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Rules of Professional Conduct to see changes in 2010

Recently, the Illinois Supreme Court adopted amendments to the Illinois Rules of Professional Conduct which will go into effect on Jan. 1, 2010.

After nearly two decades, the Supreme Court, upon the recommendation of numerous judges, lawyers and members of the Illinois State Bar Association and Chicago Bar associations, have implemented significant revisions to the 1990 rules. The modifications make the rules similar in scope and content to the ABA Model Rules adopted in 2002 / 2003.

The most noticeable difference between the old rules and the new rules is the significantly enhanced "comments" that follow almost every rule. Similar to the comments provided in the Model Rules and the Restatements, these comments will serve as a welcome guide to attorneys working their way through ethical challenges, especially with respect to newly added provisions.

"The comments should be a good working guide for the practicing attorney," said Richard A. Redmond, a longtime member of the Committee on Professional Responsibility. "The rules serve as the basis of discipline for all lawyers; the comments explain the rules, refer to court decisions relating to the rules and assist the lawyer in complying with the rules."

New Terminology

The new rules incorporate a number of newly defined words and phrases, which the drafters likely believed required further explanation. The terms include such items as "confirmed in writing;" "informed consent;" "reasonably should know;" "screened;" "tribunal;" and "writing" or "written." Several of the defined terms are followed by comments, which provide helpful details on how the terms should be interpreted as they appear in the rules.

Completely New Provisions

In addition to newly defined terminology, the Supreme Court has also adopted a number of new provisions, including Rule 1.18 (Duties to Prospective Client); Rule 2.4 (Lawyers Serving As Third-party Neutral); Rule 3.9 (Advocate In Adjudicative Proceedings); Rule 4.4 (Respect For Rights Of Third Parties); and Rule 6.5 (Nonprofit And Court-Annexed Limited Legal Services Programs).



Law for Lawyers

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For example, Rule 1.18 governs duties to prospective clients and identifies important duties that lawyers owe to prospective clients arising from preliminary discussions before the creation of a formal lawyer-client relationship. Rule 1.8 creates confidentiality obligations in identified circumstances, and also addresses conflict situations that may arise after an attorney receives information about a prospective client even though no attorney-client relationship is ever formed. (See *Highlights From the New Illinois Rules of Professional Conduct of 2010*, Illinois Supreme Court Press Release, July 1, 2009)

Rule 2.4 addresses lawyers serving as third-party neutrals. The rule defines the duties of a lawyer who serves as a third-party neutral, such as a mediator or arbitrator. (*Id.*) Similarly, Rule 3.9 identifies the duties of an advocate in a nonadjudicative proceeding, such as a legislative body or an administrative agency. The rule requires that attorneys in such circumstances disclose that their appearance is in a representative capacity, and that the attorney comply with Rules 3.3-3.5.

Rule 4.4(b) creates a new requirement that lawyers respect the rights of third persons, and specifically states that lawyers are prohibited from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person." The rule also requires lawyers who have inadvertently received confidential or privileged information about another's client to notify the sender and return such information.

Finally, Rule 6.5 addresses nonprofit and

court-annexed legal services programs. This rule is identical to the ABA Model Rule 6.5, and is intended to promote greater opportunities for lawyers to perform pro bono legal services through not-for-profit or court-annexed programs by providing limited relief to standard conflict of interest prohibitions.

New Changes To Existing Rules

In addition, the new rules also contain several significant modifications to existing rules. For example, Rule 1.6 governing confidentiality now defines client confidentiality in terms of information received during an attorney-client relationship, like the majority of jurisdictions in the country. The new rule also expands the categories of when a lawyer may make permissible disclosures of protected information, principally in cases of client fraud involving the use of the lawyer's services. Lawyers remain bound to disclose information that could result in death or serious bodily harm. (*Id.*) The revised rule also contains extensive comments containing detailed explanations on the issues of authorized disclosure, disclosure that is adverse to a client, confidentiality obligations upon withdrawal, duties of confidentiality to former clients, and a law student's, lawyer's or judge's right to confidentiality when participating in a lawyers' assistance program.

Rule 1.8 has a new requirement that lawyers refrain from having sexual relations with clients unless a prior sexual relationship existed. The comments to Rule 1.8 also now provides details on specific conflict of interest issues, including such items as business transactions between a client and lawyer, gifts to lawyers, third-parties paying for a lawyer's services, and acquiring a proprietary interest in litigation. Rule 1.13 has been expanded to include additional circumstances when a lawyer working for a corporation or similar organization must take action to protect the client from the impact of an officer's or employee's wrongful conduct. Again, this rule contains extensive comments that provide guidance concerning such issues as the rule's relationship to other rules, the rule's application to government agencies, and clarifying the lawyer's role in circumstances of dual representation.

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Rule 1.14 has also been modified, but continues to provide guidance to any lawyer who deals with a client who may have the diminished capacity to make decisions. The rules permit a lawyer to take reasonably necessary protective action to protect a client's interests, including, in certain circumstances, providing emergency legal assistance when a client does not have the capacity to form an attorney-client relationship. (*Id.*)

Other Modifications

Rule 1.5 and Rule 1.15 refine fee restrictions and the obligations of a lawyer to maintain and protect the funds and property of clients and others, including an important clarification for practitioners concerning how they should manage retainer fees. (See Rules 1.5 and 1.15). Although the Illinois Supreme Court has permitted lawyers to sell or transfer their law practices since 2005, an amendment to Rule 1.17 clarifies earlier regulations and eliminates certain

restrictions on the reasons for a sale. (*Id.*) The comments to this rule now expressly address the termination of a practice by the seller; the sale of the entire practice; client confidences, consent and notice of the sale of the law practice; fee arrangements between clients and the purchaser as well as other general applicable ethical standards.

Rule 3.8 now requires a criminal prosecutor to make reasonable efforts to assure that an accused has been advised of the right to, and has been afforded a reasonable opportunity to, obtain counsel. Prosecutors are also prohibited from seeking to obtain waiver of pretrial rights from an unrepresented person accused of a crime.

Rule 5.5, formerly, "The Unauthorized Practice of Law," has now taken on a new dimension and is now called the "Unauthorized Practice of Law; Multijurisdictional Practice of Law." The drafters of the new rules acknowledge that the practice of law has changed substantially over the course of

the past few decades, and that it is not uncommon for attorneys licensed in other jurisdictions to provide assistance to clients in this State. The rule establishes guidelines for such lawyers to render services in this state, subject to identified requirements. Similarly, Rule 7.2 has been modified to reflect present day trends such as attorneys advertising, as well as the existence of electronic communications and Web sites.

Overall, the new rules will be helpful to Illinois lawyers because they provide needed clarity on an attorney's ethical obligations in providing services to clients. All attorneys should take the time to review the new rules to remind themselves of existing standards and learn about new provisions going into effect next year. More information about the new rules is available on the ARDC's Web site at www.iardc.org.

(This article was prepared with the assistance of Sharon E. Ferguson, of Meckler, Bulger, Tilson, Marick & Pearson LLP)