third party holds assets of the judgment debtor, "[o]nly then does the citation court have the jurisdiction to order that party to produce those assets to satisfy the judgment." *Id.* If the record shows that the third party holds no assets of the judgment debtor, "then the court has no authority to enter any judgment against the third party in a supplementary proceeding." *Id.*

¶ 31 *Lange v. Misch*, 232 Ill. App. 3d 1077 (1992), is instructive. Paul Misch, an attorney, engaged in several business transactions with Wallace Lange beginning in 1985. At all times during these transactions, Lange suffered from Alzheimer's disease which affected his capacity to make rational decisions. *Id.* at 1078. Lange, through his guardian, filed a complaint against Misch individually, and against United States Capital Corporation of Delaware (USCC-Delaware) and United States Capital Corporation of Arkansas (USCC-Arkansas), alleging various claims on promissory notes. The complaint alleged that Misch controlled and dominated the corporations, failed to keep proper corporate records or maintain separate legal and financial integrity of the corporations, and commingled corporate funds with his own. *Id.* at 1077-78.

¶ 32 The defendants failed to appear, and the court entered default judgments against them. *Id.* at 1079. On the motions of Misch and USCC-Delaware, the court subsequently vacated the default judgments against them. However, no one appeared for USCC-Arkansas. In pursuing the judgment entered against USCC-Arkansas, Lange filed a petition for rule to show cause that alleged

(1) Misch failed to appear in court pursuant to the citation to discover assets and (2) Misch failed to produce documents ordered by the citations. The trial court ordered Misch to produce certain documents and to appear before the court to show cause why he should not be punished for contempt. *Id.* When neither Misch nor his counsel produced the documents or appeared before the court, the court found that USCC-Arkansas was a sham and pierced the corporate veil, entering judgment against Misch. Misch moved to vacate the judgment, filing in support the articles of incorporation of USCC-Arkansas. The trial court denied the motion and he appealed. *Id.* at 1080.

¶ 33 On appeal, the court found that the record contained no evidence that Misch, individually, possessed the assets of USCC-Arkansas, so that the trial court could "expand Lange's default judgment against USCC-Arkansas to include Misch." *Id.* at 1081. The court recognized that section 2-1402 may allow the trial court to enter a judgment against a third party in some circumstances. "However, before a court may do so, the record must contain some evidence that the third party possesses assets of the judgment debtor." *Id.* Although the court did not condone Misch's failure to obey court orders, it found that "a supplementary proceeding is not an appropriate vehicle to impose a judgment against a third party who does not possess assets of the judgment debtor." *Id.* at 1080. The court noted that Lange should have filed a separate petition to pierce the corporate veil and may still do so on remand. "Instead, the corporate veil was pierced at the supplementary proceeding, even though nothing in the Code authorizes the entry of a judgment at a supplementary proceeding against a third party who does not possess assets of the judgment debtor." *Id.* at 1081.

¶ 34 Here, the trial court found that 2XForm submitted a false sworn contractor's statement that it had made a payment of $32,655.01 to Graybill, one of the suppliers for windows, which was

never sent to Graybill. This asset, however, did not belong to judgment debtor 2XForm. It belonged to plaintiffs or to Graybill. Even if the asset belonged to 2XForm, there is no evidence that Teofil or Esther possessed the asset. Plaintiffs also alleged that 2XForm allowed materials belonging to plaintiffs, including concrete tread stairs and light fixtures, to be discarded. However, there is no evidence that respondents are in possession of these materials. Although plaintiffs alleged that 2XForm did not maintain separate accounts for each of its projects, and Teofil had access to and the ability to write checks on 2XForm's account, there was no evidence that Teofil, individually, possessed the assets of 2XForm's account. Esther and Teofil were the officers/employees of 2XForm, a corporation. "A corporation is a legal entity separate and distinct from its shareholders, directors, and officers." *In re Rehabilitation of Centaur Insurance Co.*, 158 Ill. 2d 166, 172 (1994).

¶ 35 As in *Lange*, there is no evidence that Teofil or Esther, individually, possessed the assets of the judgment debtor 2XForm, so as to authorize the trial court to enter the underlying judgment against them in supplementary proceedings. Therefore, the trial court's order entering the full amount of the underlying judgment against Esther and Teofil was error. See *id.* If they so choose, on remand, plaintiffs may file a separate petition to pierce the corporate veil in order to hold Teofil and Esther individually liable for the judgment against 2XForm. *Lange*, 232 Ill. App. 3d at 1081.

¶ 36 The trial court's order noted plaintiffs' frustration in trying to discover whether Esther and Teofil held the assets of 2XForm. The court reasoned that plaintiffs have the right in citation proceedings to ask questions of third parties in order to discover assets of the judgment debtor, and "[t]he only way Plaintiff[s] will be provided enough information to request turnover from Teofil and Esther *** is if they [fully] comply with their third party citations and Esther sit for a personal examination." Although we reverse the trial court's order, plaintiffs here are not without recourse.

In this situation, where evidence that Esther or Teofil held assets of 2XForm could not be discovered due to Esther's failure to sit for her examination and Teofil's failure "to fully and completely respond to the Citations," contempt proceedings provide a means to address dissatisfaction with their attempts at compliance. *Id.* at 1082.

¶ 37 IV. CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the circuit court is reversed, and the cause remanded for further proceedings.

¶ 39 Reversed and remanded.

No. 1-19-0476

Cite as:	*Hayward v. Scorte*, 2019 IL App (1st) 190476
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 17-L-4543; the Hon. Alexander P. White and the Hon. Michael F. Otto, Judges, presiding.
Attorneys for Appellants:	Gino L. DiVito, John M. Fitzgerald, and Amanda N. Catalano, of Tabet DiVito & Rothstein LLC, of Chicago, for appellants.
Attorneys for Appellees:	Robert G. Markoff and Douglas C. Giese, of Markoff Law, LLC, of Chicago, for appellees.

CANDIDATES FORUM

Candidates running for the position of Clerk of the Circuit Court of Cook County have been invited to the ILCBA Candidates Forum. All five candidates have accepted the invitation.

The format for the forum will be as follows:
A list of questions to be discussed was provided to each participant 7 days in advance of the forum. The ILCBA appointed a moderator to ask the questions at the forum and to ensure that each candidate has equal time to respond to the questions posed. The forum is NOT a debate, but rather an opportunity for the candidates to provide responses to the questions posed by our members.

Moderator

Michael S. Matek
Matek & Mazar LLC

Candidates

Barbara Bellar

Richard Boykin

Michael Cabonargi

Iris Martinez

Jacob Meister

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ILCBA CANDIDATE QUESTIONS – 2020

1. Please identify your three (3) major issues affecting the Clerk's Office and your plans to address them.

2. In 2014, the 7th Circuit Court of Appeals reversed almost 20 years of precedent which allowed creditors to file lawsuits at the Daley Center. The court ruled that was a violation of the Fair Debt Collection Practices Act and as a result 50% or more of the volume spilled into the Municipal Districts 2, 3, 4, 5 & 6. Despite these courthouses having to address significant case volumes, it appears the clerk's office has not been proactive in reassigning personnel to the struggling districts. How would you cope with personnel challenges in some of the suburban district courts?

3. Would you consider working with Chief Judge Wright to reestablish the Daley Center as the sole venue for collection matters to assist the suburban district and take advantage of the existing architecture to handle larger volume?

4. The Federal Court System allows access to documents via the PACER system, yet the Cook County System requires you to come downtown, use a limited-number of terminals to printout documents, then stand in line to pay a hefty-fee for these documents, which are, by default, public records. Will you prioritize upgrading the functionality of the clerk's website so that copies of court orders and other documents can be ordered and paid for online?

5. As firms dealing with large volumes of cases we need to have access to all of the relevant data, for every case we are handling. For example, every courtroom assigns a line number to each case on the call, but we cannot access the line number without accessing and finding a particular case that is before the court. Would you consider prioritizing a functionally that allows a firm to search via its Cook County number and date so we can get a list of cases by Plaintiff, Defendant, Case #, Room, Line, etc.) How will you (the candidate) work to allow us to get that information?

6. The Efiling system does not allow the filer to select the courtroom in which they want to schedule their pleading. Instead, it chooses it for you and many times, it is wrong. Thus, we are then unable to have our pleading heard by the judge. We also have issues where we cannot select the proper time for our efiled motions - What plans do you have to address persistent efiling issues.

7. As the Clerk's Office has evolved from 'face-to-face' to 'electronic-based' relationship, there appears to be fewer personnel available to address situations that arise, via either telephone or in person. How do you plan to address that situation?

THANK YOU

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