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## Coming Soon to a Law Practice near You: The New (and Improved?) Illinois Rules of Professional Conduct

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# Coming Soon to a Law Practice Near You: The New (and Improved?) Illinois Rules of Professional Conduct

*Alberto Bernabe\**

## I. INTRODUCTION

A new legal thriller is about to be published that every lawyer in Illinois should read. It has elements of intrigue, disputes over money, conflict, and sex and it will definitely have something of interest for every lawyer. It is called *The Illinois Rules of Professional Conduct*. Indeed, after several years in the making, the Illinois Supreme Court will more than likely approve a complete revision of the current Rules of Professional Conduct and replace them with a new version which is largely based on the current American Bar Association Model Rules of Professional Conduct (“ABA Model Rules”). This fact is not surprising given that since the early 1900s the states have looked primarily to the ABA for guidance in this area.<sup>1</sup> However, the ABA Model Rules have changed significantly in recent years; thus, the proposal to change the Illinois Rules will result in some significant changes as well.

The ABA Model Rules were adopted in 1983 and remained largely unchanged until 1997 when the ABA created a special commission to evaluate and revise them as needed. The commission became known as the “Ethics 2000 Commission” because it was expected to report its findings and recommendations to the ABA House of Delegates in the year 2000. However, the revision of the Rules took longer than anticipated and the Commission did not present its final report until August 2001.<sup>2</sup> The report suggested many changes to the rules. Most of those changes, in addition to some suggested by the ABA

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1. By the end of 1999 over 80% of the states, and the District of Columbia, had adopted some version of the ABA Model Rules of Professional Conduct. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE § 1-1(e)(4), at 8 (2005).

2. *Id.* § 1-1(f)(1), at 9.

Commission on Multijurisdictional Practice and the ABA Task Force on Corporate Responsibility,<sup>3</sup> were adopted between 2002 and 2005. Since then, twenty-eight states and the District of Columbia have adopted new rules or revised their existing rules.<sup>4</sup>

Illinois began the revision process in 1999 when the Illinois State Bar Association (“ISBA”) appointed a special committee to monitor the work of the ABA’s Ethics 2000 Commission and to consider recommendations for changes in the Illinois rules.<sup>5</sup> In 2002, this committee became a joint committee of the ISBA and the Chicago Bar Association (“CBA”) which issued a final report with recommendations for changes in 2003.<sup>6</sup> After considering comments on the report, the Joint Committee issued a new report in 2004,<sup>7</sup> and submitted it to the Illinois Supreme Court Committee on Professional Responsibility, which reviewed it and issued its own report in which it agreed with most, but not all, of the recommendations of the Joint Committee.<sup>8</sup>

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3. In August 2002, the ABA House of Delegates approved new versions of Model Rules 5.5 and 8.5 recommended by the ABA Commission on Multijurisdictional Practice. ISBA/CBA JOINT COMMITTEE ON ETHICS 2000, REVISED FINAL REPORT 3 (2004), *available at* [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/ISBACBAFinalReport.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/ISBACBAFinalReport.pdf) [hereinafter ISBA/CBA JOINT COMMITTEE REPORT]. One year later, it approved revised versions of Model Rules 1.6 and 1.13 recommended by the Task Force on Corporate Responsibility. *Id.*

4. Letter from Richard A. Redmond, Supreme Court Committee on Professional Responsibility, to John Nicoara, Supreme Court Rules Committee 5 (Feb. 20, 2007), *available at* [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/ProfRespReport.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/ProfRespReport.pdf) [hereinafter Letter from Richard A. Redmond]. These jurisdictions and the effective dates of their revisions are: Arizona (December 2003), Arkansas (May 2005), Connecticut (January 2007), Delaware (July 2003), District of Columbia (February 2007), Florida (May 2006), Idaho (July 2004), Indiana (January 2005), Iowa (July 2005), Louisiana (March 2004), Maryland (July 2005), Minnesota (October 2005), Mississippi (November 2005), Montana (April 2004), Nebraska (September 2005), Nevada (May 2006), New Jersey (January 2004), North Carolina (March 2003), North Dakota (August 2006), Ohio (February 2007), Oregon (January 2005), Pennsylvania (January 2005), South Carolina (October 2005), South Dakota (January 2004), Utah (November 2005), Virginia (January 2004), Washington (September 2006), Wisconsin (July 2007), and Wyoming (July 2006). *Id.*

5. *Id.*; see also Robert A. Creamer & Thomas P. Luning, *Proposed New Rules of Professional Conduct for Illinois Lawyers*, 92 ILL. B.J. 306 (2004) (introducing the recommendations of the ISBA/CBA Joint Committee on Ethics 2000 for new rules of professional conduct for Illinois lawyers).

6. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 1, 10.

7. *Id.* at 1; see *supra* note 3 and accompanying text (listing the new versions of the Model Rules).

8. Letter from Richard A. Redmond, *supra* note 4, at 2; see *supra* note 4 and accompanying text (listing the jurisdictions that have adopted new rules or revised existing rules). The Supreme Court Committee on Professional Responsibility started its review of the ISBA/CBA Joint Committee Report in October of 2005 and finalized it in January of 2007. Letter from Richard A. Redmond, *supra* note 4, at 3. It submitted its final report in February of that same year. *Id.* The Supreme Court Committee on Professional Responsibility made recommendations to the

Together, the ISBA/CBA Joint Committee and the Supreme Court Committee on Professional Responsibility have suggested numerous, and in some cases, substantial changes to the current Illinois Rules of Professional Conduct.<sup>9</sup> In an effort to clarify these important changes for Illinois practitioners, this Article will summarize the most important proposed changes and discuss the debate over the more controversial ones.

## II. A BRIEF HISTORY OF THE RULES

Over the years, the American Bar Association adopted codes of professional conduct that became the basis for most states' codes. However, the ABA is a private organization without authority to dictate or enact statutes. In order for these codes to become applicable to attorneys in any given state, they must be adopted by some governmental institution with authority to do so.<sup>10</sup> In Illinois, the State Supreme Court has this authority.<sup>11</sup>

Because the Illinois Rules of Professional Conduct follow the design of the ABA Model Rules, it is worthwhile to quickly outline the process by which the Model Rules became the most important source of regulation of the profession in this state. The move toward a uniform code of ethics for the profession throughout the nation started in 1908 when the ABA adopted the Canons of Professional Ethics.<sup>12</sup> The Canons remained in force for about sixty-two years, until the ABA adopted the Code of Professional Responsibility in 1969.<sup>13</sup> The Code was divided into sections exemplifying two different perspectives on the study of professional responsibility. It included both disciplinary rules, the violation of which would subject an attorney to sanctions, and

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ISBA/CBA Joint Committee on Ethics 2000 Revised Final Report relating to the Scope of the rules as well as Rules 1.2, 1.6, 1.15, 6.3, 7.4, 8.4 and comment 19 to rule 1.8. *Id.* at Exhibit B.

9. See ILL. RULES OF PROF'L CONDUCT (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

10. For many years, the ABA took the position that its Canons of Ethics and Code of Professional Responsibility were a "private law" binding on its members regardless of state law. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1-1(d), at 6. In response to attacks by the Department of Justice, the ABA formally acknowledged that the Code was only a Model Code. *Id.* However, the ABA was then very successful in persuading state and federal courts to adopt the Model Code as law. *Id.*

11. The Illinois Rules of Professional Conduct are, in fact, part of the Illinois Supreme Court Rules. They are published as Article VIII of the Illinois Supreme Court Rules. ILL. SUP. CT. RULES art. VIII (2006).

12. See JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 482 (2007-2008).

13. *Id.* at 395.

aspirational rules or ethical considerations. These aspirational rules are essentially suggestions that, according to the drafters, could lead to a better judicial system and to a more ethical practice but which are not the type of rules that could be enforced by the imposition of sanctions.<sup>14</sup>

As originally drafted, the Code focused almost exclusively on issues related to litigation, and the ABA created a commission to revise it just seven years after it was approved,<sup>15</sup> resulting in the adoption of the ABA Model Rules of Professional Conduct in 1983.<sup>16</sup> The ABA Model Rules do not follow the format of the Code. They begin with a section on Scope and a Preamble, both of which are intended to provide general guidance as to the application of the rules and the attorney's responsibilities.<sup>17</sup> The rest of the material is divided into rules and comments. The rules explain the duties, whether mandatory or discretionary, of attorneys in different contexts and the comments provide an interpretation of the meaning of the rules and the original intent of the drafters.<sup>18</sup>

Since the enactment of the ABA Model Rules in 1983, all but six states replaced their professional conduct codes with versions of the ABA Model Rules.<sup>19</sup> Between 1997 and 2002, the ABA developed a substantial revision to the original rules and most of the suggested changes were adopted between 2002 and 2005. Following this lead, as of February 2007, at least twenty-eight states and the District of

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14. *Id.*

15. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1-1(e)(1), at 7. The Commission was known as the Kutak Commission for its chairman Robert J. Kutak. *Id.* Between 1977 and 1983, it prepared several drafts of what later became the Model Rules of Professional Conduct. *Id.*

16. *Id.*

17. MODEL RULES OF PROF'L CONDUCT Preamble: A Lawyer's Responsibilities (2008); MODEL RULES OF PROF'L CONDUCT Scope (2008).

18. Paragraph 21 of the Scope section of the Model Rules states that "[t]he Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." MODEL RULES OF PROF'L CONDUCT Scope ¶ 21 (2008).

19. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 5-6. For the most current sources of information on the ABA Model Rules, visit the website of the ABA Center for Professional Responsibility, <http://www.abanet.org/cpr/home.html>. Interestingly, although largely based on the ABA Model Rules, the rules that were eventually adopted in Illinois were different in a number of significant ways. For example, the Illinois rules retained the concept of confidentiality as used in the old Model Code, did not adopt a rule regarding pro bono service, and endorsed the practice of screening lawyers with conflicts of interest when the lawyer moves from one private law firm to another. Also, the Illinois rules did not adopt the comments to the Model Rules.

Columbia had adopted new rules or made substantial changes to the existing ones.<sup>20</sup> Illinois is just about to join them.

The ISBA/CBA Joint Committee decided early on that it would recommend adoption of the most recent version of the ABA Model Rules unless there was a compelling reason not to do so.<sup>21</sup> In other words, rather than amend the current rules to conform to the ABA Model Rules, the Committee decided to discard the current rules and adopt the ABA Model Rules with a few changes to conform to our state law if necessary.<sup>22</sup> As will be discussed below, this was deemed necessary in several instances.<sup>23</sup>

The ISBA/CBA Joint Committee issued its final report in 2004.<sup>24</sup> Three years later, the Supreme Court Rules Committee issued its final report<sup>25</sup> in which it agreed with most, but not all, of the Joint Committee's recommendations. Both reports recommend the adoption of the ABA Model Rules, but both suggest a number of changes, some of which are quite significant. Most of the changes are not controversial, but some are intriguing, if not questionable. In some cases, the problem originates with the ABA Model Rule in question,

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20. Letter from Richard A. Redmond, *supra* note 4, at 2; *see supra* note 4 and accompanying text (listing the states that have adopted new rules or revised their existing rules).

21. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 5; *see also* Letter from Richard A. Redmond, *supra* note 4, at 9 (explaining that "the ISBA/CBA Joint Committee followed the language of the ABA Model Rules as well as the relevant Comments unless there were major policy considerations"). Typically, the policy considerations that resulted in suggestions to depart from the Model Rules were based on prior decisions of the Illinois Supreme Court or on the understanding that the text of the current Illinois Rules ought to be preserved. *Id.*

22. In their reports, both the ISBA/CBA Joint Committee and the Supreme Court Committee on Professional Responsibility support this approach with several solid arguments: (1) the Model Rules are de facto the national standard for ethics rules; (2) the Model Rules are the standard for testing of applicants to the Bar in the Multistate Professional Responsibility Examination; (3) all the standard works on legal ethics are organized around the Model Rules; (4) following the Model Rules will achieve a higher level of uniformity and consistency with the rules of other jurisdictions; and (5) adopting purely unique rules could cause more problems. Letter from Richard A. Redmond, *supra* note 4, at 6-9; ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 5-9. The ISBA/CBA Joint Committee also emphasized the benefit of adopting comments to accompany the rules. *Id.* at 10.

23. One example is the decision to require disclosure of attorney misconduct under Rule 8.3 unless the information originated in a privileged communication, as opposed to a confidential one which is the standard used in the Model Rules. Another example is the decision to retain a mandatory duty to disclose certain types of information under Rule 1.6, even though the Model Rules makes the disclosure just discretionary. A third example is the decision not to adopt Model Rule 6.1 on the duty to provide pro bono services.

24. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 1; *see supra* note 3 and accompanying text (explaining the revisions made to the Model Rules).

25. Letter from Richard A. Redmond, *supra* note 4, at 3; *see supra* note 4 and accompanying text (listing the jurisdictions that have adopted new rules or revised their existing rules).

while in others the problem originates in a proposed departure from the ABA Model Rule in question.

### III. SIGNIFICANT PROPOSED CHANGES TO EXISTING ILLINOIS RULES

#### A. *The Adoption of Comments in Addition to the Rules*

The first significant change in the proposed new rules relates to their format. The current Illinois Rules of Professional Conduct were adopted following the ABA Model Rules, but most of the Illinois Rules were adopted without their corresponding comments.<sup>26</sup> This was a mistake and the proposed new rules remedy it by recommending the adoption of the full format of the Model Rules including the comments. The comments provide helpful guidelines for the interpretation of the rules, and approving them results in a significant improvement over the current rules. As explained in the Report of the Supreme Court Committee on Professional Responsibility:

The Comments are an integral element of the Model Rules, and they were reviewed and revised by the Ethics 2000 Commission with the same care and attention as the black letter rules. The ABA Comments were also subject to the same approval process by the House of Delegates . . . .<sup>27</sup>

Virtually all the black letter rules require some clarification or additional explanation. Comments allow expanded and more specific explanation of particular issues without cluttering the black letter provisions with unnecessary details. Thus, the inclusion of the comments will provide Illinois lawyers a larger base of analysis and authority concerning their professional conduct. This additional information could be critical to the interpretation and application of the rules by practicing lawyers, the courts, and disciplinary agencies.<sup>28</sup>

#### B. *The Relationship Between Rules of Discipline and Civil Liability for Malpractice*

The relationship between the standards of conduct for disciplinary purposes and the standard of conduct used as the basis for civil liability in tort has never been completely clear. The ABA Model Rules have always suggested that the duties they impose are not necessarily

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26. Currently, Rule 3.8 is followed by "Committee Comments" and Rule 8.5 is followed by a "Comment." See ILL. RULES OF PROF'L CONDUCT R. 3.8 (West 2004); ILL. RULES OF PROF'L CONDUCT R. 8.5 (West 2004).

27. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 9.

28. Letter from Richard A. Redmond, *supra* note 4, at 9.

equivalent to the standard of conduct that would support a tort claim. The Scope section of the Model Rules attempts to explain the distinction in this way:

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process . . . .

Violation of a Rule should not itself give rise to a cause of action against the lawyer nor should it create any presumption . . . that a legal duty has been breached . . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability . . . .<sup>29</sup>

Notwithstanding this statement, however, and although it may be true that rules of professional conduct “are not *designed* to be a basis for civil liability,” in reality they are often used by courts as expressions of a duty in tort law, or, in other words, of the minimum standard of care expected of attorneys.<sup>30</sup> For this reason, in 2002, an important new sentence was added to the comment to “reflect the decisions of courts on the relationship between [the rules] and causes of action against a lawyer.”<sup>31</sup> This new sentence states: “Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”<sup>32</sup>

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29. MODEL RULES OF PROF'L CONDUCT Scope 19–20 (2008).

30. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1–9(c)(3), at 49–56. *See* Owens v. McDermott, Will & Emery, 736 N.E.2d 145, 156–57 (Ill. App. Ct. 2000) (stating that ethics rules may be relevant to establish standard of care in malpractice cases); Griffith v. Taylor, 937 P.2d 297, 305 (Alaska 1997) (holding that attorneys owe a duty of confidentiality and a duty of loyalty to former clients); *see also* Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?*, 22 J. LEGAL PROF. 33, 37 (1998) (proposing a new formula for the application of rules of professional conduct in determining the standard of care to which attorneys should be held in malpractice cases); Ann Peters, *The Model Rules as a Guide for Legal Malpractice*, 6 GEO. J. LEGAL ETHICS 609 (1993) (discussing three methods by which the American Bar Association’s Model Rules of Professional Conduct could be employed in legal malpractice actions). Ronald Rotunda and John Dzienkowski have likened the determination that the model rules should not be used in malpractice cases to an attempt to “whistl[e] past the graveyard” because “it does no harm to whistle, but the whistling provides no real protection either.” ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1–9(c)(3), at 49. The provisions of the disciplinary rules have also been regularly used as the basis for disqualification decisions. *Id.* (citing *Harrison v. Fisons Corp.*, 819 F. Supp. 1039, 1041 (M.D. Fla. 1993)) (stating that courts have regularly relied on ethics codes in order to establish standards for ruling on claimed conflicts of interest).

31. CENTER FOR PROFESSIONAL RESPONSIBILITY, ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005, 19 (2006) [hereinafter A LEGISLATIVE HISTORY].

32. MODEL RULES OF PROF'L CONDUCT Scope 20 (2008).



The result of this amendment, the combination of the original statement and this new one, is a bit confusing. As used in the Model Rules, the concept of “a basis for civil liability” must refer to the establishment of a duty in tort law. If so, it seems inconsistent to claim that violation of a rule can constitute evidence of a breach of a tort duty while claiming that the rule itself should not be seen as an expression of that duty.

What the drafters appear to want to say is that the violation of an ethics rule does not give rise to a private cause of action separate or distinct from a malpractice cause of action.<sup>33</sup> But, given the requirements of tort law, it is difficult to suggest that a violation of a rule of professional conduct would *automatically* mean the lawyer has been negligent or that a court should impose civil liability. A plaintiff in a tort claim would have to meet all the elements of the cause of action including a showing that the conduct caused damages.<sup>34</sup> Thus, it is difficult to imagine circumstances where anyone would suggest that the violation of a rule of professional conduct should *automatically* or “by itself” mean the lawyer has been negligent or that a court should impose civil liability.

Perhaps, on the other hand, the intent of the Model Rules approach is to suggest that the rules are not appropriate expressions of a tort duty for purposes of the “negligence per se” doctrine, which allows a court to use the text of a statute to define the standard of conduct that should be used to define a duty in tort law.<sup>35</sup> However, the mere fact that a

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33. Note that the 2002 amendment to the Model Rules also added the word “itself” to the following sentence: “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption . . .” A LEGISLATIVE HISTORY, *supra* note 31, at 18. This view has also been expressed by courts before. See, e.g., *Nagy v. Beckley*, 578 N.E.2d 1134, 1138 (Ill. App. Ct. 1991) (stating that violation of ethics rules is not an independent form of tort liability); see also *Astarte, Inc. v. Pacific Indus. Sys., Inc.*, 865 F. Supp. 693, 705 (D. Colo. 1994) (stating that “multiple loyalties do not, *per se*, constitute a breach of fiduciary duty”); *Baxt v. Liloia*, 714 A.2d 271, 277 (N.J. 1998) (holding that violation of rules of professional conduct did not provide basis for civil liability against mortgagee’s attorneys); *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1282 (Pa. 1992) (holding that “attorney’s representation of a subsequent client whose interests are materially adverse to a former client in a matter substantially related to matters in which he represented the former client constitutes an impermissible conflict of interest actionable at law” independent of any violation of the code of professional responsibility).

34. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 53 (2000) (stating that a lawyer is liable only if the lawyer’s breach of a duty of care or of a fiduciary duty is a legal cause of an injury).

35. The justification for using a statute as an expression of a duty in tort is that the statute reflects the fact that the legislature has taken into account the experience of the community as to what should be the conduct in particular situations and has established a standard of care in the statute.

legislature adopts a statute does not mean the courts must accept it as a basis for civil liability. The court must be convinced that the statute provides an appropriate basis for liability. In order to make this determination, courts typically require that the statute clearly define the conduct for which there could be liability, that the violation of the statute create an unreasonable risk of harm to others, that the plaintiff be within the class of people meant to be protected by the statute and that the damages claimed be the kind against which the statute is meant to protect.<sup>36</sup> In some contexts, courts also ask whether the imposition of the doctrine of negligence per se would result in a level of liability that is disproportionate to the seriousness of conduct.<sup>37</sup> Thus, again, the mere fact that a rule of professional conduct establishes a duty for purposes of a disciplinary system does not *automatically* translate into an equivalent duty in tort law.

The proposed Illinois Rules adopt, without change, the language in the Model Rules that creates all this confusion. This is particularly problematic in Illinois because it has already been decided that the ethical rules can be used to establish a duty in tort. In *Mayol v. Summers, Watson & Kimpel*, the court stated:

Juries in legal malpractice suits may properly consider standards of professional ethics pertaining to attorneys because such suits involve allegations of conduct that does not conform to minimum professional standards . . . . [A]ttorney disciplinary rules establish minimum standards of conduct and are intended to protect the general public. For these reasons, we hold that jury instructions may quote attorney disciplinary rules in legal malpractice cases to the same extent as they may quote statutes and ordinances in instructions in other types of negligence cases.<sup>38</sup>

A better alternative for the Illinois Rules is to eliminate the whole section, or at least to clarify its meaning.<sup>39</sup> As one commentator has suggested, although the current language in the Model Rules is closer to

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36. See, e.g., *Stachniewicz v. Mar-Cam Corp.*, 488 P.2d 436, 438 (Or. 1971) (stating that “violation of a statute or regulation constitutes negligence as a matter of law when the violation results in injury to a member of the class of persons intended to be protected by the legislation and when the harm is of the kind which the statute or regulation was enacted to prevent”).

37. See, e.g., *Perry v. S.N.*, 973 S.W.2d 301, 309 (Tex. 1998) (holding that violation of a child abuse reporting statute was not negligence per se).

38. *Mayol v. Summers, Watson & Kimpel*, 585 N.E.2d 1176, 1186 (Ill. App. Ct. 1992).

39. One commentator has argued that most of what courts have said about the materiality of a violation of a provision of the rules of ethics for the issue of civil liability is “shameful nonsense” and that “[m]uch of this sorry state is attributable to the pernicious disclaimers in the preambles to the codes.” Lawrence J. Lato, *The Restatement of the Law Governing Lawyers: A View From the Trenches*, 26 HOFSTRA L. REV. 697, 722–23 (1998) (cited in ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1–9(c)(3), at 52 n.23).

how courts use the rules, “it is likely that courts will continue to fashion jury charges and expert reports without regard to this language.”<sup>40</sup> If this is the case, there is little reason to adopt a statement that will be destined to be largely ignored.

*C. Referral Fees and Splitting Fees with Attorneys in Different Law Firms*

Neither the ABA Model Rules nor the current Illinois Rules of Professional Conduct allow attorneys to receive fees for *merely* referring cases to other attorneys. The main reason to ban these “referral fees” is to prevent attorneys from recovering money when they have not provided legal services to earn it, which is unethical.<sup>41</sup> Also, it would be unethical to allow an attorney to recover a fee in a case where the attorney has referred the case to someone else because the attorney cannot represent the client due to a conflict of interest.<sup>42</sup>

On the other hand, there is an interest in encouraging attorneys to refer cases to other more qualified attorneys when, for whatever reason, it is in the best interest of the client.<sup>43</sup> For this reason, the ABA Model Rules allow an attorney to share the fee in a case with another attorney in a different firm if they share responsibilities over the case. ABA Model Rule 1.5(e) states that a lawyer may divide a fee with another lawyer who is not in the same firm, but only if the division is in proportion to the services performed by each lawyer or if each lawyer assumes joint responsibility for the representation and the client agrees to the arrangement, the agreement is confirmed in writing and the total fee is reasonable.<sup>44</sup> The distribution of the fee according to this rule is different from the purely referral fee in that the referring attorney receives a fee based on actual work performed for the client or based on

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40. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1–9(c)(3), at 50.

41. Charging for work not done is, by definition, unreasonable and, thus, a violation of the rules. MODEL RULES OF PROF’L CONDUCT R. 1.5 (2008); *see also* CENTER FOR PROFESSIONAL RESPONSIBILITY, ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 71 (2007) (citing *In re Cleaver-Bascombe*, 892 A.2d 396 (D.C. 2006); *In re Ifill*, 878 A.2d 465 (D.C. 2005); *State ex rel. Okla. Bar Ass’n v. Sheridan*, 84 P.3d 710 (Okla. 2003); *In re O’Brien*, 29 P.3d 1044 (N.M. 2001); *In re Schneider*, 710 N.E.2d 178 (Ind. 1999)).

42. *Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364, 370 (Mich. Ct. App. 2002); NYSBA Comm. on Prof’l Ethics, Op. 745 (2001); ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.5–5, at 163.

43. As stated in the comments to Model Rule 1.5, “[a] division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well . . . .” MODEL RULES OF PROF’L CONDUCT R. 1.5 cmt. 7 (2008).

44. MODEL RULES OF PROF’L CONDUCT R. 1.5(e) (2008).

the fact that the attorney remains liable to the client for possible damages caused by the attorney to whom the case is referred.

Thus, allowing attorneys to share the fee is justified because the attorneys are, in a way, also sharing the responsibility of the representation. However, the meaning under the Model Rules is different from the meaning under the proposed new Illinois Rules. Under both the Model Rules and the proposed Illinois Rules, the shared responsibility over the representation includes responsibility for negligent conduct by the attorney to whom the case is referred.<sup>45</sup> However, according to the Model Rules, it also includes possible responsibility for unethical conduct by the attorney to whom the case is referred because, by referring the case to another lawyer, the referring attorney accepts the responsibility of a partner over the acts of that other attorney.<sup>46</sup> This type of responsibility is defined by Model Rule 5.1, which holds that lawyers of “comparable authority” have at least indirect responsibility for all work being done by other lawyers in their firm.<sup>47</sup> In contrast, however, the proposed Illinois rules would limit the responsibility to possible civil liability for negligent conduct only. Although the current Illinois Rule has the same language as the Model Rule, the Illinois Supreme Court has held that the “joint responsibility” that the referring lawyer assumes refers only to any potential financial responsibility for a malpractice action against the attorney to whom the case is referred.<sup>48</sup> Because the current Illinois Rule was adopted without comments, this is the only current interpretation of the local rule.

For this reason, the ISBA/CBA Joint Committee’s Report states that the ABA formulation of division of fees is inconsistent with the current law in the state of Illinois and concludes that:

It is important to encourage a lawyer to refer a client to another lawyer in situations in which the referring lawyer is unable or ill-equipped to handle the matter. However, to make the referring lawyer responsible for a subsequent ethical lapse of a responsibly chosen receiving lawyer that does not cause financial loss to the client is unnecessary overkill.<sup>49</sup>

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45. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.2.4 (1986) (stating that joint responsibility can be read as “a euphemism for assumption of joint and several liability for legal malpractice purposes, as if the two lawyers were partners”).

46. See MODEL RULES OF PROF’L CONDUCT R. 1.5(e) cmt. 7 (2008) (defining joint responsibility as including both “financial and ethical responsibility for the representation as if the lawyers were associated in a partnership”).

47. MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. 5 (2008).

48. *In re Storment*, 786 N.E.2d 963, 970–71 (Ill. 2002).

49. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 14.

In accordance with this view, the committee has recommended that the new Illinois Rule 1.5(e) hold that lawyers can share a fee with lawyers in other firms either on the basis of the proportion of services they render or, where the primary service performed by one lawyer is the referral of the client to another lawyer, if each lawyer assumes financial responsibility for the representation as a whole.<sup>50</sup> This formulation of the rule has two very important distinguishing factors: it suggests that a fee can be obtained for the “primary service” of simply referring the case and it limits the possible responsibility of the referring lawyer to financial, as opposed to ethical, liability.

This is a close call, but the approach of the ISBA/CBA report seems to be better, although perhaps not for the correct reason. Rather than being “overkill,” the Model Rule seeks to provide an extra layer of protection for potential clients. The idea behind imposing on the referring lawyer the duty (and, thus, the possible responsibility) for the ethical conduct of the lawyer to whom the case is referred is to encourage the referring lawyer to be extra careful when referring a client to someone else. As the Restatement explains, “[s]uch assumption of responsibility discourages lawyers from referring clients to careless lawyers in return for a large share of the fee.”<sup>51</sup>

Thus, the problem is not that the rule is “overkill.” Rather, the problem is that the enforcement of the rule might just be unfair. The rules that impose discipline for the conduct of others are based on the premise that the lawyers involved work closely together in the same law firm. The reason for this type of liability is to encourage firms to make sure they establish mechanisms to monitor the conduct of their members and to take measures to eliminate problems.<sup>52</sup> Attorneys organized as a law firm have the ability to do this by creating a structure specifically designed for this purpose. In contrast, the typical attorney who refers a case to another attorney in a different law firm does not have the benefit of this established structure. An attorney who refers a case to another attorney with whom he or she has little, if any, contact and whose practice might be in a different area of the law or in a different or distant location, does not have the ability to monitor the conduct of the attorney to whom the case is referred. It would not be impossible, and perhaps it would be advisable, for the referring attorney to check in with the other

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50. *Id.* at 63.

51. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 47 cmt. d (2000).

52. ROTUNDA & DZIENKOWSKI, *supra* note 1, at 812 (stating that “partners in a law firm have the duty to make reasonable efforts to assure that all lawyers in the firm comply with ethics rules”).

attorney to monitor the progress in the case, but it would still be difficult to monitor, let alone control or supervise, the ethics of this attorney. For these reasons, it seems that the proposed rule provides enough incentive for proper conduct and protection for the clients' interests.

#### *D. Duty of Confidentiality*

The proposed new Illinois Rules include a number of significant, and in some cases controversial, changes to the duty of confidentiality. These include a significant change in the approach to the concept of confidentiality itself and an expansion of the areas of mandatory and permissive disclosure of confidential information.

##### 1. Changes to the Scope of the Duty of Confidentiality

When Illinois adopted its current Rules of Professional Conduct, it did not adopt the concept of confidentiality contained in the ABA Model Rules at the time.<sup>53</sup> Instead, the Illinois Rules retained the concept as it appeared in the (by then rejected) Model Code which made a distinction between information that constituted a "confidence" and information that constituted a "secret."<sup>54</sup> Thus, according to the current rules, a confidence is defined as "information protected by the attorney-client privilege" and a secret is defined as "information gained in the professional relationship, that the client has requested be held inviolate or the revelation of which would be embarrassing to or would likely be detrimental to the client."<sup>55</sup>

Although the current approach has survived for decades, causing perhaps only one major problem,<sup>56</sup> it is a good idea to eliminate it formally and to adopt the much more accepted formulation of the concept of confidentiality currently found in the ABA Model Rules. Thus, under the proposed new rules, confidential information would be defined as "information relating to the representation"<sup>57</sup> regardless of who is the source of the information, whether it is detrimental to the

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53. Compare MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003), with ILL. RULES OF PROF'L CONDUCT R. 1.6 (2007).

54. ILL. RULES OF PROF'L CONDUCT R. 1.6 (2007).

55. See *id.* (defining terms used throughout the Illinois Rules of Professional Conduct).

56. See *In re Himmel*, 533 N.E.2d 790, 794 (1988). The problem, which is discussed below, is the anomalous application of the rule regarding the disclosure of another attorney's misconduct even if it requires disclosure of confidential information. *Id.* The court in *Himmel* would have reached a different result if it had applied the analysis of the Model Rules.

57. ILL. RULES OF PROF'L CONDUCT R. 1.6(a) (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

client and whether the client specifically requested that it be kept confidential.<sup>58</sup> For this reason, the duty of confidentiality under the proposed new rule would protect a much broader range of information than it does under the current Illinois Rules.

The most significant change being proposed to the duty of confidentiality, however, relates to the circumstances where disclosure of confidential information would be either mandatory or permissive. In 2002, the ABA adopted amendments to the Model Rules that expanded the areas of permissible disclosure of confidential information.<sup>59</sup> These were some of the most contested issues during the process of enacting the revisions to the Model Rules and there is a strong debate as to whether adopting the changes was a mistake.<sup>60</sup>

The first new element in the current Model Rule states that if an attorney's services are used to advance a fraudulent scheme, the attorney can disclose confidential client information to prevent the commission of the fraudulent act.<sup>61</sup> Having rejected a similar rule three times in the past,<sup>62</sup> the ABA approved this provision in response to the Enron, WorldCom, and HealthSouth scandals and due to pressure from the Securities and Exchange Commission.<sup>63</sup> Allowing disclosure of confidential information to prevent a fraudulent act was a significant change for the Model Rules, but adopting a similar rule in Illinois would

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58. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (stating that the "confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source").

59. Before these amendments Model Rule 1.6(b)(1) allowed a lawyer to reveal "information . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES OF PROF'L CONDUCT R. 1.6 (b)(1) (1983). The amendment changed this to allow a lawyer to disclose information "to prevent reasonably certain death or substantial bodily harm." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2003). The amendment also added two new sections to the rule that allow disclosure of confidential information to prevent conduct that may result in financial injury, to prevent financial injury and to rectify financial injury. *Id.* R. 1.6(b)(2)–(3).

60. MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYER'S ETHICS 3d 141 (2004) (noting that proposals about confidentiality issues were widely debated prior to the approval of the original Model Rules in 1983).

61. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2003).

62. FREEDMAN & SMITH, *supra* note 60, at 141 (stating that in 1983, a provision that permitted a lawyer to reveal information to prevent substantial injury to the financial interest or property of another or to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used was defeated by the House of Delegates by a vote of 207 to 129). Likewise, similar proposals were again defeated in 1991 (by a vote of 251 to 158) and in 2001 by a similar strong vote. *Id.* at 142, 145.

63. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.6–12(e)(3), at 241. The vote in favor of approving this new exception to the duty of confidentiality was 218–201. FREEDMAN & SMITH, *supra* note 60, at 146.

only expand slightly the extent of possible disclosures of confidential information. Other than expanding the disclosure to include civil frauds, adopting this rule actually would not change the current Illinois rule much because Illinois Rule 1.6(c)(2) already states that a lawyer may reveal a client's intention to commit a crime.<sup>64</sup>

Because the rule only applies when the attorney's services are used to advance the client's fraud, it seems that the purpose of the rule is to prevent a lawyer from becoming an unwilling instrument of a fraud in progress.<sup>65</sup> However, several strong arguments have been advanced that suggest that an exception to the duty of confidentiality, which arguably weakens the duty of confidentiality and with it a client's trust, is not necessary to prevent a lawyer from participating in his or her client's fraudulent conduct.

First, there are several rules already in place to prevent a lawyer from participating in a client's fraudulent scheme. For example, Rule 1.2(d) states that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.<sup>66</sup> Rule 1.16 states that the lawyer must terminate the attorney-client relationship if the representation would result in a violation of the rules.<sup>67</sup> Finally, Rule 8.4(c) states that a lawyer would be subject to discipline for dishonest or fraudulent conduct.<sup>68</sup>

Second, by recognizing discretion to share confidential information, the rule may open the door to civil liability if courts begin to interpret the rule to mean that there is a minimum duty to reveal this type of information under certain circumstances.<sup>69</sup> Just because the attorney has discretion does not mean that the exercise of that discretion is by definition reasonable (or not negligent). A court could decide that, under the circumstances of a particular case, the attorney was negligent in exercising his or her discretion.

Finally, some argue that because the new rule weakens the duty of confidentiality, it diminishes the value of the trust clients have for their

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64. ILL. RULES OF PROF'L CONDUCT R. 1.6(c)(2) (2007).

65. FREEDMAN & SMITH, *supra* note 60, at 147.

66. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003).

67. *Id.* R. 1.16.

68. *Id.* R. 8.4(c).

69. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.6–12(e)(3), at 241. Apparently, this was one of the arguments used in support of the rejection of an earlier version of the rule by the ABA House of Delegates. *Id.* (citing as an example the decision in *State v. Hansen*, 862 P.2d 117, 122 (1993) (recognizing a duty to warn)).



lawyers.<sup>70</sup> According to this argument, the rule may result in “deputizing” the lawyer in order to monitor the client’s activities, creating a somewhat adversarial relationship between attorneys and clients while the policy behind the rule may be better served by preserving confidentiality. The attorney may be in a better position to prevent or rectify the fraud if the client’s trust is stronger.<sup>71</sup>

The exceptions recognized in Model Rule 1.6(b)(3) are even more problematic. Pursuant to this new rule, if the fraudulent act has already been committed, the attorney may disclose confidential information in order to prevent the financial injury that would result from the act.<sup>72</sup> If it is too late to prevent financial injury, the attorney may disclose the information in order to rectify the injury.<sup>73</sup> The adoption of these sections is very significant. Before this amendment was approved, Model Rule 1.6 limited the circumstances that justified disclosing confidential information to situations where disclosure of the information was necessary to *prevent* future conduct.<sup>74</sup>

In fact, this new exception to the duty of confidentiality is even more far-reaching than the exception contemplated in the original comment to Model Rule 1.6. This comment stated that if the lawyer’s services were going to be used by the client in materially furthering a crime or fraud, the lawyer had to withdraw and could give notice of the withdrawal and withdraw or disaffirm any document prepared for purposes of the representation.<sup>75</sup> Once adopted, the text of the comment essentially opened the door for a lawyer to indirectly alert others that something was wrong.<sup>76</sup> The comment, therefore, created an expansion to the exceptions in the text of the rule itself. But even under the analysis of

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70. See FREEDMAN & SMITH, *supra* note 60, at 147 (arguing that the ABA has threatened confidentiality).

71. *Id.*

72. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(3) (2003).

73. *Id.*

74. FREEDMAN & SMITH, *supra* note 60, at 147. For the 2001 version of the Model Rules, see DZIENKOWSKI, *supra* note 12, at 128–29.

75. MODEL RULES OF PROF’L CONDUCT, R. 1.6 cmt. 15–16 (1983). Professor Freedman has argued that this silent disclosure provision was added to the comment “disingenuously” after the rule itself had been adopted and it was approved at a separate meeting “without the same close attention and debate.” FREEDMAN & SMITH, *supra* note 60, at 142 (citing Geoffrey Hazard, *Rectification of Client Fraud and Revival of a Professional Norm*, 33 EMORY L.J. 271, 306 (1984)).

76. FREEDMAN & SMITH, *supra* note 60, at 143 (citing Ronald Rotunda, *The Notice of Withdrawal and the New Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455 (1984) for the proposition that the consequences of the comment did not allow a lawyer to blow the whistle but it did allow the lawyer to waive a red flag).

the comment, a lawyer could only disclose confidential information to avoid furthering a crime or fraud that had not yet been completed.<sup>77</sup>

The new Model Rule 1.6(b)(3) expands the duty even further, allowing disclosure of confidential information concerning a fraud that has already been completed. It allows an attorney to do something that was not allowed even by the exception to the duty of confidentiality hidden in the comment. This is new and very troubling for some commentators. Because the rule does not allow disclosure about past conduct other than conduct that has resulted in financial injury, some argue that the new rule weakens the duty of confidentiality “to provide greater protection to someone who has lost money to the client through fraud, than to a person who has been intentionally maimed by the client or to the spouse of someone who has been murdered by the client.”<sup>78</sup>

The reasoning behind the Model Rule is to allow the attorney to rectify a wrong for which the client used the attorney’s services. This is a good goal, but it is not necessary to weaken the duty of confidentiality to achieve it. Because the rule limits its applicability to cases where the attorney’s services were (or are being) used to commit the fraud, such testimony by the attorney would be admissible under the law of evidence under the crime/fraud exception to the attorney-client privilege.<sup>79</sup> For example,<sup>80</sup> assume that the client uses the attorney’s services to obtain a loan fraudulently. When the lender discovers the fraud, the lender can subpoena the lawyer and the client could not claim the privilege to prevent the attorney from testifying. Thus, allowing the lawyer to disclose confidential information related to fraudulent conduct is not necessary in cases where the victims of fraud take action against the perpetrator of the fraud.

The proposed new rules for Illinois also expand the area of mandated disclosure. The current Illinois Rule mandates disclosure of information to prevent the client from committing an act that would result in death or serious bodily harm.<sup>81</sup> The new proposed exceptions to the duty of confidentiality expand this mandate by requiring disclosure of confidential information to prevent “reasonably certain death or substantial bodily harm.”<sup>82</sup> Because there is no requirement

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77. FREEDMAN & SMITH, *supra* note 60, at 147.

78. *Id.*

79. *Id.*

80. ROTUNDA & DZIENKOWSKI, *supra* note 1, at 251–52.

81. ILL. RULES OF PROF’L CONDUCT R. 1.6(b) (2007).

82. ILL. RULES OF PROF’L CONDUCT R. 1.6(c) (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

that the disclosure be limited to conduct of the client, this is a significant change with which Illinois would join only a very small number of states.<sup>83</sup>

## 2. Confidentiality and the Entity Client

ABA Model Rule 1.13, which regulates certain aspects of the attorney-client relationship when the client is an entity, also contains an exception to the duty of confidentiality.<sup>84</sup> The ABA Model Rule provides that when a lawyer has reported a “violation of law” by a corporate constituent to the organization’s highest authority and the organization fails to take timely remedial action, the lawyer may disclose client confidences outside the organization to the extent necessary to prevent substantial injury to the organizational client.<sup>85</sup> This is a major change from earlier versions of the Model Rule, but it is not surprising given the move to expand the exceptions to the duty of confidentiality under Rule 1.6.

However, it should be noted that the language of Model Rule 1.13 is currently inconsistent with that of Model Rule 1.6.<sup>86</sup> Proposed Illinois Rule 1.13 addresses this issue by changing the language in Rule 1.13

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83. Only thirteen states have mandatory disclosure: Arizona, Connecticut, Florida, Illinois, Iowa, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin. SUSAN MARTYN, LAWRENCE FOX & W. BRADLEY WENDEL, *THE LAW GOVERNING LAWYERS, NATIONAL RULES, STANDARDS, STATUTES, AND STATE LAWYER CODES 120–23* (2006–2007). As the ISBA/CBA Joint Committee Report states, the mandatory disclosure requirement represents a strongly-held policy position in Illinois, but it is interesting to consider the arguments in support of an alternative. For example, Professor Monroe Freedman, who for many years advocated the need of a mandatory disclosure requirement, now argues in favor of the Model Rule’s approach. FREEDMAN & SMITH, *supra* note 60, at 152. He has stated that one type of case that helped persuade him is the type of case “where the lawyer learns that her client has agreed with a loved one who is terminally ill and in great pain to assist that person to commit suicide.” *Id.* At the other end of the spectrum, Professor Abbe Smith prefers “a strict principle that client secrets and confidences are sacrosanct and lawyers should not divulge them under any circumstances.” *Id.* at 154. She believes that “in the rare case where it is truly necessary to disclose information obtained through the lawyer-client relationship (to stop the wrong person from being executed, to prevent premeditated murder, to prevent mayhem), a lawyer will do so notwithstanding the principle, and that the lawyer will not be disciplined for it. *Id.* Regardless of how difficult the circumstances may be, Smith believes that maintaining and preserving confidentiality is more important than affirming lawyer morality. *Id.* To this position, Freedman replies that “if lawyers will act that way in those rare cases, and if their actions will be condoned by disciplinary authorities, then the rules should comport with reality. It does not promote respect for law to promulgate rules with no expectations of either obedience or enforcement.” *Id.* at 154 n.135.

84. See MODEL RULES OF PROF’L CONDUCT, R. 1.13(c) (2003).

85. *Id.* R. 1.13.

86. Compare *id.* R. 1.6 (referring to disclosure of information to prevent or remedy “crime or fraud”), with *id.* R. 1.13 (referring to disclosures related to “violation of law”).

and making it consistent with Rule 1.6.<sup>87</sup> Thus, the proposed rule would allow the attorney to disclose confidential information only if the misconduct involved amounts to a crime or fraud, rather than a “violation of law.”<sup>88</sup> In that sense, the proposed Illinois Rule is an improvement over the Model Rule.

In addition, the proposed Illinois Rule is an improvement because it better explains the relationship between the two rules. Just like Model Rule 1.6, Model Rule 1.13 allows disclosure of confidential information to prevent fraudulent conduct, but the purpose of the rule is fundamentally different. While Model Rule 1.6 allows disclosure to protect the victim of the fraudulent conduct, Model Rule 1.13 allows disclosure only to protect the client. The language of Model Rule 1.13 is not concerned with any victim outside the corporate client.<sup>89</sup>

This discrepancy suggests that the rules give more protection to confidential information of corporate clients.<sup>90</sup> Under Model Rule 1.13, if a member of the corporation acts in a way that threatens innocent third parties, the attorney may disclose the information only to prevent substantial injury to the organization, and only to the extent the lawyer reasonably believes necessary.<sup>91</sup> The fact that the fraud may cause substantial injury to a third party, which is the driving force of the exceptions in Model Rule 1.6, is irrelevant to the analysis under Model Rule 1.13. If there is no reasonably certain substantial injury to the organization, the attorney seems precluded from disclosing the information under Model Rule 1.13 even if doing so would help prevent injury to others and, thus, is likely allowed under Model Rule 1.6. For this reason, some argue that Model Rule 1.6 “permits a lawyer to blow the whistle on an individual client’s fraud, but [Model Rule] 1.13

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87. See ILL. RULES OF PROF’L CONDUCT R. 1.13 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf) (changing each rule or comment reference to a “violation of law,” to “a crime, fraud or other violation of law”); ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 20–21.

88. ILL. RULES OF PROF’L CONDUCT R. 1.13 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf); ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 20–21.

89. FREEDMAN & SMITH, *supra* note 60, at 148.

90. *Id.* Professor Freedman is even more critical, claiming that Model Rule 1.13 “was designed from the outset by the corporate bar to give special protection to corporate clients, and this preferential treatment was accepted by the Kutak Commission in order to get the endorsement of the Model Rules from the ABA’s powerful Corporate Section.” *Id.*; see also Monroe Freedman, *Lawyer Client Confidences: The Model Rules’ Radical Assault on Tradition*, 68 ABA J. 428, 432 (1982) (stating that when dealing with corporate clients, a lawyer may almost never reveal the truth of a corporate client’s actions).

91. MODEL RULES OF PROF’L CONDUCT R. 1.13 (2003).

forbids it when the client is a corporation”<sup>92</sup> and that “the ABA has given the interests of corporate clients far greater protection than those of individual clients.”<sup>93</sup>

For these reasons, the comment to proposed Rule 1.13 attempts to provide a better explanation of the relationship between both rules by stating that:

Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b) . . . . If the lawyer’s services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(1), 1.6(b)(2) or 1.6(b)(3) may permit the lawyer to disclose confidential information.<sup>94</sup>

It is important to remember, though, that paragraph (b) of ABA Model Rule 1.6 does not *require* disclosure; it merely allows it.<sup>95</sup> If Rule 1.13 does not allow the attorney to disclose certain information, and Rule 1.6 allows it but does not require it, the attorney has a strong incentive *not* to disclose since it would be against the corporate client’s interests to do so and would be a violation of Rule 1.13(c). Also, Model Rule 1.6 allows disclosure to avoid or rectify financial injury only if the attorney’s services are used to advance the client’s crime or fraud.<sup>96</sup> In the typical circumstances where an in-house attorney discovers wrongdoing by a constituent of the corporation this would not be the case. Although disclosure might avert or rectify the injury, since the goal is not to protect the innocent third party, the disclosure is not allowed.

### *E. Communicating with Persons Represented by Counsel*

Current Illinois Rule 4.2 attempts to regulate attempts by attorneys to communicate directly with other persons who are represented by

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92. FREEDMAN & SMITH, *supra* note 60, at 151. For a discussion of this topic, see *id.* at 147–51. It is also interesting that the language of the new Model Rule 1.13 is more restrictive than that of the old one. Before 2003, the attorney was allowed to act if the conduct in question was “likely” to result in injury to the client. Currently, the attorney can disclose information only if it is “reasonably certain” that the conduct will result in injury to the client. *Id.*

93. *Id.* Professor Ronald Rotunda reaches a different conclusion, though. He argues that because attorneys are allowed to reveal confidential information of corporate clients under two rules, the rules grant organizational clients less protection than they provide to non-organizational clients, whose confidential information can be disclosed only as an exception to one rule. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.13–2, at 558.

94. ILL. RULES OF PROF’L CONDUCT R. 1.13 cmt. 6 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

95. MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2003).

96. *Id.* R. 1.6(b)(3).

counsel. The title of the rule is “Communications With Person Represented by Counsel.”<sup>97</sup> Yet, the actual text of the rule is limited to communications with a “party,” which is much more limited.<sup>98</sup> The proposed new Illinois Rule fixes this important discrepancy and clarifies the extent of the application of the rule in the entity client context, making it a vast improvement over the current rule.<sup>99</sup> The comment to the rule also clarifies the interplay between the rule and a client’s right to communicate with another party.<sup>100</sup>

These may seem like relatively minor changes, but in fact they are very significant. Under the current rule, it is not clear whether a lawyer who represents a client in litigation against a corporation can informally interview employees of the corporation without notifying the attorney for the corporation. The case law in Illinois is conflicting. In *Fair Automotive v. Car-X Service Systems*,<sup>101</sup> for example, the court interpreted the word “party” to include only the members of the organization’s “control group,” a concept usually used in the context of the application of the attorney-client privilege in the representation of an organization,<sup>102</sup> while *Weibrecht v. Southern Illinois Transfer, Inc.*,<sup>103</sup> rejected this interpretation. The court in this case reasoned that since the current Illinois Rule was derived from the Model Rule at the

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97. ILL. RULES OF PROF’L CONDUCT R. 4.2 (2007).

98. *Id.* The current rule reads:

During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.

*Id.*

99. ILL. RULES OF PROF’L CONDUCT R. 4.2 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf). The new rule would read as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

*Id.*

100. *Id.* R. 4.2 cmt. 4. The comment states, “Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” *Id.*

101. *Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc.*, 471 N.E.2d 554, 561 (Ill. App. Ct. 1984).

102. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1991). In *Upjohn*, the Supreme Court refers to a control group as the group of officers and agents responsible for directing the organization’s actions in response to legal advice. *Id.*

103. *Weibrecht v. S. Ill. Transfer, Inc.*, 241 F.3d 875, 881–83 (7th Cir. 2001).

time of its adoption, the proper way to interpret its meaning would be to look at the comment to the Model Rule even though the Illinois Rule was adopted without the comments.<sup>104</sup>

The comment to the new proposed rule clarifies the debate by stating that in the case of a represented organization:

[The] Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability . . . . If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.<sup>105</sup>

Not surprisingly, there is also disagreement on the propriety of communications with former employees. Many courts, as well as the ABA Model Rules, have taken the position that former employees do not have a relationship with their former employers and therefore attorneys are free to contact them without notice to opposing counsel for the entity.<sup>106</sup> At the other end of the spectrum, some jurisdictions ban *ex parte* contacts with former employees.<sup>107</sup> Yet another view allows contacts unless the objecting party can establish that the ex-employee's role was central enough to the litigation to be the basis of potential imputed liability.<sup>108</sup> Finally, another view bans *ex parte* contacts with ex-employees only if the ex-employee had been in a position to create or implement company policies relevant to the allegations of the lawsuit.<sup>109</sup>

Again, the proposed new comment to the rule takes care of this debate very clearly. It states that a lawyer does not need to obtain

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104. *Id.* This shows another reason why it is a much better approach to adopt the comments as they are being suggested presently.

105. ILL. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

106. *E.g.*, *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723, 728 (N.D. Ill. 1996); *Valassis v. Samuelson*, 143 F.R.D. 118, 123 (E.D. Mich. 1992); *Sanifill of Georgia, Inc. v. Roberts*, 502 S.E.2d 343, 345 (Ga. Ct. App. 1998); MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2003); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991).

107. *E.g.*, N.J. RULES OF PROF'L CONDUCT R. 4.2, 1.13 (banning *ex parte* contact with former agents and employees who were members of the litigation control group); *Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569, 572-73 (W.D. Va. 1998); *Pub. Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd.* 745 F. Supp. 1037, 1039-40 (D.N.J. 1990).

108. *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 89 (D.N.J. 1991).

109. *In re The Prudential Ins. Co. of Am. Sales Practices Litig.*, 911 F. Supp. 148, 153 (D.N.J. 1995).

consent from the organization's lawyer to communicate directly with a former constituent of the organization.<sup>110</sup>

#### *F. Lawyer as a Witness*

The proposed new rule addressing the issue of whether an attorney can represent a client if the attorney would have to testify in the client's case is an improvement over the current version.<sup>111</sup> When Illinois adopted its current rule, it did not follow the applicable ABA Model Rule at the time.<sup>112</sup> Instead, the current Illinois rule makes a distinction between situations in which the lawyer would be a witness for the client and situations in which the lawyer would be called as a witness other than on behalf of the client.<sup>113</sup> In most cases, the lawyer would be disqualified in the first situation.<sup>114</sup> In the second, the lawyer would be disqualified only if the lawyer's testimony would be prejudicial to the client.<sup>115</sup> However, as explained in the ISBA/CBA Joint Committee Report, this distinction:

. . . ignores the basic purposes of the rule. The rule is intended to protect both the tribunal and the opposing party by avoiding fact-finder confusion between the roles of advocate and witness and by avoiding the prospect that the client whose lawyer also testifies may have an advantage. Those risks are the same, whether the lawyer testifies for the client or for the adversary.<sup>116</sup>

For this reason, the Committee recommends adopting the current Model Rule which states that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless the testimony relates to an uncontested issue, the testimony relates to the nature and value of legal services rendered in the case, or disqualification of the lawyer would work substantial hardship on the client.<sup>117</sup>

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110. ILL. RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

111. Compare *id.* R. 3.7 (the proposed new rule), with ILL. RULES OF PROF'L CONDUCT R. 3.7 (2007) (the current version of the rule).

112. For the original version of the Model Rule, see DZIENKOWSKI, *supra* note 12, at 173.

113. ILL. RULES OF PROF'L CONDUCT R. 3.7(a)–(b) (2007).

114. See *id.* R. 3.7(a) (defining four situations in which the lawyer may testify on behalf of the client).

115. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 30.

116. *Id.*

117. *Id.*



## IV. SOME PROPOSED NEW RULES

The proposed Illinois Rules include a number of brand new rules. For example, Rule 2.4 regulates the duties of a lawyer as a third party neutral<sup>118</sup> and Rule 3.9 states the duties of a lawyer serving as an advocate in nonadjudicative proceedings.<sup>119</sup> There is nothing particularly controversial about these new rules. There are, however, a few new rules that merit some discussion.

*A. Conflict of Interest Based on Sexual Relations with Clients*

The proposed new Illinois Rules adopt ABA Model Rule 1.8(j) which states that a lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.<sup>120</sup> However, even if a lawyer is prohibited from representing a client because of a sexual relationship, the rule does not preclude other lawyers in the same firm from representing the client.<sup>121</sup>

The proposed rule is based on a sound policy: 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.<sup>122</sup> The attorney's emotional involvement can also affect

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118. ILL. RULES OF PROF'L CONDUCT R. 2.4 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf). The ISBA/CBA Committee explained the need for this new rule this way:

This is a new rule. It is appropriate to promulgate such a rule in light of increased use of alternative dispute resolution mechanisms and lawyers' frequent participation in them as a neutral. The model rule sets generally reasonable standards and offers good guidance to lawyers.

In one respect, however, the rule leaves too much room for subsequent problems that could be easily avoided. Model Rule 2.4(b) requires a lawyer serving as third-party neutral to inform unrepresented parties in every case that the lawyer is not representing them. However, it requires the lawyer to go on to explain the difference between a lawyer's role as a third-party neutral and a lawyer's role as one who represents a client only when the lawyer knows or reasonably should know that a party does not understand the lawyer's role. The Committee believes that a complete explanation is better in every case involving unrepresented parties, and proposes to revise Model Rule 2.4(b) accordingly.

ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 25.

119. ILL. RULES OF PROF'L CONDUCT R. 3.9 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

120. MODEL RULES OF PROF'L CONDUCT R. 1.8(j) cmt. 17 (2003).

121. *Id.* R. 1.8(k).

122. MODEL RULES OF PROF'L CONDUCT R. 1.8(j) cmt 17 (2003); see also *In re Rinella*, 677 N.E.2d 909 (Ill. 1997) (concluding that an attorney's sexual relationship with client was

his or her independent judgment and create a risk that the representation would be materially affected which, by itself, would be a violation of the rules.<sup>123</sup> Finally, the relationship could also make it unlikely that the client could give adequate informed consent to the possible conflict and can create a significant danger of harm to the client's interests.<sup>124</sup>

These policies, however, are already covered by the Rules<sup>125</sup> that require competence<sup>126</sup> and diligence,<sup>127</sup> and, most importantly, by Rule 1.7 which bans a lawyer from representing a client if there is a

prejudicial to the administration of justice and overreaching); *People v. Good*, 893 P.2d 101 (Colo. 1995) (“Because the lawyer stands in a fiduciary relationship with the client, an unsolicited sexual advance by the lawyer debases the essence of the lawyer-client relationship.”). The ABA Standing Committee on Professional Responsibility had expressed this view in 1992 in Formal Opinion 92-364. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992). In response to this opinion, several states adopted express rules to regulate sexual relations between attorneys and clients. See, for example, the rules in Florida, Iowa, Minnesota, New York, North Carolina, Oregon, West Virginia, Utah, Washington, and Wisconsin. California had already adopted a similar rule in 1987. Kathleen Maher, *Sex With Clients: The Progeny of ABA Opinion 92-364*, THE PROF. LAW., Winter 2001, at 20 n.4.

123. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2003) (stating, in part, that “a lawyer shall not represent a client if . . . 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”); see also MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003) (stating that in representing a client “a lawyer shall exercise independent professional judgment”). Several courts have held that engaging in a sexual relationship threatens a lawyer's ability to exercise independent professional judgment. See, e.g., *In re Grimm*, 674 N.E.2d 551, 554 (Ind. 1996) (concluding that the attorney engaged in misconduct by having a sexual relationship with a client); *In re Ashy*, 721 So.2d 859, 864 (La. 1999) (“A sexual relationship between lawyer and client may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently.”); *In re Halverson*, 988 P.2d 833, 840-41 (Wash. 2000) (discussing the unreasonableness of an attorney's sexual relationship with a marriage dissolution client).

124. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 17 (2003).

125. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2), 2.1 (2003) (broadly defining impermissible conflicts of interest and requiring an attorney to render candid advice by considering not only the law but also moral, social, and political factors). In Formal Opinion 92-364, the ABA Standing Committee on Professional Responsibility concluded that even though there was no specific rule that regulated sexual relations with clients at the time, several other rules are implicated by such a relationship. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-364 (1992). In addition, a number of courts have held that the absence of a specific rule does not preclude the imposition of discipline under any number of other rules. See, e.g., *In re Heard*, 963 P.2d 818, 825 (Wash. 1998) (“Despite the absence of an express rule banning attorney-client sexual relations, an attorney's sexual relations with a client can constitute ‘moral turpitude,’ justifying the imposition of disciplinary sanctions.”); *Musick v. Musick*, 453 S.E.2d 361, 354 (W. Va. 1994) (reasoning that, although a lawyer's sexual relationship with a client was not an express violation of the West Virginia Rules of Professional Conduct, other rules of professional conduct may have been violated by that relationship); see also *Bourdon's Case*, 565 A.2d 1052, 1056-58 (N.H. 1989) (finding that the attorney violated several New Hampshire Rules of Professional Conduct that do not specifically mention sexual relations).

126. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

127. *Id.* R. 1.3.

significant risk that the representation will be materially limited by a personal interest of the lawyer.<sup>128</sup> Of course, if the policy behind the rule is protected already by interpreting other rules, a new rule would simply clarify the existing policy and state it clearly in one place.<sup>129</sup>

As proposed, however, the rule raises concerns that need attention. For example, some are concerned that state intervention in this matter might be an impermissible intrusion on privacy, and that there is a danger of abuse of the rule by disgruntled clients.<sup>130</sup> More importantly, some are concerned about the rule's effectiveness. Assume, for example, that an attorney in a large law firm begins a relationship with an important long-standing client of the firm. At that point, the lawyer would not be allowed to represent the client, but other lawyers in the firm could continue the representation. The rule does not state that the disqualified lawyer must be screened from the representation, however. This means that the lawyer, although not participating in the representation, could have access to information about the case. Under such circumstances, it is worth wondering how much independent judgment a lawyer would feel free to exercise knowing he or she represents the sexual partner of a colleague in the firm, particularly if the lawyer assigned to represent the client is a subordinate of the lawyer involved with the client. Imagine the pressure on an associate if he knows he represents the sexual partner of a supervising partner of the

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128. *Id.* R. 1.7. See, e.g., *Horaist v. Doctor's Hosp. of Opelousas*, 255 F.3d 261, 267 (5th Cir. 2001) ("A sexual relationship with a client that arises during the course of the representation may create a conflict between the professional and personal interests of the lawyer and interfere with the lawyer's professional judgment."); *In re Tsoutsouris*, 748 N.E.2d 856, 860 (Ind. 2001) (concluding that an attorney violated a prohibition against representations that may be materially limited by the attorney's own interests and prejudiced the administration of justice by engaging in a sexual relationship with a client while he was representing her, even though the relationship was consensual); *Bourdon's Case*, 565 A.2d at 1057 (finding that the lawyer's sexual relationship materially limited the lawyer's representation of the client); *In re Joslin*, 13 P.3d 1286, 1290 (Kan. 2000) (concluding that the attorney's alleged sexual relationship with a client violated the rule prohibiting an attorney from representing a client if such representation could be materially limited by attorney's own interests).

129. A LEGISLATIVE HISTORY, *supra* note 31, at 209 ("Although recognizing that most egregious behavior . . . can be addressed through other Rules[,] . . . having a specific rule has the advantage not only of alerting lawyers more effectively to the dangers of sexual relationships with clients but also of alerting clients that the lawyer may have violated ethical obligations in engaging in such conduct.").

130. See, e.g., *Suppressed v. Suppressed*, 565 N.E.2d 101 (Ill. App. Ct. 1990). In this case the court denied a cause of action for damages based on an allegation that an attorney breached a duty to the client by engaging in sexual relations because "[t]he potential for abuse would be too great" and could "have a grave potential to be used for blackmail by unscrupulous persons seeking unjust enrichment." *Id.* at 106 n.3.

firm, particularly if the partner is not officially screened from all information about the case.

Amending the rule to impute the conflict on other members of the firm raises additional and different problems. The attorney involved in the sexual relationship would have to quit the firm or stop the relationship. The firm would have to fire the lawyer or terminate the representation of the client. The client would have to fire the law firm or end the relationship. None of these options would be very appealing to the parties involved: neither the client nor the law firm would want to terminate their long-standing relationship, the lawyer would not want to quit the job, the lawyer and client presumably would not want to end their personal relationship, the client would not want to see his or her personal friend get fired, and the firm would not want to fire a valued member. There is a real chance that the rule would simply be ignored in such a situation, perhaps by removing the attorney from assignments involving the client but preserving the representation by the firm in violation of rule 1.8(k). In other words, problems arise regardless of whether the rule imputes the conflict to the firm.

In addition, the proposed rule does not apply if the sexual relationship between the attorney and the client already existed when the client-lawyer relationship began.<sup>131</sup> According to the comment to the rule, the 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.”<sup>132</sup> Thus, the attorney is simply reminded of the duty to avoid conflicts that might materially limit the representation. Although it is understandable, this aspect of the rule does not seem to be consistent with the policy that suggests a specific rule is needed in the first place. If it is the personal relationship that creates the undesirable circumstances that call into question the attorney’s independent judgment, the fact that the sexual relationship predates the professional relationship does not quite eliminate the problem.

Finally, it is interesting to note that this is one of the few rules about which the ISBA/CBA Joint Committee and the Supreme Court Committee on Professional Responsibility disagree. The ISBA/CBA

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131. MODEL RULES OF PROF’L CONDUCT R. 1.8(j) (2003). If the relationship existed before the professional relationship, the exploitation of the fiduciary duties and the possibility of client dependency are diminished. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.8–11, at 393 (citing MODEL RULES OF PROF’L CONDUCT R. 1.8(j) cmt. 18 (2003) and Attorney Grievance Comm’n of Md. v. Culver, 849 A.2d 423 (Md. 2004)).

132. MODEL RULES OF PROF’L CONDUCT R. 1.8(j) cmt. 18 (2003).

Report suggests that the comment should clarify that the rule does not apply when the client is an organization.<sup>133</sup> The Supreme Court Committee on Professional Responsibility, on the other hand, takes the position that the new Illinois Rules should adopt the original language in the comment to the ABA Model Rules which states that the 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.”<sup>134</sup>

This second position is more sound. One main purpose of the rule is to make sure that the attorney’s relationship with a client does not affect his or her exercise of independent professional judgment.<sup>135</sup> An attorney who gets involved with a member of the entity client with whom the attorney works regularly can create the risk of a personal conflict of interest that can affect the representation just as much as in the case of an individual client.

### *B. Duties to Prospective Clients*

The concept of a prospective client is not new, but only recently has it been regulated in rules of professional conduct.<sup>136</sup> To do so, the proposed new Illinois Rules adopt ABA Model Rule 1.18, which, as stated in the ISBA/CBA Joint Committee Report, fills in a gap in the prior rules.<sup>137</sup>

Assume, for example, that a prospective client asks a lawyer to consider taking on a case against one of the attorney’s current clients. The attorney could not accept the new case because it would create a conflict of interest and promptly rejects the client’s request. Assume further that during the consultation the prospective client revealed confidential information that would be detrimental to the prospective

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133. MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. 19 (2003).

134. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 17 (“Comment [19] to MR 1.8, dealing with the application of MR 1.8(j) to organizational clients, goes too far . . . . There is no record of abuse in such situations, and [the] representatives [of organizational clients] do not need the protection that other clients in vulnerable positions may require.”).

135. *Id.* R. 1.8 cmt. 17.

136. The 1983 version of the Model Rules did not recognize duties to prospective clients, but did mention the possibility in paragraph 17 of its Preamble saying that “there are some duties . . . that attach when the lawyer agrees to consider whether a client lawyer relationship shall be established.” MODEL RULES OF PROF’L CONDUCT Preamble (1983); *see also* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 90-358 (1990) (regulating information imparted to a lawyer by a would-be client seeking legal representation even though the lawyer does not undertake representation of or perform legal work for the would-be client).

137. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 23-24.

client and beneficial to the current client. This situation, which is not that uncommon, raises many questions: whether the attorney can represent the current client if the prospective client files the claim; whether the attorney can disclose to the current client the information received during the consultation; whether the attorney can use the information to the benefit of the current client; and, if the attorney is precluded from representing the current client against the prospective client, whether another attorney in the same firm can do so. Depending on how these questions are answered and the duties to the different parties are defined, the same questions could have civil liability implications.

Proposed new Rule 1.18 addresses these questions for the first time.<sup>138</sup> Because prospective clients do have a legitimate interest in confidentiality,<sup>139</sup> the rule attempts to reach a compromise by offering some protection while not automatically disqualifying the attorney or the attorney's firm from representing the current client. The rule states that a lawyer shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, unless 1) both the affected client and the prospective client give informed written consent or 2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client, the lawyer is timely screened from any participation in the matter, the lawyer is apportioned no part of the fee, and the prospective client is given prompt written notice.<sup>140</sup>

Unfortunately, there is a problematic aspect of the Model Rule and a rather troubling detail about the proposed rule in Illinois. As stated above, the Model Rule attempts to strike a balance between protecting

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138. One issue that is not addressed specifically by the rule relates to the question of whether an attorney has a duty to advise about, or help in, getting new representation for the prospective client. The rule also does not address its possible implications regarding tort liability, which is understandable because the rule is not designed to deal with those.

139. Rule 1.18(b) states the well settled proposition that information learned from a prospective client is confidential and that the attorney has a duty to protect it just as much as any other confidential information provided by a former client. A LEGISLATIVE HISTORY, *supra* note 31, at 381. In fact, this principle had already been expressed by the ABA Committee on Professional Responsibility in 1990 in Formal Ethics Opinion 90-358 in which it concluded that information given to a lawyer by a prospective client is protected from disclosure under Model Rule 1.6 even if the lawyer does not undertake the representation. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-358 (1990).

140. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2003).

the rights of the prospective client and the ability of the firm to continue to represent, or to accept future representation of, a client with interests adverse to those of the prospective client. Part of this balance is based on the suggestion that a lawyer should not be allowed to represent an adverse interest to that of the former prospective client only if the information obtained from this person could be “significantly harmful” to him or her.<sup>141</sup> Thus, presumably, an attorney would not be disqualified from representing a client against a former prospective client if the information received from the latter was merely harmful. The problem is that there is no clear way to determine the difference between significantly harmful information and just plain harmful information. In fact, in the context of a motion to disqualify, it would be difficult for a court to make that determination without knowing the information or the theory of the case that arguably makes the information relevant and harmful.<sup>142</sup>

The Model Rule also seeks to strike a balance between the firm’s and the prospective client’s interests by requiring that the law firm inform the prospective client of the representation adverse to the prospective client’s interest and of the existence of a screening system. Presumably this provides some assurance to the prospective client that the firm has a mechanism in place to protect his or her confidences.<sup>143</sup> The proposal in Illinois eliminates this requirement.<sup>144</sup> According to this approach, the prospective client does not have a right to object to the adverse representation or even to receive notice of the potential conflict.

Finally, it should be noted that the proposed rule may have a significant impact on solo practitioners who cannot establish a screening mechanism, and therefore may be precluded from representing current clients against prospective clients altogether. Thus, solo practitioners must be extremely careful when interviewing prospective clients to avoid disqualifying themselves from representing existing clients. Whereas today it is the lawyer’s responsibility to limit the amount of information a prospective client shares, under the new rule, lawyers practicing in a law firm would not have to worry as much about this possible conflict as solo practitioners.

The key to the rule remains the definition of “prospective client.” Not every person who consults an attorney about a legal matter should

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141. *Id.* R. 1.18(c).

142. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.18–1(c), at 644.

143. MODEL RULES OF PROF’L CONDUCT R. 1.18(d)(2)(ii) (2003).

144. See ILL. RULES OF PROF’L CONDUCT R. 1.18 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

be considered a prospective client. Thankfully, the proposal in Illinois includes the adoption of the comment to the Model Rule, which provides the prevailing interpretation of the term. According to the comment, a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a “prospective client.”<sup>145</sup>

This definition is actually one of the most significant elements of the new rule given the prevalence of the use of the internet to contact attorneys. When firms offer anyone with access to the internet the option to communicate with attorneys by e-mail, attorneys may receive unsolicited messages with confidential information that could result in the attorney’s forced disqualification from representing existing clients. Whether an unsolicited e-mail message creates an attorney/prospective client relationship usually depends on the degree to which the attorney invited or encouraged the message or gave the impression that the attorney would attend to the sender’s requests, which, in turn, usually depends on the terms or appearance of the website or ad where the e-mail contact information was provided.<sup>146</sup> To avoid misunderstandings, lawyers are advised to place clear and prominent disclaimers on every internet page in which they explain that unsolicited information sent voluntarily by prospective clients will not be confidential.<sup>147</sup>

### *C. Responsibilities of a Prosecutor and the Power to Subpoena Attorneys*

Rule 3.8 of the current Illinois Rules of Professional Conduct provides a list of duties that apply specifically to prosecutors, including a duty to seek justice, a duty to disclose exculpatory evidence, and a duty to refrain from making, and to prevent others from making, certain types of extrajudicial statements.<sup>148</sup> The proposed new rule would add a duty to protect an unrepresented accused’s right to counsel<sup>149</sup> and

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145. MODEL RULES OF PROF’L CONDUCT R. 1.18 cmt. 2 (2003).

146. See Wash. St. Bar. Ass’n, Informal Op. 2080 (2006) (stating that if a law firm uses a website to solicit inquiries from prospective clients rather than just provide general information about itself, it must treat their responses as confidential).

147. See Nev. Comm. on Ethics and Prof’l Responsibility, Formal Op. 32 (2005) (holding that if unsolicited communication is in response to lawyer’s website or internet advertisement, lawyer must take appropriate precautions such as warnings and disclaimers); Ariz. St. Bar Ass’n Ethics Comm., Formal Op. 02–04 (2002) (holding that if firm’s website includes e-mail address, website should include disclaimer of confidentiality).

148. ILL. RULES OF PROF’L CONDUCT R. 3.8 (2007).

149. ILL. RULES OF PROF’L CONDUCT R. 3.8(b) (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf). In sections (a)



suggests some minor changes to the language of the current rule.<sup>150</sup> However, the proposal would also add a controversial statement regarding the authority of a prosecutor to subpoena other lawyers.

The controversy over this subpoena provision could itself be the subject of a law review article,<sup>151</sup> but a short explanation should suffice to understand it. As approved in 1983, the original Model Rules did not contain a provision regulating the authority of prosecutors to subpoena lawyers. In 1990, however, the rules were amended to place limits on this practice by requiring judicial approval after an opportunity for an adversarial hearing before a subpoena could be issued.<sup>152</sup> In 1991, the Illinois Supreme Court adopted this new version of the rule, but abandoned it just a year later because of objections by prosecutors.<sup>153</sup> The ABA also dropped the provision from its Model Rules in 1995 on the theory that it belonged in a rule of criminal procedure rather than in an ethics code.<sup>154</sup>

Since then, prosecutors continue to use the practice of subpoenaing attorneys with increasing frequency.<sup>155</sup> Prosecutors often want access to information about fees paid to criminal defense counsel to determine if the fees are subject to forfeiture. Defense attorneys try to resist the subpoenas to protect their clients' confidential information and have

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through (d), the rule states the duty of prosecutors to guard for other rights of the accused. *Id.* R. 3.8(a)–(d).

150. For example, the rule limits its application to prosecutors by eliminating references to “other government lawyers.” *Id.*

151. See, e.g., Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 919 (1992) (suggesting that “opening the grand jury to clients of attorney-witnesses would help secure attorney-client relationships without damaging the grand jury’s traditional investigative role”); Thomas D. Morgan, *An Introduction to the Debate Over Fee Forfeitures*, 36 EMORY L.J. 755, 757 (1987) (discussing whether attorneys’ fees paid with the indirect or direct proceeds of a crime may, under federal law, be subject to forfeiture if the defendant is convicted).

152. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 3.8–2(d), at 732.

153. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 30–31.

154. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 3.8–2(d), at 733; see also Baylson v. Disciplinary Bd. of Supreme Court of Pennsylvania, 975 F.2d 102, 112–13 (3d Cir. 1992) (finding that a local rule regulating a subpoena practice exceeded the court’s rulemaking authority); CTR. FOR PROF’L RESPONSIBILITY, AM. B. ASS’N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 376 (6th ed. 2007) (citing A LEGISLATIVE HISTORY, *supra* note 31, at 511–12).

155. During the 1980s, the federal government subpoenaed attorneys in approximately ten to thirty-two percent of the criminal cases in the District of Massachusetts. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 3.8–2(d), at 731 (citing *United States v. Klubock*, 832 F.2d 649, 658 (1st Cir. 1987), *aff’d en banc*, 832 F.2d 664 (1st Cir. 1987)).

argued that the government abuses its authority in order to intimidate or retaliate against successful defense attorneys.<sup>156</sup>

Seven years after it abandoned the subpoena provision in Model Rule 3.8, the ABA re-instituted a new version when it adopted the current rule. The Model Rule holds that a prosecutor shall not subpoena a lawyer to present evidence about his or her clients or former clients unless the prosecutor reasonably believes that the information sought is not protected by privilege and is essential to the prosecution or investigation and unless there is no other feasible alternative to obtain the information.<sup>157</sup> The new rule does not include the old requirement of judicial approval and opportunity for a hearing before a prosecutor can subpoena a lawyer to question him or her about current or past clients. The ISBA/CBA Joint Committee and the Supreme Court Committee on Professional Responsibility agreed to endorse the new proposed rule arguing that the new provision is significantly different than the one rejected in 1992 because it limits prosecutorial subpoenas to situations where the information sought is essential, not privileged and not accessible otherwise<sup>158</sup> and “that removal of the court order/adversarial hearing requirement should make the rule more palatable for prosecutors, and that the subpoena provision is otherwise appropriate.”<sup>159</sup>

#### V. MISSED OPPORTUNITIES: CHANGES THAT ARE *NOT* BEING PROPOSED

Although the proposed new rules address some very important issues, there are many others that are ignored. In the next few sections these missed opportunities are addressed.

##### A. *The Requirement of Written Consent for Conflicts of Interest*

As a result of the proposals of the Ethics 2000 Commission, the Model Rules now require that attorneys obtain a client’s consent to a

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156. Steven Duke, *The Drug War on the Constitution* (Oct. 5, 1999), <http://www.cato.org/realaudio/drugwar/papers/duke.html> (lamenting the characterization of defense attorneys as “enemies” in the “war on drugs”); *see also* William J. Genego, *The New Adversary*, 54 *BROOK. L. REV.* 781, 840–41 (1988) (arguing that a prosecutor has no legitimate interest in increasing the likelihood of obtaining a conviction by creating restrictions on a defendant’s right to counsel and suggesting that sometimes the true motive is to deny the prospective defendant representation by the attorney of choice).

157. MODEL RULES OF PROF’L CONDUCT R. 3.8(e) (2003).

158. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 30–31; *see also* Letter from Richard A. Redmond, *supra* note 4, Exhibit B (showing the ISBA/CBA and the Illinois Supreme Court Committee as adopting proposed Rule 3.8).

159. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 31.

conflict of interest in writing.<sup>160</sup> If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, the lawyer must obtain or transmit it within a reasonable time.<sup>161</sup> The purpose of this new requirement is to “impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.”<sup>162</sup> Though this requirement appears to be a good idea, the proposed new Illinois Rules explicitly reject it. The ISBA/CBA Joint Committee explains its position in its report, stating that:

The model rule requires waivers of conflicts (i.e., client consents) to be in writing. That would be a significant change from the current Illinois rule. Although written conflict waivers are clearly desirable in many situations, requiring written consent in every situation *as a matter of discipline* is both unnecessary and inappropriate. Often, the conflict issues are clear, the affected clients understand the issues, and the matter is uncomplicated. The need for consent may arise unexpectedly and without notice in the midst of a transaction or other matter. In such cases, requiring a writing merely adds unnecessary delay and expense, and elevates technicality over the substantive question whether consent was given. Moreover, subjecting a lawyer to potential discipline, disqualification, and malpractice liability for want of a writing—when it may be entirely clear that the consent was in fact given—is not reasonable. Accordingly, the Committee recommends that the rule and comments be revised to eliminate the requirement that conflict waivers be in writing.<sup>163</sup>

This view seems to be based on the notion that an attorney would be subject to discipline if the attorney does not get the client to sign a waiver the moment the conflict arises. Yet the comment to the Model Rule is clear that this is not a requirement; rather, the most important thing is that the attorney communicate with the client carefully about the possible conflict.<sup>164</sup>

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160. MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8, 1.9, 1.11, 1.12, 3.7 cmt 6 (2003).

161. *Id.* R. 1.7 cmt. 20.

162. *Id.*

163. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 16.

164. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 20 (2003). “Confirmed in writing” is defined as follows:

“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent . . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

*Id.* R. 1.0(b).

Requiring consent in writing essentially forces the attorney to talk to his or her client about the issue. Presumably, the attorney would want to take the time to explain to the client the consequences of the document he or she is asking the client to sign. As stated in the comment to Model Rule 1.7:

The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.<sup>165</sup>

Because there is no requirement that an attorney drop everything the moment the need for consent arises unexpectedly or in the midst of a transaction, it does not seem unreasonable to require written consent. For this reason, the requirement of a written waiver need not add unnecessary delays or much expense. On the other hand, it may enhance the required attention both attorney and client would give to the discussion of the issue.

### B. *Pro Bono Service*

The ABA's Ethics 2000 Commission seriously considered adopting a rule that imposed a duty of mandatory pro bono service but ultimately rejected the idea.<sup>166</sup> The Model Rule that was approved essentially states that all lawyers are expected to perform pro bono services but does not require it.<sup>167</sup> The comment to the rule also makes clear that non-compliance with the rule cannot be enforced through the disciplinary process.<sup>168</sup> The rule is merely aspirational. For this reason, Illinois does not currently have a similar rule.<sup>169</sup> The ISBA/CBA Joint

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165. *Id.* R. 1.7 cmt. 20.

166. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 6.1–2(b), at 911–12. This discussion is not new. One of the original drafts of the Model Rules prepared by the Kutak Commission included a mandatory duty to perform pro bono work. In fact, since the ABA started to draft model professional responsibility codes and rules, there has been a debate as to whether there ought to be a rule mandating pro bono service. Every time, however, it was ultimately decided not to make pro bono service a mandated requirement.

167. Model Rule 6.1 states that a lawyer “should aspire” to render fifty hours of pro bono publico legal services every year. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2003).

168. *Id.* R. 6.1 cmt. 12.

169. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 35 (citing GEORGE W. OVERTON, THE NEW ILLINOIS RULES OF PROFESSIONAL CONDUCT, AN ANNOTATED EDITION 28 (1991)).

Committee has suggested that the current Model Rule not be adopted, stating that “[t]he model rule articulates praiseworthy goals and aspirations for a lawyer, but aspirations are not appropriate subjects of a disciplinary rule.”<sup>170</sup>

Although the Committee is correct that the Model Rule is aspirational, it is a mistake to leave the rule out. Encouraging attorneys to provide pro bono services is an important goal, and the Model Rule would do just that.<sup>171</sup> It serves as a reminder of the importance of pro bono service and as an exhortation to attorneys to get involved. While the rule is not meant to be enforced through the disciplinary process, this is not the only rule that fits that description. If the logic of the ISBA/CBA Joint Committee’s report were to be followed strictly, many other discretionary rules should be eliminated as well, including some of the exceptions to the duty of confidentiality and the rules suggesting the circumstances where an attorney can decline or terminate the representation of a client. As clearly explained in the Scope section of the Model Rules:

Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has professional discretion. *No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.*<sup>172</sup>

Regardless of whether the Model Rule is adopted, the Committee’s recommendation to amend the Preamble of the Rules to include the portions of the current Illinois Rules Preamble addressing pro bono service should be implemented. However, the Preamble should also

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170. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 35.

171. Rule 6.1, comment 1 of the ABA Model Rules of Professional Conduct states:

Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer’s professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule.

MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. 1 (2003).

172. *Id.* at Scope cmt. 14 (emphasis added).

mention Supreme Court Rule 756(f), which now requires lawyers to report all pro bono activity every year.<sup>173</sup>

*C. The Problem of Attempting to Regulate “Extrajudicial Speech”*

The proposed new Illinois Rules suggest maintaining current Rule 3.6, which limits the right of attorneys to make statements about ongoing litigation in circumstances when the attorney “knows or reasonably should know” that the statement “will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter.”<sup>174</sup> This formulation is better than that adopted by the ABA in its version of Model Rule 3.6, which, as the ISBA/CBA Joint Committee Report correctly states, may be more restrictive of attorney speech.<sup>175</sup>

However, considering the debate regarding the constitutionality of these types of rules, the first question is whether it is a good idea to continue to approach the issue of extrajudicial speech through professional regulation. It would be worthwhile to consider eliminating the rule entirely.

There is no question that states have a substantial interest in making sure trials are fair, and that attorneys have an obligation to make sure that their conduct does not prejudice the administration of justice. States also have an interest in protecting public confidence in the judicial system, protecting the integrity of the process, ensuring decisions are based on the arguments and facts at trial, and ensuring that attorneys do not increase administrative costs by forcing changes in

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173. ILL. SUP. CT. R. 756(f) (2008). The rule defines pro bono legal service as the delivery of legal services without charge or expectation of a fee to a person of limited means or to charitable, religious, civic, community, governmental or educational organizations in matters designed to address the needs of persons of limited means, or to charitable, religious, civic, or community organizations in matters in furtherance of their organizational purposes. *Id.* The rule also considers pro bono services the provision of training, without charge or expectation of a fee, intended to benefit legal service organizations or lawyers who provide pro bono services. *Id.* Legal services for which payment was expected, but is uncollectible, do not qualify as *pro bono* legal service. *Id.* It has been argued that the mandating reporting of pro bono work is more effective than mandating pro bono service itself. See Lisa Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 415 (2007). The constitutionality of a mandatory reporting statute has been questioned, but in *Schwarz v. Kogan*, 132 F.3d 1387 (11th Cir. 1998), the court decided that a mandatory reporting statute was constitutional and that a lawyer could be disciplined for failing to report. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 6.1–2(b), at 912.

174. ILL. RULES OF PROF'L CONDUCT R. 3.6(a) (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

175. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 29. The ABA Model Rule bans statements that will have a “substantial likelihood of materially prejudicing an adjudicative proceeding.” MODEL RULES OF PROF'L CONDUCT R. 3.6 (2003).

venue, extensive *voir dire* or sequestration of juries to counter the effects of their speech. Yet, the question remains whether these interests weigh in favor of imposing restrictions on attorney speech.

This balancing may depend on whether the state interests are so threatened by attorney speech that the regulation chosen to advance those interests is justified. The fundamental rationale for the rules is that extrajudicial trial publicity, specifically attorney speech, can be especially prejudicial in adjudicative proceedings. Yet, the evidence suggesting that attorney speech can have this effect is conflicting or inconclusive.<sup>176</sup>

Because there is no conclusive evidence that extrajudicial statements can cause prejudice, the application of rules attempting to limit the effect of those statements becomes problematic. The rules seek to preserve fairness in the process at the expense of an attorney's ethical obligation to zealously represent a client.<sup>177</sup> They also affect the attorney's First Amendment rights of expression and interfere with the public's right to be informed about matters of public concern. Although the rules prohibit statements that lawyers know or should know could be prejudicial, there is little evidence that any statements are indeed prejudicial. Attorneys attempting to comply with the rules would rarely, if ever, be able to know the effect of the statements. This could result in a chilling effect on presumptively protected speech.

The alternative is to eliminate the rule altogether and emphasize the courts' inherent power to regulate the conduct of attorneys who practice before them. This way judges could consider the specific facts and circumstances of each particular case and issue narrowly tailored guidelines giving attorneys a fair warning as to what would be allowed.

Assuming the rule is not eliminated, there is another objection to how it is drafted. The rule states that:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and would pose a serious and

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176. For a detailed discussion of this issue, including a discussion of empirical studies on the effect of extrajudicial publicity on jurors, see generally Alberto Bernabe, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. CHI. L.J. 323 (2002).

177. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991) (plurality opinion) (Justice Kennedy's opinion supporting the view that, by virtue of their involvement in a case and their training as advocates, attorneys are frequently the most appropriate persons to speak publicly on behalf of a client); see also FREEDMAN & SMITH, *supra* note 60, at 104-05.

imminent threat to the fairness of an adjudicative proceeding in the matter.<sup>178</sup>

Although the drafters of the proposed new Illinois rules suggest that a lawyer “should rarely be subjected to discipline for what he or she should have known,”<sup>179</sup> proposed Illinois Rule 3.6 retains the possibility of discipline based on what a lawyer “should know.”<sup>180</sup> This is surprising because the use of the “should know” or “should have known” standard in Rule 3.6 is questionable. As applied, the rule does not refer to knowing what a competent attorney should know but to knowing what a person outside the attorney’s control would know.

If Illinois decides to keep the “should have known standard” in this rule, the rule should be changed from stating that a lawyer “shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter” to “shall not make an extrajudicial statement that the lawyer knows will be disseminated by means of public communication and knows or reasonably should know that the statement would pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter.” This way, the rules would not require a lawyer to anticipate what someone beyond his or her control would do with the information, and any possible discipline would be based on an evaluation of the attorney’s own conduct.

#### *D. Reporting Another Attorney’s Misconduct*

According to both the Model Rules and the current Illinois Rules, a lawyer is obligated to report another lawyer’s misconduct when the lawyer knows of the other lawyer’s violation of a rule that raises a substantial question as to honesty and fitness to practice law.<sup>181</sup> However, the Model Rule does not allow disclosures of confidential information, while the current Illinois Rule does. This difference is the

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178. ILL. RULES OF PROF’L CONDUCT R. 3.6(a) (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

179. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 18. The report adds that “[t]he rules are intended primarily to instruct lawyers how to behave, and it is impossible to act upon what one does not know.” *Id.*

180. ILL. RULES OF PROF’L CONDUCT R. 3.6(a) (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

181. ILL. RULES OF PROF’L CONDUCT R. 8.3 (2007); MODEL RULES OF PROF’L CONDUCT R. 8.3 (2003).



result of the Illinois Supreme Court's decision in *In re Himmel*.<sup>182</sup> Its consequence is that attorneys in Illinois have a broader obligation to report than attorneys in all other jurisdictions. The proposed new rules for Illinois do not alter this fact.

With *In re Himmel*, Illinois became the first state to impose discipline based solely on a lawyer's failure to report another lawyer's misconduct.<sup>183</sup> In doing so, the court interpreted the duty much more broadly than intended by the ABA. In *Himmel*, the attorney in question had obtained confidential, but not privileged, information that his client's previous lawyer had converted client's funds.<sup>184</sup> Instead of reporting the conduct to the authorities, the attorney negotiated a settlement in exchange for a promise not to disclose the misconduct.<sup>185</sup>

The main problem with the decision of the court in *Himmel*<sup>186</sup> is that the court found a duty to report even though the attorney obtained his knowledge of the misconduct through confidential information. When the Illinois Rules were adopted some time later, they copied the text of the Model Rules which excepted from disclosure "information protected as a confidence"<sup>187</sup> but defined "confidence" as information protected by the attorney-client privilege.<sup>188</sup> Because this is a much narrower category of information, the end result is that, in Illinois, the rule mandates disclosure in many more circumstances.

Interestingly, thus far, other states have not followed the Illinois Supreme Court's lead.<sup>189</sup> The Committees that prepared the proposal for the new Illinois Rules should not have either. Instead, and without much explanation, they simply suggest that imposing a duty to disclose confidential, but not privileged, information must be a good policy essentially because the Illinois Supreme Court has so held. The end result is that the proposed rule is very similar to the current one,<sup>190</sup>

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182. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988).

183. *Id.*

184. *Id.* at 794.

185. *Id.* at 791.

186. For a discussion of some of the problems with the decision in *Himmel*, see ROTUNDA & DZIENKOWSKI, *supra* note 1, § 8.3-1, at 1074, to § 8.3-2, at 1082.

187. ILL. RULES OF PROF'L CONDUCT R. 8.3 (2007).

188. *Id.*

189. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 8.3-1(b), at 1178.

190. The ISBA/CBA Joint Committee report summarizes its suggestions for the rule by stating that the text of the Model Rule should be adopted, except that:

(1) Current Illinois law concerning the type of violation that must be reported should be retained; (2) current Illinois law limiting the exception to the reporting duty to privileged information should be retained; (3) Comment [4] should be supplemented to clarify that a lawyer consulted in a professional capacity by another lawyer concerning

which means that it mandates disclosure of more information and under more circumstances than the ABA Model Rule, and quite possibly more than any other rule in any other state.<sup>191</sup> Whether this is a good idea depends on whether the threat of discipline for non-disclosure is resulting in more prosecutions for unethical or unprofessional conduct that would otherwise go undiscovered. Mary Robinson, former Administrator of the Illinois Attorney Registration and Disciplinary Commission, has argued that this is indeed the case, stating that “lawyers faced with potential disciplinary exposure make prompt reports, and . . . that promptness makes it possible for discipline to intervene more swiftly and limit the potential damage that might be done by the offending lawyer.”<sup>192</sup>

More importantly, the rules do not address when the report must be made. In *In re Himmel*, the attorney argued that he did not report because it was actually in the best interest of the client.<sup>193</sup> Even in such a case, it is clearly not acceptable to fail to report, but would it be acceptable to *delay* the disclosure until a point in time when doing so would not affect the client? If so, what would be an acceptable amount of time? There seems to be a variety of approaches to this question,<sup>194</sup> and the rule should specifically address it.

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the second lawyer’s obligation to report does not thereby incur a reporting obligation; and (4) a requirement to notify the ARDC of disciplinary action by other authorities should be added to the rule, or, if a separate proposal for a new Supreme Court Rule 761A is adopted, a cross reference to that rule should be added to a comment.

ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 39.

191. The ABA Model Rules require that attorneys report another lawyer’s violation of a rule that “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” MODEL RULES OF PROF’L CONDUCT R. 8.3 (2003). In contrast, the Illinois rule would require a lawyer to report “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” and “conduct involving dishonesty, fraud, deceit or misrepresentation.” ILL. RULES OF PROF’L CONDUCT R. 8.3(a) (2007).

192. Mary T. Robinson, *A Lawyer’s Duty to Report Another Lawyer’s Misconduct: The Illinois Experience*, 2007 SYMP. ISSUE OF PROF. LAW. 3 (on file with author).

193. *In re Himmel*, 533 N.E.2d 790, 791–93 (Ill. 1988).

194. *Compare* Ass’n of the Bar of the City of New York, Formal Op. 1990–3 (1990) (stating that reporting must be prompt but some delay may be warranted to protect client’s interests), *with In re Anderson*, 769 A.2d 1282 (Vt. 2000) (holding that nine months was too long to wait to report), *and* *United States v. Cantor*, 897 F. Supp. 110 (S.D.N.Y. 1995) (holding that reporting must be within reasonable time under the circumstances). *See also* Joanne P. Pitulla, *Should Clients Be Able to Veto the Duty to Report?*, PROF. LAW., August 1996, at 2 (arguing that the duty of client confidentiality should not trump the duty to report).

*E. Inadvertent Disclosure of Documents and Confidential Information*

Proposed new Illinois Rule 4.4(b) states that a lawyer who receives a document relating to the representation of a client that the lawyer knows was inadvertently sent should promptly notify the sender.<sup>195</sup> It is interesting to note that the rule does not impose a duty to return the document or to refrain from reading it. The comment to the rule states that unless there is applicable law that requires the lawyer to return the document, the decision to return it is a matter of professional judgment and personal choice.<sup>196</sup>

This new addition to the Illinois Rules can be improved by addressing issues arising out of the practice of transmitting digital documents, which increases the risk of inadvertent disclosure of confidential information.<sup>197</sup> State bar association ethics opinions in New York and Florida have essentially taken the position that any embedded data in digital documents is to be considered by the receiving lawyer as confidential information that the sending lawyer did not intend to transmit.<sup>198</sup> In contrast, the ABA Committee on Professional Responsibility concluded in a recent formal opinion that the Rules “do not contain any specific prohibition against a lawyer’s reviewing and using embedded information in electronic documents.”<sup>199</sup> The ABA’s

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195. ILL. RULES OF PROF’L CONDUCT R. 4.4(b) (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf). This is a slightly different version of ABA Model Rule 4.4(b), which holds the same thing but imposes the same duty if the attorney “should have known” that the document was sent by mistake. See MODEL RULES OF PROF’L CONDUCT R. 4.4(b) (2003) (containing a “should have known” standard).

196. ILL. RULES OF PROF’L CONDUCT R. 4.4(b) cmt. 3 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf). The comment also suggests that whether the disclosure eliminates the privileged status of the document depends on the law of evidence. It should be noted that there is support for the proposition that if the evidentiary privilege is lost, the receiving attorney can take advantage of the mistake. In fact, some would argue that if the privilege is lost by the inadvertent disclosure, the lawyer who receives the information not only can but *should* read and use the information to his or her client’s advantage. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §102 reporters’ note cmt. e (2000) (stating that “[i]f the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer’s own client and may be required to do so if that would advance the client’s lawful objectives”).

197. See generally David Hricik, *Mining for Metadata: Is it Ethical to Take Intentional Advantage of Other People’s Failures?*, 8 N.C. J. L. & TECH 231 (2007) (discussing the transmittal of digital documents).

198. See Prof’l Ethics of the Florida Bar, Op. 06-2 (2006) (detailing Florida’s position regarding embedded data in digital documents); New York State Bar Ass’n Comm. on Prof’l Ethics, Op. 749 (2001) (discussing New York’s position).

199. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-442 (2006).

opinion has been criticized, and several states have adopted different views.<sup>200</sup>

Whether the duties (and the consequences for their violation) should fall on the sender of the document, on the recipient, or on both of them is a complex topic, and its importance will increase even more as the distribution of documents digitally becomes more common. It thus seems prudent to consider this issue as part of the process of modernizing the Illinois Rules of Professional Conduct.

#### *F. Imputed Disqualification and Screening*

When Illinois adopted its current rule regarding imputed disqualification due to conflicts of interest, it rejected the then-applicable Model Rule and became one of a minority of states that recognize the practice of screening attorneys within a law firm.<sup>201</sup> Having allowed this practice for years, the ISBA/CBA Joint Committee has taken the position that eliminating the screening provision from the Illinois rules “would be a fundamental step backwards.”<sup>202</sup> While it would be difficult to argue that it should be abandoned, it is worthwhile to examine some arguments in support of taking that step.

The problem arises when an attorney leaves a firm to join a new firm that represents a client with interests adverse to those of a client the attorney previously represented in the original firm. This former client of the attorney has a right to expect a certain level of loyalty from the attorney, which is protected by Model Rule 1.9.<sup>203</sup> According to Model Rule 1.9, if the attorney joining the firm possesses relevant confidential

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200. Hricik, *supra* note 196, at 238–42; John Levin, *What to do with Metadata*, CBA RECORD, June/July 2007, at 68 (arguing that New York and Alabama have a better approach to the problem).

201. Aside from Illinois, only Arizona, Delaware, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, and Washington allow screening. SUSAN MARTYN, LAWRENCE FOX & W. BRADLEY WENDEL, *THE LAW GOVERNING LAWYERS, NATIONAL RULES, STANDARDS, STATUTES AND STATE LAWYER CODES 120–23* (2006–2007).

202. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 19; *see also* Creamer & Luning, *supra* note 5, at 308 (“Model Rule 1.10, dealing with imputation of conflicts, does not allow screening of a lateral entrant to a firm to prevent disqualification of the entire firm. That would be a step backward for Illinois, where screening has operated well since 1990, with no evidence of harm to clients.”).

203. MODEL RULES OF PROF’L CONDUCT R. 1.9(c) (2000) (“A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.”)

information, the firm he or she joins will be disqualified from representing a client with interests adverse to those of the client left behind.<sup>204</sup> The issue hinges on whether the attorney acquired relevant confidential information while in the original firm.

According to the Model Rules, the new firm must show that the attorney did not acquire confidential information while in the previous firm. Otherwise, the attorney's new firm is disqualified. In contrast, the current approach in Illinois allows the new firm to continue to represent its client even if the new attorney who joined the firm has relevant confidential information, as long as he or she is screened from all participation in the representation.<sup>205</sup>

The endorsement of screening sets Illinois apart from other states and has generated a spirited debate among commentators. Defenders of the current approach allowing screening assert that the underlying argument against screening is simply the notion that you "can't trust attorneys" to comply with their duty to keep confidences and not get involved in the case while in the new firm, which they say is at least ironic, if not insulting.<sup>206</sup> They also argue that there is no evidence from states allowing screening showing an increase in client complaints because of the practice.<sup>207</sup> As stated by one commentator:

In the real world, . . . actual cases of lateral lawyers disclosing confidential information about former clients to their new firms are nonexistent. While some clients may be upset to learn that "their lawyer," or more commonly a lawyer who formerly worked on a

204. ABA Model Rule 1.9 states:

A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

MODEL RULES OF PROF'L CONDUCT R. 1.9(b) (2003). This duty extends to everyone in the new firm. *Id.* R. 1.10.

205. ILL. RULES OF PROF'L CONDUCT R. 1.10 (2007).

206. Robert Creamer, *Three Myths About Lateral Screening*, PROF. LAW., Winter 2002, at 20; Erin Cohn, *The Use of Screens to Cure Imputed Conflicts of Interest: Why The American Bar Association's and Most State Bar Associations' Failure to Allow Screening Undermines the Integrity of the Legal Profession*, 35 U. BAL. L. REV. 367, 378 (2006) (discussing fears that lawyers will not effectively self-regulate themselves).

207. Creamer, *supra* note 206, at 21. In 1999, the Administrator of the Illinois Attorney Registration and Disciplinary Commission stated in a letter to the ABA Ethics 2000 Commission that in almost nine years since the use of screening was allowed in Illinois, there had been "no formal cases involving charges that an effort to screen under Rule 1.10 was inadequate to protect confidential information." *Id.*; see also Creamer & Luning, *supra* note 5, at 308 (arguing that screening has operated since 1990 with no evidence of harm to clients).

matter handled by the firm that represents the client, has joined a law firm that represents an adverse party, there is no hard evidence that such clients have suffered any real harm. In fact, evidence presented to the [ABA Ethics 2000] Commission . . . from lawyer disciplinary authorities in states that have long permitted lateral screening confirmed that there have been virtually no complaints of harm to former clients of lateral lawyers who have been screened.<sup>208</sup>

Furthermore, supporters of screening point out that disqualification of the new firm is unfair to that firm's client, who loses his or her attorney of choice when the client did not do anything to deserve it.<sup>209</sup> They also argue that prohibiting screening makes it difficult for attorneys to seek new jobs and move to new firms<sup>210</sup> and that the Model Rules are inconsistent because they allow screening when an attorney joins a private firm after having worked for the government.<sup>211</sup> The ISBA/CBA Joint Committee Report essentially adopts these positions, stating:

A significant deficiency in Model Rule 1.10 is that it fails to allow screening of a lateral entrant to a firm in order to avoid the disqualification of the entire firm . . . . Screening has operated well for many years, without any indication of abuse or of harm to clients. It properly balances the interests of former clients in confidentiality, the interests of current clients in hiring counsel of their choice, and the interests of lawyers in mobility . . . . Accordingly, the Committee recommends that Illinois retain a screening provision.<sup>212</sup>

On the other hand, the argument in support of abandoning the current approach in Illinois is compelling.<sup>213</sup> Some argue that it is difficult to trust screening as an effective method to protect the interests of former clients against the risk of disclosure of confidential information.<sup>214</sup> Screening allows firms to avoid a conflict based on the firm's word,

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208. Creamer, *supra* note 206, at 21.

209. *Id.*

210. *Id.*

211. In fact, the Model Rules do allow screening in the context of attorneys moving from a government position to a private law firm under Model Rules 1.11 and 1.12 and to protect the interests of a prospective client under Model Rule 1.18. MODEL RULES OF PROF'L CONDUCT R. 1.11, 1.12, 1.18 (2003).

212. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 18–19.

213. In fact, the argument is so compelling that it convinced the ABA House of Delegates to reject the Ethics 2000 Commission's recommendation to amend the Model Rules to allow screening in August 2001. Creamer, *supra* note 205, at 20.

214. See Lawrence J. Fox, *Ethics 2000: Is It Good For Clients?*, PROF. LAW., Spring 2001, at 17, 20 ("Clients should have as much confidence in these screens protecting their confidential information as those who live in New Orleans have in real screens preventing the torrid summer heat from entering their homes.").

which the client cannot prove wrong. As one noted commentator explains, imposing screening on clients does not foster client trust because it:

... ignores client interests entirely . . . . [T]he client is simply told that . . . she should not worry because that person has been “screened.” No longer is the client presented with the conflict of interest situation and asked whether she will waive the conflict, with the lawyer agreeing to abide [sic] the client’s decision . . . . Rather this screening is presented to the innocent client as a *fait accompli*.<sup>215</sup>

Additionally, although there is no evidence to suggest problems in jurisdictions that allow screening, this may be because the client would never know if there is a violation of the screen. Opponents of screening argue that it is too much to ask a client to accept on faith the effectiveness of the screening without any way to verify it.<sup>216</sup>

Finally, there is the question of whether screening actually works. Many think of screening as a practice that affects one attorney, which is easy to manage. The reality might be quite different. Firms may have to establish multiple screens of multiple lawyers and multiple clients. One commentator has argued that the ability to keep track of such screens, let alone enforce them, is dubious at best.<sup>217</sup>

In addition, the fact that the rules allow screening when an attorney moves from public service to private practice and in cases of prospective clients should not necessarily result in the recognition of screening in other contexts. The rule allowing screening for former government lawyers is based on the idea that lawyers should not be discouraged from seeking employment in the public sector for fear of being unable to seek jobs in private law firms later.<sup>218</sup> This public policy does not apply when the attorney attempts to move from one private law firm to another. It has been argued that “cases are rare where someone could not find good employment while respecting our rules governing loyalty.”<sup>219</sup>

Moreover, screening to protect the confidences of a prospective client presents its own set of questions. As discussed previously, currently it is the attorney’s responsibility to be careful when interviewing a prospective client to make sure that the prospective client’s interests are

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215. *Id.* at 19.

216. *Id.* at 20 (“It is clearly asking too much for the client to accept on faith the effectiveness of screening when there is no way the client will ever be able to determine whether there has been compliance.”).

217. *Id.*

218. *Id.* at 19.

219. *Id.*

protected and that the attorney preserves the possibility of representing a party with interests adverse to those of the prospective client. The proposed rules in Illinois shift this responsibility to the prospective client, and the firm does not even have to inform the prospective client.<sup>220</sup> The prospective client cannot object and must accept the effectiveness of the screen on faith.<sup>221</sup>

In sum, abandoning the practice of screening in Illinois would certainly turn back the clock, but it would not necessarily be a step backward. In fact, it can be argued that it would be a step in the right direction.

Regardless of whether the screening provision is retained or abandoned, the proposed Illinois Rule is different from the Model Rule in another important detail. As stated above, to decide a motion to disqualify, the court would have to determine if the attorney has acquired confidential information. The Model Rules presume that the attorney acquired confidential information while working at the first firm and, thus, impose the burden of proof that the attorney did not do so on the firm whose disqualification is sought.<sup>222</sup> The proposed Illinois Rules reject this approach and state that the burden should fall on the party seeking disqualification.<sup>223</sup>

This is a difficult question and neither approach is perfect, but the proposed approach in Illinois seems to be better. If the burden is on the firm whose disqualification is sought, the firm must prove that the attorney did not have confidential information. This can be shown by providing the attorney's own testimony and evidence of the original firm's practices and records. This last type of evidence, however, is in the hands of the firm that now represents an opponent trying to get access to the evidence. On the other hand, if the burden is on the party seeking disqualification, this party must prove that the attorney had access to confidential information. To do so, it has available the records and practices of its own firm, which would be easier to produce.

#### *G. Obligation to Take Remedial Measures After Using False Evidence*

The proposed rules suggest a number of changes to issues related to the duty of candor to the tribunal, but miss the chance to explain when the duty begins. Current Illinois Rule 3.3 collects a number of duties

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220. *Id.* at 20.

221. *Id.*

222. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 6 (2003).

223. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 18 (citing Schwartz v. Cortelloni, 685 N.E.2d 871 (Ill. 1997)).



related to the duty of candor toward a tribunal, including the duty to not make false statements of fact or law and the duty to take remedial action when the attorney knows that a witness, including his or her client, has engaged in perjury.<sup>224</sup> Proposed Rule 3.3 would institute a number of important changes to the current rule.<sup>225</sup> For example, it would clarify certain aspects of the lawyer's duty, including specifying when it is necessary to take corrective action and what such action might be. The proposed rule also provides that a lawyer may not refuse to offer testimony of a defendant in a criminal case that the lawyer merely believes, rather than knows, is false.<sup>226</sup> The proposed rule also eliminates a number of items contained in the current rule because they either restate obligations already mentioned in other rules or are more properly the subject of substantive law or civil practice rules.<sup>227</sup> Finally, the proposed rule sets a time limit on the duration of the rectification obligation, which the ISBA/CBA Joint Committee Report states is "a matter left indefinite in the current Illinois rule, which could lead to a construction that the obligation exists forever."<sup>228</sup>

All of these changes are appropriate. However, while establishing a time limit for the duty to rectify to end, the rule fails to establish when the duty begins. This is an important element because a lawyer's mistake in understanding when the duty begins could form the basis for a claim of ineffective assistance of counsel.<sup>229</sup> If the attorney discloses the client's intention to commit perjury too early, the duty of confidentiality is compromised.<sup>230</sup> Also, until the defendant actually takes the stand, there is hope that the attorney will be able to dissuade the client from committing perjury and, thus, there is a chance that the client will decide to testify truthfully.<sup>231</sup>

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224. ILL. RULES OF PROF'L CONDUCT R. 3.3(a)(4) (2007).

225. ILL. RULES OF PROF'L CONDUCT R. 3.3 (Proposed Rules 2007), available at [http://www.state.il.us/court/SupremeCourt/Public\\_Hearings/2007/04-18.pdf](http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/04-18.pdf).

226. *Id.* R. 3.3(a)(3).

227. They include the following subsections of the current Illinois Rule: 5, 7, 8, 9, 10, 11, 12, 13, 14, and 15. *See* ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 26–27.

228. *Id.* at 26.

229. *See* *People v. Barte*, 566 N.E.2d 855, 856 (Ill. App. Ct. 1991) (outlining a situation in which a defendant claimed ineffective assistance of counsel when the lawyer, after being denied the ability to withdraw, allowed defendant to testify in narrative form).

230. An attorney that informs the court of his belief of possible perjury by his client "takes on role of fact finder, a role which perverts structure of [an] adversary system." *Id.* (quoting *United States v. Long*, 857 F.2d 436, 445 (8th Cir. 1988)).

231. *See Barte*, 566 N.E.2d at 856 (citing the opinions of Justices Blackmun and Stevens in *Nix v. Whiteside*, 475 U.S. 157 (1986), in which they argued for limiting court notification of possible perjury to "announced plans" to commit perjury because counsel's perceptions may be incorrect, the client may more clearly recollect certain details that contradict prior recollections,

For this reason, the new rule should give some guidance as to the moment when the duty to disclose the client's intention to commit perjury begins. Although it is clear that a mere suspicion that the witness will commit perjury is not enough to trigger the duty to disclose,<sup>232</sup> courts have developed varied approaches to this question. Some courts hold that a clear expression of intent to commit perjury is required before an attorney can reveal client confidences.<sup>233</sup> Others suggest that there is a duty to disclose only if there is a "firm factual basis" to believe the client is going to commit perjury.<sup>234</sup> The Illinois Court of Appeals, however, has decided that absent some showing that a lawyer's decision was unreasonable under the circumstances, it cannot be said that a defendant was denied a fair trial and, for that reason, recognized a duty based on a "good faith determination" by the attorney.<sup>235</sup> The new rule should include this standard.

#### H. "Pay to Play"

The proposed Illinois Rules do not adopt Model Rule 7.6 which states that a lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for a legal engagement or appointment.<sup>236</sup> Although the Model Rule was enacted for a good reason,<sup>237</sup> the rule creates more problems than it solves and it is a good decision to exclude it.

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and because "even a stated intent to perjure one's self does not necessarily mean that the client will lie once sworn in on the stand").

232. Rule 3.3 suggests that an attorney has a duty to take remedial measures only if the attorney has knowledge, which is more than a mere suspicion or belief. MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2003); *see also* United States v. Midgett, 342 F.3d 321, 326–27 (4th Cir. 2003) (finding that a lawyer's "mere belief" that his client was not truthful was insufficient to deny the defendant assistance in the presentation of his testimony). Note, however, that the definition of knowledge in the Model Rules is not particularly helpful. Rule 1.0 states that knowledge "denotes actual knowledge of the fact in question." MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2003).

233. *See* Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989) (stating that a lawyer must have evidence establishing beyond a reasonable doubt that testimony will be perjured before she can reveal client confidences).

234. United States v. Long, 857 F.2d 436, 445–46 (8th Cir. 1988); Commonwealth v. Mitchell, 781 N.E.2d 1237, 1247 (Mass. 2003).

235. *Bartee*, 566 N.E.2d at 857 (applying a standard developed by the Supreme Court of Illinois in *People v. Flores*, 538 N.E.2d 481 (1989)).

236. MODEL RULES OF PROF'L CONDUCT R. 7.6 (2003).

237. As stated in an ABA work:

The practice commonly known as "pay-to-play" addressed by the Rule is a system whereby lawyers and law firms are considered for or awarded government legal

The ISBA/CBA Joint Committee Report summarizes the reasons to reject the rule convincingly this way:

The Committee's recommendation is not an endorsement of so-called "pay-to-play" practices addressed by the model rule. Such practices are reprehensible and should not be tolerated. However, the attempt to regulate them in a disciplinary rule is misplaced and raises substantial enforceability and constitutionality concerns.

The ABA adopted this model rule in February 2000, after initially rejecting it six months earlier, and after publicity about "pay-to-play" practices by investment bankers, financial advisers, and lawyers, principally in New York. The rule has not been adopted in Illinois, or in most other states, for good reason. There are real issues of enforceability. How does the ARDC divine the purpose of a lawyer's political contribution? The problem is demonstrated by the intricate "guidance" in Comment [5]. There is also concern about the possible chilling effect on lawyers making political contributions in circumstances where their motives are pure. In addition, real issues of constitutionality exist. Contributions to political campaigns are equated with speech and are accorded the highest level of First Amendment protection. Finally, there is an issue whether the rule is necessary. Rule 7.2(b) prohibits a lawyer giving anything of value to a person for recommending the lawyer's services, and existing statutes deal with bribery.<sup>238</sup>

Probably for similar reasons, few jurisdictions have adopted Rule 7.6 and one member of the ABA's Ethics 2000 Commission has called it the most decisively rejected rule and a "most brilliant mistake."<sup>239</sup> The possible application of the rule turns on the motive behind the contribution which is difficult to prove, to say the least. The rule is essentially unenforceable.<sup>240</sup>

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engagements or appointments by a judge only upon their making or soliciting contributions for the political campaigns of officials who are in a position to "steer" such business their way.

A LEGISLATIVE HISTORY, *supra* note 31, at 785.

238. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 37.

239. Lucian Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 818 (2005); see also Brian C. Buescher, *ABA Model Rule 7.6: The ABA Pleases the SEC, But Does Not Solve Pay to Play*, 14 GEO. J. LEGAL ETHICS 139 (2000) (proposing to shift the burden to attorneys who have made campaign donations in potential "pay to play" situations).

240. John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action Cops: Public Servants or Private Enterpreneurs?*, 57 STAN. L. REV. 1441, 1469 (2005) (arguing that Rule 7.6 requires proof of illegal purpose which makes it virtually unenforceable in all but the most extreme cases).

## CONCLUSION

At the time of this writing, the new Illinois Rules of Professional Conduct are a work in progress. Some of the rules are, in fact, not totally finalized.<sup>241</sup> However, the main structure and the content of most of the rules seems to be in place. The ISBA/CBA Joint Committee and the Supreme Court Committee on Professional Responsibility should be congratulated on the very good work they did in revising the Rules of Professional Conduct and for their thoughtful and comprehensive reports. For the most part, they are excellent and their proposals should be followed. However, some of the new proposed rules need to be discussed further. Hopefully, this article will contribute to that discussion and, eventually, to the enactment of the best possible set of rules for our profession in the state of Illinois.

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241. For example, the ISBA is currently working on an alternative to proposed Rule 5.7 which attempts to provide guidelines on whether attorneys are subject to the Rules of Professional Conduct when they engage in law related services that do not constitute the practice of law. The ISBA has drafted two alternative proposals. One deals with law related services provided in circumstances that are not distinct from the lawyer's practice and another that relates to non legal services performed by an ancillary entity. ISBA/CBA JOINT COMMITTEE REPORT, *supra* note 3, at 33. For this reason the ISBA/CBA Joint Committee Report does not make any recommendations on this issue. *Id.*