# ETHICS 2023

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May 31st

## PM PROGRAM

### ARDC 50th Anniversary Retrospective and Conversations on Diversity with the Commission on Professionalism

**HON. THOMAS MORE DONNELLY**

*Circuit Court of Cook County*

**JEROME "JERRY" E. LARKIN**

Administrator, *Illinois ARDC*

**JULIA ROUNDTREE LIVINGSTON**

DEI Manager, *Illinois Supreme Court Commission on Professionalism*

**RACHEL C. MILLER**

Litigation Counsel, *Illinois ARDC*

**MARY T. ROBINSON**

Partner, *Robinson, Stewart, Montgomery & Doppke, LLC*

**ADRIAN M. VUCKOVICH**

Partner, *Collins Bargione & Vuckovich*

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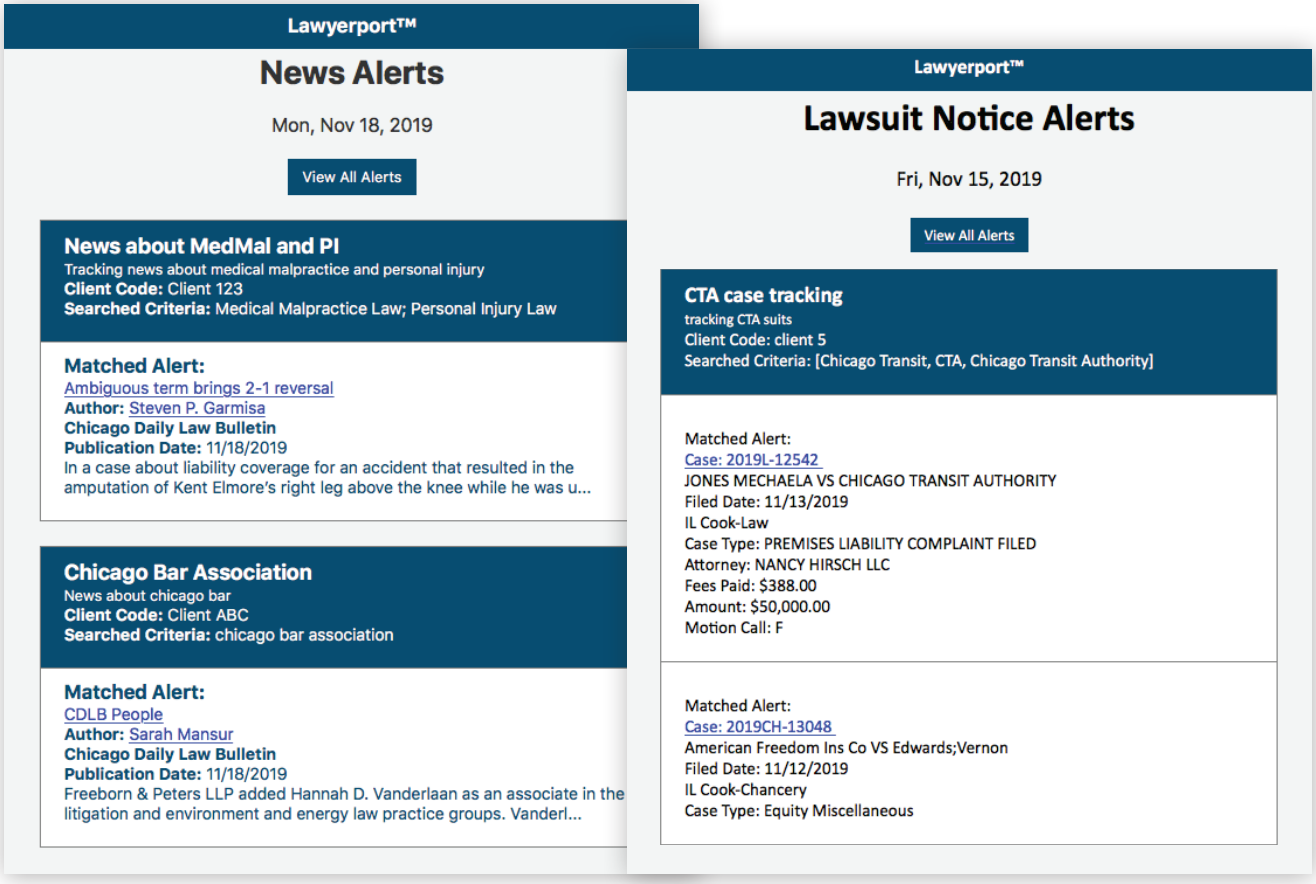


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Welcome to the Law Bulletin Seminars Ethics 2023 Conference. We are excited to be presenting this year's conference both in-person and streaming virtually. The morning program provides 3 Illinois

PMCLE credits, including the required wellness credit, and a separate after¬noon program also provides 3 Illinois PMCLE credits, including diversity. We are honored that you have chosen our conference to meet your profes¬sionalism requirements.

Our afternoon program celebrates the 50th anniversary of the ARDC and also features the new DEI Manager Julia Livingston from the Commission on Professionalism. The afternoon ses¬sions begin with a guidance on how to navigate difficult conversations regarding diversity. Next, we have a session on some of the milestone ARDC cases that have and continue to impact how lawyers practice in Illinois. Finally, we're review the new rules regarding retainer fees with ARDC Administrator Jerry Larkin.

We wish to extend a special thanks to the Illinois ARDC, the Commission on Professionalism and our exceptional faculty. We also are thankful for the support of Aronberg Goldgehn, Collins Bargione & Vuckovich, Konicek & Dillon PC, Johnson &Bell, Robinson Stewart Montgomery & Doppke LLC, and Smith Gambrell & Russell.

We hope you enjoy this event and encourage you to attend some of our other Law Bulletin Seminars events throughout the year. Visit our website LawBulletinSeminars.com to learn how you can earn your MCLE credits in a dynamic and professional environment.

If you should have any questions, comments or suggestions, please contact us. Law Bulletin Media has been serving the Chicago legal community for 169 years, and your comments have helped improve our products and services over the years. We will continue to solicit and act on your advice.

Thank you again for attending,

**Peter Mierzwa**
President
Law Bulletin Media

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## PM PROGRAM

### ARDC 50th Anniversary Retrospective and Conversations on Diversity with the Commission on Professionalism

## PANEL 4 — 1:30pm - 2:30pm

Navigating Difficult Conversations Regarding Diversity (DEI)

**Panel Leader:** **Julia Roundtree Livingston,** Diversity, Equity & Inclusion Manager, *Illinois Supreme Court Commission on Professionalism*

**Julia Roundtree Livingston,** Diversity, Equity & Inclusion Manager, *Illinois Supreme Court Commission on Professionalism*

Julia serves as the Diversity, Equity, and Inclusion Manager for the Illinois Supreme Court Commission on Professionalism, where she promotes integrity, civility, and professionalism among the lawyers and judges of Illinois. In this role, Julia leads the Commission's educational and advocacy initiatives aimed at promoting diversity, equity, and inclusion (DEI) in the legal and justice systems.

As DEI Manager, Julia develops and delivers legal education on DEI and other professionalism topics to lawyers, judges, and law students, and performs outreach across the state on behalf of the Commission. She also supports the Commission's lawyer-to-lawyer mentoring program and manages its involvement in Jumpstart, a law school preparatory program for historically underrepresented law students.

Before joining the Commission, Julia was the Executive Director of Macon County CASA (Court Appointed Special Advocates) in Illinois. Earlier in her career, Julia was also the Director of Development at Macon County CASA and Baby TALK.

In addition to her role at CASA, Julia was a member of the Illinois CASA Equity Task Force, the Illinois CASA/Children Advocacy Centers Task Force, and the CWAC (Child Welfare Advisory Committee) on Racial Equity led by the Illinois Department of Children & Family Services.

Julia has served as an adjust professor of English—Rhetoric, U.S. Literature, since 1865, African American Literature, Professional Writing and Humanities at the University of Illinois—Urbana, Champaign, Richland Community College, Florida State University, and Southern Illinois University—Carbondale.

Julia is ABD for a PhD from Florida State University in African American Literature and U.S. Literature Since 1865; she holds an MA from Southern Illinois University—Carbondale and a BA from Southern Illinois University—Carbondale.

Julia is a member of the Diversity & Education Leadership Team at the Maroa-Forsyth School District and founder of Discourse on Racial Difference: A Macon County Book Club, which has 600 members statewide.

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Illinois Supreme Court Commission on Professionalism

# We Need To Talk: Navigating Challenging Conversations about Diversity

## Course credit

1 hour of PR Diversity and Inclusion CLE credit (IL)

## Learning Objectives

- Understand how to identify and challenge biases and microaggressions
- Develop the skills necessary to have conversations on culturally sensitive topics
- Understand what an ally is and how to become one

## Course Description

Since 2020, the murder of George Floyd has prompt people to have difficult conversations regarding race. However, little constructive guidance was given regarding how to have these conversations. As a result, although some people engaged in these conversations and were catalysts for change, other people had conversations which may have done more harm than good, and other people simply tried to avoid having these conversations at all.

The reality is that many people struggle with having honest and productive conversations about diversity. These conversations require people to discuss potentially sensitive topics … to speak and listen with empathy … to be open to accepting constructive criticism … to be willing to ask questions with an open mind … and to risk potentially saying the wrong thing. As a result, some people try to avoid ever having these conversations.

This course explores how professionalism and civility can provide you with skills to facilitate difficult conversations regarding diversity and help you to be leaders in creating more inclusive environments. .

## Timed agenda

| Time | Section | Content/Activities |
|---|---|---|
| 5 mins | Introduction | Welcome and introductions |
| 10 mins | The data | Overview of the data on civility and groups most affected |
| 10 mins | Identifying biases | Bias video discussion. What biases are evident? |
| 20 mins | Challenging biases | What strategies can we employ to combat biases? |
| 10 mins | Key takeaways | Do's and Dont's of difficult conversations |
| 5 mins | Summary and Q&A | Overview of takeaways and questions |

2Civility™

# We Need To Talk: Navigating Challenging Conversations about Diversity

Presented by the
Illinois Supreme Court
Commission on Professionalism

# Listening to Understand

## Be curious about their story

- Lower your internal voice to remain interested in what the speaker says.
- Incline your body toward the speaker.
- Maintain an appropriate distance from the speaker.
- Establish effective eye contact.

## Inquire to learn their perspective

- Ask open-ended questions, e.g. “Can you say a little more about that?”
- Ask why this issue is important to them.
- Ask for any additional information that has not been shared, e.g. “What information do you have that I/the other doesn’t?”

## Paraphrase and reflect

- Express, in your own words, your understanding of what the speaker is saying, e.g., “What I hear you saying is…”, “Do you mean…”, “Are you saying...”

## Summarize and restate the main points of the conversation

- “I now understand your concerns about this matter, and I agree that discussing at our staff meeting would be the best way to bring it to everyone’s attention and get feedback on how to proceed.”
- “In summary, we all agree that…”

# Do's and Don'ts of Approaching Difficult Conversations

## The person who experiences the bias


- Do make a few notes in advance of the conversation regarding what happened and how it made you feel
- Do focus on the other person's words/behavior as opposed to their intentions
- Do suggest how the other person could have handled the situation in a way that made you feel valued and respected


- Don't blame yourself for the other person's behavior or comment
- Don't apologize for initiating the conversation
- Don't hold yourself responsible for the conversation's outcome

## The person who exhibits the bias


- Engage the conversation in good faith
- Ask questions to clarify
- Be open to changing your perspective
- Be open to changing your behavior
- Validate what you can sincerely affirm


- Do nothing
- Sidetrack the conversation
- Appease
- Terminate the discussion
- Become defensive

# To Address Implicit Bias, Disrupt It

Last year, the Conference of Chief Justices and Conference of State Court Administrators issued a resolution to intensify efforts to combat racial prejudice in the justice system, both explicit and implicit. While those exhibiting explicit bias are aware of their prejudices and attitudes toward a certain group, implicit biases are hidden. They are subconscious attitudes or beliefs people have about others based on past experiences or influences.

Implicit biases manifest themselves everywhere and can be more difficult to uncover and address. However, a recently released report from the National Center for State Courts (NCSC) says they may be lessened by teaching people how to override their automatic gut reactions.

"Embedded in the architecture of our daily lives, many of these associations can be, or have become, invisible to us," Jennifer Elek and Andrea Miller, NCSC researchers, wrote in the report. "We may not endorse these associations, but they can nevertheless contaminate our choices and leak out through our behavior to impact others in ways that we do not intend."

The report, titled "The Evolving Science of Implicit Bias: An Updated Resource for the State Court Community," explores how implicit bias fits into
broader conversations about equity and fairness and summarizes current psychological research around implicit bias, including effective and ineffective strategies. Additionally, the report defines key terminology originating from research into implicit bias and addresses implications for legal professionals.

**Implicit Bias Interventions – What's Working and What Isn't**

Based on their analysis of physiological research on bias interventions, the authors offered three key takeaways on addressing implicit bias that have practical implications for courts and their communities:

1. General interventions that attempt to reduce prejudice and discrimination through positive, meaningful intergroup contact are some of the most effective strategies for courts.
    - Activities that include the following have the biggest impact: 1) different groups working toward a common goal, 2) the groups have equal status in the activity, 3) the activity allows individuals to get to know each other on an individual basis, and 4) the activity receives institutional support or support from the relevant authority figures.

2. Implicit bias interventions that attempt to change implicit associations in memory are not consistently effective.
    - While some of these "change interventions" can reduce the strength of implicit associations, they are difficult to implement, don't last long, and typically fail to change subsequent behavior.

3. Implicit bias interventions that bypass or disrupt biased responding show more promise.
    - "Expression interventions," which disrupt the expression of underlying implicit biases by teaching people how to override their automatic gut reactions and make decisions based on a more egalitarian response, show more promise than trying to retrain the brain.

Implicit bias research is continually developing, meaning there are still many unknowns. However, legal professionals across the board would be wise to make themselves aware of how their implicit biases may be impacting the advancement of a more equitable and effective justice system. As summarized by Elek and Miller, "Educate not just to raise awareness, but to build capacity for change."

If you'd like to learn more about implicit bias, including strategies to counter it in your personal and professional life, take our free CLE, "Rebalance the Scales: Implicit Bias, Diversity, and the Legal Profession."

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*2civility.org blog excerpt*

*2civility.org blog excerpt by Jayne Reardon*

## Inclusive Language is Allyship


Should lawyers use legal terms of art that may be considered offensive? A provocative series of posts recently lit up a listserv I'm on, bringing this issue into sharp focus. Some comments articulated a historically neutral explanation for a term, another sought evidence that a receiver took offense, another dismissed the kerfuffle with a pithy "Micro-Aggressions warrant no more than a Micro-Concern." Another comment that said acceptable language, like people, changes and evolves over time.

Given that "effective communicator" is part of a lawyer's job description, we should be sensitive to how listeners may interpret our language.

**Metaphors May Offend**

The unfortunate truth about America's status as a "melting pot" includes discrimination toward each new wave of immigrants. Often, that discrimination has included labeling immigrants with an ethnic slur.

Over time, some of these ethnic slurs have been abandoned as unacceptable. However, others live on in our language as shortcuts or analogies. Speakers or writers may intend no discrimination or malice but offend nonetheless.

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Take the term "Chinese wall." When I was practicing, I recall my firm using the term to defend against a possible motion to disqualify due to the lateral hiring of an attorney who represented an opposing party at a previous firm.

By using screening procedures to isolate the attorney with confidential information, the hope was that the conflict of interest would be restricted to the individual lawyer and not be imputed to other attorneys in the firm.

"Chinese Wall" actually appears in Black's Law Dictionary. There it is defined as "more commonly known as 'ethical wall' or 'firewall,' this term refers to '[a] screening mechanism maintained by an organization, esp. a law firm, to protect client confidences from improper disclosure to lawyers or staff who are not involved in a particular representation.'"

Justice Law in Peat, Marwick, Mitchell & Co. v. Superior Court (1988) firmly asserted that the term "Chinese Wall" should be jettisoned in favor of "screen" or "ethical wall":

'Chinese Wall' is one such piece of legal flotsam which should be emphatically abandoned. The term has an ethnic focus which many would consider a subtle form of linguistic discrimination. Certainly, the continued use of the term would be insensitive to the ethnic identity of the many persons of Chinese descent.

A strained metaphor when crafted, it is uncomfortable but important to acknowledge this example at this time in history. It shows how pervasive discrimination is, even in our profession.

As diversity advocate and former General Counsel Rick Palmore shared in his talk at The Future Is Now: Legal Services conference, awareness and acknowledgment are the first steps toward greater inclusiveness. Action must follow for true allyship.

**History and Intent Doesn't Mitigate Effect**

Similarly, our collective path is riddled with examples of people being targeted or ostracized for having a disability. Terms that lawyers use regularly in arguments may smack of ableism, or discrimination in favor of able-bodied people.

For example, "the blind leading the blind" describes a situation when someone who knows nothing about a subject gets advice from another person who knows little more. Similarly, "turning a blind eye" may refer to ignoring facts or an argument and "turning a deaf ear" may mean to ignore or refuse to listen.

I learned from a listserv commenter that the expression "turn a blind eye" is believed to have come from the 1801 Battle of Copenhagen in which Horatio Nelson, a British naval commander, was ordered to withdraw. Nelson, who was blind in one eye due to an earlier battle, pretended not to see the signals by putting his telescope to his wounded eye.

However, whether or not this or any term originated from a historical event doesn't ameliorate the harmful effects this language can have on a person.

In addition, that our intent may be benign in using certain terms is irrelevant. As another commenter on the listserv said, "Personally, I don't believe that I have standing, as you lawyers might say, to tell someone else what they shouldn't find offensive."

**Language Can Signal Inclusiveness…or Not**

As lawyers, our stock in trade is language. We can choose language that makes our points persuasively or language that is distracting and possibly offensive. Distracting or offensive language, of course, doesn't serve our clients, our profession, or our image in the eyes of the public.

When we disregard how others may interpret our language or are unthoughtful with our words, we risk offending members of our professional community, like the judge, judge's staff, opposing counsel, or others who may hear the oral argument or read the brief. In choosing more inclusive language, we choose allyship.

Allyship, according to Nicole Asong Nfonoyim-Hara, the Director of the Diversity Programs at Mayo Clinic, describes an action of "a person of privilege work[ing] in solidarity and partnership with a marginalized group of people to help take down the systems that challenge that group's basic rights, equal access, and ability to thrive in our society."

Allyship is also defined as a form of action by Ellie Krug, Founder and President of Human Inspiration Works.

In a conversation about her talk at The Future Is Now conference, Krug explained that "ally" is a noun. "An ally acts to help humans who often lack a voice to speak on their own behalf or who aren't always in the room when demeaning or marginalizing comments/behaviors occur, or marginalizing policies or plans are made," she writes.

As a transgender lawyer, Krug finds the language of "us vs. them" particularly pernicious to our democratic values. She exhorts lawyers to embrace the diversity, equity, and inclusion practices that the business community adopted long ago.

Increased allyship through language and actions is essential for the legal profession to remain relevant. The topic may make us uncomfortable, but that is where growth occurs.

Concrete steps toward allyship were explored at the Commission on Professionalism's The Future Is Now conference on April 29, 2021. Krug, Palmore, and Hon. Ann Claire Williams, a retired federal judge now at Jones Day, shared specific strategies for actively re-shaping the culture of our profession.

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# Providing justice for your clients through proximity, listening

I sat waiting in a windowless, narrow room built of concrete blocks. Between me and the hot summer day were three steel doors controlled by a deputy sheriff behind a closed-circuit monitor. Eventually, the sound of doors opening and closing told me that Kevin (a pseudonym) was about to join me.

He was accompanied by another deputy who reminded me, as he had on previous occasions, that, "The buzzer's broken, so just pound on the door when you're done."

In came Kevin, dressed in a white T-shirt, gray sweatpants, and socks with flip-flops, the typical uniform of inmates at the Ford County Jail in Paxton, Ill. Kevin was a detained federal criminal defendant waiting for his sentencing hearing after pleading guilty and accepting responsibility for possession with intent to deliver crack cocaine and the possession of a firearm by a felon. This would be my last meeting with Kevin, my client, before his sentencing hearing.

He talked. I listened. We had developed a mutual trust in the time between my court appointment to represent him and our final meeting. I was his adviser, his counsel, and his advocate and he knew it.

Kevin was a Black man in his 20s, a high school graduate, and a star football player. At 6-feet-7-inches tall and weighing nearly 300 pounds, he was massive in stature. Yet, he was still vulnerable to the socioeconomic factors that pushed him to the margins of society, led by drugs, gangs and crime. I learned all I could about Kevin, from Kevin. He talked. I listened.

•

Acclaimed public interest lawyer Bryan Stevenson often speaks of the power of proximity. He emphasizes that we can discover things in proximity that we cannot when proximity is absent. For Stevenson, whose career was defined around repeated immediacy to incarcerated and often condemned individuals, it was this proximity that helped him understand the power of the law in protecting the vulnerable.

When I heard Stevenson speak in 2018, he stressed that while proximity isn't the definitive solution, it is a crucial, albeit uncomfortable, step into difficult places. "Even if we don't have any answers once we get there, find ways to engage and invest in the excluded, marginalized, disfavored, left out," Stevenson said. "At a very minimum, we can find collective, institutional, and meaningful ways to embrace these communities. And sometimes it is that witness who can be transformative."

•

As Kevin's defense attorney, I would seek out myriad mitigating factors relevant to the sufficiency component of the parsimony principle — that a sentence is sufficient, but not greater than necessary to comply with the purposes of sentencing. His family background, education, employment, contributions to his community and society might impact his sentencing memorandum, and my argument on his behalf. While I crafted it, Kevin provided it.

Former President Barack Obama once said, "Learning to stand in somebody else's shoes, to see through their eyes, that's how peace begins. And it's up to you to make that happen. Empathy is a quality of character that can change the world."

That day in Ford County Jail was much more than fulfilling my ethical obligation to provide Kevin with competent legal representation. It was getting proximate, listening, and respecting Kevin as a person and his advocate.

As I left the jail that afternoon, I was consumed by one of the greatest compliments of my career. Before I left, Kevin said, "Thank you for listening to me. No one has ever done that."

In one of his lowest moments, when he felt alone, ignored, and even disrespected for mistakes he had made and accepted responsibility for, someone was listening to him. Finally.

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In one of Martin Luther King Jr.'s best-known quotations, he said, "The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy." We, as lawyers and defenders of justice, must find opportunities to stand in proximity to disputes and injustices to change the narrative.

The legal profession is not for the faint of heart or spirit. As lawyers, we are charged with carrying out justice to solve problems for our clients. The better we are able to step into our clients' shoes, and embrace the diversity of thought experienced from different perceptions, perspectives, and values, the better we can serve those ends of justice.

Will you take the first uncomfortable and inconvenient step by getting proximate?

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*2civility.org blog excerpt from Mark Palmer*

**About the Illinois Supreme Court Commission on Professionalism**

The Illinois Supreme Court Commission on Professionalism was established by the Illinois Supreme Court in 2005 under Supreme Court Rule 799(c) to foster increased civility, professionalism, and inclusiveness among lawyers and judges in Illinois. To learn more, visit www.2civility.org.

## PANEL 5 — 2:40pm - 3:40pm

Milestone ARDC Cases Shaping Lawyer Conduct

**Panel Leader:** **Hon. Thomas More Donnelly,** *Circuit Court of Cook County*

**Panelists:** **Mary T. Robinson,** Partner, *Robinson Stewart Montgomery & Doppke LLC*

**Adrian M. Vuckovich,** Partner, *Collins Bargione & Vuckovich*

### Hon. Thomas More Donnelly, *Circuit Court of Cook County*

Judge Tom Donnelly presides in the Trial Section of the Law Division of the Circuit Court of Cook County. He was appointed Court's 1st Municipal District, in January 2000, following the retirement of Judge Ronald J.P. Banks. Judge Donnelly previously presided over traffic and domestic violence courtrooms, and heard misdemeanor jury trials and civil trial calls.

Judge Donnelly has been very active in judicial organizations and initiatives. He served as the reporter for the Supreme Court Committee on Professional Responsibility and is a member of the Committee on Jury Instructions in Criminal Cases, the Advanced Judicial Academy Planning Committee, and the Judicial Conference of Illinois. The Illinois Supreme Court appointed Judge Donnelly chair of its Committee on Education. In December 2015, he was appointed as chair of the Board of Trustees of the Illinois Judicial College. On December 21, 2017, Judge Donnelly was appointed a member to the newly formed Illinois Supreme Court Commission on Pretrial Practices. In 2019, he was appointed to serve as Judicial College Board of Trustees Liaison to the Illinois Judicial College Committee on Judicial Education for a term expiring June 30, 2024.

Prior to joining the bench, Judge Donnelly was an assistant public defender at the Cook County Public Defender's Office, Appeals Division, later becoming supervisor of the Training and 1st Municipal District Divisions. In 1997, he became a supervisor in the office's post-conviction unit.

Judge Donnelly is a frequent lecturer including serving as an adjunct professor at Loyola University School of Law and the University of Chicago Law School's Mandel Legal Aid Clinic and he has lectured at Washington and Lee School of Law, Marquette University Law School and DePaul University College of Law.

**Mary T. Robinson,** Partner, *Robinson Stewart Montgomery & Doppke LLC*

Mary is a partner at Robinson Stewart Montgomery & Doppke LLC where she and her law firm provide representation, consultation, and expert witness services in matters involving lawyer ethics and professional responsibility, including discipline defense. Mary began that practice in 2007 after serving for fifteen years as Administrator of the Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC). Before joining the ARDC, she practiced as an appellate public defender and then in her own firm, primarily in appellate, criminal and family law.

Mary is a frequent speaker for national, state and local bar association programs on ethics and professional responsibility issues. She has served as a member of American Bar Association, Illinois State Bar Association and Chicago Bar Association committees focused on professional responsibility and the future of lawyering. She taught Professional Responsibility at Northwestern University Law School and Northern Illinois University School of Law. She received her law degree from the University of Southern California, and is licensed in Illinois and California.

**Adrian M. Vuckovich,** Partner, *Collins Bargione & Vuckovich*

Adrian is a partner at Collins Bargione & Vuckovich, where he concentrates his practice in real estate and business litigation, disputes between shareholders and partners, and also attorney and judicial disciplinary matters. Adrian represents clients in bench trials, jury trials and at hearings before administrative agencies.

He regularly provides ethics advice to attorneys and law firms in the Chicagoland area, and has represented individuals and businesses in a variety of appeals. Additionally, Adrian represents individuals in trust and probate litigation, employment disputes, family law matters, foreclosure defense, and many different kinds of business, real estate and personal matters. He also handles certain personal injury matters on behalf of injured individuals. Adrian also has a significant appellate practice. He has represented individuals and businesses in a variety of appeals and is often retained post-trial to represent a client before the appellate court.

Adrian was a recipient of the Chicago Bar Association's 2017 Vanguard Award, recognizing individuals who have made the law and legal profession more accessible to and reflective of the community at large.

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of May, 1988.

Present: Thomas J. Moran, Chief Justice
Justice Daniel P. Ward — Justice Howard C. Ryan
Justice William G. Clark — Justice Ben Miller
Justice Joseph F. Cunningham — Justice John J. Stamos

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On the twentieth day of June, 1988, the Supreme Court entered the following judgment:

In re:

No. 65609

Mr. Philip H. Corboy
33 North Dearborn, S#630
Chicago, IL 60602

Appeal from
Attorney
Registration &
Disciplinary
Commission
DC86SH120

FILED

OCT 17 1988

ATTY REG & DISC COMM
CHICAGO

Docket Nos. 65609, 65629, 65666, 65673, 65674, 65681 cons.—Agendas 12, 11, 12, 13, 15, and 22—November 1987 and January 1988.

*In re* PHILIP H. CORBOY, Attorney, Respondent.—*In re* PATRICK ALAN TUITE, Attorney, Respondent.—*In re* WILLIAM D. MADDUX, Attorney, Respondent.—*In re* WILLIAM JAMES HARTE, Attorney, Respondent.—*In re* JAMES ROBERT MADLER, Attorney, Respondent.—*In re* SAMUEL V. P. BANKS, Attorney, Respondent.

PER CURIAM: These cases involve attorneys who were each charged with violation of the Code of Professional Responsibility by reason of having made a gift or a loan to a judge. While we initially heard each of these cases separately, we have, on our own motion, consolidated them to consider in one opinion the common legal issues raised by all of these cases. The crucial common question is one of first impression in this court: What conduct constitutes giving or lending "a thing of value" to a judge so that it falls within the proscription of our Rule 7—110(a)? 107 Ill. 2d R. 7—110(a).

The Corboy, Maddux, Harte, and Madler cases all involve the payment of $1,000 by each of these attorneys to Richard LeFevour, then a judge of the circuit court of Cook County. The procedural facts in these four cases are so similar that for purposes of this opinion, they need not be separately stated. Each of the four attorneys had become involved with LeFevour in the matter under consideration in these cases through the effort of attorney Walter Ketchum (see *In re* Ketchum (June 20, 1988), No. 65431). Although the personal relationship of each of these four attorneys with LeFevour is different, the facts relevant to this opinion are as follows. In December 1981, Evelyn LeFevour, mother of Judge Richard LeFevour, was in the hospital. It was, apparently, necessary to settle the hospital bill before she left the hospital for Christmas, in order for her to reenter the hospital after Christmas. Each of the four attorneys was solicited by Walter Ketchum to make out a check for $1,000, payable to Richard LeFevour, so that the hospital bill could be paid. Each of the four attorneys did as he was requested and each considered that the payment was either a gift or a loan to Evelyn LeFevour, and not a gift or a loan to Richard LeFevour. In some of the cases, it was not shown what happened to the check that had been made payable to Richard LeFevour. In one case, the record reflects that the checks were deposited in Richard LeFevour's personal checking account. A copy of a bank statement showing the activity in that account for December 19, 1981, through January 20, 1982, and copies of all checks drawn during the period were a part of the record in the Madler case. They reflect that Richard LeFevour did not draw upon that checking account to pay his mother's hospital bill. Also included in the record is a copy of a stipulation entered at the trial of Richard LeFevour in the Federal court, which states that LeFevour's brother, John LeFevour, testified that their mother died in early 1982, and that both her hospital and funeral expenses were covered by insurance.

At the time that each respondent attorney made out his check payable to Richard LeFevour, each knew that LeFevour was a judge of the circuit court of Cook County, and that he was the presiding judge of the first municipal district of that court, although at the hearing Corboy could not recall whether at the time of the issuance of his check LeFevour was the chief judge of the traffic court or the presiding judge of the first municipal district. None of the four attorneys had ever practiced before Judge LeFevour and each had only a very limited contact with the first municipal district of the circuit court of Cook County, through occasional cases that may have been filed in that division of the court. Some of the attorneys considered the payment as a gift or an act of philanthropy to Evelyn LeFevour, whereas others considered their payment as a loan to Evelyn LeFevour; however, no promissory notes were executed and no discussion was had concerning the payment of interest. None of the money was ever repaid.

The Administrator of the Attorney Registration and Disciplinary Commission (ARDC) charged that the attorneys gave $1,000 to Richard LeFevour, the presiding judge of the first municipal district of the circuit court of Cook County. The complaints charged that each attorney was thereby guilty of conduct tending to defeat the administration of justice and to bring the legal profession into disrepute, and violative of the disciplinary rules of the Code of Professional Responsibility: Disciplinary Rule 7—110(a) (107 Ill. 2d R. 7—110(a) (giving or loaning a thing of value to a judge)), Disciplinary Rule 1—

102(a)(5) (107 Ill. 2d R. 1—102(a)(5) (conduct prejudicial to the administration of justice)) and Canon 9 (107 Ill. 2d Canon 9) (avoiding even the appearance of impropriety)). The complaints filed by the Administrator prayed that each attorney should be sanctioned, as provided under our Rule 771 (87 Ill. 2d R. 771) for conduct tending to bring the court and legal profession into disrepute.

Although the procedures before the Hearing Board and the Review Board of the ARDC and the conclusions of these bodies may have differed slightly in each of the cases, the proceedings relevant to this opinion may, generally, be stated as follows. A majority of the hearing panels found that each attorney had violated the Code of Professional Responsibility. The panels disagreed, however, on the type of discipline to be imposed. Some of the members of the panels found that the language of Disciplinary Rule 7—110(a) of the Code of Professional Responsibility is a *per se* prohibition against the giving or lending anything of value to a judge, and that, since the rule did constitute an absolute prohibition, any gift or loan which was in fact paid to the judge constituted a violation of the rule regardless of the intent of the donor. Those holding this view thought that the attorneys should be censured. Other members of the hearing panels recommended that the attorneys only be reprimanded for a technical violation of the rule. Those who dissented from the above conclusions considered that the evidence did not show that the attorneys violated any provisions of the Code of Professional Responsibility and found that Rule 7—110(a) is not a *per se* rule and that whether an attorney had violated Rule 7—110(a) depends partially upon the attorney's intent, motive and state of mind. Exceptions were filed by the Administrator and by the attorneys with the Review Board.

The Review Board initially filed a report in which a majority recommended no discipline; however, four members of the Review Board found that Rule 7—110(a) had been violated and recommended censure. The Administrator sought to file these reports with this court. The attorneys, however, moved this court to bar the filings, asserting that Supreme Court Rule 753(e)(4) (107 Ill. 2d R. 753(e)(4)) prohibits the filing of such a report with this court unless the "review board concludes that disciplinary action is required."

In granting the motion of the attorneys, this court stated: "The tendered report and recommendation of the Review Board does not represent the concurrence of at least five members of the Board recommending some form of disciplinary action by this court under Rule 771." Accordingly, this court in each case remanded the matter to the Review Board for any additional action it deemed appropriate within the scope of its authority under Supreme Court Rule 753(e)(3). 107 Ill. 2d R. 753(e)(3).

Upon remand, the Review Board filed reports and recommendations with this court, in which six members of the Board found that the attorneys had given a thing of value to a judge. The majority concluded that Rule 7—110(a) is a *per se* rule and five of the six members recommended censure. The sixth member of the majority concluded that there was a technical violation of the rule and therefore recommended that the complaint be discharged. The three remaining members dissented and rejected the *per se* application of the rule, because of their belief that such an interpretation would lead to absurd results.

Although the complaints charged the respondent attorneys with violations of Rule 1—102(a)(5) and Canon 9, the principal allegation, on which these subsidiary charges stand or fall, is that the respondents violated Rule 7—110(a). Rule 7—110(a) provides:

> "A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office." 107 Ill. 2d R. 7—110(a).

Rule 7—110(a) is part of Canon 7 of the Code of Professional Responsibility, which cautions that a lawyer should represent his client zealously, but within the bounds of the law. The policy objective of Rule 7—110(a) is the preservation of an independent and impartial judiciary. The rule is prophylactic. It is designed not only to forestall lawyers from seeking to exercise improper influence over the judiciary, but also to eliminate even the appearance of improper influence.

The Administrator and the respondents differ as to the proper interpretation of Rule 7—110(a). The Administrator argues for a literal "*per se*" construction of the rule, absolutely prohibiting a lawyer from giving or lending anything of value to a judge. The Administrator concedes that common social courtesies are not "things of

value" within the meaning of Rule 7—110(a), but denies that a lawyer can absolve himself from responsibility under the rule merely by showing an eleemosynary motive or a charitable intent.

While there are slightly different nuances to the arguments of the different respondents, the main thrust is quite similar. All argue that a *per se* interpretation of Rule 7—110(a) is unwarranted. Under the respondents' interpretation, attorney gifts or loans which are not motivated by an intent to influence, or which are not likely to influence, a judge, should be permitted. The respondents, in other words, would have the propriety of the gift turn, at least in part, upon the subjective state of the attorney's mind.

The respondents further argue that the Administrator's *per se* rule would lead to unjust and absurd consequences. A convivial meal enjoyed by long-time friends, a ride to a weekly bridge game, a gift to a close relative, or even a birthday card, would all, they contend, be "things of value" proscribed under the Administrator's interpretation of the rule. Under their interpretation, on the other hand, these would not be "things of value," because they would all be unmotivated by an intent to influence the judge who received them.

As a subsidiary argument, respondents argue that they did not "intend" to give anything of value to LeFevour himself, but only intended to make a gift or loan to his mother, Evelyn LeFevour.

We find no need to decide whether Rule 7—110(a) is or is not a *per se* rule. We agree, however, with the Administrator that application of the rule does not depend upon the subjective state of the attorney's mind. If it did, the prophylactic effect of the rule would be lost, since only attorney gifts or loan which were intended to influence or may tend to influence a judge would be proscribed. Under the respondents' interpretation an attorney could, for example, give a substantial sum to a judge who was currently deciding one of his cases, so long as the attorney demonstrated that he was motivated by "compassion" or "charity." We cannot accept such an interpretation. Attorney gifts or loans to judges, even if well-intended, are simply too susceptible to abuse, and too prone to creating an appearance of impropriety.

In other contexts, we have held that evidence of dishonest intent and motive is not necessary to justify the imposition of discipline. (*In re Clayter* (1980), 78 Ill. 2d 276, 283; *In re Bloom* (1968), 39 Ill. 2d 250, 254.) Thus, even when an attorney's conduct is based upon an honest mistake, he can be subject to discipline. (*In re Young* (1986), 111 Ill. 2d 98, 103.) Evidence showing lack of a dishonest intent is usually only appropriate to determine the nature and severity of the sanction imposed. *Clayter*, 78 Ill. 2d 276; *In re Thompson* (1963), 30 Ill. 2d 560.

Moreover, this interpretation of Rule 7—110(a) is supported by the rule itself, which does not contain a specific element of intent. Rules that contain an element of intent usually use language such as "deliberately," "knowingly," "when he knows," or "intentionally." (See, *e.g.*, 107 Ill. 2d Rules 2—110(b), 2—110(b)(2), 7—101(a).) This rule has none of this language.

For these reasons, the eleemosynary motives animating the respondents, while uncontested, are irrelevant. Moreover, the argument that the loans or gifts were actually made to Evelyn LeFevour is not supported by the record. There is no evidence that Ketchum ever represented that Evelyn LeFevour would be personally responsible for the repayment of the loan. In fact, Madler testified that Ketchum told him that Richard LeFevour wanted to be in a position to pay the hospital bill. This, in our view, was a clear solicitation of a loan to Richard LeFevour, albeit one purportedly to be used for the benefit of his mother. Moreover, the checks were made payable to Richard LeFevour. Respondents therefore knew that Richard LeFevour would receive and negotiate them.

On the other hand, we do not believe that a refusal to read a "state of mind" exception into Rule 7—110(a) need entail the absurd consequences urged by the respondents. The reason is simple. Although Rule 7—110(a) allows for no exceptions but campaign contributions, it must be read in conjunction with the Code of Judicial Conduct. The Code contains a very specific listing of the circumstances under which a judge may accept a gift or loan from a lawyer. Since it would not be reasonable to hold that a judge may accept something from a lawyer which the lawyer is not permitted to give, the Code and the rule must be read together.

The new Code of Judicial Conduct, effective January 1, 1987, expressly permits a judge or relative of a judge to accept a gift or loan from a lawyer under specific cir-

cumstances. The Code now provides:

> "(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor or loan from anyone except as follows:
>
> (a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;
>
> (b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a bequest, favor, or loan from a relative; a wedding or engagement gift ***;
>
> (c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan, only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge." 107 Ill. 2d Rules 65(C)(4)(a), 65(C)(4)(b), 65(C)(4)(c).

When Rule 65(C)(4) of the Code of Judicial Conduct is read together with Rule 7—110(a), it becomes clear that we can avoid the absurd and unfair consequences urged by the respondents without reading a requirement of dishonest motive into Rule 7—110(a). Combining the two rules, it is clear that an attorney may make a loan or gift to a judge if: the gift falls under the exceptions of subparagraph (a) set forth above, which does not appear to be relevant in this case, or if the gift or loan constitutes "ordinary social hospitality," or the attorney is related to the judge, or the gift is a wedding or engagement gift, all as provided in subparagraph (b) quoted above. The attorney may make any other gift or loan to a judge only if the attorney has not practiced and does not practice before the judge, and is otherwise unlikely to come before him (107 Ill. 2d R. 65(C)(4)(c)). Also, as provided in the Code of Professional Responsibility, an attorney may make a gift to a judge if the gift is a contribution to a judicial campaign fund. (107 Ill. 2d R. 7—110(a).) Thus, whether the respondents are guilty of an infraction depends upon whether their gifts or loans to LeFevour fall within any one of these exceptions.

We note that Rule 65(C)(4) governing judicial conduct was not in effect at the time the respondents gave money to LeFevour. The rule actually in effect was former Rule 61(c)(22), which was somewhat less specific. It provided: "A judge should not accept gifts or favors from litigants, lawyers practicing before him, or others whose causes are likely to be submitted to him for judgment." (87 Ill. 2d R. 61(c)(22).) The committee commentary to current Rule 65(C)(4) makes it clear that this rule, now modeled after Canon 5(C)(4) of the ABA Model Code of Judicial Conduct, retains the "requirements" of former Rule 61(c)(22). Although our disposition of this matter would be no different were we to decide it by reference to the language of former Rule 61(c)(22), we can discern no benefit in exhuming the former rule. To provide better guidance to Illinois lawyers, we instead look to current Rule 65(C)(4), the refined successor to Rule 61(c)(22), to flesh out the scope of Rule 7—110(a).

Of the exceptions noted above, only two are even arguably applicable. The respondents do not claim that they are related to LeFevour, that the sums were wedding or engagement gifts, or that they were campaign contributions. The only two possible exceptions are "ordinary social hospitality" and a gift or loan from a lawyer not practicing before or not likely to practice before the judge. We find that neither of these exceptions apply.

"Ordinary social hospitality" is not a self-defining concept. It is not, however, completely opaque. We believe that ordinary social hospitality consists of those routine amenities, favors, and courtesies which are normally exchanged between friends and acquaintances, and which would not create an appearance of impropriety to a reasonable, objective observer. The test is objective, rather than subjective, and the touchstone is a careful consideration of social custom. While we cannot draw any bright lines, we believe that the following factors should be taken into account: (1) the monetary value of the gift, (2) the relationship, if any, between the judge and the donor/lender lawyer, (3) the social practices and customs associated with gifts and loans, and (4) the particular circumstances surrounding the gifts and loans.

Applying these factors, we cannot agree that the gift or loan constitutes ordinary social hospitality, nor was it intended to be considered as such. The amount of each gift or loan, $1,000, was substantial. Some of the respondents had only a nodding acquaintance with LeFevour. In each case, the loan or gift was certainly generous. But it is precisely the generosity of a $1,000 gift or

loan which makes it unusual and extraordinary, rather than ordinary, social hospitality. Regardless of each respondent's charitable intent, the very size of such a gift or loan is likely to raise an appearance of impropriety.

All of these transactions are a far cry from the social dinners, gratuitous rides, birthday recognitions and gifts of books or flowers, which might be genuine instances of social hospitality, and which would not necessarily fall within the purview of Rule 7—110(a).

The only other possible exception set out in Rule 65(C)(4) of the Code of Judicial Conduct is the exception for a lawyer not practicing or likely to practice before the donee judge contained in Rule 65(C)(4)(c). None of the respondents falls within this exception.

This exception cannot be liberally construed in favor of the donor. If the nature of an attorney's practice is such that a matter in which he is involved is likely to be involved in a court proceeding, then that attorney should be prohibited from making a gift to any judge who sits on the court where the case may be heard—circuit, appellate, or supreme. The same prohibition must apply if the lawyer, though he, himself, may not be likely to have a case involved in a court proceeding, is associated in the practice of law with another who is likely to have matters that will be so involved.

It is also not proper to rationalize a judicial gift to a judge who may sit in probate or traffic, or in the criminal division, simply because the donor only tries cases in another division of the court. Under our rules, a judge is not a permanent fixture of any division, but is subject to reassignment by the chief judge. 107 Ill. 2d R. 21(b).

It is undisputed that these respondents had cases in the circuit court of Cook County, and, in fact in the first municipal district, where Richard LeFevour was presiding judge. For the reasons given above, we do not consider LeFevour's status as presiding judge, which apparently excused him from hearing cases, as determinative. In many ways, a gift to a presiding judge raises an even stronger appearance of impropriety than a gift to a judge lower in the hierarchy. In any case, there was no assurance that LeFevour would not be transferred or demoted.

Canon 2 of the Code of Judicial Conduct now requires that a judge should avoid impropriety or the appearance of impropriety. Former Rule 61(c)(4) (87 Ill. 2d R. 61(c)(4)) contained a similar requirement. The general public would certainly consider it an appearance of impropriety if a judge were to accept a gift from a lawyer who has matters in the court on which that judge sits. Even if the matter were not to be heard by the judge to whom the gift is given, the public's perception would be one of suspicion, enhanced, no doubt, by the potential subliminal influence on the favored judge's colleagues. If, under these situations, a judge may not accept a gift, then, *a fortiori*, under Rule 7—110(a) of the Code of Professional Responsibility, the attorney may not give the gift to the judge.

Thus, if a lawyer or one with whom he is associated in the practice of law is likely to have a matter before a court (circuit, appellate or supreme), he should not make a gift to any judge of that court, unless the gift falls within one of the exceptions listed in exception (a) or (b) of Rule 65(C)(4), set out above, or unless it falls within the exception of Rule 7—110 of the Code of Professional Responsibility, which permits a lawyer to make a contribution to the campaign fund of a candidate for a judicial position.

For the foregoing reasons, we hold that these four respondents violated Rule 7—110(a). However, we hold that we cannot censure any of these respondents for their conduct. They acted without the guidance of precedent or settled opinion, and there was, apparently, considerable belief among members of the bar that they had acted properly. See *In re Friedman* (1979), 76 Ill. 2d 392; *In re Luster* (1957), 12 Ill. 2d 25.

We have only today held for the first time that Rule 7—110(a) must be read in conjunction with the Code of Judicial Conduct and specified the limitations of Rule 65(C)(4) of that Code. It is clear from the rule, as we have construed it, that this type of behavior on the part of lawyers in this State will result in violation of Rule 7—110(a). It would be unfair to apply the limitation we have today for the first time defined to respondents' conduct in 1981.

The draft of a proposed revision of our Code of Professional Responsibility, which has recently been presented to this court by its committee, and on which input has been sought from the various bar associations and from attorneys, has made no change in the wording of our Rule 7—110(a). However, Rule 1—102 of the pro-

posed draft adds two restrictions on the conduct of an attorney not found in the present limitations of Rule 1—102 (see 107 Ill. 2d R. 1—102). The draft now provides, in addition to the five limitations set out in the present rule as subparagraphs 1 through 5, additional limitations numbered subparagraphs 6 and 7 as follows:

> "Rule 1—102 Misconduct
>
> (a) A lawyer shall not:
>
> * * *
>
> (6) state or imply an ability to influence improperly any tribunal, legislative body, government agency or official; or
>
> (7) assist a judge or judicial officer in conduct that the lawyer knows is a violation of applicable rules of judicial conduct."

Thus, proposed Rule 1—102(a)(7) recognizes the Code of Judicial Conduct as a limitation on the conduct of attorneys. However, so that the limitation may be clear in the area we are now discussing in this case, we hereby amend Rule 7—110(a) of the Code of Professional Responsibility. Effective as of the date of this opinion, that rule shall provide:

> "(a) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except those gifts or loans which a judge or a member of his family may receive under Rule 65(C)(4) of the Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office."

These four respondents are outstanding attorneys. Considerable testimony was presented before the hearing panel concerning their philanthropic and charitable contributions. These respondents have been active in charitable and legal organizations and have each worked diligently to enhance the good name of the legal profession.

For the foregoing reasons, the complaints against respondents Corboy, Maddux, Harte and Madler are discharged.

As to the respondents Banks and Tuite, a different factual picture is presented. Both of these respondents practiced primarily in the area of criminal law. Both of these respondents were long-time personal friends of Richard LeFevour, and both of the respondents were well acquainted with LeFevour's wife and family. Although both of the respondents' offices had cases pending in the first municipal district of the circuit court of Cook County, neither of the respondents tried any cases before Judge LeFevour.

In addition to the above, Judge LeFevour's son, Terrence LeFevour, has worked in respondent Banks' law firm since 1979, first as a law student and later as a lawyer. Thus, under our Rule 63(C)(1)(e)(ii) (107 Ill. 2d R. 63(C)(1)(e)(ii)), Judge LeFevour may have been disqualified from hearing cases in which respondent Banks' law firm was involved. However, according to the committee comments to this section of Rule 63, this affiliation would not, of itself, have disqualified the judge from hearing cases involving the Banks law firm.

In April 1981, Richard LeFevour went to see respondent Banks and told the respondent that he needed a short-term loan to "straighten out some tax problems." He requested a loan of $2,500. Banks did not ask LeFevour to pay interest on the loan or to sign a promissory note. About a year later, in April 1982, LeFevour again approached respondent for a loan of $2,000, again stating he needed the money for taxes. Before loaning LeFevour more money, the respondent reminded him that he already owed him money and asked when he would be repaid. LeFevour told the respondent that he would be repaid from the proceeds of the LeFevour home, which the respondent knew was for sale. Banks then wrote a check for $2,000 to LeFevour. LeFevour has not repaid Banks for either of these loans.

In August 1982, LeFevour called respondent Tuite and requested him to come to LeFevour's office. During this meeting, LeFevour asked the respondent if he could lend him $5,000 for 60 days to help LeFevour pay taxes. The respondent agreed to make the loan and later delivered a check for $5,000 to LeFevour. No discussion as to whether interest was to be paid on the loan was had and no promissory note was executed. It was understood that the loan would be for 60 days. However, LeFevour did not repay the loan, although the respondent requested him to do so on several occasions. Following his indictment in December 1984, LeFevour requested the respondent to represent him in the criminal proceedings. The respondent agreed to do so only if LeFevour would pay him the $5,000. Shortly thereafter, LeFevour paid the respondent the $5,000 on the loan. During this period of time, respondent Tuite, or his law firm, had nu-

merous cases pending in the first municipal district of the circuit court of Cook County. These cases were generally misdemeanors, felony preliminary hearings and traffic cases.

Complaints were filed against respondents Tuite and Banks by the Administrator of the Attorney Registration and Disciplinary Commission, charging each respondent with violation of Rule 7—110(a) (87 Ill. 2d R. 7—110(a) (a lawyer shall not give or lend any thing of value to a judge)). In respondent Tuite's case, the Hearing Board found that the loan was not made with intent to influence the judge in any way, but was made at the request of the judge and was made to the judge as a "professional and social friend." The Hearing Board further found that respondent Tuite's actions did not in any way defeat the administration of justice or bring the courts or legal profession into disrepute. However, the Hearing Board viewed the prohibition of Rule 7—110(a) as absolute and recommended a private reprimand. The Review Board issued a report, as it did in the cases of the respondents Corboy, Maddux, Harte and Madler, in which a majority of the Board did not vote to impose any discipline. This court ruled that the report could not be filed. In response to that ruling, the Review Board issued a modified decision in which a majority of the Review Board recommended that the respondent Tuite be censured.

In case of respondent Banks, the Hearing Board found that Banks had committed a technical violation of Rule 7—110(a), but that his conduct was not prejudicial to the administration of justice. The Hearing Board found that the loans were not made to a judge before whom Banks had any cases pending, and were not made to influence or gain favor with a judge, but were made out of friendship and generosity; the long-standing social relationship between Banks and LeFevour was the main motivating factor in making the loans. The Hearing Board found that Rule 7—110(a) was an absolute ban on the giving or lending of anything of value to a judge and recommended that respondent Banks be reprimanded. The Review Board affirmed the Hearing Board's conclusion that Rule 7—110(a) is an absolute ban on the giving or lending of anything of value to a judge. Five members of the Review Board recommended that respondent Banks be censured.

Here, as in the cases of respondents Corboy, Maddux, Harte and Madler, respondents Tuite and Banks were sailing in uncharted waters. In fact, the record discloses that these respondents were not aware of the prohibition of Rule 7—110(a) and certainly could not have been aware of the construction that we have, for the first time, placed on that rule in this opinion. Neither of these respondents practiced before Judge LeFevour, although both had cases pending in the first municipal district of the circuit court of Cook County, over which Judge LeFevour presided. These respondents made these loans to a long-time personal friend, with no thought of influencing nor gaining favor with the judge. Although the respondents' conduct would constitute a violation of Rule 7—110(a) under the construction we have today placed upon that rule, such conduct would not constitute a violation under a more liberal construction of what constitutes "practice before a judge" under Rule 65(C)(4)(c) (107 Ill. 2d R. 65(C)(4)(c)).

Unlike the facts in Corboy, Maddux, Harte and Madler, respondents Tuite and Banks did intend to make a loan directly to Richard LeFevour. However, for the same reasons that we find it inappropriate to impose sanctions in the previously discussed cases, we deem it inappropriate to impose sanctions against Tuite and Banks.

For the reasons stated herein, all of the respondents are discharged.

*Respondents discharged.*

JUSTICE STAMOS took no part in the consideration or decision of this case.

# United States of America

No. 65609

State of Illinois } ss.
Supreme Court }

In re:

Philip H. Corboy

Disciplinary Commission

I, Juleann Hornyak, *Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Supreme Court in the above entitled cause of record in my office.*

*In Testimony Whereof, I have set my hand and affixed the Seal of the said Supreme Court in Springfield, in said State, this* 13th *day of* October *A.D. 19* 88.

Juleann Hornyak

*Clerk,*

*Supreme Court of the State of Illinois*

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of September, 1991.

Present: Ben K. Miller, Chief Justice
Justice William G. Clark  Justice Thomas J. Moran
Justice Michael A. Bilandic  Justice James D. Heiple
Justice Charles E. Freeman  Justice Joseph F. Cunningham

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On the seventeenth day of October, 1991, the Supreme Court entered the following judgment:

In re:

No. 71174

John Andrew Doyle
221 No. LaSalle St., #638
Chicago, IL 60601-1209

Gabriel Anthony Kostecki
5801 N. Mulligan Avenue
Chicago, IL 60646-5332

Attorney
Registration and
Disciplinary
Commission
DC87CH329

IT IS ORDERED that respondents, John A. Doyle and Gabriel A. Kostecki are discharged.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this fourteenth day of November, 1991.

Julieann Hornyak
Clerk,
Supreme Court of the State of Illinois

FILED
NOV 18 1991
ATTY REG & DISC COMM
CHICAGO

Docket No. 71174—Agenda 7—March 1991.
*In re* JOHN A. DOYLE *et al.*, Attorneys-Respondents.

JUSTICE MORAN delivered the opinion of the court:

The Administrator of the Attorney Registration and Disciplinary Commission filed a complaint alleging, *inter alia*, that respondents, John A. Doyle (Doyle) and Gabriel A. Kostecki (Kostecki), collected an excessive fee in violation of the Code of Professional Responsibility (the Code) (87 Ill. 2d R. 2—106(a)) in their handling of a life insurance matter for Alojza Janus, the complainant herein. A panel of the Hearing Board found Kostecki had committed prejudicial acts against the interests of his client and recommended that he be censured. The panel further recommended that the charges against Doyle be discharged. The Review Board concurred with the Hearing Board's findings of fact and conclusions of law. However, the Review Board recommended that the charges against each of the respondents be dismissed and that Kostecki not be censured for his prelitigation conduct because such conduct was not alleged in the Administrator's complaint. The Administrator filed exceptions to the report and recommendation of the Review Board (134 Ill. 2d R. 753 (e)(6)).

The issues presented for review are whether: (1) respondents' collection of one-third of the complainant's life insurance proceeds constituted an excessive fee; (2) Doyle's motion for a directed finding was properly granted by the Hearing Board; and (3) Kostecki can be disciplined for his prelitigation conduct.

The relevant facts are as follows. Kostecki was admitted to the Illinois bar in 1966 and thereafter maintained a storefront, neighborhood law office on the northwest side of Chicago. His ability to speak both English and Polish enabled him to represent many working-class Polish people, some of whom spoke little or no English. Joseph Janus, who immigrated to the United States from Poland, sought Kostecki's legal advice as a consequence of the tragic deaths of his two brothers, Adam and Stanley, and Stanley's wife, Theresa.

Three members of the Janus family were victims of the infamous "tainted Tylenol" episode in 1982. During the evening of September 29, 1982, Stanley and Theresa, while at Adam's home, were mourning Adam's death when they both unknowingly ingested cyanide-laced Tylenol capsules from the same container that Adam previously had taken capsules. Stanley and Theresa became very ill and both were transported by ambulance to a hospital. Stanley was pronounced dead at 8:15 p.m., on September 29, 1982. Theresa, however, was put on a medical respirator while in a deep coma, and was not pronounced dead until 1:15 p.m., on October 1, 1982. The question of whether Theresa survived Stanley was the subject of a lawsuit. See *Janus v. Tarasewicz* (1985), 135 Ill. App. 3d 936 (appellate court affirmed trial court finding that Theresa survived her husband Stanley).

At the time of Stanley's and Theresa's deaths, two $100,000 life insurance policies were in effect, one issued by the Reserve Life Insurance Company (Reserve) and the other issued by the Metropolitan Life Insurance Company (Metropolitan). On each of these two policies, Theresa was the primary beneficiary and Stanley's mother, the complainant, was the contingent beneficiary. However, only the Reserve policy contained a 15-day clause which provided in part: "If any beneficiary dies at the same time as the insured, or within 15 days after the insured *** the life insurance proceeds will be paid as though that beneficiary died before the insured." Therefore, given the 15-day clause in the Reserve policy and the fact that Theresa did not survive Stanley beyond 15 days, the proceeds of the Reserve policy would normally be paid to the complainant.

Before a panel of the Hearing Board, Joseph Janus testified as follows: prior to his brother Stanley's death, Joseph and Stanley had been partners in the automotive parts business; in October of 1982, about a day or so after Stanley's funeral, he gathered some partnership and insurance papers (including the Reserve and Metropolitan policies) from a locker at their auto parts store and visited Kostecki's law office; at this meeting, he instructed Kostecki to look over these papers and correspond with the Tarasewiczes (the administrator of Theresa's estate) and explore the possibility of settling Stanley and Theresa's affairs in a fifty-fifty manner; Kostecki glanced at the documents and returned one of them to Joseph with instructions that Joseph cash in the policy; he left Kostecki's office and over the next two months or so, he periodically inquired about the status of the papers that were left behind.

He also testified that, on December 23, 1982, a second meeting was arranged at Kostecki's office where he and other members of his family signed the following contingent-fee agreement:

> "We, the undersigned, as heirs and/or beneficiaries of STANLEY JANUS, Deceased, do hereby retain and employ GABRIEL A. KOSTECKI and DOYLE & RYAN, LTD. to represent us in the presentation of claims against the Estate of Teresa [*sic*] Janus (who had been married to Stanley Janus) and any insurance companies involved and in the handling of the Estate of Stanley Janus, Deceased, and in consideration of their services, in addition to the payment of any fees normally associated in the handling of said Estate, agree to pay said attorneys for their services one-third (1/3) of the value of any asset, as well as *one-third (1/3) of any* amount entering the Estate of Stanley Janus or received by any of us individually from said Estate or as beneficiaries of, or from any insurance proceeds on the life of Stanley Janus including but without limitation proceeds of Metropolitan Life Insurance Company Policy No. 822—902—081—A and *proceeds of Reserve Life Insurance Company Policy No. 010587916S*. The above fee arrangement covers all services through the trial court level. Appeals, which are rare, are not included in the above fee arrangement. Clients also are responsible for the reimbursement of expenses incurred in the handling of the above." (Emphasis added.)

The gravamen of the Administrator's complaint concerns the reasonableness of the one-third contingent fee charged against the proceeds of the Reserve policy.

Kostecki also testified before the hearing panel and his testimony was generally as follows: Joseph Janus called his office and informed him of Stanley Janus' death; shortly after Stanley's funeral, Joseph visited Kostecki's law office and brought certain insurance papers—a Metropolitan life insurance policy, a Reserve life insurance policy, a New York Life insurance policy, an Aetna insurance policy, and a business insurance policy; Joseph asked him to review the policies and determine who would recover the proceeds under the respective policies; he read the policies and discovered that the New York Life policy had lapsed; he returned the business insurance policy to Joseph and advised him to cash it in; he considered the timing of Stanley's and Theresa's deaths to be determinative as to who would recover the death benefit under the Metropolitan policy; and that after examining the Reserve policy and its 15-day clause, he determined that the proceeds under this policy would be payable to the complainant.

Although he was in receipt of the above policies, Kostecki admitted to informing an attorney from the law firm representing Theresa's estate, Renn & High, that he did not possess any insurance policies. He claimed that Joseph Janus instructed him to give this false information. Kostecki's communications with the firm of Renn & High are the subject of the prelitigation activities referred to by the Hearing and Review Boards.

As to the Reserve policy in particular, Kostecki testified as follows: he tried to reach Mr. Abe I. Nubani of Reserve on several occasions for the purpose of obtaining the necessary claim forms so that a claim could be filed on behalf of the complainant; he eventually reached Nubani, but a follow-up call to Nubani was necessary because several days had passed and he had yet to receive the forms; it was during this follow-up call to Nubani in mid-December of 1982 that Kostecki allegedly learned that an investigation was in progress about a possible murder or suicide associated with the deaths of Theresa and Stanley; it was about this time that he also learned that Metropolitan was going to pay the proceeds of its policy to the Tarasewicz family; and therefore, he grew concerned about the possibility of the Tarasewiczes making a claim on the Reserve policy.

Because he felt that the Reserve and Metropolitan claims may be litigated, Kostecki contacted Joseph Janus and advised him that he wished to bring another attorney, Doyle, into the case. On December 18, 1982, the complainant and her husband, Tadeusz Janus, came to Kostecki's office. At this meeting Kostecki explained the two different ways in which he could be compensated: an hourly rate plus a $5,000 retainer or a one-third contingent fee. They agreed to the contingent-fee arrangement and he then contacted Doyle to prepare the fee contract. He picked up the contract at Doyle's office and the complainant signed the agreement (quoted earlier) on December 23, 1982.

After the contingent-fee agreement was signed, Kostecki received the claim forms from Reserve and the death certificates of Stanley and Theresa, and he forwarded these documents to Doyle. Doyle completed the claim form and returned it to Kostecki for the purpose

of obtaining the complainant's signature. In February of 1983, Reserve paid the death benefit to the complainant. Kostecki received $17,000, which represented one half of the $34,000 contingent fee taken from the Reserve proceeds.

Kostecki further testified that he performed the following services in relation to the contingent-fee contract as a whole: he met with Joseph Janus on several occasions; he obtained Joseph's partnership agreement; he checked his files on an assumed name matter; he checked the recorder of deeds office in Cook County because Joseph and Stanley purchased a building; he met with Chester Rawski on numerous occasions because he had represented Joseph on a variety of matters; he phoned the medical examiner's office about 15 or 20 times in an effort to obtain death certificates on Stanley and Theresa; he phoned Reserve in order to obtain a claim form; he performed about 25 hours of legal research on the subject of simultaneous death; he spent approximately 15 to 20 hours in consultation with his brother, a pharmacist, and a sister-in-law, a registered nurse; he had further consultations with Dr. Stanley Forest and Nancy Bisco, chief of the laboratory at the University of Illinois Hospital; he spoke with Dr. Thomas S. Kim, who desired to write an article regarding the medical events surrounding Stanley and Theresa's deaths; he opened up Stanley Janus' estate, making several trips to Du Page County; he made two court appearances prior to the actual trial of the Metropolitan claim; he prepared for the depositions of Drs. Biela and Hanley and he tried to reach another doctor, Dr. Cascino; he dealt with a mmary judgment motion; he made two court appearances in connection with the Metropolitan claim; he prepared and participated in a week-long trial over the Metropolitan claim; and he obtained a stay order on the probate matter after the trial court ruled that Theresa survived Stanley.

Doyle gave the following testimony before a panel of the Hearing Board: he was admitted to the Illinois bar in 1950 and his practice consisted primarily of personal injury and related insurance matters; he did not know Kostecki very well since he knew him only from one professional matter and a couple of social meetings; in December of 1982, Kostecki contacted him and informed him of certain insurance matters arising out of the Tylenol deaths; Kostecki explained the facts surrounding the deaths and that a question existed as to whether Theresa survived Stanley Janus; Kostecki also informed him that the Tarasewicz family claimed the proceeds of both the Metropolitan and Reserve insurance policies and that Reserve was investigating the possibility of a murder or suicide; he accepted Kostecki's statements as true without making any independent inquiry of the facts surrounding the insurance matters; it was his understanding that he would handle the insurance claims and any litigation stemming from the Metropolitan and Reserve policies; and he prepared the contingent-fee agreement (quoted earlier in this opinion) after Kostecki advised him that the Janus family agreed to such a fee.

Thereafter Doyle obtained a proof-of-death claim form, completed it, obtained complainant's signature through Kostecki, and submitted the claim to Reserve on or about January 6, 1983. Approximately one month later, a draft dated February 1, 1983, was issued by Reserve in the amount of $102,038.36. A letter signed by Doyle and Kostecki was then given to the complainant. The letter, dated February 11, 1983, read as follows:

> "As you know, we have received a check from Reserve Life Insurance Company in the sum of $102,038.36. On this amount, Mr. Kostecki and I, pursuant to our agreement, are entitled to fees of one-third which amounts to $34,000.00. We are presently supplying you with a post-dated check to allow the clearing of the Reserve check through our Trust Account.
>
> Inasmuch as the Estate of Theresa Janus might make a claim against these proceeds, both Mr. Kostecki and I wish to assure you that in the event that such a claim was successful, Mr. Kostecki and our firm [Doyle & Ryan, Ltd.] will, to the extent of 50 per cent each, reimburse you the $34,000.00 presently being retained by us as fees."

Jean Saunders, a former claims examiner with Reserve, also testified before the Hearing Board and her testimony was as follows: she received the claim related to the death of Stanley Janus; she reviewed the policy and determined that if the primary beneficiary died at the same time or within 15 days of the insured, the contingent beneficiary received the policy proceeds; she reviewed the death certificates and determined that the 15-day clause would take effect because the primary beneficiary died within 15 days of the insured; because

Stanley and Theresa did not die from natural causes, she contacted the Chicago police department and the Tylenol Task Force, but was given no information as to a possible murder or suicide; and it was her opinion that the proceeds should be paid to the complainant.

Jerry Jenkins, Saunders' former claims supervisor at Reserve, testified before the Hearing Board as follows: in order for a claim to be paid, the company needed three items—the insurance policy, the appropriate claim forms, and the death certificates; if an accidental bodily injury was involved, as in the Janus case, it was standard procedure to contact the local police department in order to rule out a suicide or murder; he approved the payment of the claim to the complainant because it was relatively clear to him that as the contingent beneficiary, she should receive the policy proceeds; and his opinion was based on the fact that the policy contained a provision that if the primary beneficiary died within 15 days of the date of insured's death, the proceeds would be payable to the contingent beneficiary.

A number of character witnesses testified on behalf of respondents. Robert Chapman Buckley, Illinois appellate court justice, described Doyle as a man of unimpeachable integrity. Miriam Harrison, associate judge for the Cook County circuit court, considered Doyle's reputation in the community to be outstanding. Joseph Baron, who practiced law for over 50 years, considered Kostecki to be a very industrious and hard-working lawyer. Andre Vrtjak, assistant Attorney General with the Illinois Tollway, considered Kostecki to be a very able attorney whose reputation was above reproach.

At the conclusion of the Administrator's case, each respondent filed a motion for a directed finding. A panel of the Hearing Board allowed Doyle's motion but denied Kostecki's. The hearing panel later recommended that Kostecki be censured for his prelitigation conduct wherein he gave false statements in response to inquiries made by Tarasewicz's lawyers, Renn & High. The Review Board recommended that the charges against each of the respondents be dismissed, and that Kostecki not be disciplined for his prelitigation conduct. In its report, the Review Board stated that "the Administrator's Complaint in no manner informed Kostecki that his pre-litigation conduct was at issue or that he should explain or defend that conduct. Consequently, Kostecki cannot be said to have had any real opportunity to defend against the alleged violation found by the Hearing Board."

The Administrator first contends that respondents' collection of one-third of the Reserve policy proceeds constituted an excessive fee in violation of Disciplinary Rule 2—106 of the Code (87 Ill. 2d R. 2—106(a)). The Review Board affirmed the Hearing Board's finding as to the fee, stating: (1) "the fee that MR. DOYLE received was [not] excessive or overreaching in light of the work he was required to perform and the expertise he brought to the case"; and (2) "MR. KOSTECKI certainly earned the fees that he ultimately received because of the substantial amount of work that had to be performed before all of this litigation was resolved ***." This court, in reviewing an attorney's conduct through a record of a disciplinary proceeding, will generally defer to the Hearing Board's findings of fact unless the board's findings are not supported by clear and convincing evidence. *In re Gerard* (1989), 132 Ill. 2d 507, 520; *In re Harth* (1988), 125 Ill. 2d 281, 287.

The reasonableness of contingent-fee contracts are subject to the scrutiny of the courts. (*In re Teichner* (1984), 104 Ill. 2d 150, 161, citing *Pocius v. Halvorsen* (1963), 30 Ill. 2d 73, 83.) While a contingent-fee contract may be valid at the time of its formation, this court still has a duty to safeguard the public from the *collection* of an excessive fee. (*Teichner*, 104 Ill. 2d at 160.) Paragraph (a) of Rule 2—106 explicitly provides that "[a] lawyer shall not enter into an agreement for, charge, or *collect* an *** excessive fee." (Emphasis added.) 87 Ill. 2d R. 2—106(a).

Under Rule 2—106(b), "[a] fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." (87 Ill. 2d R. 2—106(b).) Whether a fee is excessive is determined after consideration of the factors enumerated in Rule 2—106(b):

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood that the acceptance of the particular employment would preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent." 87 Ill. 2d Rules 2—106(b)(1) through (b)(8).

In *Gerard*, 132 Ill. 2d 507, this court discussed the appropriate circumstances under which an attorney could collect a contingent fee. In that case, the court stated that "a contingent fee is to be collected *only* if an attorney successfully champions the legal rights and claims of his client, with the result that the client is compensated through a *settlement with*, or *judgment against*, those who denied his claims." (Emphasis added.) *Gerard*, 132 Ill. 2d at 522.

While the events in the instant case occurred well before the *Gerard* opinion was filed, *Gerard* was grounded upon the plain language of Rule 2—106(c)(1), a rule which was in effect at the time respondents collected their contingent fee. Rule 2—106(c)(1) provides that a contingent-fee agreement is an "agreement for the provision of legal services by a lawyer under which the amount of the lawyer's compensation is contingent in whole or in part upon the successful accomplishment (*by settlement or litigation*) of the subject matter of the agreement ***." (Emphasis added.) (87 Ill. 2d R. 2—106(c)(1).) The fact that respondents charged a contingent fee on the Reserve policy is relevant because it is one of the eight factors to be considered in deciding whether the fee was in excess of a reasonable fee.

In *Teichner*, 104 Ill. 2d 150, the court considered whether the collection of a contingent fee from the proceeds of a life insurance policy was excessive. In *Teichner*, a woman filed a claim to obtain payment under her paramour's life insurance policy. Although she was the named beneficiary on the policy, she was concerned over her right to the proceeds because she never formally married the insured and she feared the insured's wife would file a competing claim. Therefore, she consulted a lawyer for advice.

A lawyer agreed to represent her on the life insurance claim and a contingent-fee agreement was executed wherein the lawyer would receive one-fourth of the amount recovered by settlement or judgment. Less than one month after the claim was submitted, the insurance company paid the life insurance benefit of $27,598.71 to the paramour. In accordance with the contingent-fee agreement, the lawyer received one-fourth of the proceeds, or approximately $7,000. In one of the counts of a two-count complaint, the Administrator charged the lawyer with receiving an excessive fee. A panel of the Hearing Board found, and the Review Board agreed, that the contingent fee was unconscionable.

On appeal, the lawyer alleged that the Administrator did not prove by clear and convincing evidence that the fee was excessive. Although no records were kept, the lawyer claimed that a clerical employee researched the subjects of common law marriage, bigamy and insurance. Moreover, he testified that he contacted the insurance company by phone a number of times in order to facilitate prompt payment of the claim. However, the claim was not disputed and it was paid in a routine manner in the normal course of business. After considering the factors listed in Rule 2—106, the court in *Teichner* concluded "that a lawyer of ordinary prudence would be left with a definite and firm conviction that a fee of approximately $7,000 in connection with the insurance proceeds in the circumstances of this case was not only in excess of a reasonable fee, but was unconscionable ***." *Teichner*, 104 Ill. 2d at 163.

The circumstances in *Teichner* are somewhat similar to the circumstances presented here. The Reserve claim was paid in a routine manner within one month after it was submitted for payment. A dispute did not develop over the complainant's right to the proceeds of the policy. Respondents admitted that, given the plain language of the policy and the fact there was no question that Theresa did not survive Stanley by more than 15 days, the life insurance proceeds were clearly payable to the complainant as the contingent beneficiary.

Respondents argue that the claim was not routine because Kostecki learned from Nubani, a sales agent with Reserve, that an investigation was underway regarding a possible murder or suicide in connection with the deaths of Stanley or Theresa. However, Nubani testified that he did not recall mentioning the words "murder or suicide" in his conversation with Kostecki. Furthermore, Nubani testified that he told Kostecki "that as far as

payment of the claim, I don't handle claims. Of course, our home office and the Claim Department handles all the claims pertaining to any death on any insurance policy."

Moreover, Jean Saunders, the employee who had processed the claim, testified that had an agent such as Nubani contacted their office, this type of communication would generally be noted in the file. But, the file contained no such notation. The Reserve employee who approved the payment of claims, Jerry Jenkins, testified that under the circumstances, it was "pretty clear and pretty easy" to determine that the complainant was entitled to the proceeds. Jenkins also testified that three levels of upper management never expressed any concern about the validity of complainant's right to the Reserve proceeds.

Respondents may have initially had a good-faith belief that their client's claim would be disputed. But, at the time respondents took their fee, they were aware of the 15-day clause; they both knew that Theresa did not survive Stanley by more than 15 days; and the the insurance company paid the claim in an expeditious manner. This set of circumstances should have demonstrated to the respondents that their client's claim on the Reserve proceeds was uncontested. See, *e.g.*, *Gerard*, 132 Ill. 2d at 524 (attorney collected an excessive fee under contingent-fee agreement where he did not "recover" certificates of deposit as originally anticipated, but simply performed nonlegal services of identifying the certificates and having them registered).

Nevertheless, respondents point out that at the time the claim was paid, the murder and suicide issues were unresolved and the claim could have been contested at a later date. If we were to follow respondents theory, any speculation of a *future* challenge to a legal matter, regardless of how well grounded in fact, would allow members of the bar to take most cases on a contingent-fee basis. This line of reasoning simply does not comport with the plain language of the Code, which states that a contingent fee is to be derived from a settlement or litigated matter (87 Ill. 2d R. 2—106(c)(1)) and the reasonableness of a fee is judged after considering eight different factors (87 Ill. 2d R. 2—106(b)).

The fee here was taken from a check issued by an insurance company after the company received a completed claim form on a life insurance policy. Respondents did not litigate the Reserve claim, nor did they reach a settlement with Reserve because "a settlement normally presupposes a dispute or disagreement." *Teichner*, 104 Ill. 2d at 160.

Respondents contend that *Teichner* is distinguishable from the case at bar in that the contingent-fee contract in *Teichner* involved a single obligation on the part of the attorney. Whereas, under the contingent-fee contract here, respondents were obligated to perform many services, including an estate matter and a trial on the Metropolitan policy. Respondents maintain, and the Hearing Board agreed, that the reasonableness of the $34,000 fee should be judged in light of all the services rendered on behalf of the complainant, rather than simply those services performed with respect to the Reserve Policy. Whether the $34,000 fee was in exchange for services other than those on the Reserve policy requires this court to review the contingent-fee contract.

The objective to be reached "in construing a contract is to give effect to the intention of the parties involved." (*Schek v. Chicago Transit Authority* (1969), 42 Ill. 2d 362, 364.) Provided no ambiguity exists within the contract, the intentions of the parties, at the time the contract was formed, must be ascertained from the language of the contract. (*Lenzi v. Morkin* (1984), 103 Ill. 2d 290, 293.) The object of our inquiry here is to determine whether the parties intended that the contingent fee taken from the Reserve proceeds was in exchange for services beyond those rendered on the Reserve policy.

The contingent-fee contract provides that "[t]he *** fee arrangement cover[ed] *all services* through the trial court level." (Emphasis added.) Thus, the contract is clear that the one-third fee assessed on the Reserve proceeds, as well as the other contingent fees charged under the contract, were in exchange for all of the services rendered by the respondents, up to, and including, the services rendered through the trial court level.

The record shows that each of the respondents rendered significant legal services on behalf of the complainant and the other parties to the contingent-fee agreement. Kostecki investigated into some partnership and real estate matters in which Joseph and Stanley Janus had participated. Kostecki read four insurance pol-

icies to see if his client had a claim to the proceeds on any of the policies. He returned the business insurance policy to Joseph Janus and instructed him to obtain the benefit payable under that policy. He discovered that one of the policies had lapsed and that the proceeds on that policy would not be recoverable. Kostecki made many phone calls to the medical examiner's office in an attempt to procure the death certificates of Stanley and Theresa. These certificates were required by Reserve to be submitted along with other items so that the claim could be paid. Doyle read the claim form and submitted it to Reserve. In light of the circumstances surrounding Stanley and Theresa's deaths, Kostecki researched the subject of simultaneous death and also consulted a pharmacist, a registered nurse, a hospital department head, and an emergency room physician on this subject. Doyle and Kostecki participated in a week-long bench trial on the Metropolitan policy. The report of the Hearing Board noted that "[i]t was clear to the panel *** that there was indeed a substantial amount of legal effort that must have taken place in preparation for trial." Moreover, Kostecki opened an estate for Stanley Janus. Given the nature and extent of the legal services provided, and after considering the guidelines listed in Rule 2—106(b), we find that a lawyer of ordinary prudence would not have definitely and firmly believed that a $34,000 fee was in excess of a reasonable fee.

The second issue presented for review is whether the Hearing Board erred in allowing Doyle's motion for a directed finding. Citing *Pedrick v. Peoria & Eastern R.R. Co.* (1967), 37 Ill. 2d 494, the Administrator contends that the motion should have been denied when the evidence presented is viewed in the light most favorable to the opposing party. Doyle claims that section 2—1110 of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 2—1110) is applicable under the circumstances here and that the board's ruling was correct.

The Administrator presented evidence before a panel of the Hearing Board, not a jury. Therefore, the hearing panel should not view the evidence under the *Pedrick* standard. (See *Kokinis v. Kotrich* (1980), 81 Ill. 2d 151, 154.) Instead, section 2—1110 of the Code of Civil Procedure is controlling and it provides, in part:

> "Motion in non-jury case to find for defendant at close of plaintiff's evidence. In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered." Ill. Rev. Stat. 1987, ch. 110, par. 2—1110.

The Hearing Board's decision to allow Doyle's motion for directed finding should not be reversed by this court unless it is contrary to the manifest weight of the evidence. (*Kokinis*, 81 Ill. 2d at 154.) For the reasons set forth earlier in this opinion, we find the Hearing Board's decision was not contrary to the manifest weight of the evidence.

The third issue for review is whether Kostecki can be disciplined for his prelitigation activities. In its decision, the Hearing Board recommended that Kostecki be censured because "his conduct prior to litigation was suspect and in fact unethical. Had MR. KOSTECKI talked frankly and candidly to the law firm of RENN & HIGH about the status of the case and not given false or misleading answers to their inquiries litigation would have been avoided." The Review Board disagreed with the recommendation of the Hearing Board on the basis that the Administrator's complaint did not inform Kostecki that his prelitigation activities were at issue. Therefore, any attempt to discipline him for such activities would have been violative of his due process rights.

Under Supreme Court Rule 753(b), a complaint filed with the Hearing Board "shall reasonably inform the attorney of the acts of misconduct he is alleged to have committed." (107 Ill. 2d R. 753(b).) In *In re Beatty* (1987), 118 Ill. 2d 489, 499, it was explained that a "complaint must contain factual allegations of every fact which must be proved in order for the plaintiff to be entitled to judgment on the complaint, and a judgment cannot be rendered on facts demonstrated by evidence at trial unless those facts shown were alleged in the complaint."

Both the Hearing and Review Boards found, as does this court, that the Administrator's complaint did not contain any factual allegations that Kostecki's prelitigation activities constituted misconduct. Consequently, we agree with the Review Board's recommendation that Kostecki cannot be disciplined for misconduct not alleged in the complaint.

For the foregoing reasons, each of the respondents are discharged.

*Respondents discharged.*

## 53 Ill.Dec. 204, 423 N.E.2d 873, 85 Ill.2d 312, Driscoll, In re, (Ill. 1981)

---------- Page 423 N.E.2d 873 follows ----------

**In re James Francis DRISCOLL**, Attorney, Respondent.

No. 53785.
85 Ill.2d 312, 53 Ill.Dec. 204, 423 N.E.2d 873

Supreme Court of Illinois.
June 26, 1981.

Attorney disciplinary action was brought. The Supreme Court, Simon, J., held that where attorney converts to own use proceeds of clients' settlement, repays clients out of another client's funds which attorney improperly deposits in his own account and repays money only after charges are filed with Attorney Registration and Disciplinary Commission, but where attorney's judgment and will are undermined by alcoholism, attorney thereafter successfully abstains from alcohol for two and one-half years and leads otherwise exemplary life, suspension from practice for six months, conditioned on continuing reports by attorney of his rehabilitation, is warranted.

Respondent suspended.

Ill., 1981.

Where attorney converts to own use proceeds of clients' settlement, repays clients out of another client's funds which attorney improperly deposits in his own account and repays money only after charges are filed with Attorney Registration and Disciplinary Commission, but where attorney's judgment and will are undermined by alcoholism, attorney thereafter successfully abstains from alcohol for two and one-half years and leads otherwise exemplary life, suspension from practice for six months, conditioned on continuing reports by attorney of his rehabilitation, is warranted. Supreme Court Rules, Rule 755, S.H.A. ch. 110A, Sec. 755.

[85 ILL2D 313] [53 ILLDEC 204] Carl H. Rolewick, Chicago, of the Attorney Registration and Disciplinary Commission, for appellant.

Raymond P. Carroll, Chicago, for respondent.

SIMON, Justice:

Forging his co-counsel's name, the respondent, James Driscoll, converted to his own use the proceeds of a settlement which, by court order, he was to deposit to the account of two children, his clients. After several months of repeated demands for the money, Driscoll's wife, with his knowledge and consent, repaid the clients out of another client's funds, which Driscoll had improperly deposited to his own account thus accomplishing a second conversion. This money was repaid about a year later, after the client had filed charges with the Attorney Registration and Disciplinary Commission. These misdeeds were committed in late 1977.

Driscoll admitted the charges and cooperated fully with the disciplinary process. In mitigation, he offered evidence that at the time of his offenses he was an alcoholic. [85 ILL2D 314] It appears, from the testimony of the respondent, his wife, and the doctor who headed the alcoholism-treatment program at Lutheran General Hospital, that respondent began drinking heavily in 1973, and his habit and condition worsened progressively until 1978. When the conversions

occurred, the respondent had undergone a change in personality. His personal appearance disintegrated, his weight dropped, he ate little, and his nails were falling out; he could not remember where he had been or what he had done; he stayed out every night and had no family or social life; he did not return clients' calls and took no new clients. Nothing mattered to him except a drink. He was, however, competent enough, at least at intervals, to earn some money from his legal practice; in particular, he handled adequately the cases that generated the money he converted.

In August 1978 respondent voluntarily entered Lutheran General Hospital for treatment. He spent three weeks being "detoxified" and getting psychiatric counseling, and was introduced to Alcoholics Anonymous, in which he remains active. He has now successfully abstained from

---------- Page 423 N.E.2d 874 follows ----------

[53 ILLDEC 205] alcohol for about 2 1/2 years and is "perfectly fit" medically. There is always a risk that an alcoholic may relapse into drink; but the risk decreases with time, and the odds are heavily in respondent's favor.

The Hearing Board rejected the idea of alcoholism as a defense, and recommended that Driscoll be disbarred. The Review Board recommended that he be suspended for 30 months and thereafter until further order. A minority of the Review Board proposed suspension for one year, on condition that the respondent continue in an appropriate program of rehabilitation. Before the Review Board, the respondent accepted the idea of a one-year suspension; but in this court he argues that no suspension is necessary, and that the proper discipline would be simply a probation arrangement, during which he would be required to [85 ILL2D 315] continue with his rehabilitation.

The legal profession and the courts have begun to acknowledge the problem presented by alcoholic, or, as they are sometimes referred to, "impaired," attorneys. We must find ways to help them and induce them to rehabilitate themselves. That problem, however, is no longer presented in this case, because respondent has already largely rehabilitated himself. And because respondent, on his own initiative, has overcome his active alcoholism and restored himself to a stable, more or less normal, condition, there is no need to keep him from practicing law during a period of temporary disability due to alcoholism. If he were now unfit to practice law, he would presumably remain so indefinitely, and the proper response to protect the public from further injury would be to disbar him or suspend him until further order.

We are not convinced, however, that he is unfit.

His professional misconduct was so serious that if it accurately reflected his continuing character and proclivities, if his alcoholism were only the occasion of his dishonesty and not a strong contributing cause, we would not hesitate to disbar him. Attorneys have been disbarred for misconduct even during a time of insanity or alcoholism where the attorney's behavior after his restoration to sanity confirmed that he was not an honest man (In re Patlak (1938), 368 Ill. 547, 15 N.E.2d 309), or where there was no detailed evidence to show the attorney's drinking was crucial to his misconduct (In re Smith (1976), 63 Ill.2d 250, 347 N.E.2d 133).

Here, however, the circumstances support a charitable interpretation. Respondent's judgment and will were undermined by alcoholism; he cared only for drink, and neglected all other concerns, at great cost to himself. His self-destructive behavior was typical of alcoholism; it was not typical of respondent, who was sensible enough until he succumbed to drink, and who is sensible enough again now that he has recovered from his disability. When someone[85 ILL2D 316] who has apparently led an otherwise blameless life is guilty of professional misconduct while crippled by a chemical addiction, we are willing to assume that the misconduct, like his other shortcomings, was dependent on his craving and will not be repeated once that craving is subdued.

The respondent is not now a thief and a menace to his clients; but he did commit two thefts, of the most aggravated sort. Betraying clients by converting their money is conduct not acceptable to the bar under any circumstances. We cannot assent to respondent's suggestion that no punishment is appropriate.

Perhaps in rare cases alcoholism might so change the character of the misconduct or so distort the attorney's state of mind as to provide a complete excuse. Usually, however, alcoholism is at most an extenuating circumstance, a mitigating fact, not an excuse. The attorney's impaired judgment diminishes the responsibility he must bear, but does not

eliminate it. Not all alcoholics appropriate the money of their clients; the slide from drink to dishonor may be smooth, but it is neither automatic nor uncontrollable. We can understand it; we cannot excuse it or overlook misconduct as serious as respondent's. Alcoholics need not be treated just like other people; our duty to uphold the standards and reputation of the

---------- Page 423 N.E.2d 875. follows ----------

[53 ILLDEC 206] profession is not incompatible with sympathy and leniency for victims of alcoholism. But their tragedy cannot be used as a license to exploit clients by taking their money.

The respondent was impaired, but not paralyzed. He continued to function to some extent. He occasionally tried cases and negotiated settlements, including those he got into trouble over. At least at times, he must have been rational enough to appreciate his duty to his clients, and to be reminded that even if he did not care, others would. We cannot regard him as entirely an innocent victim of forces beyond his control. To some degree he was culpable. And [85 ILL2D 317] perhaps there are many like him; misbehaving attorneys suffer from alcoholism or comparable difficulties remarkably often in our stressful profession. If suspending the respondent will keep any of them from dishonesty or reassure the public that even hard-drinking attorneys must play fair, respondent has no legitimate complaint.

While uniformity in attorney discipline is desirable, every case must be considered on its own merits. (In re Andros (1976), 64 Ill.2d 419, 1 Ill.Dec. 325, 356 N.E.2d 513.) In this case, we are impressed by Driscoll's sincere, strenuous, and, so far, successful effort to overcome his alcoholism. An exemplary life before and after the incident charged may properly be considered in mitigation. (In re Bourgeois (1962), 25 Ill.2d 47, 52, 182 N.E.2d 651.) We also recognize that the financial hardship, social embarrassment, and perhaps despair that a long suspension would create would not be conducive to sobriety; respondent might actually be fitter after a short suspension than a long one.

Respondent is suspended for six months. In addition, as an experiment in dealing with impaired attorneys, we shall require that he continue, and report at such intervals as the Attorney Registration and Disciplinary Commission shall specify, and until further order, his personal program of rehabilitation, including active participation in Alcoholics Anonymous, the Lawyers' Assistance Program established by the Chicago Bar Association and the Illinois State Bar Association, or some similar program acceptable to the Commission. The Commission may recommend to this court any further conditions it thinks desirable. In addition, the Commission may perhaps call upon other attorneys for help under Rule 755 (73 Ill.2d R. 755). We, of course, reserve the right to take further action if respondent, either during the period of his suspension or thereafter, succumbs to alcohol or has other problems that reflect upon his fitness to serve clients. Similar approaches have been adopted in California (Tenner v. State Bar [85 ILL2D 318] (1980), 28 Cal.3d 202, 617 P.2d 486, 168 Cal.Rptr. 333), Minnesota (In re Johnson (Minn.1980), 298 N.W.2d 462), Massachusetts (In re Flannery (Mass. Nov. 5, 1980), No. 80-20 BD), South Dakota (In re Walker (S.D.1977), 254 N.W.2d 452), and Oregon (In re Lewelling (1966), 244 Or. 282, 417 P.2d 1019). After further experience we may revise our rules, which do not now provide for probation or supervision of impaired attorneys. Meanwhile, this court has inherent authority to use such methods of discipline. See In re Walker (S.D.1977), 254 N.W.2d 452.

We would like to see respondent restored to an active practice and a position of esteem in his profession. We must also protect the integrity and reputation of that profession, and protect the public. Pending further experience with alcoholic attorneys, we are trying our best to manage both.

*Respondent suspended.*

---------- **Page 533 N.E.2d 790 follows** ----------

125 Ill.2d 531, 127 Ill.Dec. 708, 533 N.E.2d 790

57 U.S.L.W. 2246

In re **James H. HIMMEL**, Attorney, Respondent.
No. 65946.
Supreme Court of Illinois.

Sept. 22, 1988.
Rehearing Denied Jan. 30, 1989.

In disciplinary proceeding, the Supreme Court, Stamos, J., held that attorney's failure to report misconduct on part of attorney who has formerly represented client and has converted client's settlement, in violation of rule, warrants one-year suspension, not merely private reprimand.

Ordered accordingly.

**[**125 ILL2D 534**]** **[**127 ILLDEC 708**]** William F. Moran, III, of Springfield, for the Administrator of the Attorney Registration and Disciplinary Commission.

James H. Himmel, of Palos Heights, respondent pro se.

George B. Collins, of Collins & Bargione, of Chicago, for respondent.

Justice STAMOS delivered the opinion of the court:

This is a disciplinary proceeding against respondent, James H. Himmel. On January

---------- **Page 533 N.E.2d 791 follows** ----------

**[**127 ILLDEC 709**]** 22, 1986, the Administrator of the Attorney Registration and Disciplinary Commission (the Commission) filed a complaint with the Hearing Board, alleging that respondent violated Rule 1-103(a) of the Code of Professional Responsibility (the Code) (107 Ill.2d R. 1-103(a)) by failing to disclose to the Commission information concerning attorney misconduct. On October 15, 1986, the Hearing Board found that respondent had violated the rule and recommended that respondent be reprimanded. The Administrator filed exceptions with the Review Board. The Review Board issued **[**125 ILL2D 535**]** its report on July 9, 1987, finding that respondent had not violated a disciplinary rule and recommending dismissal of the complaint. We granted the Administrator's petition for leave to file exceptions to the Review Board's report and recommendation. 107 Ill.2d R. 753(e)(6).

We will briefly review the facts, which essentially involve three individuals: respondent, James H. Himmel, licensed to practice law in Illinois on November 6, 1975; his client, Tammy Forsberg, formerly known as Tammy McEathron; and her former attorney, John R. Casey.

The complaint alleges that respondent had knowledge of John Casey's conversion of Forsberg's funds and respondent failed to inform the Commission of this misconduct. The facts are as follows.

In October 1978, Tammy Forsberg was injured in a motorcycle accident. In June 1980, she retained John R. Casey to represent her in any personal injury or property damage claim resulting from the accident. Sometime in 1981, Casey negotiated a settlement of $35,000 on Forsberg's behalf. Pursuant to an agreement between Forsberg and Casey, one-third of any monies received would be paid to Casey as his attorney fee.

In March 1981, Casey received the $35,000 settlement check, endorsed it, and deposited the check into his client trust fund account. Subsequently, Casey converted the funds.

Between 1981 and 1983, Forsberg unsuccessfully attempted to collect her $23,233.34 share of the settlement proceeds. In March 1983, Forsberg retained respondent to collect her money and agreed to pay him one-third of any funds recovered above $23,233.34.

Respondent investigated the matter and discovered that Casey had misappropriated the settlement funds. In April 1983, respondent drafted an agreement in which Casey would pay Forsberg $75,000 in settlement of any [125 ILL2D 536] claim she might have against him for the misappropriated funds. By the terms of the agreement, Forsberg agreed not to initiate any criminal, civil, or attorney disciplinary action against Casey. This agreement was executed on April 11, 1983. Respondent stood to gain $17,000 or more if Casey honored the agreement. In February 1985, respondent filed

suit against Casey for breaching the agreement, and a $100,000 judgment was entered against Casey. If Casey had satisfied the judgment, respondent's share would have been approximately $25,588.

The complaint stated that at no time did respondent inform the Commission of Casey's misconduct. According to the Administrator, respondent's first contact with the Commission was in response to the Commission's inquiry regarding the lawsuit against Casey.

In April 1985, the Administrator filed a petition to have Casey suspended from practicing law because of his conversion of client funds and his conduct involving moral turpitude in matters unrelated to Forsberg's claim. Casey was subsequently disbarred on consent on November 5, 1985.

A hearing on the complaint against the present respondent was held before the Hearing Board of the Commission on June 3, 1986. In its report, the Hearing Board noted that the evidence was not in dispute. The evidence supported the allegations in the complaint and provided additional facts as follows.

Before retaining respondent, Forsberg collected $5,000 from Casey. After being retained, respondent made inquiries regarding Casey's conversion, contacting the insurance company that issued the settlement check, its attorney, Forsberg, her

**---------- Page 533 N.E.2d 792 follows ----------**

[127 ILLDEC 710] mother, her fiance and Casey. Forsberg told respondent that she simply wanted her money back and specifically instructed respondent to take no other action. Because of respondent's efforts, [125 ILL2D 537] Forsberg collected another $10,400 from Casey. Respondent received no fee in this case.

The Hearing Board found that respondent received unprivileged information that Casey converted Forsberg's funds, and that respondent failed to relate the information to the Commission in violation of Rule 1-103(a) of the Code. The Hearing Board noted, however, that respondent had been practicing law for 11 years, had no prior record of any complaints, obtained as good a result as could be expected in the case, and requested no fee for recovering the $23,233.34. Accordingly, the Hearing Board recommended a private reprimand.

Upon the Administrator's exceptions to the Hearing Board's recommendation, the Review Board reviewed the matter. The Review Board's report stated that the client had contacted the Commission prior to retaining respondent and, therefore, the Commission did have knowledge of the alleged misconduct. Further, the Review Board noted that respondent respected the client's wishes regarding not pursuing a claim with the Commission. Accordingly, the Review Board recommended that the complaint be dismissed.

The Administrator now raises three issues for review: (1) whether the Review Board erred in concluding that respondent's client had informed the Commission of misconduct by her former attorney; (2) whether the Review Board erred in concluding that respondent had not violated Rule 1-103(a); and (3) whether the proven misconduct warrants at least a censure.

As to the first issue, the Administrator contends that the Review Board erred in finding that Forsberg informed the Commission of Casey's misconduct prior to retaining respondent. In support of this contention, the Administrator cites to testimony in the record showing that while Forsberg contacted the Commission and received a complaint form, she did not fill out the form, return [125 ILL2D 538] it, advise the Commission of the facts, or name whom she wished to complain about. The Administrator further contends that even if Forsberg had reported Casey's misconduct to the Commission, such an action would not have relieved respondent of his duty to report under Rule 1-103(a). Additionally, the Administrator argues that no evidence exists to prove that respondent failed to report because he assumed that Forsberg had already reported the matter.

Respondent argues that the record shows that Forsberg did contact the Commission and was forwarded a complaint form, and that the record is not clear that Forsberg failed to disclose Casey's name to the Commission. Respondent also argues that Forsberg directed respondent not to pursue the claim against Casey, a claim she had already begun to pursue.

[1] We begin our analysis by examining whether a client's complaint of attorney misconduct to the Commission can be a defense to an attorney's failure to report the same misconduct. Respondent offers no authority for such a defense and our research has disclosed none. Common sense would dictate that if a lawyer has a duty under the Code, the actions of a client would not relieve the attorney of his own duty. Accordingly, while the parties dispute whether or not respondent's client informed the Commission, that question is irrelevant to our inquiry in this case. We have held that the canons of ethics in the Code constitute a safe guide for professional conduct, and attorneys may be disciplined for not observing them. (In re Yamaguchi (1987), 118 Ill.2d 417, 427, 113 Ill.Dec. 928, 515 N.E.2d 1235, citing In re Taylor (1977), 66 Ill.2d 567, 6 Ill.Dec. 898, 363 N.E.2d 845.) The question is, then, whether or not respondent violated the Code, not whether Forsberg informed the Commission of Casey's misconduct.

[2] As to respondent's argument that he did not report Casey's misconduct because his client directed him not **[**125 ILL2D 539**]** to do so, we again note respondent's failure to suggest any legal support for such a defense. A lawyer, as an officer of the court, is duty-bound to uphold the rules in the Code.

---------- **Page 533 N.E.2d 793 follows** ----------

**[**127 ILLDEC 711**]** The title of Canon 1 (107 Ill.2d Canon 1) reflects this obligation: "A lawyer should assist in maintaining the integrity and competence of the legal profession." A lawyer may not choose to circumvent the rules by simply asserting that his client asked him to do so.

As to the second issue, the Administrator argues that the Review Board erred in concluding that respondent did not violate Rule 1-103(a). The Administrator urges acceptance of the Hearing Board's finding that respondent had unprivileged knowledge of Casey's conversion of client funds, and that respondent failed to disclose that information to the Commission. The Administrator states that respondent's knowledge of Casey's conversion of client funds was knowledge of illegal conduct involving moral turpitude under In re Stillo (1977), 68 Ill.2d 49, 54, 11 Ill.Dec. 289, 368 N.E.2d 897. Further, the Administrator argues that the information respondent received was not privileged under the definition of privileged information articulated by this court in People v. Adam (1972), 51 Ill.2d 46, 48, 280 N.E.2d 205, cert. denied (1972), 409 U.S. 948, 93 S.Ct. 289, 34 L.Ed.2d 218. Therefore, the Administrator concludes, respondent violated his ethical duty to report misconduct under Rule 1-103(a). According to the Administrator, failure to disclose the information deprived the Commission of evidence of serious misconduct, evidence that would have assisted in the Commission's investigation of Casey.

Respondent contends that the information was privileged information received from his client, Forsberg, and therefore he was under no obligation to disclose the matter to the Commission. Respondent argues that his failure to report Casey's misconduct was motivated by his respect for his client's wishes, not by his desire for financial **[**125 ILL2D 540**]** gain. To support this assertion, respondent notes that his fee agreement with Forsberg was contingent upon her first receiving all the money Casey originally owed her. Further, respondent states that he has received no fee for his representation of Forsberg.

[3] Our analysis of this issue begins with a reading of the applicable disciplinary rules. Rule 1-103(a) of the Code states:

> "(a) A lawyer possessing unprivileged knowledge of a violation of Rule 1-102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." 107 Ill.2d R. 1-103(a).

Rule 1-102 of the Code states:

> "(a) A lawyer shall not
>
> (1) violate a disciplinary rule;
>
> (2) circumvent a disciplinary rule through actions of another;
>
> (3) engage in illegal conduct involving moral turpitude;

(4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or

(5) engage in conduct that is prejudicial to the administration of justice." 107 Ill.2d R. 1-102.

These rules essentially track the language of the American Bar Association Model Code of Professional Responsibility, upon which the Illinois Code was modeled. (See 107 Ill.2d Rules art. VIII, Committee Commentary, at 604.) Therefore, we find instructive the opinion of the American Bar Association's Committee on Ethics and Professional Responsibility that discusses the Model Code's Disciplinary Rule 1-103 (Model Code of Professional Responsibility DR 1-103 (1979) ). Informal Opinion 1210 states that under DR 1-103(a) it is the duty of a lawyer to report to the proper tribunal or authority any unprivileged knowledge of a lawyer's perpetration of any misconduct listed in Disciplinary Rule 1-102. **[**125 ILL2D 541**]** (ABA Committee on Ethics & Professional Responsibility, Informal Op. 1210 (1972) (hereinafter Informal Op. 1210).) The opinion states that "the Code of Professional Responsibility through its Disciplinary Rules necessarily deals directly with reporting of lawyer misconduct or misconduct of others directly observed in the legal practice or the administration of justice." Informal Op. 1210, at 447.

This court has also emphasized the importance of a lawyer's duty to report misconduct. In the case In re Anglin (1988),

**---------- Page 533 N.E.2d 794 follows ----------**

**[**127 ILLDEC 712**]** 122 Ill.2d 531, 120 Ill.Dec. 520, 524 N.E.2d 550, because of the petitioner's refusal to answer questions regarding his knowledge of other persons' misconduct, we denied a petition for reinstatement to the roll of attorneys licensed to practice in Illinois. We stated, "Under Disciplinary Rule 1-103 a lawyer has the duty to report the misconduct of other lawyers. (107 Ill.2d Rules 1-103, 1-102(a)(3), (a)(4).) Petitioner's belief in a code of silence indicates to us that he is not at present fully rehabilitated or fit to practice law." (Anglin, 122 Ill.2d at 539, 120 Ill.Dec. 520, 524 N.E.2d 550.) Thus, if the present respondent's conduct did violate the rule on reporting misconduct, imposition of discipline for such a breach of duty is mandated.

[4] The question whether the information that respondent possessed was protected by the attorney-client privilege, and thus exempt from the reporting rule, requires application of this court's definition of the privilege. We have stated that " '(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.' " (People v. Adam (1972), 51 Ill.2d 46, 48, 280 N.E.2d 205 (quoting 8 J. Wigmore, Evidence 2292 (McNaughton rev.ed.1961) ), cert. denied (1972), 409 U.S. 948, 93 S.Ct. 289, 34 L.Ed.2d**[**125 ILL2D 542**]** 218.) We agree with the Administrator's argument that the communication regarding Casey's conduct does not meet this definition. The record does not suggest that this information was communicated by Forsberg to the respondent in confidence. We have held that information voluntarily disclosed by a client to an attorney, in the presence of third parties who are not agents of the client or attorney, is not privileged information. (People v. Williams (1983), 97 Ill.2d 252, 295, 73 Ill.Dec. 360, 454 N.E.2d 220, cert. denied (1984), 466 U.S. 981, 104 S.Ct. 2364, 80 L.Ed.2d 836.) In this case, Forsberg discussed the matter with respondent at various times while her mother and her fiance were present. Consequently, unless the mother and fiance were agents of respondent's client, the information communicated was not privileged. Moreover, we have also stated that matters intended by a client for disclosure by the client's attorney to third parties, who are not agents of either the client or the attorney, are not privileged. (People v. Werhollick (1970), 45 Ill.2d 459, 462, 259 N.E.2d 265.) The record shows that respondent, with Forsberg's consent, discussed Casey's conversion of her funds with the insurance company involved, the insurance company's lawyer, and with Casey himself. Thus, under Werhollick and probably Williams, the information was not privileged.

Though respondent repeatedly asserts that his failure to report was motivated not by financial gain but by the request of his client, we do not deem such an argument relevant in this case. This court has stated that discipline may be appropriate even if no dishonest motive for the misconduct exists. (In re Weinberg (1988), 119 Ill.2d 309, 315, 116 Ill.Dec. 216, 518 N.E.2d 1037; In re Clayter (1980), 78 Ill.2d 276, 283, 35 Ill.Dec. 790, 399 N.E.2d 1318.) In addition, we have held that client approval of an attorney's action does not immunize an attorney from disciplinary action. (In re Thompson (1963), 30 Ill.2d 560, 569, 198 N.E.2d 337; People ex rel. Scholes v. Keithley (1906), 225 Ill. 30, 41, 80 N.E. 50.) We **[**125 ILL2D 543**]** have already dealt with, and dismissed, respondent's assertion that his conduct is

acceptable because he was acting pursuant to his client's directions.

[5] Respondent does not argue that Casey's conversion of Forsberg's funds was not illegal conduct involving moral turpitude under Rule 1-102(a)(3) or conduct involving dishonesty, fraud, deceit, or misrepresentation under Rule 1-102(a)(4). (107 Ill.2d Rules 1-102(a)(3), (a)(4).) It is clear that conversion of client funds is, indeed, conduct involving moral turpitude. (In re Levin (1987), 118 Ill.2d 77, 88, 112 Ill.Dec. 708, 514 N.E.2d 174; In re Stillo (1977), 68 Ill.2d 49, 54, 11 Ill.Dec. 289, 368 N.E.2d 897.) We conclude, then, that respondent possessed unprivileged knowledge

---------- **Page 533 N.E.2d 795 follows** ----------

**[**127 ILLDEC 713**]** of Casey's conversion of client funds, which is illegal conduct involving moral turpitude, and that respondent failed in his duty to report such misconduct to the Commission. Because no defense exists, we agree with the Hearing Board's finding that respondent has violated Rule 1-103(a) and must be disciplined.

The third issue concerns the appropriate quantum of discipline to be imposed in this case. The Administrator contends that respondent's misconduct warrants at least a censure, although the Hearing Board recommended a private reprimand and the Review Board recommended dismissal of the matter entirely. In support of the request for a greater quantum of discipline, the Administrator cites to the purposes of attorney discipline, which include maintaining the integrity of the legal profession and safeguarding the administration of justice. The Administrator argues that these purposes will not be served unless respondent is publicly disciplined so that the profession will be on notice that a violation of Rule 1-103(a) will not be tolerated. The Administrator argues that a more severe sanction is necessary because respondent deprived the Commission of evidence of another attorney's conversion and thereby interfered with **[**125 ILL2D 544**]** the Commission's investigative function under Supreme Court Rule 752 (107 Ill.2d R. 752). Citing to the Rule 774 petition (107 Ill.2d R. 774) filed against Casey, the Administrator notes that Casey converted many clients' funds after respondent's duty to report Casey arose. The Administrator also argues that both respondent and his client behaved in contravention of the Criminal Code's prohibition against compounding a crime by agreeing with Casey not to report him, in exchange for settlement funds.

In his defense, respondent reiterates his arguments that he was not motivated by desire for financial gain. He also states that Forsberg was pleased with his performance on her behalf. According to respondent, his failure to report was a "judgment call" which resulted positively in Forsberg's regaining some of her funds from Casey.

[6] In evaluating the proper quantum of discipline to impose, we note that it is this court's responsibility to determine appropriate sanctions in attorney disciplinary cases. (In re Levin (1987), 118 Ill.2d 77, 87, 112 Ill.Dec. 708, 514 N.E.2d 174, citing In re Hopper (1981), 85 Ill.2d 318, 323, 53 Ill.Dec. 231, 423 N.E.2d 900.) We have stated that while recommendations of the Boards are to be considered, this court ultimately bears responsibility for deciding an appropriate sanction. (In re Weinberg (1988), 119 Ill.2d 309, 314, 116 Ill.Dec. 216, 518 N.E.2d 1037, citing In re Winn (1984), 103 Ill.2d 334, 337, 82 Ill.Dec. 664, 469 N.E.2d 198.) We reiterate our statement that " '[w]hen determining the nature and extent of discipline to be imposed, the respondent's actions must be viewed in relationship "to the underlying purposes of our disciplinary process, which purposes are to maintain the integrity of the legal profession, to protect the administration of justice from reproach, and to safeguard the public." (In re LaPinska (1978), 72 Ill.2d 461, 473 [21 Ill.Dec. 373, 381 N.E.2d 700].)' " In re Levin (1987), 118 Ill.2d 77, 87, 112 Ill.Dec. 708, 514 N.E.2d 174, quoting In re Crisel (1984), 101 Ill.2d 332, 343, 78 Ill.Dec. 160, 461 N.E.2d 994.

[7] **[**125 ILL2D 545**]** Bearing these principles in mind, we agree with the Administrator that public discipline is necessary in this case to carry out the purposes of attorney discipline. While we have considered the Boards' recommendations in this matter, we cannot agree with the Review Board that respondent's conduct served to rectify a wrong and did not injure the bar, the public, or the administration of justice. Though we agree with the Hearing Board's assessment that respondent violated Rule 1-103 of the Code, we do not agree that the facts warrant only a private reprimand. As previously stated, the evidence proved that respondent possessed unprivileged knowledge of Casey's conversion of client funds, yet respondent did not report Casey's misconduct.

This failure to report resulted in interference with the Commission's investigation of Casey, and thus with the administration

---------- **Page 533 N.E.2d 796. follows ----------**

**[**127 ILLDEC 714**]** of justice. Perhaps some members of the public would have been spared from Casey's misconduct had respondent reported the information as soon as he knew of Casey's conversions of client funds. We are particularly disturbed by the fact that respondent chose to draft a settlement agreement with Casey rather than report his misconduct. As the Administrator has stated, by this conduct, both respondent and his client ran afoul of the Criminal Code's prohibition against compounding a crime, which states in section 32-l:

> "(a) A person compounds a crime when he receives or offers to another any consideration for a promise not to prosecute or aid in the prosecution of an offender.
>
> (b) Sentence. Compounding a crime is a petty offense." (Ill.Rev.Stat.1987, ch. 38, par. 32-1.)

Both respondent and his client stood to gain financially by agreeing not to prosecute or report Casey for conversion. According to the settlement agreement, respondent would have received $17,000 or more as his fee. If Casey had satisfied the judgment entered against him for failure **[**125 ILL2D 546**]** to honor the settlement agreement, respondent would have collected approximately $25,588.

We have held that fairness dictates consideration of mitigating factors in disciplinary cases. (In re Yamaguchi (1987), 118 Ill.2d 417, 428, 113 Ill.Dec. 928, 515 N.E.2d 1235, citing In re Neff (1988), 83 Ill.2d 20, 46 Ill.Dec. 169, 413 N.E.2d 1282.) Therefore, we do consider the fact that Forsberg recovered $10,400 through respondent's services, that respondent has practiced law for 11 years with no record of complaints, and that he requested no fee for minimum collection of Forsberg's funds. However, these considerations do not outweigh the serious nature of respondent's failure to report Casey, the resulting interference with the Commission's investigation of Casey, and respondent's ill-advised choice to settle with Casey rather than report his misconduct.

Accordingly, it is ordered that respondent be suspended from the practice of law for one year.

*Respondent suspended.*



**End of Document**

## Chart 26

## Attorney Reports: 2008-2022

| Year | Number of Grievances | Number of Attorney Reports | Percent of Attorney Reports to Grievances | Number of Grievances Voted into Complaints | Number of Attorney Reports Voted into Complaints | Percent of Attorney Reports to Formal Complaints |
|---|---|---|---|---|---|---|
| **2008** | 5,897 | 542 | 9.1% | 228 | 69 | 30.2% |
| **2009** | 5,837 | 489 | 7.7% | 226 | 60 | 26.5% |
| **2010** | 5,617 | 497 | 8.8% | 271 | 73 | 26.9% |
| **2011** | 6,155 | 536 | 8.7% | 156 | 33 | 21.2% |
| **2012** | 6,397 | 651 | 10.2% | 273 | 86 | 31.5% |
| **2013** | 6,073 | 485 | 9.2% | 144 | 48 | 33.3% |
| **2014** | 5,835 | 581 | 9.4% | 199 | 52 | 26.1% |
| **2015** | 5,554 | 583 | 9.4% | 159 | 62 | 39.2% |
| **2016** | 5,401 | 606 | 11.1% | 142 | 67 | 47.2% |
| **2017** | 5,199 | 551 | 10.6% | 118 | 55 | 46.6% |
| **2018** | 5,029 | 479 | 9.6% | 101 | 44 | 43.6% |
| **2019** | 4,937 | 557 | 11.4% | 68 | 29 | 42.7% |
| **2020** | 3,936 | 404 | 10.4% | 53 | 28 | 52.8% |
| **2021** | 3,881 | 322 | 8.4% | 76 | 31 | 40.8% |
| **2022** | 4,359 | 408 | 9.5% | 82 | 35 | 42.7% |
| **Totals for 2008-2022** | 80,107 | 7,691 | -- | 2,296 | 772 | -- |
| **Average For 2008-2022** | 5,340 | 513 | 9.6% | 153 | 51 | 36.6% |

FORM NO. 3

# State of Illinois
# Supreme Court

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November, 19 93.

Present: Ben K. Miller, Chief Justice

Justice Michael A. Bilandic
Justice Charles E. Freeman
Justice Mary Ann G. McMorrow
Justice James D. Heiple
Justice Moses W. Harrison II
Justice John L. Nickels

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On the 18th day of November, 19 93, the Supreme Court enetered the following judgement:

In re:

No. 74929

David R. Jordan
174 N. Taylor Avenue
Oak Park, IL 60302-2524

Atty. Reg. &
Disc. Comm.
90 CH 178

Respondent David Richard Jordan is suspended from the practice of law for three years, and the suspension is stayed by a three-year period of probation subject to the following terms:

(1) respondent shall devote a minimum of 25 hours per month without charge to the various organizations he has assisted;

(2) respondent shall itemize the time devoted on such pro bono legal matters, with quarterly reports to the Administrator;

(3) respondent shall attend an appropriate course of instruction on the Illinois Rules of Professional Conduct, to be determined in consultation with the Administrator and subject to the approval of the Administrator, in the first year of probation;

(4) respondent shall reimburse the Administrator for the costs of this proceeding as defined in Supreme Court Rule 773 and will reimburse the Commission for any further costs incurred during probation.

If respondent either (1) fails to comply with the terms of this probation, (2) becomes subject to any further discipline, or (3) is found guilty of a felony or misdemeanor, this period of probation shall cease and the term of suspension shall be reinstated.

Suspension ordered but stayed; conditional probation entered.

I, JULEANN HORNYAK, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 16th day of December, 19 93

Juleann Hornyak Clerk,

Supreme Court of the State of Illinois.

Docket No. 74929--Agenda 18--May 1993.
*In re* DAVID R. JORDAN, Attorney, Respondent.

JUSTICE McMORROW delivered the opinion of the court:

Supreme Court Rule 772 permits an attorney to be placed on probationary status when the lawyer has committed an act of professional misconduct occasioned by a disability such as substance abuse or mental illness. (134 Ill. 2d R. 772.) In the present case, we are asked to decide whether the respondent, an attorney who suffers from no proven disability, should nevertheless receive probation for conduct that violated the Code of Professional Responsibility (107 Ill. 2d R. 1--101 *et seq.* (now replaced by the Rules of Professional Conduct, 134 Ill. 2d R. 1.1 *et seq.* (effective August 1, 1990))). Respondent suggests that probationary status is appropriate in the case at bar because his misconduct was an isolated incident in a long and otherwise untarnished legal career, did not involve moral turpitude or corrupt motives, and caused harm to no one. Respondent also notes that his legal practice is comprised of substantial *pro bono* activities and serves a predominantly underrepresented group that often cannot afford legal protection. We agree that, under the circumstances present in this case, a period of probation is an appropriate sanction for the respondent's misconduct.

I

In 1984, Dean Pittenger (Pittenger) was injured while he was driving an automobile in Cook County. He was issued traffic citations with respect to the accident. Pittenger received medical treatment from Ingalls Memorial Hospital (Ingalls Hospital) for his injuries. Thereafter, Pittenger retained Donald Nolan, a Chicago attorney, to represent him for any personal injury award he might recover from the automobile accident.

Pittenger asked Nolan to recommend an attorney to represent him with regard to the traffic citations he had been issued for the automobile accident. Nolan suggested that Pittenger contact David R. Jordan (respondent). Respondent was admitted to the Illinois bar in 1976 and has had a sole-attorney practice in a west neighborhood of the City of Chicago since 1978. Respondent agreed to represent Pittenger with respect to the alleged traffic violations. Later respondent also agreed to represent Pittenger in filing personal bankruptcy. Pittenger did not compensate respondent at the time of this representation, because he had no funds to pay respondent. It was respondent's expectation that he would be paid if Pittenger recovered any monetary award from the personal injury suit involving the automobile accident.

In August 1988, Nolan asked respondent about the status of a lien that had been filed by Ingalls Hospital for the costs of treatment Pittenger received following the automobile accident. Respondent told Nolan that the lien had been discharged when Pittenger had been adjudged bankrupt. A few months later, Pittenger reached a settlement with one of the defendants in the personal injury suit, in the sum of $15,000. Nolan told respondent that the attorney representing the settling defendants in the personal injury suit believed the Ingalls Hospital lien remained valid despite Pittenger's bankruptcy. Respondent telephoned Susan Bauer, who was defense counsel in the personal injury matter. Bauer told respondent that it would be necessary to obtain a release from Ingalls Hospital before Pittenger's settlement funds could be disbursed. Respondent agreed to obtain a lien release from the Hospital.

Respondent then drafted a letter to a corporate officer at Ingalls Hospital and a release of lien form. Respondent never sent the documents to the Hospital for execution, however. Respondent signed the lien release form himself, using the name of the corporate officer at Ingalls Hospital. Respondent then caused the document to be delivered to Bauer, the defense counsel in Pittenger's personal injury suit.

Bauer contacted Ingalls Hospital and discovered that the corporate officer had never signed the lien release form. When confronted with this disclosure, respondent explained to Bauer that he had sent an "employee" to the Hospital and that this employee must have been "overzealous" in obtaining the signature on the form.

Bauer advised respondent that she believed the matter should be referred to the Attorney Registration and Disciplinary Commission (ARDC) for investigation. Respondent sent a letter to the ARDC and repeated his earlier explanation that an "employee" had been "overzealous" in forging the signature. In a later explanation to the ARDC, respondent advised that he could not divulge what had transpired because the information was subject to the "attorney-client privilege." Still later, in a sworn statement to the Administrator, respondent said that he had asked his wife to have the release signed and that she signed the document herself, without his knowledge. Thereafter, respondent's counsel advised the Administrator that respondent's sworn statements were false.

At the disciplinary hearing, respondent explained that he had executed the release of lien form "as a stupid, short-sighted and improper short-cut to get Pittenger his money quicker because he was in such desperate financial straits." Respondent characterized his actions as "foolish[]" and stated that he did not

undertake his acts in order to receive payment from Pittenger for the legal services respondent had provided to Pittenger. Respondent also noted that Ingalls Hospital received the amount due from the proceeds of Pittenger's settlement of the personal injury suit. Respondent stated that Pittenger had not compensated respondent for his legal services.

As mitigating evidence in his own behalf, respondent testified at the hearing regarding his substantial *pro bono* activities in the neighborhood where his office is located, which is economically disadvantaged and plagued by crime. Respondent testified that he has provided *pro bono* legal services for the Austin Christian Law Center of approximately 15 hours per month. His legal representation has included domestic relations, domestic violence, guardianships, and related matters. Respondent stated that he has also assisted the Cook County Legal Assistance Foundation/Suburban Volunteer Attorneys for approximately eight hours per month and has also provided volunteer help to the Kenwood Oakland Community Organization. Robert L. Lucas, administrator of the Kenwood Organization, testified on respondent's behalf and stated that respondent's efforts have "literally saved" a number of buildings in the north Kenwood-Oakland area. Lucas also testified that respondent has loaned the Kenwood Organization approximately $20,000 over a period of several years and that these sums were repaid shortly before the respondent's disciplinary hearing.

Following the hearing, the Hearing Board found that respondent's misconduct violated our professional ethics rules and suggested that respondent receive a three-year probation. The Review Board agreed with this recommendation. The Administrator has filed exceptions to the Review Board's recommendation and asks this court to impose a period of suspension for respondent's unethical acts.

II

Respondent acknowledges that his signature upon the release of lien, as well as his subsequent efforts to conceal his actions, violated our professional ethics rules. (See 107 Ill. 2d R. 1--102(a)(4) (conduct involving dishonesty, deceit and misrepresentation), R. 771 (conduct tending to defeat administration of justice and bring legal profession into disrepute).) The central issue in the present case is the severity of discipline to be imposed for respondent's violations of Illinois' professional ethics rules.

Our rules set forth various forms of discipline for attorney misconduct, including disbarment, suspension, and censure. (134 Ill. 2d R. 771.) Respondent urges that suspension of his right to practice law should be stayed during a period of probation. In 1983, this court adopted the rule that formally acknowledged its power to stay a respondent's suspension pending a term of probation. (See 94 Ill. 2d R. 772.) Rule 772 provides that probation may be imposed in conjunction with a period of suspension that is stayed while the term of probation is carried out. (134 Ill. 2d R. 772(a).) The rule states that such probation may be appropriate where the respondent lawyer has proven the following four elements:

> "(1) [the attorney] can perform legal services and the continued practice of law will not cause the courts or profession to fall into disrepute;
>
> (2) [the attorney] is unlikely to harm the public during the period of rehabilitation and the necessary conditions of probation can be adequately supervised;
>
> (3) [the attorney] has a disability which is temporary or minor and does not require treatment and transfer to inactive status; and
>
> (4) [the attorney] is not guilty of acts warranting disbarment." 134 Ill. 2d R. 772(a).

Respondent acknowledges that Rule 772 was intended to allow probation for an attorney whose misconduct was occasioned by a disability such as substance abuse or mental illness. Respondent also concedes that he failed to produce evidence of such disability to explain his violations of our professional ethics rules in the case at bar. Respondent contends that Rule 772 probation should be expanded to permit its imposition where no disability has been proven. Both the Review and Hearing Board have made a similar recommendation to this court in the instant cause.

This court may, in its inherent powers, impose a probationary term for respondent's misconduct, irrespective of whether respondent's acts were occasioned by a disability envisioned by Rule 772. It is the duty and authority of this court to discipline lawyers who have engaged in unprofessional conduct; attorneys serve as officers of the court and the court has the inherent and constitutional power to regulate the practice of law in this State. See, *e.g.*, *In re Wyatt* (1972), 53 Ill. 2d 44, 45; *People ex rel. Illinois State Bar Association v. Peoples Stock Yards State Bank* (1931), 344 Ill. 462, 470; *In re Application of Day* (1899), 181 Ill. 73, 96-97.

Even before Rule 772 was adopted, this court recognized its inherent authority to place an errant attorney on probationary status, notwithstanding the absence of a specific rule authorizing such discipline. In *In re Driscoll* (1981), 85 Ill. 2d 312, the court imposed a six-month suspension, followed by a period of probation, for an attorney's conversion of client funds while the attorney was suffering from alcoholism. The attorney's alcoholism at the time of his ethical violations was found to be a substantial mitigating circumstance, particularly when considered in conjunction with his subsequent rehabilitation and his exemplary

life before and after the incidents charged. *Driscoll*, 85 Ill. 2d at 316–17.

Following *Driscoll*, a number of this court's reported disciplinary decisions have resulted in conditional probation for the attorney's recovery from a disability that caused the lawyer's professional misconduct. In *In re Chapman* (1983), 95 Ill. 2d 484, an attorney's two-year suspension for neglect of legal matters was stayed pending probation for the lawyer's recovery from alcoholism. A similar result was reached in *In re Ackermann* (1983), 99 Ill. 2d 56, where the lawyer's six-month suspension was stayed during probation because of the attorney's rehabilitation from alcohol abuse. And in *In re Crisel* (1984), 101 Ill. 2d 332, an attorney's two-year suspension was stayed pending probation during the lawyer's treatment for depressive neurosis. More recently, in *In re Kunz* (1988), 122 Ill. 2d 547, this court imposed a two-year suspension stayed pending probation during the attorney's recovery from alcoholism. See also *In re Hogan* (1986), 112 Ill. 2d 20 (respondent who suffered from unspecified condition causing him to be unable to draft pleadings transferred to inactive status; petition for probation under Rule 772 to be considered when respondent shows ability to practice law); *In re Hessberger* (1983), 96 Ill. 2d 423 (respondent placed on conditional probation prior to reinstatement); 134 Ill. 2d Rules 757, 758 (transfer to inactive status because of involuntary commitment, judicial determination of legal disability, mental disability, or substance addiction); see generally Carrol & Feldman, *Supreme Court Rule 772--Support for the Impaired Lawyer*, 73 Ill. B.J. 17 (1984); Skoler & Klein, *Mental Disability and Lawyer Discipline*, 12 J. Marshall L. Rev. 227 (1979); Swett, *Illinois Attorney Discipline*, 26 DePaul L. Rev. 325 (1977).

Both the public and the legal profession benefit from our use of probation as a form of attorney discipline under Rule 772. Probation allows clients to be represented by an attorney who is still capable of practicing law, albeit under certain conditions or limitations. As a result, the public benefits because it does not lose the opportunity to be served by able counsel. Moreover, probation permits the attorney to continue his legal practice; the lawyer does not forfeit all gainful employment or valuable experience in his chosen field.

Probation, by its very nature, reminds both the bar and the public that professional misconduct by attorneys will not be countenanced. By placing conditions on the respondent's term of probation, the errant attorney is constantly reminded that his actions were unethical. The requirement that the respondent account periodically to the ARDC carries a stigma that cannot be ignored or lightly brushed aside. The possibility that the term of suspension will be imposed, if the conditions of probation are not satisfied, also ensures the respondent's compliance with ethical rules. The public nature of the proceedings, and our decision to impose discipline for the attorney's misconduct, send a clear message to both the respondent and the public at large that this court does not and will not tolerate or minimize attorney misconduct in this State.

Probation has thus provided significant benefits. We are hard-pressed to discern why these benefits should be limited to instances where the respondent has been found disabled by a mental illness or substance addiction. Expansion of the applicable circumstances warranting probation would serve our twin concerns in all attorney misconduct cases: to safeguard the public and protect the integrity of the bar. (See, *e.g., In re McAuliffe* (1987), 116 Ill. 2d 254, 263.) Other State courts already allow the use of probation although the attorney's misconduct was not occasioned by substance abuse or mental disability. (See, *e.g., Gadda v. State Bar* (1990), 50 Cal. 3d 344, 787 P.2d 95, 267 Cal. Rptr. 114; *Florida Bar v. Guard* (Fla. 1984), 448 So. 2d 981; *Florida Bar v. Brennan* (Fla. 1982), 411 So. 2d 176; *In re McCallum* (Minn. 1980), 289 N.W.2d 146; *In re Schiff* (Mo. 1976), 542 S.W.2d 771 (*en banc*); *In re Kotok* (1987), 108 N.J. 314, 528 A.2d 1307; *In re Privette* (1978), 92 N.M. 32, 582 P.2d 804; *In re Haws* (1990), 310 Or. 741, 801 P.2d 818; *State Board of Law Examiners v. Holland* (Wyo. 1972), 494 P.2d 196.) Our ultimate objective in attorney discipline is not to be harsh or to punish the respondent, but to impose a sanction that is uniquely tailored to the precise facts of each particular case. (See, *e.g., In re Owens* (1991), 144 Ill. 2d 372, 380 (*per curiam*).) To this end we must retain a degree of flexibility in disciplining unprofessional conduct, so that we are guided by the spirit of our rules, not merely by a strict or technical interpretation of terminology.

In our view, a term of probation, where the attorney's right to practice law is limited by certain conditions or requirements, "should be imposed when a lawyer's right to practice law needs to be monitored or limited rather than suspended or revoked." (Model Standards for Imposing Lawyer Sanctions Standard 2.7, Commentary, at 15 (1992).) We conclude that the instant cause, given its precise facts and circumstances, is one where the respondent's right to practice should be monitored rather than revoked.

We emphasize that the respondent's signature of the release of lien form, combined with his efforts to conceal his actions by blaming others for the incident, clearly violated our professional ethics rules for attorneys. (107 Ill. 2d Rules 771, 1--102.) Although no pecuniary harm was caused by the respondent's conduct, we cannot ignore the equally significant nonpecuniary damage to the legal profession that resulted from respondent's actions. (See *In re Lamberis* (1982), 93 Ill. 2d 222 (respondent

censured for plagiarism in master's thesis).) Respondent's efforts to conceal his conduct cast a particularly poor reflection on his ability to handle client matters wisely. Respondent's misconduct warrants disciplinary sanction.

Nevertheless, we do not believe that suspension of respondent's law license would be appropriate under the facts of the instant cause. Respondent was not motivated by personal gain or profit. Respondent unsuccessfully attempted an improper "short-cut" to facilitate his client's speedy receipt of monies from settlement of the personal injury claim. As the respondent himself later conceded, the attempt was a "stupid" error in judgment.

In addition, respondent's unprofessional actions were an isolated incident. Respondent has lead an exemplary career that, with the exception of the instant proceedings, has seen no proof of professional misconduct. Respondent's community activities and *pro bono* legal work are considerable. The Administrator acknowledges that respondent's law practice serves a primarily poor and underrepresented segment of the community, and that respondent's legal services have often gone unpaid or underpaid.

We believe that a period of probation will adequately protect the public and the reputation of the legal profession. Weighing all of the surrounding circumstances, we conclude that respondent should receive a three-year suspension, stayed by a three-year period of probation. The following terms of probation, as recommended by the Hearing Board and the Review Board, are also imposed:

> (1) respondent shall devote a minimum of 25 hours per month without charge to the various organizations he has assisted;
>
> (2) respondent shall itemize the time devoted on such *pro bono* legal matters, with quarterly reports to the Administrator;
>
> (3) respondent shall attend an appropriate course of instruction on the Illinois Rules of Professional Conduct, to be determined in consultation with the Administrator and subject to the approval of the Administrator, in the first year of probation;
>
> (4) respondent shall reimburse the Administrator for the costs of this proceeding as defined in Supreme Court Rule 773 and will reimburse the Commission for any further costs incurred during probation.

If the respondent either (1) fails to comply with the terms of this probation, (2) becomes subject to any further discipline, or (3) is found guilty of a felony or misdemeanor, this period of probation shall cease and the term of suspension shall be reinstated.

The suggestions of *amicus curiae* Illinois State Bar Association, regarding the formal modification of the specific terms of Rule 772 to provide for probation where the respondent attorney suffers from no disability, are hereby taken under advisement for further study and review.

*Suspension ordered but stayed; conditional probation entered.*

CHIEF JUSTICE MILLER, dissenting:

I do not agree with the majority's conclusion that probation is the appropriate sanction in the present case. The respondent forged a signature on a document and later attempted to conceal his misconduct through an elaborate series of lies. On this record, I believe that a suspension, not stayed by a term of probation, is necessary.

As the majority opinion notes, Rule 772 currently limits the availability of probation as a sanction in disciplinary matters to cases in which the attorney has a temporary or minor disability. (134 Ill. 2d R. 772; see *In re Trezise* (1987), 118 Ill. 2d 346, 354-55; *In re Goldstein* (1984), 103 Ill. 2d 123, 131.) In the present case, the majority broadens the scope of the rule considerably, allowing imposition of probation here and, by extension, in other cases in which no disability is claimed.

Even if it is assumed that probation should be made available in a wider range of circumstances, I do not agree with the majority's conclusion that probation is appropriate in this case. The facts of the respondent's misconduct are not in dispute. The respondent forged a hospital officer's signature on a release-of-lien form in November 1988. When opposing counsel questioned the authenticity of the signature, the respondent stated that he had sent an unnamed employee to the hospital with the form and that the employee must have been "overzealous" in attempting to procure the necessary signature. Perhaps hoping to forestall a formal inquiry into the matter, the respondent then wrote to the Attorney Registration and Disciplinary Commission, advising the Commission of the forgery but attributing it to either a mix-up at the hospital or, again, to the actions of the anonymous employee. Later, in January 1989, in response to an inquiry from the Commission, the respondent refused to disclose the identity of the particular employee, declaring that information about the incident had been revealed to him in a privileged conversation. Finally, in a sworn statement made in March 1989, the respondent provided an explanation that was different from his earlier accounts, casting blame for the forgery on his wife.

There is some dispute regarding the respondent's motive for his initial misconduct in forging the hospital officer's signature on the release-of-lien form. Before the Hearing Board, the respondent acknowledged that he had hoped that he would receive, from the settlement proceeds, the $2,460 fee owed to him

by this client. Yet the Hearing Board found that there was "no clear and convincing evidence that the misdeed was done to deprive [the hospital] of any money, or to benefit the Respondent economically." It is clear, though, that the respondent's forgery of the hospital officer's signature, as well as his subsequent actions in attempting to cover-up that initial misdeed, constituted conduct involving dishonesty, deceit, and misrepresentation, as both the Hearing Board and the Review Board concluded.

However desirable probation might be as a sanction in attorney disciplinary cases, I do not believe that it is an appropriate disposition in the case at bar. The history of *pro bono* activities undertaken by the respondent is commendable, as is his decision to practice in the community he has served. Though these are mitigating matters (see *In re Merriwether* (1990), 138 Ill. 2d 191, 201-02), I do not believe that they warrant the disposition chosen by the majority in this case. As we have often stated, the attorney disciplinary process is intended to safeguard the public, to maintain the integrity of the legal profession, and to protect the administration of justice from reproach. (*In re Witt* (1991), 145 Ill. 2d 380, 397-98; *In re Kitsos* (1989), 127 Ill. 2d 1, 10; *In re Teichner* (1984), 104 Ill. 2d 150, 160.) None of these goals are advanced by the sanction imposed here. There is nothing in this case to suggest that the respondent's actions in forging the hospital officer's signature and in attempting later to shift the blame to others would be remediable by a course of probation under the conditions imposed by the majority, or under any other conditions that might be proposed. Nor do I believe that the respondent, his past and future clients, or the public at large is well-served by a disciplinary sanction that now allows the respondent to carry on his law practice without interruption, simply on the condition that he continue performing, during the period of probation, the same public service work the majority relies on as mitigation in determining its disposition. There is no sanction at all in that remedy.

It is no answer here to conclude, as the majority seemingly does, that the respondent's decision to work in a distressed area means that a lower standard of conduct should govern his professional life, or qualifies him for a less onerous sanction in the event of misconduct. Such a result is unfair to the clients involved and can only threaten to undermine the moral authority of our legal system. The requirements of the rules of professional conduct apply to all lawyers and to all cases equally; the ethical demands of the legal profession are not somehow reduced when the potential fee is small or the particular client is poor. (See *In re Samuels* (1989), 126 Ill. 2d 509, 530 ("We also find troublesome the implication in respondent's remarks that there is some cut-rate version of our rules which permits an attorney to agree to represent a client in a matter and then 'move on' when the case fails to meet his or her expectation").) I would hope that no one is so cynical as to suggest that the residents of an impoverished community must be made to bear the burden of an unethical attorney merely because they are too poor to pay for better representation.

The misconduct disclosed in the present case is serious. The respondent forged the hospital officer's signature on the release-of-lien form and later compounded that initial dishonesty with an elaborate series of lies, including an attempt to shift the blame for his misconduct to his wife. Misconduct of this nature strikes at the core of a lawyer's ethical duties and is not of a type that can be remedied through a course of probation. In its zeal to expand the range of circumstances in which probation is an available sanction, the majority has overlooked these fundamental principles and has chosen the wrong case in which to apply a broadened rule.

# United States of America

State of Illinois } ss.
Supreme Court

No. 74929

In re: David Richard Jordan

Disciplinary Commission

*I, JULEANN HORNYAK, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

**In Testimony Whereof,** *I have set my hand and affixed the Seal of the said Supreme Court in Springfield, in said State, this* 16th *day of* December *A.D. 19* 93.

Julieann Hornyak

*Clerk,*

*Supreme Court of the State of Illinois*

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Chicago, on Monday, the eleventh day of November, 2013.

Present: Rita B. Garman, Chief Justice

Justice Charles E. Freeman
Justice Thomas L. Kilbride
Justice Anne M. Burke
Justice Robert R. Thomas
Justice Lloyd A. Karmeier
Justice Mary Jane Theis

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On the fifteenth day of November, 2013, the Supreme Court entered the following judgment:

No. 115767

In re:
Theodore George Karavidas
3326 Elmdale Road
Glenview, IL 60025-2546

Attorney Registration and
Disciplinary Commission
2009PR00136

Charges are dismissed against respondent Theodore George Karavidas.

Charges dismissed.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twentieth day of December, 2013.

Carolyn Taft Grosboll

Clerk,
Supreme Court of the State of Illinois

FILED

DEC 23 2013

ATTY REG & DISC COMM
CHICAGO

2013 IL 115767

# IN THE SUPREME COURT OF THE STATE OF ILLINOIS

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(Docket No. 115767)
*In re* THEODORE GEORGE KARAVIDAS, Attorney-Respondent.

*Opinion filed November 15, 2013.*

CHIEF JUSTICE GARMAN delivered the judgment of the court, with opinion.

Justices Freeman, Kilbride, Burke, and Theis concurred in the judgment and opinion.

Justice Thomas dissented, with opinion, joined by Justice Karmeier.

## OPINION

¶ 1 The Administrator of the Attorney Registration and Disciplinary Commission (ARDC) filed a one-count complaint against respondent, Theodore George Karavidas, charging him with various violations of the Illinois Rules of Professional Conduct. The Hearing Board found that he breached his fiduciary duty to the beneficiaries of his father's estate by converting funds from the estate and recommended that he be suspended for four months. The Review Board reversed and recommended that the charges be dismissed. The Administrator filed a petition for leave to file exceptions pursuant to Supreme Court Rule 753(e) (Ill. S. Ct. R. 753(e) (eff. Sept. 1, 2006)), which this court allowed.

¶ 2 BACKGROUND

¶ 3 Respondent was admitted to practice law in Illinois in 1979 and thereafter worked for the City of Chicago, the Attorney General, and several law firms. In 1988, he opened his own practice, focusing on personal injury law. He has no record of previous disciplinary actions and no professional experience in matters of probate or trusts.

¶ 4 Attorney John Hayes, who specialized in estate and probate matters, prepared a will and trust documents for respondent's father, George Karavidas. The elder Karavidas executed the documents on February 17, 2000, and died later that day. Respondent was named in the will to be executor of his father's estate and in the trust documents to be successor trustee. Respondent retained Hayes and his law firm, Pedersen & Houpt, to represent him as executor. Hayes filed a petition to probate the estate on April 11, 2000.

¶ 5 The will provided for George's personal property to be given to his wife, Lillian, and directed that the remainder of the estate pour over into the unfunded trust. The will also authorized independent administration of the estate, meaning that the executor was allowed to take actions with regard to the estate without court approval. See 755 ILCS 5/28-1 (West 2000). The probate estate was valued at approximately $700,000 and included investment accounts with PaineWebber and Harris Investors. In addition, the estate included an interest in a family business called Marie's Pizza and Liquors (Marie's).

¶ 6 The trust documents provided that upon George's death and the resulting transfer of estate assets to the trust, the successor trustee was to create two separate trusts. A family trust was to be funded first, in an amount equal to the maximum federal estate tax exemption (then $675,000); the remaining assets were to be placed in a marital trust for Lillian's benefit. Upon exhaustion of the funds in the marital trust, the principal of the family trust was to be used for Lillian's health and support. In addition, the trustee was given the authority to distribute family trust assets to George's descendants, a group consisting of respondent and his sister, Nadine, provided that the distributions were for the beneficiary's health, support, or education. When making distributions from the family trust, the trustee was instructed to "give primary consideration" to Lillian's needs. Upon Lillian's death, any remaining assets of the family trust were to be distributed in equal shares to respondent and Nadine, without regard to any distributions made to them earlier. However, the trust document also gave Lillian

a testamentary power of appointment, under which she could appoint "any one or more" of George's descendants and their spouses to take the principal of the family trust upon her death. Thus, it was not certain that either respondent or his sister would ever receive any funds from this trust.

¶ 7 Respondent did not transfer any estate assets to the existing trust or create the family and marital trusts. On August 9, 2000, he withdrew $50,000 from one of the investment accounts for his own use. In addition, between August 2, 2000, and July 1, 2005, respondent made multiple withdrawals totaling $398,104 from another investment account for his own use. Between February 1, 2001, and October 17, 2005, he deposited $349,604 of his own funds into the same account. He also made payments of his own funds directly to Marie's, his mother, and his sister. The largest deficit of estate funds due to these transactions at any time was $152,104, which was less than one-third of the amount of the entire estate. The Administrator does not allege that any further restitution is owed to the estate.

¶ 8 Respondent also used estate funds to purchase a new Mercedes automobile for Lillian, to pay her health insurance premiums and her real estate taxes, to make contributions to Nadine's Individual Retirement Account (IRA) and to his wife's IRA, to pay a portion of the real estate taxes on the building that housed Marie's, and to pay Nadine's personal income taxes. At the request of Nadine, who operated Marie's, he made advances from the estate of $339,247 to keep Marie's in business. He also paid approximately $20,000 directly to Nadine.

¶ 9 In 2006, Nadine learned that respondent had attempted to sell Marie's without her or her mother's knowledge. She retained an attorney to represent herself and Lillian, and he filed an appearance in the probate case seeking to terminate independent administration. The petition alleged, among other things, that respondent had not circulated an inventory of the assets of the estate or an account of his administration. Later, Lillian and Nadine sought to have respondent removed as executor. Thereafter, the probate court terminated respondent's independent administration of his father's estate, and he resigned as executor. Nadine became executor of the estate.

¶ 10 On December 30, 2009, the Administrator filed a one-count complaint against respondent, alleging that he engaged in: (1) conversion of assets entrusted to him as executor of his father's

estate; (2) breach of fiduciary obligations owed to the beneficiaries of the estate; (3) conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Rule 8.4(a)(4) (Ill. R. Prof. Conduct R. 8.4(a)(4) (eff. July 6, 2001)); (4) conduct that is prejudicial to the administration of justice, in violation of Rule 8.4.(a)(5) (Ill. R. Prof. Conduct R. 8.4(a)(5) (eff. July 6, 2001)); and (5) conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute, in violation of Supreme Court Rule 770 (Ill. S. Ct. R. 770 (eff. Apr. 1, 2004)).

¶ 11 At the hearing, the Administrator called five witnesses, including Lillian and Nadine. Respondent called four witnesses and testified on his own behalf.

¶ 12 Hayes testified that he prepared the will and trust documents and that no assets were placed in the trust prior to George's death. He summarized the terms of the will and trust and explained that the family trust would have to be funded before the estate could be closed. If no funds remained after fully funding the family trust, the marital trust would not be funded. As attorney for the estate, he received copies of the monthly statements of the investment accounts. The executor of the estate had the authority to act on behalf of the estate with regard to these accounts. Hayes was not aware of the loans to respondent when they occurred, but became aware of them when he prepared an accounting of the estate in response to Nadine's motion in the probate case. By that time, all of the loans had been repaid by respondent. The repayments did not include interest on the amounts borrowed.

¶ 13 Hayes was aware of payments made by respondent on behalf of his mother and sister, but was not aware of any notice to them regarding any loans or payments of estate funds. He also knew of payments made to fund repairs and operating expenses for Marie's, which was losing money, had overdrafts on its checking accounts, and had ceased paying rent. Respondent's transfers for Marie's totaled $339,236.50. Hayes was also aware that respondent had asked one of Hayes's law partners to draft a sales agreement because he intended to sell the business to its manager. Hayes ceased representing the estate when respondent withdrew as executor and was replaced by his sister.

¶ 14 Attorney Theodore Rodes, Jr., who specializes in estate planning and trusts, was called as an opinion witness. After reviewing the will and trust documents, he concluded that neither the documents nor the

Illinois Probate Act authorized the respondent to make loans from the estate to himself. As independent executor, respondent was allowed to take appropriate actions with regard to the estate without court approval. However, as a fiduciary, he had a duty of loyalty, a duty to avoid self-dealing, and a duty to protect the interests of the beneficiaries. The duty to avoid self-dealing prohibits one from placing oneself on both sides of a transaction, such as lender and borrower. Rodes believed that these duties should have been clear to the respondent. Absent specific authority in the documents, the loans would have been proper only if authorized by court order or if the beneficiaries had agreed.

¶ 15 Rodes further opined that respondent violated his duties as executor when he made payments on behalf of his mother and sister. Under the will, he was directed to distribute his father's personal property to Lillian, which he did, and then to turn over the residue of the estate to the trust, which he failed to do. Any authority that the trustee might have had to make distributions to himself and his mother and sister did not exist under the terms of the will. Even if respondent had funded the trust, the trust document did not authorize self-dealing by way of loans.

¶ 16 Although he characterized respondent's conduct as "dishonest," Rodes stated that he saw nothing in the records that suggested respondent was aware that his conduct was improper or that he attempted to conceal the transactions. Rodes also acknowledged that respondent repaid the amounts, but stated that repayment did not absolve him of the breach of duty.

¶ 17 Nadine testified that she had never seen the will or trust documents, but that she understood that her brother was the executor. She expected him to protect the estate and "make it grow." She understood that she, her mother, and her brother were the beneficiaries of the estate. She did not know that her brother was making loans to himself and would have objected if he had asked her permission. She was aware that her brother used money from the estate to buy their mother a new car, to make contributions to her IRA, and to pay some of the real estate taxes on the building that housed Marie's. She had no objection to these expenditures of estate funds. On the occasions when respondent paid her personal income taxes, she gave permission for him to use estate funds. She did not know if he used estate funds to pay his own taxes. She acknowledged that when Marie's was experiencing shortfalls and overdrafts, she

asked respondent to fix the problem but did not know how he did it. She assumed he used money from the estate. Nadine's hiring of an attorney and filing of a petition to terminate independent administration was prompted by her discovery that respondent was negotiating to sell Marie's.

¶ 18 Lillian stated that respondent had informed her that he had taken money from the estate, but he did not ask her permission to do so. She did not tell Nadine that respondent had taken any money. She also denied that respondent had used estate funds to keep Marie's in business.

¶ 19 Respondent stated that he had previously handled client funds and he understood his duty as a fiduciary to segregate client funds from his own property. He acknowledged that he used estate funds for his own purposes, explaining that he believed that he was authorized to do so as a beneficiary. Although he believed that he would have been allowed to retain the funds, he chose to treat the withdrawals as loans and to repay the estate. He testified that the attorney, Hayes, told him that under independent administration, an executor could take whatever actions he was authorized to take and make an accounting when the estate was closed. He stated that Hayes did not tell him he first needed to fund the trusts before he could take the actions he was taking. He was unaware that there was any issue with the loans until he received a letter from the ARDC. He denied any intent to convert estate funds.

¶ 20 Chris Atsaves, vice president of investments at UBS Financial Services, testified that he managed the account into which respondent transferred the estate assets. He was familiar with the history of transactions, including respondent's loans to himself and transfers to Marie's. He understood that the funds advanced to Marie's would be repaid to the estate from the proceeds of the eventual sale of the business. While respondent did not sign notes or specify interest rates or terms of repayment when he transferred money to his personal or law office accounts, Atsaves understood that these transfers were personal loans. Respondent repaid these amounts. His first repayment was several thousand dollars greater than the amount owed, and Atsaves deemed the overage to represent interest on the loan. Subsequent repayments did not include interest amounts because respondent considered the interest offset by the approximately $100,000 in unpaid rent owed to him as a part owner of the building occupied by Marie's. Atsaves was also aware that respondent used

estate funds to open IRAs for himself, his wife, and Nadine; he repaid the funds used for his own IRA and his wife's, but not for Nadine's.

¶ 21 Anthony Siragusa, another financial professional, testified that he had known respondent for 50 years and that he was named in respondent's will to be executor of his estate. Respondent kept him informed of his actions with regard to his father's estate. Siragusa was aware that respondent was using estate funds to keep Marie's afloat and that he was trying to sell the business as a going concern. Nadine opposed any sale. Siragusa was also aware that respondent was borrowing funds from the estate for his own use. Respondent kept him informed so that if something happened to respondent, Siragusa would make sure that a full accounting was made and any outstanding debt repaid. Although he acknowledged that he had no information on the terms or interest rates of the loans and that he did not hold a promissory note, he was confident that he would have been able, if necessary, to reconstruct the transactions.

¶ 22 The Hearing Board found that the will was the controlling instrument, because the trust was never funded. Further, under the will, respondent had no authority to lend money to himself. Even if the trust had been funded, the terms of the trust did not authorize such loans and, although respondent was authorized to distribute trust funds to himself for certain specified purposes, he did not properly document the transactions. The absence of promissory notes caused the Hearing Board to "question" respondent's characterization of the transactions as loans. Respondent, an attorney, did not seek clarification of his responsibilities from Hayes, the attorney for the estate. Further, his self-dealing was not excused by the fact that he used estate funds to benefit his mother and sister, or by the fact that he repaid the funds he borrowed. Thus, the Hearing Board concluded that respondent breached his fiduciary duty to the estate and its beneficiaries.

¶ 23 The Hearing Board also found that because respondent had no authority under either the will or the Probate Act to lend funds to himself, he committed conversion when he took funds from the estate. The Board concluded that because respondent failed "to follow correct procedures, which failure eventually became the subject of court proceedings," his conduct was prejudicial to the administration of justice in violation of Rule of Professional Conduct 8.4(a)(5) and tended to defeat the administration of justice in violation of Supreme Court Rule 770.

¶ 24 On the issue of dishonesty, the Hearing Board concluded that respondent did not intend to deceive or to defraud the estate or its beneficiaries. He took no affirmative steps to conceal his actions, and he repaid the amounts he borrowed. Indeed, repayment was complete more than a year before his actions were reported to the ARDC. He was unfamiliar with estate administration and did not appreciate the separate roles of the will and trust documents or his separate roles as executor and trustee. Thus, the Hearing Board concluded, he did not violate Rule of Professional Conduct 8.4(a)(4).

¶ 25 The Hearing Board recommended that respondent be suspended from the practice of law for four months.

¶ 26 Both parties appealed to the Review Board. Before the Review Board, the Administrator argued that the Hearing Board erred by finding that respondent did not violate Rule 8.4(a)(4) and by recommending a suspension for four months rather than for one year. Respondent argued that the Hearing Board erred by finding that he breached his fiduciary duty to the estate and its beneficiaries and by finding that his conduct amounted to conversion. In the alternative, he argued that the appropriate discipline would be reprimand or censure.

¶ 27 The Review Board concluded that in the absence of an attorney-client relationship between respondent and the estate or its beneficiaries, the charges of breach of fiduciary duty and conversion could not serve as the basis for professional discipline in this case.

¶ 28 As a general matter, the Review Board discouraged the Administrator's use of breach of fiduciary duty as a free-standing charge, absent an allegation of violation of a specific Rule of Professional Conduct. The Board noted that breach of fiduciary duty is not one of the specifically enumerated forms of misconduct in the Rules and that as a general concept of tort liability, it encompasses a wide variety of behavior, not all of which should be the basis for professional discipline. Because the fiduciary duty in this case did not arise from an attorney-client relationship and did not violate a specific Rule, the Review Board stated that the charge had no basis "in law," that is, in the Rules of Professional Conduct.

¶ 29 Similarly, the Review Board stated that the only Rule of Professional Conduct that would specifically encompass conversion is Rule 1.15, which provides that "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." Ill.

R. Prof. Conduct R. 1.15(a) (eff. Oct. 21, 2009). Again, the Review Board concluded that, absent an attorney-client relationship, respondent could not have violated this rule because he did not "hold" the estate funds for a client or in connection with a representation.

¶ 30 Further, if the tort of conversion, as opposed to a violation of Rule 1.15, were to be the basis of professional discipline, the Review Board stated that the Administrator should be required to prove the elements of the tort by clear and convincing evidence, which was not done in this case. *In re Storment*, 203 Ill. 2d 378, 390 (2002) ("In attorney disciplinary proceedings, misconduct must be proved by clear and convincing evidence."). The Board criticized the suggestion that an attorney could be disciplined for the wrongful deprivation of another's property, without proof of the other elements of the tort. In addition, the Board observed, one cannot convert money unless it is tangible, such as currency taken from a briefcase or a safe-deposit box. For this proposition, the Board cited *Sandy Creek Condominium Ass'n v. Stolt & Egner, Inc.*, 267 Ill. App. 3d 291, 294 (1994) ("Money may be the subject of conversion if the sum of money is capable of being described as a specific chattel. [Citation.] However, an action for the conversion of funds may not be maintained to satisfy an obligation to pay an indeterminate sum of money. If such is the case, the cause of action lies in debt, rather than conversion."). *Sandy Creek*, in turn, cites this court's opinion in *In re Thebus*, 108 Ill. 2d 255, 260 (1985) ("It is ordinarily held, however, that an action for conversion lies only for personal property which is tangible, or at least represented by or connected with something tangible***.' " (quoting 18 Am. Jur. 2d *Conversion* § 9, at 164 (1965))).

¶ 31 The Board concluded that because the Administrator did not plead and prove either a violation of Rule 1.15 or commission of the tort of conversion, the charge of conversion could not stand.

¶ 32 In sum, the Review Board reversed the Hearing Board's decision and recommended that the charges against respondent be dismissed because the Administrator did not prove by clear and convincing evidence that respondent violated the Rules of Professional Conduct when he committed the alleged conversion and breach of fiduciary duty.

¶ 33 ANALYSIS

¶ 34 The issues presented in this case are: (1) whether the Administrator met the burden of proving by clear and convincing

evidence that respondent's actions with respect to his father's estate constituted a breach of fiduciary duty or conversion; and (2) if so, whether his actions are professional misconduct that may be the basis for the imposition of professional discipline.

¶ 35 The first question requires us to review the factual findings of the Hearing Board under the manifest weight of the evidence standard. *In re Timpone*, 208 Ill. 2d 371, 380 (2004). Respondent argues that he did not breach his fiduciary duty or engage in conversion and that, in any event, these charges were not proven by clear and convincing evidence. The Administrator responds to this argument in its reply brief, arguing that the Hearing Board's findings of facts were correct.

¶ 36 The second question involves interpretation and application of the Rules of Professional Conduct, which we review *de novo*. *Id.*

¶ 37 Factual Findings of Hearing Board

¶ 38 *Breach of Fiduciary Duty*

¶ 39 The Hearing Board found, and respondent does not deny, that he was executor of his father's estate and, as such, "was in a fiduciary position that required him to exercise the highest degree of good faith and fidelity toward the estate and toward its beneficiaries, and to avoid placing his own interests above those of the estate."

¶ 40 The Administrator argues that the Hearing Board's finding of a breach of fiduciary duty was correct because respondent "had no authority under either his father's will or Illinois probate law to lend estate funds to himself yet he lent himself almost $450,000 over the course of five years."

¶ 41 Respondent argues that because the will provided for independent administration of the estate under section 28-1 of the Probate Act of 1975 (755 ILCS 5/28-1 (West 2010)), he was authorized to act without court approval. Further, he asserts that under section 28-10 of the Act, which provides that "the independent representative may at any time or times distribute the estate to the persons entitled thereto" (755 ILCS 5/28-10 (West 2010)), he was entitled to make loans to himself because he would have been entitled to distribute a portion of the estate to himself, without court approval or notice to other beneficiaries. Respondent also relies on the language of the trust document, which authorized the trustee to "make loans to the fiduciary of any trust created by me or any member of my family *** even though the trustee is such a fiduciary." He states that this

language gave him the authority to make loans of trust funds to himself without notice or approval. Thus, respondent's argument concludes that the Administrator failed to prove a breach of fiduciary duty by clear and convincing evidence.

¶ 42 The rules governing the fiduciary duty of an executor are well-settled. "[T]he beneficiaries of an estate are intended to benefit from the estate and are owed a fiduciary duty by the executor to act with due care to protect their interests." *Gagliardo v. Caffrey*, 344 Ill. App. 3d 219, 228 (2003). The executor's duty is to "carry out the wishes of the decedent," acting in the utmost good faith to protect the interests of the beneficiaries, "exercising at the very least that degree of skill and diligence any reasonably prudent person would devote to [his] own personal affairs." *Will v. Northwestern University*, 378 Ill. App. 3d 280, 291-92 (2007). Ultimately, the executor's duty is to administer the assets of the estate so that any debts or obligations are paid and the beneficiaries receive their just and proper benefits " 'in an orderly and expeditious manner.' " *Id.* (quoting *In re Estate of Greenberg*, 15 Ill. App. 2d 414, 424 (1957)). In addition, an executor owes a duty of full disclosure to the beneficiaries under the testator's will. See *In re Estate of Talty*, 376 Ill. App. 3d 1082, 1089 (2007).

¶ 43 The father's will named two beneficiaries: his wife, Lillian, and the unfunded trust. As executor of his father's will, respondent was required to distribute his father's personal property to Lillian and to transfer all other estate assets to the trust. Then, in his role as trustee, he was required to create two separate trusts. He did not transfer the residue of the estate to the trust, as evinced by the fact that the checks he drew on the account at USB Financial Services continued to list the "Estate of George Karavidas" as the account holder. Thus, the Hearing Board was correct in concluding that because the assets were never transferred to the trust, the will is the controlling instrument with respect to the transactions at issue.

¶ 44 We also agree with the Hearing Board that although the will authorized independent administration, neither the will itself nor the independent administration provision of the Probate Act (755 ILCS 5/28-1 (West 2010)), authorized respondent, as executor, to make loans to himself or to use the estate assets as a line of credit for his own benefit. Section 28-1 of the Probate Act permits an executor to act on behalf of the estate without court approval; it does not permit him to ignore the intent of the testator. The will gave the executor the power to borrow money, not to lend it. It allowed the executor to

"deal with" himself in his other role as trustee, but not to engage in transactions with himself as an individual. The provision allowing him to make distributions from the estate permitted such distributions only to the named beneficiaries of the will—Lillian and the trust—not to the eventual beneficiaries of the trust.

¶ 45 The facts of this case are similar to *Prignano v. Prignano*, 405 Ill. App. 3d 801, 811-12 (2010), where the executor of the estate, who was brother of the testator and co-owner of several businesses, breached his fiduciary duty to carry out the express provisions of the will. The will provided that the executor was to receive his late brother's share of the "assets" of a corporation owned by the brothers. In addition to the assets of the business, the executor distributed to himself his late brother's share of the stock in the corporation. The appellate court held that shares of stock are not assets of a corporation; rather, they are units of ownership in the corporation. As such, the stock was part of the residue of the estate, which was to be distributed to the testator's widow and their two minor children. Thus, the executor "breached his fiduciary duty as executor to carry out the express provisions of the will." *Id.* at 811. In addition, because the children's share of the residue was to be placed in trust for them, the executor also breached his fiduciary duty as trustee of the children's trusts "to secure for them the property that should have formed the *res* of their trusts." *Id.* at 812.

¶ 46 Similarly, in the present case, respondent breached his fiduciary duty to carry out the express provisions of the will by failing to transfer estate assets to the trust and by lending estate assets to himself. Even if such loans had been permissible, his failure to document the transactions as loans placed the assets of the estate at risk if he were to die or become incompetent before the loans were repaid.

¶ 47 Respondent also breached his fiduciary duty by failing to disclose the transactions to his mother or sister. In *Estate of Talty*, the testator named as executor his brother, with whom he co-owned an automobile dealership and the real estate on which it was located. The will named the testator's wife as the sole residuary beneficiary, giving the brother the right to purchase the testator's share of the dealership, subject to certain conditions, including an independent appraisal of the value of the dealership. *Estate of Talty*, 376 Ill. App. 3d at 1084. The executor obtained an appraisal that falsely stated the value of the dealership and closed the sale to himself. In ensuing litigation, the

circuit court found that although the testator "knowingly waived any conflict of interest" when he appointed his brother and business co-owner as his executor, the executor nevertheless acted in bad faith. *Id.* at 1086. The appellate court affirmed, stating that the testator had waived any conflict of interest by placing his brother in "multiple capacities as buyer, seller, and fiduciary." Further, the court observed that "an executor can serve potentially conflicting interests without exercising bad faith as a fiduciary." *Id.* at 1089. However, the executor breached his fiduciary duty of full disclosure by failing to disclose to the residuary beneficiary information regarding the appraisals of the business and the real estate and the closing dates for the sales. *Id.* at 1089-90.

¶ 48 The elder Karavidas named his son as executor and successor trustee, knowing that his son was also a beneficiary of the trust. Thus, as in *Talty*, he waived any conflict of interest by placing respondent in multiple capacities as executor, trustee, and beneficiary. However, such a waiver does not relieve the respondent of an executor's fiduciary duty of full disclosure. The record clearly demonstrates that respondent did not inform his mother, who was a beneficiary under the will and trust, of his repeated taking of loans from the estate. He also failed to disclose the transactions to his sister, who, while not a direct beneficiary of the will, was an intended beneficiary of the trust that he failed to fund with estate assets.

¶ 49 Respondent argues that his position is supported by the case of *In re* Nagler, M.R. 23644 (May 17, 2010), in which the respondent attorney, who drafted a will and trust for his father and served as executor of his father's estate, failed to follow the directions in the will. He did not set up separate trusts for himself and his sister as instructed, but rather allowed all of the funds to remain in one trust account, keeping a mental note of the amount to which each was entitled and making sure that he did not distribute more than one half of the funds to himself. He also made a loan of trust funds to a friend, without informing his sister of the transaction. Although he was found to have committed other forms of misconduct, Nagler was not found to have breached his fiduciary duty. Respondent argues that his conduct was less egregious than the conduct charged in *In re* Nagler and, thus, he should be found not to have breached his fiduciary duty.

¶ 50 The Hearing Board considered and rejected this argument, noting the significant distinction between respondent and Nagler. In contrast to Nagler, respondent was acting as executor of his father's estate, not

as a trustee. An executor has a duty of full disclosure. *Estate of Talty*, 376 Ill. App. 3d at 1089-90. Further, although Nagler failed to separate the residuary trust into two separate trusts, he was operating under the terms and conditions of his father's trust document, which gave broad discretion to the trustee. In the present case, respondent was operating under the terms of his father's will, which did not permit him to make loans to himself.

¶ 51 Although the will was the operative instrument, respondent nevertheless relies on the trust document to argue that he was entitled to distribute trust assets to himself and that, therefore, he cannot have breached his fiduciary duty by taking the same funds directly from the probate estate. We reject the implicit suggestion that the funding of the trust was a mere formality that could be dispensed with. Further, although respondent as trustee did have the authority to make distributions of trust funds to himself, that authority was not unlimited. During his mother's lifetime, he was authorized to distribute trust funds to himself and his sister only for their "health, support and education" and only after consideration of their "other resources." Additionally, as trustee, he was required to give "primary consideration" to his mother's needs. Thus, even if he had funded the trust, he was not authorized to use the trust as his personal line of credit.

¶ 52 Respondent's explanation that he at no time owed the estate more than one-third of its total original value is not persuasive. Even had he carried out his father's wishes, he was not entitled to one-third of the estate. Rather, he would have eventually received one-half of the remaining principal in the family trust upon the death of his mother, provided that she did not exercise her testamentary power of appointment to reduce his share. Indeed, it was entirely possible that the care and support of his mother would consume the entire corpus of the family trust.

¶ 53 We acknowledge respondent's assertion that he also made payments of estate funds to or on behalf of his mother and sister. While these payments do tend to support his claim that he was not acting to defraud the estate, but simply did not understand his obligations as executor, these transactions do not negate his breach of fiduciary duty. Indeed, they, too, were breaches of fiduciary duty because they were unauthorized by the will.

¶ 54 Had respondent followed the instructions in his father's will, the estate could have been closed in a timely manner. Instead, he allowed

the assets to remain in the probate estate for over five years and engaged in numerous undocumented transactions, some of which benefitted his mother and sister and some of which benefitted himself. He did so without disclosing the transactions to the other intended beneficiaries and without their consent. We find, therefore, that the Hearing Board's finding that respondent breached his fiduciary duty as executor of his father's estate was not against the manifest weight of the evidence.

¶ 55 *Conversion*

¶ 56 The same conduct that was alleged to constitute a breach of fiduciary duty—respondent's unauthorized taking of estate funds in the form of undocumented loans for his personal use—was also alleged to constitute conversion. In effect, the respondent was charged with breaching his fiduciary duty by means of converting estate funds. The Hearing Board concluded that his conduct met the definition of conversion.

¶ 57 Respondent argues that he did not engage in conversion because he was entitled to use all or part of the estate funds and that his mother and sister were not deprived of anything to which they were entitled because they had no greater right to the funds than he did. He acknowledges that he borrowed the funds from the estate, rather than creating the trusts and then disbursing funds to himself as a beneficiary of the family trust, but insists that no conversion took place when he would have been allowed to use the funds if they had been placed in the family trust. He asserts that the Administrator failed to prove any of the elements of the common law tort of conversion and that the Review Board correctly found that he did not convert estate funds.

¶ 58 The Administrator responds that respondent cites no authority for his assertion that he was entitled to use the estate funds or that his actions, particularly the utter lack of documentation for the loans, would have been permitted if the trust had been funded. Thus, his taking of the funds, even with subsequent repayment, was conversion.

¶ 59 At common law, conversion is the "wrongful possession or disposition of another's property as if it were one's own; an act or series of acts or willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property." Black's Law Dictionary 381 (9th ed. 2009).

¶ 60 "This court has stated that '[a] conversion is any unauthorized act, which deprives a man of his property permanently or for an indefinite time ***.' (*Union Stock Yard & Transit Co. v. Mallory, Son & Zimmerman Co.* (1895), 157 Ill. 554, 563. In *Bender v. Consolidated Mink Ranch, Inc.* (1982), 110 Ill. App. 3d 207, 213, the court said, 'The essence of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held.' In *Jensen v. Chicago & Western Indiana R.R. Co.* (1981), 94 Ill. App. 3d 915, 932, it was stated: 'One claiming conversion must show a tortious conversion of the chattel, a right to property in it, and a right to immediate possession which is absolute ***.' In *Farns Associates, Inc. v. Sternback* (1979), 77 Ill. App. 3d 249, 252, the court said, 'The essence of an action for conversion is the wrongful deprivation of property from the person entitled to possession.' " *Thebus*, 108 Ill. 2d at 259-60.

¶ 61 In the context of a civil case, " '[t]o prove conversion, a plaintiff must establish that (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property.' " *Loman v. Freeman*, 229 Ill. 2d 104, 127 (2008) (quoting *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114 (1998)).

¶ 62 However, when conversion is charged as a form of professional misconduct, it has a more "specialized meaning." *Thebus*, 108 Ill. 2d at 259. Thus, the general rules as to the elements of the tort may be altered to fit the requirements of the Rules of Professional Responsibility. See *id.* at 261. For example, an attorney may be found to have committed conversion when the balance in an account in which client funds are being held falls below the amount then belonging to clients. *In re Cheronis*, 114 Ill. 2d 527, 534-35 (1986). This is true even though no client entitled to the funds has made a demand for possession. Thus, in *In re* Lasica, No. 07-CH-125 (Review Board Jan. 22, 2010), the Review Board rejected the attorney's argument that demand for possession is a necessary element of conversion in a disciplinary proceeding, observing that "[a]ttorneys are not free to use funds that they hold on behalf of a client or third party until such time as a demand for possession is made."

¶ 63 In the context of a disciplinary proceeding where an attorney-client relationship is involved, we use the term "conversion" as a term of art and focus on the attorney's conduct with respect to the property or funds of the client or third party, not on the circumstances that would be necessary to give rise to a claim in tort by the rightful owner. See *In re Rosin*, 156 Ill. 2d 202, 206 (1993) (defining conversion in the context of a disciplinary proceeding as "any unauthorized act, which deprives a man of his property permanently or for an indefinite time," where the property at issue was the client's share of proceeds of a settlement (internal quotation marks omitted)). Thus, when an attorney is acting as an attorney, he may be found to have converted funds that are held in a trust account holding funds owed to numerous clients, even though his misconduct does not fit the common law definition of conversion.

¶ 64 As the Review Board correctly noted, respondent's conduct did not violate Rule 1.15(a) because the funds involved were neither client funds nor funds held by respondent for a third person "in connection with a representation." Ill. R. Prof. Conduct R. 1.15(a) (eff. Oct. 21, 2009). Thus, our term of art does not apply.

¶ 65 This raises the additional consideration that, at common law, not all types of property are subject to being converted. See *Thebus*, 108 Ill. 2d at 260 (" 'It is ordinarily held, however, that an action for conversion lies only for personal property which is tangible, or at least represented by or connected with something tangible ***.' " (quoting 18 Am. Jur. 2d *Conversion*, § 9, at 164 (1965))). Thus, if the nonattorney executor of an estate were to help himself to a valuable painting or piece of jewelry, he would not only be in breach of his fiduciary duty, he would be liable in tort for conversion. However, the Review Board observed that the funds that respondent "borrowed" from the estate were not "capable of being described as a specific chattel" and, thus, were not capable of being converted.

¶ 66 As established above in our discussion of breach of fiduciary duty, respondent's actions were indeed wrongful and without authorization. In addition, he deprived the estate and its intended beneficiary, the trust, of the funds for an indefinite period of time. Because we have already found that respondent's conduct with respect to the estate funds was a breach of fiduciary duty, we need not determine whether the means by which the breach was committed may also be labeled as common law conversion.

¶ 67 We briefly address the argument, made for the first time at oral argument, that respondent could not have committed conversion of funds from the estate or breached his fiduciary duty because the death of George Karavidas "funded" the George Karavidas Trust and that the trust document allowed the trustee to make loans.

¶ 68 The Administrator rightly points out that this is a change in the respondent's position before the Hearing Board and should not be given any consideration. We also note that the assertion that estate assets somehow automatically become trust principal upon the death of a testator who has created an unfunded trust that is to be funded via a pour-over will is unsupported by any citation to authority. Further, respondent's claim is contradicted by the fact that the investment accounts continued to be held in the name of the "Estate of George Karavidas," not in the name of the trust.

¶ 69 The finding of the Hearing Board that respondent breached his fiduciary duty is not against the manifest weight of the evidence. We decline to determine whether his conduct might also be labeled as conversion. The question remains whether this civil offense—for which a civil remedy is available to aggrieved parties—is a proper basis for professional discipline in this case.

¶ 70 Alleged Violations of Rules of Professional Conduct

¶ 71 The complaint states that respondent converted estate funds and breached his fiduciary duty and that he violated Rules 8.4(a)(4) and 8.4(a)(5) of the Illinois Rules of Professional Conduct and Supreme Court Rule 770. These charges are enumerated (1) through (5). This is the Administrator's standard way of stating charges, but it is not entirely clear whether the respondent was being charged with five separate types of misconduct, or he was being charged with violating three separate rules by committing two types of misconduct, which were, in turn, based on a single act.

¶ 72 We urge the Administrator to ensure that a complaint clearly and unambiguously inform a respondent of the specific acts with which he is charged and the specific rules that he is alleged to have violated by engaging in those acts.

¶ 73 Supreme Court Rule 753(b) provides that a disciplinary complaint "shall reasonably inform the attorney of the acts of misconduct he is alleged to have committed." Ill. S. Ct. R. 753(b) (eff. Sept. 1, 2006). An accused attorney's procedural due process rights, including the

right to fair notice and the right to an opportunity to defend against all charges, would be violated if an attorney were disciplined for uncharged misconduct. *In re Chandler*, 161 Ill. 2d 459, 470 (1994). When an attorney is accused of engaging in certain conduct, but that accusation is not tethered to an alleged violation of a specific Rule of Professional Conduct, it creates the risk that discipline might be imposed for conduct that does not violate professional norms.

¶ 74 For example, in *In re Mulroe*, 2011 IL 111378, the respondent attorney represented a friend in a dissolution proceeding, a matter outside his usual areas of practice. He agreed to hold the proceeds from the sale of the couple's home until the allocation was determined by the court. *Id.* ¶ 7. The Hearing Board found that he converted client funds in violation of Rules 1.15(a) and (b) by failing to hold the escrow funds separate from his own property and to promptly deliver the funds upon demand by the rightful owner. In addition, he violated Rule 8.4(a)(5) by engaging in conduct that was prejudicial to the administration of justice and that brought the legal profession into disrepute. *Id.* ¶ 12. However, the Hearing Board found that the Administrator did not prove a violation of Rule 8.4(a)(4) by clear and convincing evidence where the conversion "was a technical one, not motivated by an intention to deprive" the rightful owner of the funds. *Id.* The attorney had the financial means to deliver the funds at all relevant times and honestly believed that he was not to distribute the funds to the ex-wife until the issues on appeal were resolved. *Id.*

¶ 75 This court rejected the Administrator's argument that recklessness in the handling of client funds is sufficient to satisfy the *scienter* requirement of Rule 8.4(a)(4). *Id.* ¶ 19. While we acknowledged that the holding of client funds "is a serious fiduciary duty and should not be treated lightly," we determined that "the question at hand is not whether respondent committed conversion, but whether the conversion constituted 'conduct involving dishonesty, fraud, deceit, or misrepresentation' such that respondent violated Rule 8.4(a)(4)." *Id.* ¶ 20. We declined to adopt a bright-line rule that reckless conversion creates a presumption of dishonesty. *Id.* ¶ 23. We also concluded that the Hearing Board's finding of no dishonest intent behind the conversion was not against the manifest weight of the evidence. *Id.* ¶ 31. Thus, there was no violation of Rule 8.4(a)(4), despite the conversion.

¶ 76 In contrast, in *In re Merriwether*, 138 Ill. 2d 191 (1990), the respondent attorney negotiated a settlement on behalf of a client in a personal injury case. The client's medical expenses had been paid by the Illinois Department of Public Aid, which, thus, had a lien on the settlement proceeds. He remitted to the client the funds to which she was entitled, but despite repeated demands by the Department, failed to remit the amount due under the lien. *Id.* at 194-96. The attorney admitted that he used the money for personal purposes because he was in a "financial predicament." *Id.* at 198. As a result, the balance in his client trust account fell below the amount of the lien. *Id.* at 197. This commingling and conversion of funds involved "client money," but it did not involve money owed to the client; rather, it involved funds owed to a state agency to reimburse it for funds expended on the client's behalf. *Id.* at 200. The Hearing Board found violations of numerous provisions of the Code of Professional Responsibility. (The Code of Professional Responsibility was replaced in 1990 by the Rules of Professional Conduct.)

¶ 77 This court found that the attorney's conduct resulted in his client's becoming subject of a body attachment order and a contempt proceeding when the Department, not knowing that the attorney retained a portion of the settlement amount, attempted to collect the funds owed from the client. This conduct violated the Code by inconveniencing the client. *Id.* at 200-01. See Ill. S. Ct. Code of Prof. Res. R. 7-101(a)(3) (eff. July 1, 1980) (prohibiting conduct that may damage or prejudice a client). In addition, the attorney also violated the Code by acting dishonestly in his dealings with the Department and by attempting to conceal his misdeeds. *Merriwether*, 138 Ill. 2d at 201. See Ill. S. Ct. Code of Prof. Res. R. 1-102(a)(4) (eff. July 1, 1980) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation). Thus, it was not the conversion *per se* that constituted professional misconduct. It was the violations of several provisions of the Code of Professional Conduct. Conversion was the means of committing the violations.

¶ 78 *Mulroe* and *Merriwether* support the proposition that an attorney's breach of fiduciary duty or conversion does not, standing alone, warrant the imposition of professional discipline. As the Review Board noted in the present case, discipline for conduct occurring outside the attorney-client relationship should be limited to situations where the attorney's conduct violates the Rules by demonstrating "a lack of professional or personal honesty which

render[s] him unworthy of public confidence." *In re* Bruckner, No. 00-CH-12, at 30 (Hearing Board Aug. 8, 2001), approved and confirmed M.R. 17722 (Nov. 28, 2001).

¶ 79 In sum, we hold that professional discipline may be imposed only upon a showing by clear and convincing evidence that the respondent attorney has violated one or more of the Rules of Professional Conduct. Mere bad behavior that does not violate one of the Rules is insufficient.

¶ 80 *Supreme Court Rule 770*

¶ 81 The Hearing Board concluded that respondent's conversion of estate funds "tended to defeat the administration of justice in violation of Supreme Court Rule 771." (Effective April 1, 2004, a new Rule 771 was adopted and the former Rule 771, to which the Hearing Board was referring, was renumbered as Rule 770.)

¶ 82 The Administrator argues that Rule 770 specifically provides that "attorneys may be disciplined for conduct that does not violate the Rules of Professional Conduct." This argument focuses on the use of the word "or" in Rule 770 to argue that discipline may be imposed on an attorney *either* for violating the Rules *or* for engaging in conduct that does not violate the Rules, but that defeats the administration of justice or tends to bring the courts or the profession into disrepute.

¶ 83 We begin our analysis by noting that Rule 770 is a procedural rule of this court, not a Rule of Professional Conduct. As we noted in *In re Thomas*, 2012 IL 113035, ¶ 92:

> "Supreme Court Rule 770 is not itself a Rule of Professional Conduct. Rather, it is contained in article VII, part B, of our rules, which governs 'Registration and Discipline of Attorneys.' Rule 770 is titled 'Types of Discipline' and provides that '[c]onduct of attorneys which violates the Rules of Professional Conduct contained in Article VIII of these rules or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court.' [Citation.] The rule then lists eight levels of discipline ranging from disbarment to reprimand. Thus, one does not 'violate' Rule 770. Rather, one becomes subject to discipline pursuant to Rule 770 upon proof of certain misconduct."

¶ 84 We do not attach the significance to the word "or" that the Administrator suggests. Aside from the placement of Rule 770 in article VII of our court rules, which signifies the procedural nature of the rule, the Rules of Professional Conduct are sufficiently broad to encompass conduct that defeats the administration of justice. Indeed, Rule 8.4(a)(5) prohibits conduct that is "prejudicial" to the administration of justice. Ill. R. Prof. Conduct R. 8.4(a)(5) (eff. July 6, 2001). Further, one may bring the courts or the legal profession into disrepute by violating any of the Rules. However, attorney conduct that does not violate any of the Rules may not be the basis for professional discipline.

¶ 85 In the past, we have referred to Rule 770 and its predecessor Rule 771 as if they were Rules of Professional Conduct. For example, in *In re Winthrop*, we stated that the respondent attorney, who made a false statement of material fact to opposing counsel, "violated both" Rule of Professional Conduct 8.4(a)(4) and Supreme Court Rule 771. *In re Winthrop*, 219 Ill. 2d 526, 558 (2006). A more precise statement would have been that he violated Rule 8.4(a)(4) by making the false statement and, thus, was subject to discipline pursuant to Rule 771.

¶ 86 We reiterate: by definition, violation of any of the Rules of Professional Conduct may tend to defeat the administration of justice, to bring the courts or the profession into disrepute, or both. If an attorney is proven to have violated the Rules of Professional Conduct, he is then subject to discipline under Supreme Court Rule 770. Rule 770 cannot support a separate charge against an attorney because it is not a Rule of Professional Conduct; it governs the types of discipline that may be imposed upon a showing of a violation of a Rule.

¶ 87 *Rule of Professional Conduct 8.4(a)(5)*

¶ 88 Respondent was charged with violating Rule 8.4(a)(5), which at the relevant time enumerated nine types of professional misconduct. In pertinent part:

> "A lawyer shall not:
>
> ***
>
> (3) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.
>
> (4) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(5) engage in conduct that is prejudicial to the administration of justice." Ill. R. Prof. Conduct R. 8.4(a) (eff. July 6, 2001).

¶ 89 Depending on the facts of the case, an attorney's breach of fiduciary duty might involve criminal conduct, which could subject the attorney to discipline under subsection (3), or it could involve dishonesty, fraud, deceit, or misrepresentation, subjecting him to discipline under subsection (4). In the present case, the Administrator charged respondent with violating subsection (5).

¶ 90 The Hearing Board stated that respondent's failure to properly document the loans was prejudicial to the administration of justice in violation of Rule 8.4(a)(5) because his failure to properly document the loans "eventually became the subject of court proceedings."

¶ 91 In *In re Vrdolyak*, 137 Ill. 2d 407, 425 (1990), we interpreted this rule as requiring proof of actual prejudice to the administration of justice. Vrdolyak, an attorney who was also a Chicago alderman, operated under a conflict of interest when he represented a client in a dispute with the city. He did not, however, violate Disciplinary Rule 1-102, which forbade engaging in "conduct that is prejudicial to the administration of justice" Ill. S. Ct. Code of Prof. Res. R. 1-102(a)(5) (eff. July 1, 1980)), because "clear and convincing evidence that the administration of justice was, indeed, prejudiced" was lacking. *Vrdolyak*, 137 Ill. 2d at 425.

¶ 92 Thus, in *In re Storment*, 203 Ill. 2d 378 (2002), we found that the Hearing and Review Boards' conclusion that the respondent attorney had not violated Rule 8.4(a)(5) was not against the manifest weight of the evidence, despite his violation of Rule 1.5(f), which required a client's written agreement to an attorney fee-sharing arrangement. The violation of the writing requirement had no impact on the attorney's representation of the client or on the outcome of the case. Thus, the record lacked clear and convincing evidence of any prejudice to the administration of justice. *Id.* at 397-98.

¶ 93 In contrast, in *In re Cutright*, 233 Ill. 2d 474 (2009), the respondent attorney was found to have engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(a)(5) when he neglected an estate of which he was executor, allowing it to remain open for 17 years. *Id.* at 485. The actual prejudice to the administration of justice was that two heirs died before ever receiving their share of the estate and other heirs were forced to wait 17 years before receiving any distribution. *Id.* at 486.

¶ 94 The attorney conduct at issue in *In re Thomas* was also prejudicial to the administration of justice in violation of Rule 8.4(a)(5). The respondent attorney, who had been suspended from practicing law, appeared before the Seventh Circuit to represent a corporation of which he was the president and sole shareholder. We noted that the corporation had filed for bankruptcy and that any recovery that might have been made in the litigation would have been part of the bankruptcy estate. Thus, because the respondent represented only his own interests as a shareholder, and not the interests of the bankrupt corporation's creditors, his conduct did indeed prejudice the administration of justice. *Thomas*, 2012 IL 113035, ¶ 91. This was so even though his conduct did not result in actual harm to the creditors; his conduct undermined the judicial process and, thus, prejudiced the administration of justice.

¶ 95 Attorney Thomas also engaged in conduct that prejudiced the administration of justice by continuing to represent other clients after the date of his suspension. This conduct placed the interests of his clients in jeopardy because his unauthorized practice of law could have resulted in a default judgment for the opposing party. *Id.* ¶ 123.

¶ 96 In the present case, the Hearing Board concluded that respondent's sister's filing of a motion in the probate case implicated the judicial process, so that respondent's conduct was prejudicial to the administration of justice. However, the record reveals no conduct by respondent regarding the motion to terminate independent administration or the later motion to replace him as executor that could have undermined the judicial process. The loans were made and repaid in full before her papers were filed. His breach of fiduciary duty, while not acceptable conduct for any executor, had no actual or potential effect on the administration of justice.

¶ 97 We, therefore, agree with the Review Board that respondent's conduct, because he was not acting as an attorney and he was not involved in the judicial process at the time of the breach, did not undermine the administration of justice. While an attorney's breach of fiduciary duty owed to a nonclient could constitute an act that is prejudicial to the administration of justice, this did not occur in this case. Further, if an attorney is to be disciplined for such conduct, the Administrator must, as a matter of due process, plead and prove that the breach of fiduciary duty had a prejudicial effect on the administration of justice. To the extent that our earlier decisions state or imply otherwise, they are hereby overruled.

¶ 98 *Rule of Professional Conduct 8.4(a)(4)*

¶ 99 Rule 8.4(a) lists nine separate acts that constitute misconduct. The Administrator charged respondent with violating Rule 8.4(a)(4), engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." The Hearing Board found no violation of this rule despite respondent's breach of his fiduciary duty. We agree.

¶ 100 Under the manifest weight of the evidence standard of review, we give deference to the factual findings of the Hearing Board, because the Hearing Board is in a position to observe the witnesses' demeanor, judge their credibility, and resolve conflicting testimony. *Timpone*, 208 Ill. 2d at 380.

¶ 101 We see no reason in the present case to reject the Hearing Board's findings. The record suggests that respondent did not fully understand his obligations as executor and trustee, not having practiced in this area, and that he may have been given confusing legal advice (or the questions he posed to his legal advisor were not sufficiently detailed to elicit correct advice). Whatever the case, there is no suggestion that he acted to deceive or to defraud; at most, he was careless in his duties.

¶ 102 CONCLUSION

¶ 103 In sum, before professional discipline may be imposed under Supreme Court Rule 770, the Administrator must demonstrate that the attorney violated the Rules of Professional Conduct. To the extent that any of our prior cases suggest that an attorney may be subjected to professional discipline for conduct that is not prohibited by the Rules of Professional Conduct or defined as misconduct therein, we hereby reject such a suggestion. As a matter of due process, an attorney who is charged with misconduct and faces potential discipline must be given adequate notice of the charges, including the rule or rules he is accused of violating. Personal misconduct that falls outside the scope of the Rules of Professional Conduct may be the basis for civil liability or other adverse consequences, but will not result in professional discipline. We, therefore, accept the recommendations of the Review Board and dismiss the charges against respondent.

¶ 104 Charges dismissed.

¶ 105 JUSTICE THOMAS, dissenting:

¶ 106 The majority holds that, although respondent breached his fiduciary duty in no less than four distinct ways while serving as the executor of his late father's $700,000 estate, he nevertheless is immune from professional discipline because none of his misconduct violated a specific Rule of Professional Conduct. According to the majority, "before professional discipline may be imposed under Supreme Court Rule 770, the Administrator must demonstrate that the attorney violated the Rules of Professional Conduct." *Supra* ¶ 103. By way of corollary, the majority then adds that, "[t]o the extent that any of our prior cases suggest that an attorney may be subjected to professional discipline for conduct that is not prohibited by the Rules of Professional Conduct or defined as misconduct therein, we hereby reject such a suggestion." *Supra* ¶ 103.

¶ 107 The problem with the majority's reasoning is that this court has not merely *suggested* that an attorney may be subjected to professional discipline for conduct that is not specifically prohibited by the Rules of Professional Conduct. On the contrary, this court has *expressly held as much*. In *In re Rinella*, 175 Ill. 2d 504 (1997), this court began its analysis by "reject[ing] respondent's contention that attorney misconduct is sanctionable only when it is specifically proscribed by a disciplinary rule." *Id.* at 514. In doing so, this court explained that "the standards of professional conduct enunciated by this court are not a manual designed to instruct attorneys what to do in every conceivable situation." *Id.*

¶ 108 Quite notably, the foregoing portion of *Rinella* is not, as the majority would have us believe, anchored in an imprecise reading of Rule 770 (then Rule 771). In fact, this portion of *Rinella* is not anchored in Rule 770 at all. Rather, *Rinella* is simply an articulation of this court's understanding of its own rules. And as *Rinella* points out, that understanding was memorialized in the 1990 preamble to the Rules of Professional Conduct themselves, which states in relevant part:

> " 'Violation of these rules is grounds for discipline. No set of prohibitions, however, can adequately articulate the positive values or goals sought to be advanced by those prohibitions. This preamble therefore seeks to articulate those values ***. Lawyers seeking to conform their conduct to the requirements of these rules should look to the values described in this preamble for guidance in interpreting the

difficult issues which may arise under the rules.' " *Id.* at 514-15 (quoting Ill. R. Prof. Conduct, Preamble).

According to *Rinella*, "[t]he preamble *** likens the practice of law to a public trust, and charges lawyers with maintaining public confidence in the system of justice by acting competently and with loyalty to the best interests of their clients." *Id.* at 515. Consequently, *Rinella* explained, it is appropriate to look not just to the specific language of the Rules themselves but also to the principles set forth in the preamble in determining whether an attorney's conduct is sanctionable. *Id.* at 514-15.

¶ 109 Although it is nowhere mentioned by the majority, *Rinella* is of paramount importance in this case. Indeed, once *Rinella* is taken into account, the majority's reading of Rule 770 becomes untenable. Again, Rule 770 provides, in relevant part:

> "Conduct of attorneys which violates the Rules of Professional Conduct contained in article VIII of these rules or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court." Ill. S. Ct. R. 770 (eff. Apr. 1, 2004).

Now on its face, this language would seem to state very plainly that there are two categories of conduct for which an attorney may be disciplined by the court: (1) conduct "which violates the Rules of Professional Conduct contained in article VIII of these rules," and (2) conduct "which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute." Indeed, such a reading is compelled by numerous well-settled canons of construction, not the least of which are that clear and unambiguous language must be enforced as written (*Hines v. Department of Public Aid*, 221 Ill. 2d 222, 230 (2006)) and that a statute or rule should be construed, wherever possible, such that no word, clause, or sentence is rendered meaningless or superfluous (*People v. Jones*, 168 Ill. 2d 367, 375 (1995)).

¶ 110 Yet the majority's reading of Rule 770 turns both of these canons on their heads. According to the majority, though Rule 770 clearly identifies two distinct categories of conduct for which an attorney may be disciplined by the court (conduct that violates a rule and conduct that tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute), in fact, Rule 770 identifies only one category (conduct that violates a rule). This

reading renders the phrase "or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute" entirely meaningless. Indeed, if the majority's reading of Rule 770 is correct, what possible reason is there for the inclusion of that phrase in the rule? The fact is, the majority's reading of Rule 770 is not driven by the plain language of that rule but rather by the majority's conviction that due process prohibits an attorney from being "subjected to professional discipline for conduct that is not prohibited by the Rules of Professional Conduct or defined as misconduct therein." *Supra* ¶ 103. But this is the very argument we rejected outright in *Rinella*. See *Rinella*, 175 Ill. 2d at 514 (rejecting respondent's argument that "imposing *** sanction[s] under these circumstances would violate due process because [respondent] did not have adequate notice that his conduct was prohibited"). In other words, the majority's entire reading of Rule 770 stems from a false premise.[1]

¶ 111 Once *Rinella*'s holding is taken into account, Rule 770 makes perfect sense on its face, and it becomes easy to give full effect to every one of its words, rather than to only half of them. Again, *Rinella* makes crystal clear both that "the standards of professional conduct enunciated by this court are not a manual designed to instruct attorneys what to do in every conceivable situation" and that attorneys *may* be sanctioned for engaging in misconduct that is not "specifically proscribed by a disciplinary rule." In light of this holding, it should come as no surprise that Rule 770, which authorizes the imposition of discipline for attorney misconduct, authorizes it both for "[c]onduct of attorneys which violates the Rules of Professional Conduct" and for conduct that "tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute."

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[1]The majority cites this court's recent statement from *In re Thomas* that "one does not 'violate' Rule 770. Rather, one becomes subject to discipline pursuant to Rule 770 upon proof of certain misconduct." *Supra* ¶ 83 (quoting *In re Thomas*, 2012 IL 113035, ¶ 92). Of course, this statement does not settle the question at hand; it raises it: What "certain misconduct" subjects one to discipline pursuant to 770? I believe that question is answered clearly both in *Rinella* and in Rule 770 itself: conduct which violates the Rules of Professional Conduct and conduct that, though not violating a specific Rule of Professional Conduct, tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.

Indeed, Rule 770 reflects and enables the very policy that the court articulated in *Rinella*. The two go hand-in-hand.

¶ 112 Now I recognize that, in 2010, the Rules of Professional Conduct were overhauled and that, with the overhaul, came a whole new preamble. This is of no consequence, however, for at least two reasons. First, all of respondent's conduct in this case occurred *prior to* the 2010 overhaul, which means that at all relevant times respondent was operating under the very rules (and preamble) that the court construed in *Rinella*. But even if that were not the case, the preamble enacted in 2010 continues to reflect this court's belief that "the standards of professional conduct enunciated by this court are not a manual designed to instruct attorneys what to do in every conceivable situation." *Rinella*, 175 Ill. 2d at 514. Indeed, paragraph 16 of the 2010 preamble expressly states that the rules "do not *** exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules." Ill. R. Prof. Conduct (2010), Preamble, ¶ 16 (eff. Jan. 1, 2010). Thus, there is absolutely no reason to believe this court's understanding of its rules has in any way changed since *Rinella*.

¶ 113 In sum, I am convinced that, contrary to the majority's conclusion, an attorney absolutely may be disciplined for misconduct that is not specifically set forth in our Rules of Professional Conduct. That was this court's express holding in *Rinella*, and it is a policy clearly reflected in the plain language of Rule 770.

¶ 114 The next question is whether respondent's conduct in this case justifies the imposition of professional discipline. I am convinced that it does. Again, this court has expressly held that an attorney may be subject to professional discipline for misconduct that is not specifically proscribed by a disciplinary rule, and Rule 770 authorizes the imposition of discipline for "[c]onduct of attorneys which *** tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute." Ill. S. Ct. R. 770 (eff. Apr. 1, 2004). There is no question that respondent's conduct in this case tends to bring the legal profession into disrepute. As the majority itself points out, respondent, a licensed attorney, engaged in numerous and serious breaches of his fiduciary duty while acting as executor of his father's $700,000 estate. These breaches included (1) not funding the various trusts as required by the will but instead keeping the estate open and lending nearly $450,000 in estate assets to himself for his own personal benefit (*supra* ¶ 46); (2) failing to

document any of these personal loans and thereby placing the assets of the estate at risk (*supra* ¶ 46); (3) failing to disclose to any of the estate beneficiaries that he was treating the estate as a personal line of credit (*supra* ¶ 47); and (4) making unauthorized distributions out of the estate (*supra* ¶ 53). These breaches extended over a period of five years, and they came to an end only after respondent's sister, a co-beneficiary of the estate, learned of respondent's conduct and filed a petition to terminate independent administration. *Supra* ¶¶ 4-9.

¶ 115 The 1990 preamble states that the "practice of law is a public trust" and that "[l]awyers seeking to conform their conduct to the requirements of these rules should look to the values described in this preamble for guidance." Ill. R. Prof. Conduct, Preamble. Among the values articulated in the 1990 preamble is that lawyers should "maintain[ ] public confidence in the system of justice by acting competently and with loyalty to the best interests of their clients." *Id.* Similarly, paragraph 5 of the 2010 preamble now states that "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." Ill. R. Prof. Conduct (2010), Preamble, ¶ 5 (eff. Jan. 1, 2010). The majority's own analysis confirms that respondent's conduct in this case did not accomplish any of these things. On the contrary, respondent's conduct undermined confidence in the legal profession, displayed a profound lack of loyalty to the best interests of those to whom he was acting as fiduciary, and certainly did not conform to the requirements of the law governing fiduciary relationships. And while this may have been only a "personal affair," it is worth noting that, as far as personal affairs go, the administration and execution of an estate is about as closely connected to the formal legal process as one can get. Historically, estate executors and administrators served formally as agents of the court itself, exercising by delegation the court's power and the court's responsibility over the estate. See *Will v. Northwestern University*, 378 Ill. App. 3d 280, 292 (2007). The rise of independent administration has weakened that connection over the years, but the fact remains that even independent executors and administrators are discharging responsibilities that are closely connected with and directly serve the legal system. All this to say that respondent's conduct in this case, while technically "personal," also bore a very close connection to the profession he occupies. Accordingly, a higher standard of conduct was to be expected than what respondent displayed here.

¶ 116 The Hearing Board recommended that respondent's law license be suspended for four months. The Administrator is asking this court to suspend it for one year. In light of the mitigating factors that are present in this case—*e.g.*, that respondent repaid everything he borrowed and apparently at no time acted with an intent to deceive or defraud—I believe the Hearing Board's recommendation is appropriate, and that is the judgment I would support in this case.

¶ 117 For these reasons, I respectfully dissent.

¶ 118 JUSTICE KARMEIER joins in this dissent.

FORM NO. 1

# State of Illinois
# Supreme Court

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of January, 1997.

Present: James D. Heiple, Chief Justice
Justice Benjamin K. Miller — Justice Michael A. Bilandic
Justice Charles E. Freeman — Justice Moses W. Harrison II
Justice Mary Ann G. McMorrow — Justice John L. Nickels

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**On the 20th day of February, 1997, the Supreme Court entered the following judgment:**

In re:

No. 81878

Richard Anthony Rinella
321 Cumberland Ave.
Kenilworth, IL 60043-1171

Atty. Reg. &
Disc. Comm.
93 CH 387

Respondent Richard Anthony Rinella is suspended from the practice of law for three years and until further order of this Court.

Respondent suspended.

Bilandic, J., and McMorrow, J., took no part.

FILED

APR 16 1997

ATTY REG & DISC COMM
CHICAGO

**As the Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.**

**IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 10th day of April, 1997.**

Julieann Hornyak

**Clerk,**
**Supreme Court of the State of Illinois**

Docket No. 81878–Agenda 10–November 1996.
*In re* RICHARD ANTHONY RINELLA, Attorney, Respondent.

CHIEF JUSTICE HEIPLE delivered the opinion of the court:

The Administrator of the Attorney Registration and Disciplinary Commission filed a complaint with the Hearing Board charging respondent, Richard Anthony Rinella, with four counts of professional misconduct for engaging in sexual relations with clients and testifying falsely before the Commission. The Hearing Board found that respondent had committed the misconduct charged in each of the counts and recommended that respondent be suspended from the practice of law for a period of three years and until further order of this court. The Review Board approved the findings and recommendation of the Hearing Board, except that it recommended that respondent's suspension expire automatically at the end of three years. We granted respondent's petition for leave to file exceptions. For the reasons that follow, we approve in part and reject in part the recommendation of the Review Board, and approve the recommendation of the Hearing Board. Respondent is suspended from the practice of law for three years and until further order of this court.

## FACTUAL AND PROCEDURAL HISTORY

### I. The Complaint and Answer

Count I of the Administrator's complaint alleged that in July of 1983 Jane Doe[1] retained respondent to represent her in a dissolution of marriage proceeding and paid respondent a fee of $7,500. The complaint alleged that respondent and Doe had a sexual relationship that began in approximately July of 1983 and continued throughout the duration of respondent's representation of her. The complaint alleged that the relationship was initiated by respondent when he made sexual advances to Doe during her second visit to his office, and that Doe submitted to respondent's advances because she was afraid that refusing to do so would adversely affect respondent's representation of her and because she could not afford to hire another lawyer after paying respondent his retainer. The complaint charged that by engaging in the conduct alleged in count I, respondent had committed overreaching and violated Rules 1–102(a)(5), 5–101(a), 5–102(a), and 5–107(a) of the Code of Professional Responsibility (87 Ill. 2d Rs. 1–102(a)(5), 5–101(a), 5–102(a), 5–107(a)) and Supreme Court Rule 771 (94 Ill. 2d R. 771).

Count II of the complaint alleged that in March of 1991 and March of 1993, while testifying under oath before the Commission, respondent falsely stated that he had never had sexual relations with Jane Doe, that he had not had sex with her at her house, and that he had never had nude photographs taken of himself at her house. Count II further alleged that in June of 1993, while again testifying before the Commission, respondent retracted these denials after he was shown a nude picture of himself which he admitted was taken at Doe's house. Count II charged that respondent's March 1991 and March 1993 testimony violated Rules 8.1(a)(1), 8.4(a)(3), 8.4(a)(4), and 8.4(a)(5) of the Rules of Professional Conduct (134 Ill. 2d Rs. 8.1(a)(1), 8.4(a)(3), (a)(4), (a)(5)) and Supreme Court Rule 771 (134 Ill. 2d R. 771).

Count III of the complaint alleged that in November of 1983, Jeanne Metzger retained respondent to represent her in a dissolution of marriage proceeding and paid him a retainer of $2,500. The complaint alleged that on Saturday, December 10, 1983, respondent scheduled an appointment with Metzger at his office to discuss her case, and that after Metzger arrived and entered his office, respondent barred the door with a chair and initiated sexual activity with her. The complaint alleged that Metzger submitted to respondent's sexual advances because she believed that the quality of respondent's representation of her would be adversely affected if she refused. The complaint further alleged that respondent engaged in sexual activity with Metzger on two other occasions thereafter, including once on January 11, 1984, at which time respondent asked Metzger to

[1]This court has granted Jane Doe's motion to conceal her identity in this proceeding.

supply him with nude pictures of her. The complaint also alleged that during a court appearance on February 8, 1984, to which respondent had asked Metzger to bring an instant camera, respondent instructed Metzger to answer all of his questions relating to her divorce in the affirmative, regardless of how she wished to respond. The complaint charged that by engaging in the conduct alleged in count III, respondent committed overreaching and violated Rules 1–102(a)(5), 5–101(a), 5–102(a), 5–107(a), and 7–101(a)(3) of the Code of Professional Responsibility (87 Ill. 2d Rs. 1–102(a)(5), 5–101(a), 5–102(a), 5–107(a), 7–101(a)(3)) and Supreme Court Rule 771 (94 Ill. 2d R. 771).

Count IV alleged that Sandra Demos retained respondent's law firm in 1980 to represent her in a dissolution of marriage proceeding. The complaint alleged that although respondent did not have primary responsibility for Demos' case, he would call her frequently to ask her to meet him socially, and during these telephone calls would discuss with her items of a personal nature that he could only have learned from reviewing her file. The complaint alleged that on one occasion around 1982, respondent made sexual advances to Demos and engaged in sexual relations with her in his automobile, after which he immediately took her to a motel room where he attempted to have sexual intercourse with her. The complaint further alleged that Demos submitted to respondent's sexual advances because she believed that refusing to do so would adversely affect his firm's representation of her. The complaint charged that by engaging in the conduct alleged in count IV, respondent committed overreaching and violated Rules 4–101(b)(3), 5–101(a), and 5–102(a) of the Code of Professional Responsibility (87 Ill. 2d Rs. 4–101(b)(3), 5–101(a), 5–102(a)) and Supreme Court Rule 771 (87 Ill. 2d R. 771).

In his answer to the complaint, respondent denied the specific instances of sexual encounters with Doe and denied having engaged in any sexual relations with Metzger or Demos. As to the allegations of perjury, respondent admitted that his testimony before the Commission was untrue, but maintained that his answers were justified because any sexual activity with Doe occurred after his representation of her had ceased and was therefore not a proper subject of the Commission's inquiry. Respondent also filed a motion to dismiss the complaint based primarily on the ground that no disciplinary rule specifically forbids sexual relations between an attorney and his client. The Commission denied this motion and set the matter for hearing.

## II. The Evidence

Before the Hearing Board, Jane Doe testified that during her second visit to respondent's office in July 1983, respondent came over to the sofa she was sitting on and began fondling her. She testified that she began crying and that respondent told her to stop crying. She testified that she then performed fellatio on respondent. She also testified that during the sexual activity, respondent said "it would make it easier." She testified that she did not want to engage in sexual activity with respondent but felt she had to because she had just changed lawyers and paid respondent a large retainer.

Doe further testified that one day in the spring of 1984, she and respondent were undressed and engaging in fellatio in her bedroom at her house when her ex-husband, John Doe, walked into the room. Jane Doe testified that she put on a robe and followed John Doe downstairs while respondent hid in a closet. She testified that John Doe then asked where the couple's five-year-old son was, and she responded that he was at a friend's house. She testified that John Doe periodically refers to this incident when she requests timely maintenance or child support payments from him.

John Doe testified before the Hearing Board that the incident in the bedroom at his wife's house occurred a few weeks before the entry of a supplemental judgment resolved issues of property distribution, maintenance, and child support in the Does' dissolution of marriage proceeding.

Also before the Hearing Board, Jane Doe identified two exhibits as photographs of respondent in the nude taken at her house in the spring of 1984. She said the photographs showed wallpaper in her house which she had removed in the fall of 1984.

Jane Doe admitted that she attended a holiday luncheon

sponsored by respondent's law firm in 1987 or 1988, and that she sent respondent a humorous postcard in January 1986 which she signed "Lustfully Yours."

Respondent testified before the Hearing Board that while he had engaged in sexual activity with Jane Doe, this activity took place in late 1986, or in 1987 or 1988, after he had stopped representing her. He denied having sex with Jane Doe in his office in July 1983, and denied having sex with her in her house at any time. He testified that he went to Jane Doe's house on a few occasions during his representation of her, and that John Doe came to the house on one of those occasions, but said that he and Jane Doe were standing in an upstairs hallway fully clothed when John Doe encountered them. Respondent also testified that the photographs of him in the nude were taken on an occasion when he and Jane Doe engaged in sexual activity in late 1986, or in 1987 or 1988. Respondent admitted that in prior testimony before the Commission he falsely denied ever having had sex with Jane Doe and having had nude pictures taken, but he stated that he believed these answers were justified because his sexual relationship with Doe occurred after he stopped representing her.

Jeanne Metzger testified that she retained respondent in November 1983, and that on a Saturday in December 1983, she had an appointment at respondent's office to discuss her case. She testified that when she entered respondent's office, respondent closed the door behind her and propped a chair up against the doorknob. She testified that respondent then came towards her, unzipped his pants, and sat down on the couch beside her. She testified that respondent then put his hand on her head, had her lean towards him, and pushed her head down while stating "You don't have to do this if you don't want to." Metzger testified that she then performed fellatio on respondent. She testified that while she did not want to do so, she felt she had to for the welfare of her children, whose custody was contested.

Metzger further testified that respondent scheduled another appointment with her for December 14, 1983, at his office, and that when she arrived, respondent told her to go downstairs and wait on the sidewalk outside the building. She testified that respondent then joined her outside and took her by taxi to an apartment in a high-rise building. She testified that after entering the apartment, respondent undressed and sniffed a bottle of liquid, and then asked her to do the same. She testified that she sniffed the bottle and got an "extreme high," and that the two then had sex. Metzger further testified that on January 11, 1984, after a deposition in her case, respondent again took her to the apartment and asked her to sniff the bottle of liquid, and that the two then had sex again. She testified that on this occasion, respondent told her to make an appointment to get a "tummy tuck," and that he gave her the name of the doctor with whom she should make the appointment. She also testified that on this occasion, respondent said that he wanted to take pictures of her "from the neck down" and offered to let her take similar pictures of him, but that there was no camera in the apartment.

Metzger further testified that respondent told her to bring an instant camera to a court appearance in her case one day in February 1984. She testified that just before the court appearance, respondent instructed her to answer "yes" to all of his questions. She also testified that respondent asked her before the hearing if she had brought the camera, and that she said "yes" because she was afraid telling him the truth would affect his representation that day. She testified that immediately after the court appearance, when she told respondent that she did not really have the camera, he became angry and left abruptly, refusing to discuss with her a number of questions she had regarding the testimony she had given that day. Metzger testified that shortly thereafter, she hired another attorney to replace respondent.

Respondent testified that he never had sexual relations with Metzger. He denied propping a chair up against the door during an appointment with Metzger. He denied ever going with her to an apartment and having sex. He also denied asking her to bring a camera to a court appearance.

Sandra Demos testified before the Hearing Board that she retained respondent's law firm in 1980 to represent her in a dissolution of marriage proceeding, and that respondent's father was the primary attorney on her case. Demos testified that she met respondent for the first time in the lobby of the law firm,

and that after this meeting, he began calling her frequently to ask her out for a drink. She stated that although she continually refused to meet him, the phone calls went on for months, and that during the conversations, respondent discussed information he could only have learned by viewing her confidential files, such as her sexual history with her husband.

Demos testified that she finally agreed to meet respondent one day in March 1992. She testified that they met and had several drinks, and that respondent afterwards offered to drive her home. She testified that respondent then drove her to a harbor, parked the car, and began kissing and fondling her. She testified that she did not want to have sexual relations with him, but submitted to his advances because she feared her case would be mishandled if she did not. She further testified that after approximately 15 minutes, respondent, without saying anything to her, drove the car to a motel and took her into a room. She testified that respondent attempted to have sexual intercourse with her, but had trouble maintaining an erection, and that he then began sniffing some liquid in a bottle. She testified that respondent then attempted to force her to perform fellatio on him, but that she refused. She testified that after they had spent approximately one hour in the motel, respondent drove her home.

Respondent testified that he did not recall ever meeting Demos, although he might have met her once briefly in the lobby of his law firm. He denied ever discussing Demos' case with other attorneys at his firm or viewing the firm's files on her case. He also denied that he ever had sexual relations with her or took her to a motel.

### III. Findings and Recommendations

The Hearing Board found that respondent engaged in sexual relations with each of the three women while he or his firm represented them. The Board found that this conduct by respondent constituted overreaching because he used his position of influence over the clients to pressure them to engage in sexual relations. The Board noted that all of the women testified that they did not want to engage in sexual relations with respondent but felt that they had to in order to ensure that they were effectively represented and because they could not afford to hire another lawyer.

The Hearing Board also found that respondent violated the following rules of the Code of Professional Responsibility: Rule 1–102(a)(5), by engaging in conduct prejudicial to the administration of justice (87 Ill. 2d R. 1–102(a)(5)); Rule 4–101(b)(3), by using client confidences for his own advantage in his dealings with Sandra Demos (87 Ill. 2d R. 4–101(b)(3)); Rule 5–101(a), by failing to withdraw from the women's cases when his professional judgment may have been affected by his own personal interest (87 Ill. 2d R. 5–101(a)); and Rule 5–107(a), by failing to represent his clients with undivided fidelity (87 Ill. 2d R. 5–107(a)). As to count II, the Board found that respondent violated Rules 8.1(a)(1), 8.4(a)(3), 8.4(a)(4), and 8.4(a)(5) of the Rules of Professional Conduct by giving false testimony before the Commission. 134 Ill. 2d Rs. 8.1(a)(1), 8.4(a)(3), (a)(4), (a)(5). Finally, the Board found that respondent violated Supreme Court Rule 771 by engaging in conduct which tends to defeat the administration of justice or bring the courts or the legal profession into disrepute. 134 Ill. 2d R. 771.

The Board found that the Administrator did not prove that respondent violated Rule 5–102(a) by failing to withdraw from employment when it was obvious that he might be called as a witness other than on behalf of his clients, or Rule 7–101(a)(3) by intentionally prejudicing or damaging his clients during his representation of them. 87 Ill. 2d Rs. 5–102(a), 7–101(a)(3).

The Hearing Board recommended that respondent be suspended from the practice of law for a period of three years and until further order of this court. The Review Board approved each of the findings and the recommendation of the Hearing Board, except that it recommended that respondent's suspension expire automatically at the end of three years.

## ANALYSIS

### I. Respondent's Sexual Relations with Clients

Respondent takes exception to the Hearing Board's finding that he committed sanctionable misconduct. He contends that he cannot be sanctioned for engaging in sexual relations with his

clients because no disciplinary rule specifically proscribes such conduct, and that imposing a sanction under these circumstances would violate due process because he did not have adequate notice that his conduct was prohibited. He also asserts that his conduct did not violate the specific rules cited by the Board and did not constitute overreaching.

Initially, we reject respondent's contention that attorney misconduct is sanctionable only when it is specifically proscribed by a disciplinary rule. On the contrary, the standards of professional conduct enunciated by this court are not a manual designed to instruct attorneys what to do in every conceivable situation. *In re Gerard*, 132 Ill. 2d 507, 538 (1989). As stated in the preamble to the Illinois Rules of Professional Conduct:

> "Violation of these rules is grounds for discipline. No set of prohibitions, however, can adequately articulate the positive values or goals sought to be advanced by those prohibitions. This preamble therefore seeks to articulate those values ***. Lawyers seeking to conform their conduct to the requirements of these rules should look to the values described in this preamble for guidance in interpreting the difficult issues which may arise under the rules." 134 Ill. 2d Illinois Rules of Professional Conduct, Preamble, at 470.

The preamble then likens the practice of law to a public trust, and charges lawyers with maintaining public confidence in the system of justice by acting competently and with loyalty to the best interests of their clients. 134 Ill. 2d Illinois Rules of Professional Conduct, Preamble, at 470.

In support of his contention that only specifically proscribed conduct is sanctionable, respondent relies on *In re Corboy*, 124 Ill. 2d 29 (1988). In that case, this court refused to impose sanctions on certain attorneys who made gifts to a judge because the attorneys could not reasonably have been on notice that their conduct was prohibited and because there was considerable belief among members of the bar that the attorneys had acted properly. *In re Corboy*, 124 Ill. 2d at 45. In contrast, we do not believe that respondent, or any other member of the bar, could reasonably have considered the conduct involved here to be acceptable behavior under the rules governing the legal profession.

The Hearing Board found that respondent failed to withdraw from representation when the exercise of his professional judgment on behalf of his clients reasonably could have been affected by his own personal interests, thereby violating Rule 5–101(a) of the Code of Professional Responsibility. 87 Ill. 2d R. 5–101(a). The Hearing Board also found that respondent failed to represent his client with undivided fidelity, thereby violating Rule 5–107(a). 87 Ill. 2d R. 5–107(a). We believe the record amply supports these findings. The Hearing Board was justified in concluding that respondent took advantage of his superior position as the women's legal representative to gain sexual favors from them during times when they were most dependent upon him. Each of the women testified that she did not want to engage in sexual relations with respondent, but felt she needed to submit to his advances in order to ensure the vigorous representation of her interests. By placing his clients in such situations of duress, respondent compromised the exercise of his professional judgment on their behalf and failed to represent them with undivided fidelity. Furthermore, with regard to Sandra Demos, the record supports the Hearing Board's finding that respondent used a confidence or secret of a client for his own advantage in violation of Rule 4–101(b)(3). 87 Ill. 2d R. 4–101(b)(3).

We also believe the record supports the Hearing Board's finding that respondent engaged in conduct prejudicial to the administration of justice, thereby violating Rule 1–102(a)(5). 87 Ill. 2d R. 1–102(a)(5). Two of the women described incidents in which respondent, during appointments he had scheduled with them in his office to discuss their cases, made completely unsolicited sexual advances which included undressing himself. Respondent's sexual relations with all three clients originated solely from the provision of legal services, since he did not know the women prior to their retaining him or his firm. These abuses of respondent's professional relationship with clients were clearly prejudicial to the administration of justice.

Respondent's conduct is also sanctionable as overreaching. An attorney commits overreaching when he takes undue

advantage of the position of influence he holds *vis-a-vis* a client. *In re Stillo*, 68 Ill. 2d 49, 53 (1977). By making lewd and unsolicited sexual advances to his clients during appointments purportedly scheduled to discuss their cases, and by causing the clients to believe that their interests would be harmed if they refused his advances, respondent took undue advantage of his position and thereby committed overreaching.

We further believe the Hearing Board was justified in finding that respondent's misconduct violated Supreme Court Rule 771 by tending to defeat the administration of justice or to bring the courts or the legal profession into disrepute. 94 Ill. 2d R. 771.

Respondent contends that his alleged sexual misconduct should not be subject to sanction because there is no evidence that it adversely affected his or his firm's representation of the women. In this regard, we note that Jeanne Metzger testified that respondent refused to consult with her after a court appearance because he was angry that she had not brought a camera with her to take nude pictures. Even absent such evidence of actual harm, however, respondent's sexual conduct would still be sanctionable because it posed a significant risk of damaging the clients' interests. See *In re Lewis*, 118 Ill. 2d 357, 362-63 (1987).

Respondent also challenges the sufficiency of the evidence that he engaged in the sexual activity alleged in the complaint. Factual findings of the Hearing Board are entitled to great deference, given the Board's superior capabilities as a trier of fact, and will not be disturbed unless they are against the manifest weight of the evidence. *In re Timpone*, 157 Ill. 2d 178, 196 (1993). Considering all of the testimony in this case, we cannot say that the Hearing Board's findings are manifestly erroneous.

For the above reasons, we approve the Hearing Board's findings of fact and conclusions of law regarding respondent's sexual misconduct with the former clients.

II. Respondent's Prior Testimony Before the Commission

Respondent contends that his admittedly false testimony before the Commission is not sanctionable because the questions posed to him were ambiguous, because information concerning his private sexual relations was protected by the right of privacy, and because he later recanted his false testimony. We find no merit in any of these contentions. Respondent was clearly asked if he had ever had sexual relations with Jane Doe, to which he falsely responded "no." Furthermore, to the extent that respondent's sexual conduct constituted an abuse of his professional position, that conduct took on a public concern. Finally, we observe that respondent did not voluntarily recant his false testimony, but rather recanted only when confronted with undeniable pictorial evidence that he had lied to the Commission. Under these circumstances, his false testimony is entirely inexcusable. We therefore approve the Hearing Board's findings that respondent violated Rules 8.1(a)(1), 8.4(a)(3), 8.4(a)(4), and 8.4(a)(5) of the Rules of Professional Conduct and Supreme Court Rule 771. 134 Ill. 2d Rs. 8.1(a)(1), 8.4(a)(3), (a)(4), (a)(5), 771.

III. Propriety of Recommended Sanction

Respondent contends that the three-year suspension recommended by the Hearing and Review Boards is an excessive sanction for the instant misconduct. In deciding on an appropriate sentence, the Hearing Board considered the following factors in aggravation: respondent's pattern of misconduct, his selfish motive, the nonconsensual nature of his sexual relations with the women, his inability to appreciate the wrongfulness of his conduct, and his false testimony before the Commission. In mitigation, the Board considered that this is respondent's first charged instance of misconduct, as well as the testimony of numerous witnesses regarding respondent's good character and reputation in the legal community.

We do not believe that the recommended three-year suspension is an excessive sanction. Respondent violated numerous ethical standards in his dealings with three separate clients. He then compounded this misconduct by concealing and denying it while it was under investigation. Moreover, we believe that the seriousness of the violations in this case warrants imposition of the suspension until further order of this

court, as recommended by the Hearing Board.

Accordingly, we approve in part and reject in part the recommendation of the Review Board, and approve the recommendation of the Hearing Board. Respondent is suspended from the practice of law for three years and until further order of this court.

*Respondent suspended.*

JUSTICES BILANDIC and McMORROW took no part in the consideration or decision of this case.

JUSTICE FREEMAN, concurring in part and dissenting in part:

The majority finds that respondent has, by his conduct, violated several rules under our Code of Professional Responsibility. Therefore, the majority has suspended respondent from the practice of law for a period of three years and until further order of the court. I agree that respondent's conduct warrants sanction, and given the nature and seriousness of that conduct, suspension from the practice of law is appropriate. However, because I fail to see how either the public is further protected or the integrity of the legal profession is further safeguarded by the "until further order" portion of the sanction, I disagree to that extent.

That said, I find it apt to comment on an additional aspect of this case. The respondent has urged that because the Code offers no explicit guidance on the issue of sexual relationships between an attorney and client, his conduct should not subject him to discipline. I agree with the majority that the absence of an explicit rule concerning sexual relationships in the context of the attorney-client relationship is not a reason to excuse respondent's conduct. No rule need have existed to inform respondent that his conduct, which was so obviously improper, was violative of the rules of professional conduct.

Respondent's misconduct consisted of more than a single isolated incident involving one client. Furthermore, this was conduct which went beyond the mere verbalization of sexual desire. At various times during the course of respondent's or his firm's representation, the respondent repeatedly engaged in uninvited physical sexual conduct with three different clients. In each of the three cases, respondent's sexual advances were both unsolicited and unwelcome. Further, some of these sexual episodes lasted no longer than did the period of the legal representation. These facts not only evidence the gratuitous nature of the conduct, but also support the complainants' characterization of respondent's advances as coercive.

Therefore, had the circumstances of this case been different, the absence of an express rule might be reason either to excuse the conduct or certainly to impose a lesser sanction. However, this conduct far exceeds any innocent mistake in professional judgment which, in the absence of an express proscription, would merit such leniency.

As a practical matter, there could never be a set of rules which contemplates every aspect of the many encounters between an attorney and client. Furthermore, and as the majority so aptly points out, implicit in the Code is that every attorney, in the exercise of professional judgment, will conduct him or herself in a manner which will not potentially compromise the attorney-client relationship. Given that, some may disagree that there need be any rule which expressly governs sexual relations between an attorney and client. Yet, few could disagree that a *per se* rule prohibiting sexual relations between an attorney and client during the course of the legal representation would provide the clearest guidance to practitioners in this regard. Incidentally, our rules committee is on the threshold of fashioning a rule to address this very issue.

Returning to the "until further order" portion of the sanction, I again note my disagreement. Typically, the "until further order" sanction has been reserved for those cases where the attorney has been the subject of repeated disciplinary proceedings (see, *e.g.*, *In re Levin*, 101 Ill. 2d 535 (1984) (respondent involved in repeated incidents of misconduct and prior discipline)) or where a condition which renders an attorney not fit to practice is amenable to treatment and change (see, *e.g.*, *In re Guilford*, 115 Ill. 2d 495 (1987) (until further order sanctions have been ordered in cases in which attorneys suffered

mental illness or some form of addiction)). In such cases the disciplined attorney is afforded an opportunity to establish that the conduct or the condition which required suspension has actually improved or changed. Correspondingly, the court has an opportunity to assess the attorney's rehabilitation and readiness to return to the practice of law.

Respondent's conduct, which was largely confined to sexual relations with clients during the course of his or his firm's representation of them, is not conduct which is amenable to assessment of change. There are no allegations of sexual misconduct occurring outside of the attorney-client relationship. Therefore, for purposes of reinstatement, it is not apparent how respondent will demonstrate, in any meaningful way, and how this court will be able to assess, with much reliability, whether respondent has truly mended his ways. Further, respondent has not been subject to either prior or repeated disciplinary proceedings which would, for those reasons, warrant tightening the reins on his ability to re-enter the practice.

Finally I have become aware that, in practice, when an "until further order" sanction has been imposed, the process for reinstatement, which is conducted through our Attorney Registration and Disciplinary Commission, may take well up to two years. In such cases, the "until further order" sanction operates to enhance the sanction by extending the suspension period. Absent the necessary showing that a suspended attorney's suspension should continue, any extension of that suspension, even an unintentional one, is simply unfair to the practitioner.

As a means of assessing fitness to practice law, the "until further order" sanction is invaluable. However, to the extent that the sanctionable conduct at issue is not amenable to measurement for improvement, imposition of an "until further order" sanction serves no valid purpose. This sanction should be reserved only for those cases where it will function most effectively as an assessment tool. This court, as overseers of the practice of law in Illinois, must take care to insure that the very sanction by which we assess the need for continued suspension from the practice of law does not, merely by its imposition, effect a baseless continuation of the suspension.

My disagreement with the "until further order" sanction in this case has more to do with the general operation of the sanction itself than with the fact that it was imposed on this particular respondent. Clearly, respondent's misconduct was sanctionable. However, because of the nature of this respondent's misconduct, the "until further order" sanction will be ineffective to assess, with much reliability, his fitness to return to the practice of law.

Therefore, I respectfully dissent from this portion of the court's judgment.

Form 18

# United States of America

State of Illinois )
) ss.
Supreme Court )

In re:
No. 81878
Richard Anthony Rinella
Disciplinary Commission

*I, JULEANN HORNYAK, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

In Testimony Whereof, *I have set my hand and affixed the Seal of the said Supreme Court in Springfield, in said State, this* 10th *day of* April, *A.D. 19* 97.

Julieann Hornyak *Clerk,*

*Supreme Court of Illinois*

# Milestone ARDC Cases Shaping Lawyer Conduct

Chicago Daily Law Bulletin
ETHICS 2023
MAY 31, 2023

## CASE #1

- Attorney's practice included estate work.
- He also owned a plastics company. The company had never turned a profit.
- When he persuaded client to invest estate proceeds in company, he did not tell client about the company's unprofitability, nor did he tell client to talk to another lawyer.
- Company failed.

## CASE # 1

In re Imming
131 Ill.2d 239 (1989)

## CASE #1

"This court has established that an attorney's relation to a client ceases on rendition and satisfaction of the matter which the attorney was employed to conduct, in absence of special circumstances or arrangements which show a continuation of the relationship. . . . In all eight instances of loans made by those who testified before the Hearing Board, the investors made the loans while the respondent was performing some legal service for them, or within a relatively short time thereafter. Respondent's whole basis for his relations with these people was his past or present relation to them as attorney." at 252-253

"[Loans made upon the conclusion of the legal work from the proceeds of that work], occurred so close in time to the respondent's legal services to each client as to cause the client to believe that the respondent's business relations were a continuation of the attorney-client relationship." at 253-254

## CASE #2

- Judge was the presiding judge in a division in which four attorneys and their firms did little work. None of the attorneys had practiced before Judge A and none had more than a nodding acquaintance with the Judge.
- Each of the four attorneys wrote a check for $1000 to Judge to assist in settling hospital bills for Judge A's mother so that she could be discharged for Christmas and then be readmitted
- Each testified that they intended the funds to be a gift or a loan to Judge A's mother and none had any intent to influence Judge.

## CASE #2

In Re Corboy
124 Ill.2d 29 (1988)

Illinois Code of Judicial Conduct of 2023

RULE 3.13: ACCEPTANCE OF GIFTS, LOANS, BEQUESTS, FAVORS, BENEFITS, OR OTHER THINGS OF VALUE.

A judge shall not accept any gifts, loans, bequests, benefits, favors, or other things of value, except as follows: . . .

(3) ordinary social hospitality; . . .

(10) gifts, loans, bequests, benefits, favors, or other things of value, only if the donor is not a party or other person whose interests have come or are likely to come before the judge, including lawyers who practice or have practiced before the judge.

## CASE #2

" We agree, however, with the Administrator that application of the rule does not depend upon the subjective state of the attorney's mind. If it did, the prophylactic effect of the rule would be lost, since only attorney gifts or loans which were intended to influence or may tend to influence a judge would be proscribed. . . . Attorney gifts or loans to judges, even if well intended, are simply too susceptible to abuse, and too prone to creating an appearance of impropriety." at 39

## CASE #2

"It is also not proper to rationalize a judicial gift to a judge who may sit in probate or traffic, or in the criminal division, simply because the donor only tries cases in another division of the court. Under our rules, a judge is not a permanent fixture of any division, but is subject to reassignment by the chief judge." at 44

"The general public would certainly consider it an appearance of impropriety if a judge were to accept a gift from a lawyer who has matters in the court on which that judge sits. Even if the matter were not to be heard by the judge to whom the gift is given, the public's perception would be one of suspicion, enhanced, no doubt, by the potential subliminal influence on the favored judge's colleagues." at 44

## CASE # 3

Divorce attorney had sex with several clients. No rule explicitly prohibited sex with clients.

## CASE #3

In Re Rinella
175 Ill.2d 504 (1997)

Current IRPC 1.8(j):

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

## CASE #3

"Initially, we reject respondent's contention that attorney misconduct is sanctionable only when it is specifically proscribed by a disciplinary rule. . . . we do not believe that respondent, or any other member of the bar, could reasonably have considered the conduct involved here to be acceptable behavior under the rules governing the legal profession." at 514–515 (But see *In re Karavidas,* 2013 IL 115767.)

"The Hearing Board found that respondent failed to withdraw from representation when the exercise of his professional judgment on behalf of his clients reasonably could have been affected by his own personal interests. . . . The Hearing Board was justified in concluding that respondent took advantage of his superior position as the women's legal representative to gain sexual favors from them during times when they were most dependent upon him. . . . By placing his clients in such situations of duress, respondent compromised the exercise of his professional judgment on their behalf and failed to represent them with undivided fidelity." at 515-516

## CASE #4

- Attorney A converted a client's settlement funds.
- Client retained Attorney B to recover the funds.
- Attorney B negotiated an agreement with Attorney A requiring A to pay the client the amount converted times three.
- In return, Attorney B and client agreed not to submit an ARDC complaint – and they didn't.

## CASE #4

In re Himmel
125 Ill.2d 531 (1988)

See also Skolnick v. Altheimer & Gray, 191 Ill.2d 214 (2000)

## CASE #4

"A lawyer may not choose to circumvent the rules by simply asserting that his client asked him to do so." at 539

"Perhaps some members of the public would have been spared from Casey's misconduct had respondent reported the information as soon as he knew of Casey's conversions of client funds." at 545

"We are particularly disturbed by the fact that respondent chose to draft a settlement agreement with Casey rather than report his misconduct. . . . Both respondent and his client stood to gain financially by agreeing not to prosecute or report Casey for conversion." at 545

## CASE #5

- Multiple clients of Attorney with a volume family law practice complained to ARDC that attorney would do nothing in their cases for long periods of time and would not return their calls when they tried to understand what was going on.
- Representative cases included simple divorces that took up to three years to complete.
- All of the clients got their divorces.

## CASE #5

In re Smith
168 Ill.2d 269 (1995)

## CASE #5

"Perhaps no professional shortcoming is more widely resented than procrastination." at 283 (quoting Comment to ABA Model Rule 1.3, now IRPC 1.3, Cmt. [3])

"Months of unexplained delay in the completion of relatively simple dissolution of marriage actions cannot be excused merely because clients ultimately received the legal services for which they had retained the respondent. The long delays . . . caused those clients considerable and needless anxiety. Respondent's claim that his clients did not suffer from his misconduct ignores the anguish that his inaction necessarily inflicted upon his clients." at 285

## CASE #6

- Attorney converted funds he was supposed to be holding for minor clients and then used another client's funds to pay what was owed to the minors.
- Attorney had a serious drinking problem at the time of the conversions.
- Attorney entered treatment and had remained abstinent for 2 ½ years as of the time the Court was deciding what sanction to impose.

## CASE #6

In re Driscoll
85 Ill.2d 312 (1981)

Ill. Supreme Court Rule 772
Adopted August 1983

See also In re Jordan, 157 Ill.2d 266 (1993)

## CASE #6

"Respondent's judgment and will were undermined by alcoholism; he cared only for drink, and neglected all other concerns, at great cost to himself. His self-destructive behavior was typical of alcoholism; it was not typical of respondent, who was sensible enough until he succumbed to drink, and who is sensible enough again now that he has recovered from his disability." at 315

"Usually, however, alcoholism is at most an extenuating circumstance, a mitigating fact, not an excuse. The attorney's impaired judgment diminishes the responsibility he must bear, but does not eliminate it. . . . The respondent was impaired, but not paralyzed. He continued to function to some extent. . . . We cannot regard him as entirely an innocent victim of forces beyond his control. To some degree he was culpable." at 316

## CASE #6

- "In this case, we are impressed by Driscoll's sincere, strenuous, and, so far, successful effort to overcome his alcoholism. An exemplary life before and after the incident charged may properly be considered in mitigation. . . . [A]s an experiment in dealing with impaired attorneys, [in addition to a suspension for 6 months] we shall require that he continue, and report at such intervals as the Attorney Registration and Disciplinary Commission shall specify, and until further order, his personal program of rehabilitation." at 317

## PANEL 6 — 3:55am - 4:55am

ARDC – New Retainer Fees Rules

**Panel Leader:** **Jerome "Jerry" E. Larkin,** Administrator, *Illinois ARDC*

**Panelists:** **Rachel C. Miller,** Litigation Counsel, *Illinois ARDC*

**Adrian M. Vuckovich,** Partner, *Collins Bargione & Vuckovich*

### **Jerome "Jerry" E. Larkin,** Administrator, *Illinois ARDC*

Jerry is Administrator of the Attorney Registration and Disciplinary Commission of the Illinois Supreme Court (ARDC), where he is responsible for administering the agency which registers Illinois lawyers and investigates and prosecutes allegations of ethical violations. Jerry has investigated, litigated and appealed countless attorney disciplinary cases, and served as Senior Counsel, Chief Counsel, Assistant Administrator, and then Deputy Administrator from 1988 until his appointment as Administrator in March 2007. He is a past President of the National Organization of Bar Counsel (NOBC), the bar association of lawyer regulators. In 2003, he received the ARDC's 25- year leadership and service award. Recently, Jerry won the NOBC President's Award for lifetime achievement in the field of lawyer regulation. He was also given the Robert Bellarmine award for distinguished service to the Loyola Law Alumni Association in 1992. Jerry will be stepping down as Administrator of the ARDC at the end of 2023.

### **Rachel C. Miller,** Litigation Counsel, *Illinois ARDC*

Rachel works as Litigation Counsel for the Illinois Attorney Registration and Disciplinary Commission ("ARDC") in Springfield. Before joining the ARDC, she practiced family law, primarily for domestic violence victims, with Land of Lincoln Legal Aid, and she developed a medical-legal partnership with the SIU Center for Family Medicine in Springfield. She then worked as an Assistant Inspector General with the Illinois Office of Executive Inspector General.

She received a Bachelor of Arts in History from the University of Florida in 2009 and a JD from Saint Louis University School of Law in 2012.

**Adrian M. Vuckovich,** Partner, *Collins Bargione & Vuckovich*

Adrian is a partner at Collins Bargione & Vuckovich, where he concentrates his practice in real estate and business litigation, disputes between shareholders and partners, and also attorney and judicial disciplinary matters. Adrian represents clients in bench trials, jury trials and at hearings before administrative agencies.

He regularly provides ethics advice to attorneys and law firms in the Chicagoland area, and has represented individuals and businesses in a variety of appeals. Additionally, Adrian represents individuals in trust and probate litigation, employment disputes, family law matters, foreclosure defense, and many different kinds of business, real estate and personal matters. He also handles certain personal injury matters on behalf of injured individuals. Adrian also has a significant appellate practice. He has represented individuals and businesses in a variety of appeals and is often retained post-trial to represent a client before the appellate court.

Adrian was a recipient of the Chicago Bar Association's 2017 Vanguard Award, recognizing individuals who have made the law and legal profession more accessible to and reflective of the community at large.

Ethics Scenarios
2023 Rules 1.5 and 1.15 Amendments
Law Bulletin Ethics 2023 Seminar
Adrian Vuckovich
Rachel Miller
Jerry Larkin

## Scenario #1 The Gifted Attorney Wonders…

George is gifted, creative, and skillful Illinois attorney. He prides himself on taking on just about any type of case imaginable, including civil, criminal and even lawyer regulatory actions. He takes on transactional work as well. His reputation is top notch.

George has digested the amendments, and believes that the changes may affect his own billing practices and that of some of his clients. He is not certain that he would recommend all of these changes, but does recognize that they are our professional standards.

Let's explore some of George's questions together and see how these changes may affect our own practice.

George tell us that some of his clients have often used the "non-refundable" retainer concept very effectively, with George's blessing, in circumstances where the fee may is expected to be earned. He sees that, effective 7.1.23, Rule 1.5(c) now prohibits the term "non-refundable."

George ponderes: why the prohibition?

George asks: Do his clients may need to scrub the "non-refundability" term from pre-existing contracts. Scrub or not?

Demonstrating his creative lawyering skills, George suggests that his lawyer-clients and their clients may be best served by agreeing in writing to a different approach: including a "deemed earned" retainer provision in their client fee agreements.

OK? If no, why not?

Rule 1.5 reasonability standard and factors remain unchanged. George tells us that these standards have served lawyers and clients well for decades. They provide a framework for lawyer and clients to reslove disputes. Do we agree? See *In re Kutner*, 88 Ill. 2d 157 (1979).

## Scenario #2: Fixed Fees

Carl is an experienced, in-demand criminal defense lawyer. He will not take on a client without a pre-paid, fixed fee, typically in mid-5 figures or more. Carl wonders how the rules affects his very effective practice.

Carl: Do I now need a written fixed fee agreement? (Rule 1.5(b)). If not, would a writing be of help?
Carl: I've heard that the ABA ethics opinion advises that I deposit these fixed fee advances in a trust account (which I have never needed)? What's the business risk of not holding back fees until earned? What do the Illinois rules require? (Rule 1.5(d)(1)).

Carl: What happens if:

My client pleads out at he first court dates? See Kutner opinion?

My client fires me after I've prepared for trial?

Why would I need to provide any refund if I've performed fully under the fixed fee agreement? See Rule 1.16(d).

Carl asks whether he could have a limited scope fee agreement for the segments of the criminal case? Structure the fee as a variable fixed amount, dependent on whether the case pled (e.g., $5K) or went to trial ($30K). Consult Rule 1.15(d)(1) "specific service for fixed amount" terminology.

## Scenario #3: Engagement Retainers

Joe represents regulated financial professionals. On occasion, potential clients wish to make sure that Joe is available should representation be required in the future in the event that the regulator misconstrues the professional's business practices. These clients are willing to pay him a significant fee to make sure that Joe is available when needed. Given Joe's skill and reputation, he usually commands a 5 figure retainer.

What is the gist of an engagement retainer? Rule 1.5(d)(3)?

Is a written contract required? Rule 1.5(b)

Upon payment, whose money is it?

Where must Joe deposit these funds?

Under what circumstances would Joe need to make a refund of this fee?

## Scenario #4: Security retainers

Bill represents lawyers in regulatory matters before the ARDC. He requires a security retainer and bills against it as he provides services. Given his experience, that retainer can be substantial. One client, pays Bill a $10,000 retainer fee.

Is a written contract required? Rule 1.5(b). Any writtten contract must describe retainer as "security retainer." Rule 1.5(d)(4).

Upon deposit, is the retainer the property of the lawyer or client? Rule 1.5(d)(4)

How does lawyer "apply" retainer to charges for services?

Can lawyer apply charges based on activities completed, as opposed to hours devoted?

Scenario #5: Special Purpose Retainers

Susan agrees to represent a judgment debtor against whom collection proceedings may be instituted. The debt is substantial. The client has some unencumbered assets that would be sufficient to fund his defense in the collection matter, but no other assets to pay Susan. Susan suggests that the client pay her a "Special Purpose Retainer." See Rule 1.5(d)(5) and Comments 5 through 8.

What may a lawyer use a SPR? A writing. Strictly construed. Available in limited circumstances. Sparing use; only when necessary to accompliah a purpose that may not be accomplihd by security retainer.

Where must the lawyer deposit the SPR?

Refundability?

Scenarion #6: Definition of Conversion

Bob is a sole practitioner who handles PI cases on a contingent fee basis. He deposits PI recoveries in his trust account and distributes those funds as soon as he gets a chance. On occasion, distribution is not complete as Bob is negotiating related liens as he finds the time. He does not pay particular attention to his trust account. Clients always get paid right away. At times, lienholders do complain to the ARDC.

How might amended Rule 1.15 inform Bob's approach to handling his trust account?

Rule 1.15(a): explicitly "outlaws" even "temporary" use of property of clients or third parties without authorization. Misappropriation proof: reconciled balance in account is insufficient to meet all outstanding funds due clients and third parties. No mental state elemnt to the rule.

Bob uses his ATM card to withdraw cash, which he believes is due him. Good idea? He also withdraws cash from his trust account to pay clients who do not have access to a bank account. Permitted practices? Rule 1.15(g) says "no." Why?

Required recordkeeping practices: maintenance and reconcilaiation of matter-centric legders, bank statements, and receipts and disbursement ledgers. Rule 1.15(A).
Bob is frustrated by these requirements. He purposely avoided any accounting classes in college and law school. He's not a number sguy.

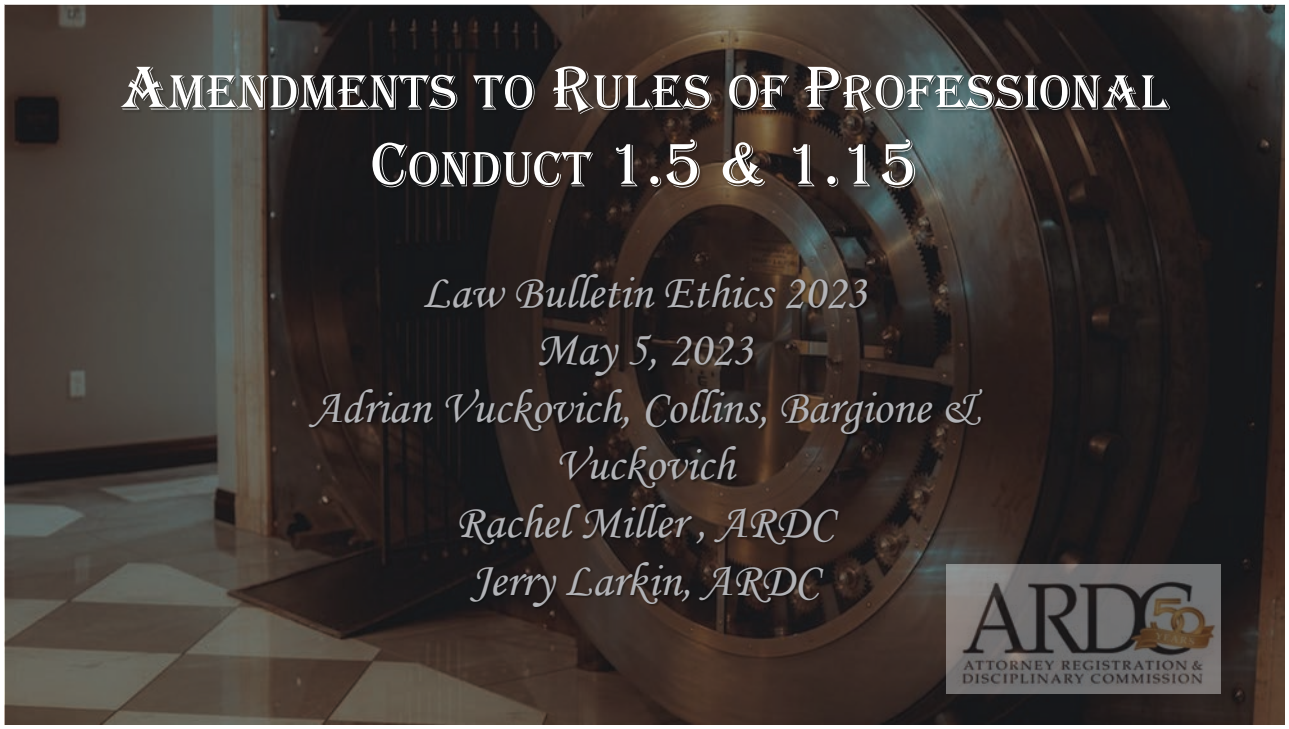
What is the goal of these recordkeeping requirements?

How can Bob meet these requirements and what do they accomplish?

By the way, Bob asks for help on choosing the right type of trust account. Where can he get help? See Rule 1.15(B). Note: requirements that all trust accounts earn interest, with the interest for the benefit of a single client or for the benefit of the Lawyers Trust Fund. Rule 1.15(B)(a).

Bob asks how to make that choice? Net interest test. Lawyer's reasonable determination. Rule 1.15(B)(a) and (b).

Bob takes to heart the explicit requirements of the amended rules. He hires an accountant to clean up his books. As he guessed, his IOLTA account is "over-funded." After diligent analysis by the accountant, ownership could not be determined. How can Bob get a fresh start on these "Unidentified funds"? See Rule 1.15(B)(d)


Amendments to Rules of Professional Conduct 1.5 & 1.15
Law Bulletin Ethics 2023
May 5, 2023
Adrian Vuckovich, Collins, Bargione & Vuckovich
Rachel Miller , ARDC
Jerry Larkin, ARDC
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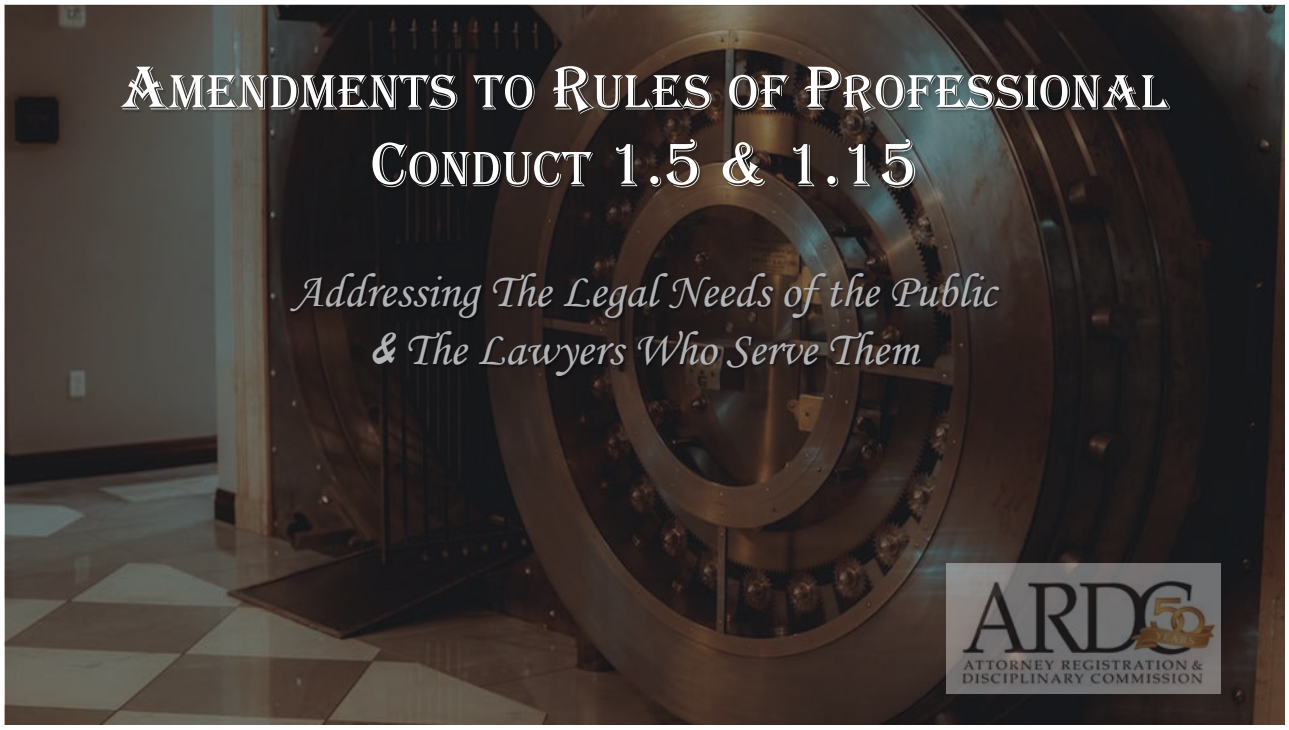
ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION


Amendments to Rules of Professional Conduct 1.5 & 1.15
Addressing The Legal Needs of the Public & The Lawyers Who Serve Them
ARDC
ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION

Supreme Court of Illinois

March 1, 2023

## ILLINOIS SUPREME COURT AMENDS RULES OF PROFESSIONAL CONDUCT

Chief Justice Mary Jane Theis and the Illinois Supreme Court announced today amendments to Illinois Rules of Professional Conduct 1.5 and 1.15. The amendments to the Rules are intended to address existing issues between the legal needs of the public and the lawyers who could serve them.

"These amendments provide additional guidance for attorneys in a clear, straightforward way," Chief Justice Theis said. "They also highlight the importance of providing affordable representation for clients and minimize the potential for fee disputes."

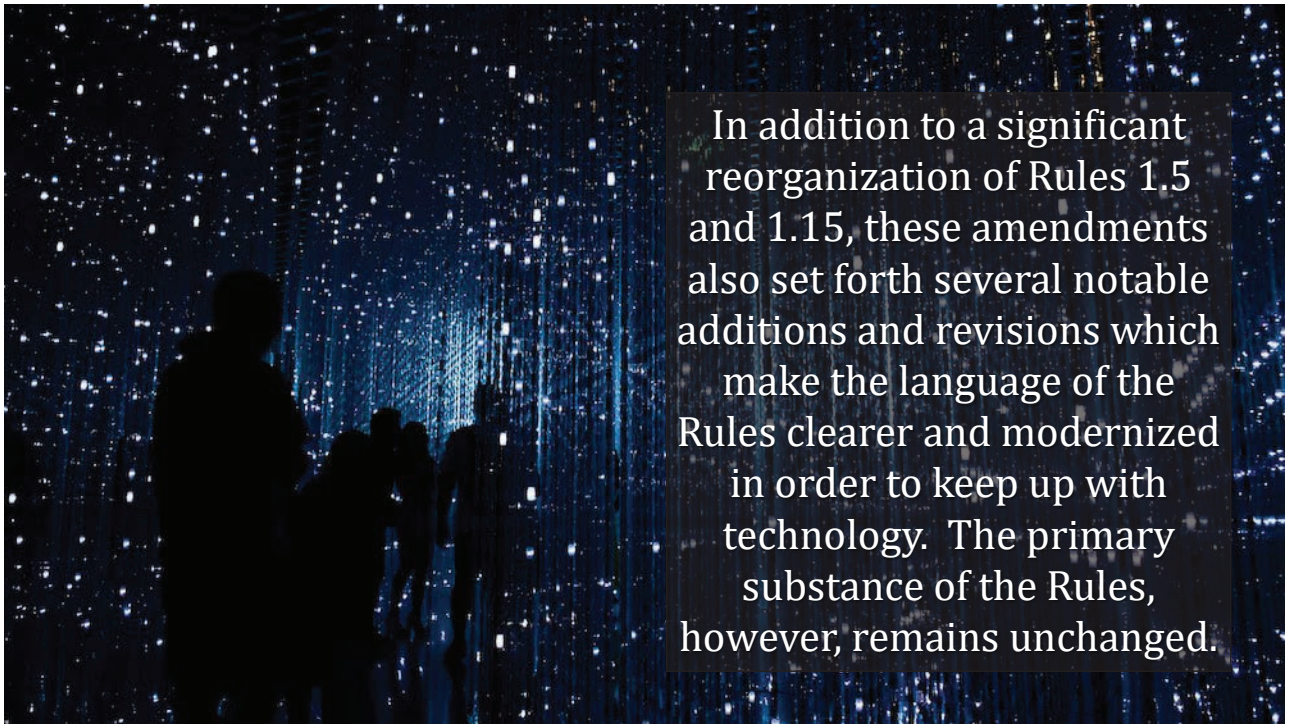
**Effective July 1, 2023**

**The amendments were approved by the Court after being proposed by a working group of the Illinois Attorney Registration and Disciplinary Commission (ARDC) and Lawyers Trust Fund (LTF), and were reviewed by the Supreme Court's Committee on Professional Responsibility.**

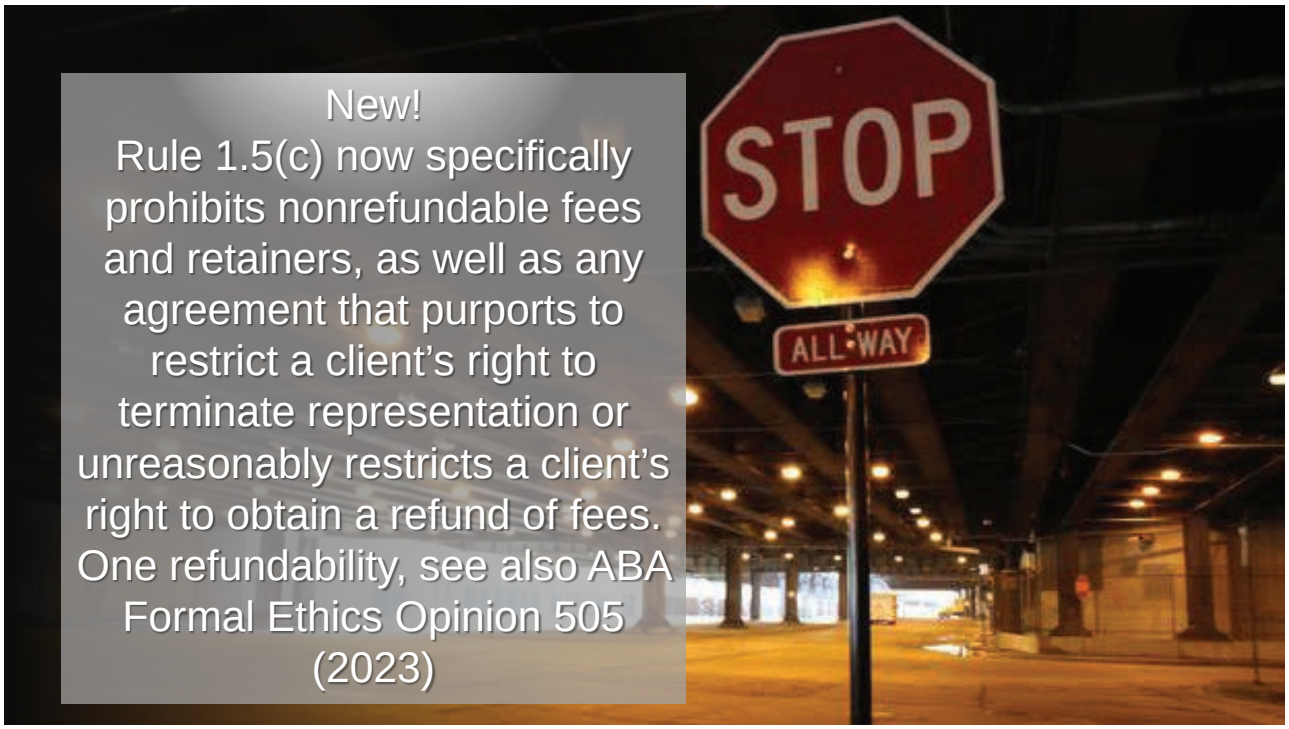
"These amendments provide additional guidance for attorneys in a clear, straightforward way."

"They also highlight the importance of providing affordable representation for clients and minimize the potential for fee disputes."

-Chief Justice Mary Jane Theis




## LET'S TALK ABOUT RETAINER AGREEMENTS


New!
Rule 1.5(c) now specifically prohibits nonrefundable fees and retainers, as well as any agreement that purports to restrict a client's right to terminate representation or unreasonably restricts a client's right to obtain a refund of fees. One refundability, see also ABA Formal Ethics Opinion 505 (2023)
STOP
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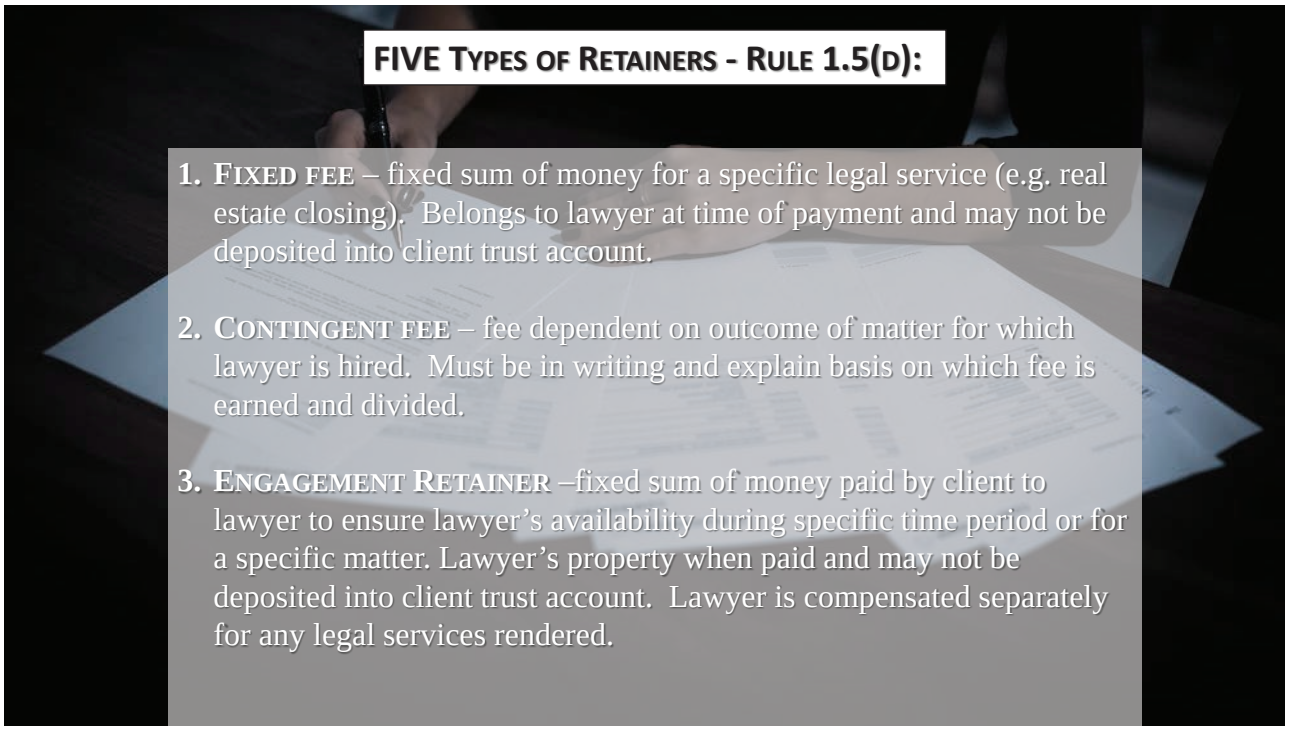

FIVE TYPES OF RETAINERS - RULE 1.5(D):
1. FIXED FEE – fixed sum of money for a specific legal service (e.g. real estate closing). Belongs to lawyer at time of payment and may not be deposited into client trust account.
2. CONTINGENT FEE – fee dependent on outcome of matter for which lawyer is hired. Must be in writing and explain basis on which fee is earned and divided.
3. ENGAGEMENT RETAINER –fixed sum of money paid by client to lawyer to ensure lawyer's availability during specific time period or for a specific matter. Lawyer's property when paid and may not be deposited into client trust account. Lawyer is compensated separately for any legal services rendered.

## FIVE TYPES OF RETAINERS (Cont'd) - RULE 1.5(D):

4. **SECURITY RETAINER** – funds paid to lawyer up front for legal services. Remain property of client and must be placed in client trust account until funds are applied to services rendered.

5. **SPECIAL PURPOSE RETAINER** – formerly "advance payment retainer" described in *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007). Like a security retainer, but must be in writing, fee belongs to lawyer when paid, other requirements spelled out in Rule 1.5(d)(5).

**Descriptions of the common fee retainers were previously located in the Comments to Rule 1.15*

### RULE 1.5 MAINTAINS EXISTING GUIDELINES REGARDING:

1) Factors determining reasonableness of fees;

2) Communication with clients about fees; and,

3) Referral fees between lawyers in different firms.

# Rule 1.5(a) reasonableness factors

1. **TIME, LABOR, NOVELTY/DIFFICULTY, REQUISITE SKILL**
2. **OTHER EMPLOYMENT PRECLUSION**
3. **CUSTOMARY FEE FOR SIMILAR SERVICES IN LOCALITY**
4. **AMOUNT INVOLVED& RESULTS OBTAINED**
5. **TIME LIMITATIONS OF CLIENT/CIRCUMSTANCES**
6. **NATURE/LENGTH CLIENT RELATIONSHIP**
7. **LAYER(S) EXPERIENCE/REP/ABILITY**
8. **FEE TYPE: FIXED/CONTINGENT/RETAINER**

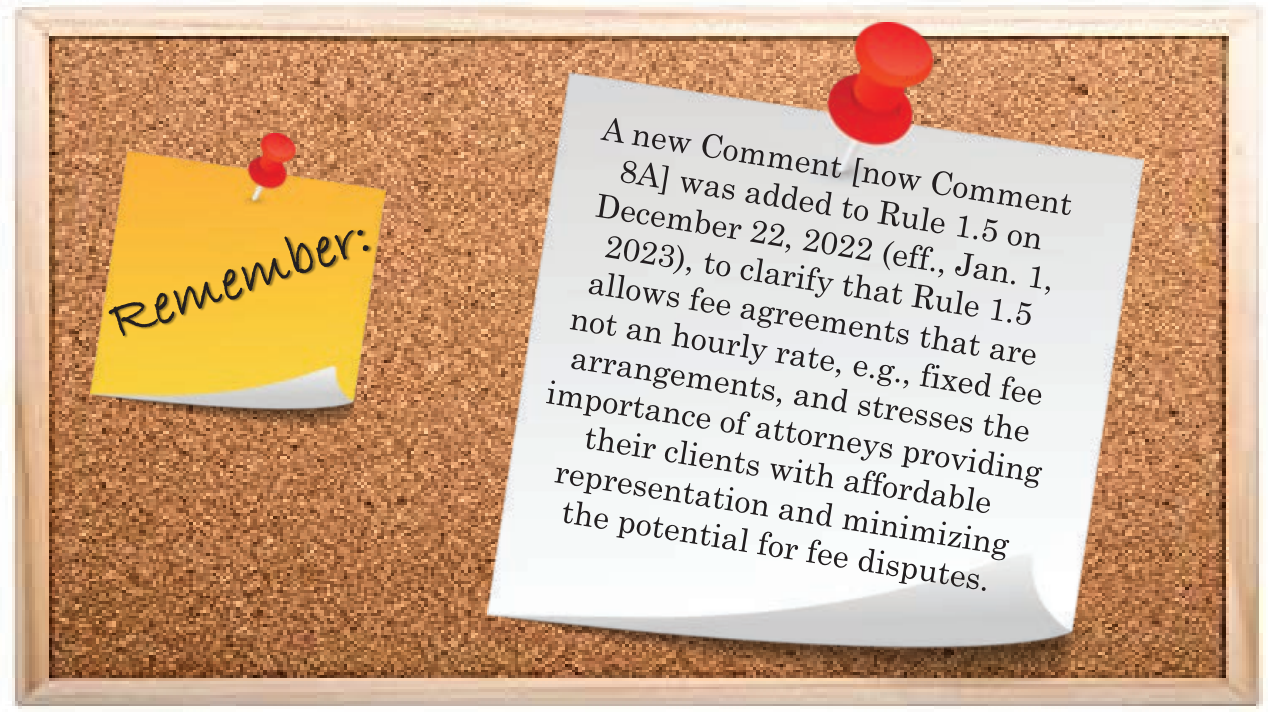
# Four key "unreasonable fee" cases

- *In re Kutner*, 78 Ill. 2d 157 (1979): Fixed $5K fee ($26,500 in today's dollar) excessive for defense of routine,"family squabble" criminal battery charge, which the CW dropped at first court date. "Law of fixed fee contracts" rejected. Censure.

- In re *Teichner*, 75 Ill. 2d 88 (1979): Collecting contingent fee for routine, uncontested life insurance payment. Other vioaktions and prior disccipline. Disbarment.

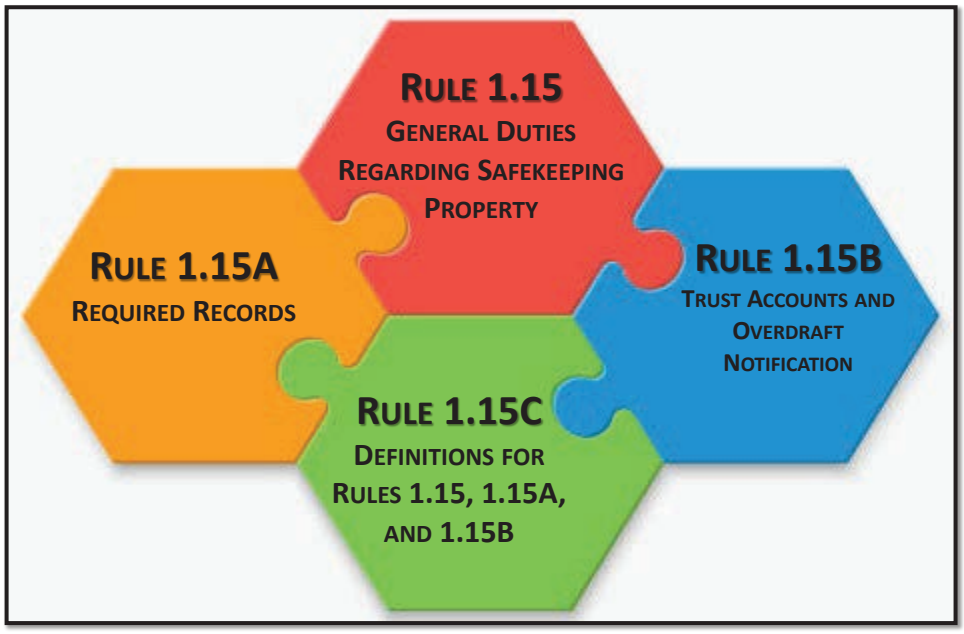
- *In re Gerard*, 132 Ill. 2d 507 (1989): Collecting excessive $259K contingent fee for "recovering" elderly client's CDs. No contingency. Duty to reform contract. Constructive fraud in collecting excessive fee.

- *In re Serritella*, Jr., ARDC No. 03SH115, M.R. 21655 (2007): unreasonable fee and failure to refund fee. Suspended 30 days and until restitution made.


Remember:
A new Comment [now Comment 8A] was added to Rule 1.5 on December 22, 2022 (eff., Jan. 1, 2023), to clarify that Rule 1.5 allows fee agreements that are not an hourly rate, e.g., fixed fee arrangements, and stresses the importance of attorneys providing their clients with affordable representation and minimizing the potential for fee disputes.


NEW RULE 1.15
ADDRESSING HOW A LAWYER MUST HANDLE FUNDS OR PROPERTY OF CLIENTS OR THIRD PERSONS

# New Rule 1.15: Four Parts




## Rule 1.15
## "General Duties Regarding Safekeeping Property"

Retains the admonishment that property or funds held by a lawyer in connection with a representation must be kept separate from the lawyer's own property and adds language to underscore the directive that a lawyer cannot use trust funds or property without authorization

## New!

- **Rule 1.15(a)** now specifically outlaws conversion of funds: "A lawyer must not, even temporarily, use funds or property of clients or third persons for the lawyer's own purposes without authorization."

- **Rule 1.15(g)** now requires withdrawals from client trust accounts only by check to named payee or by electronic transfer. No cash withdrawals, no checks to "cash," no ATM withdrawals.

***Keeps existing rules regarding:***

1) Safekeeping property and funds;
2) When it is permissible for lawyers to place their own funds in a trust account;
3) Lawyers' duties to notify and pay out funds received by lawyers on behalf of others; and,
4) Lawyers' duties in event of dispute over held funds.

The New Comments explain the meaning of "conversion" and provide guidance for lawyers receiving funds through electronic payment methods.

## Rule 1.15A
## "Required Records"

**New Rule 1.15A, along with Comments, outlines the required records to be maintained when holding funds or property in trust as well as adding a specific provision detailing how to do a three-way reconciliation.**

## New!

- **Rule 1.15A(b)(7)** requires lawyers to prepare and maintain three-way reconciliation reports of all client trust accounts on at least a quarterly basis. Essentially balancing figures from checkbook register, client ledgers, and receipts and disbursement journals.

- **Rule 1.15A(c)** explains how to perform a three-way reconciliation.

**Keeps existing rules regarding what trust account records are and how long to keep them.*

## Rule 1.15B
## "Trust Accounts and Overdraft Notification"

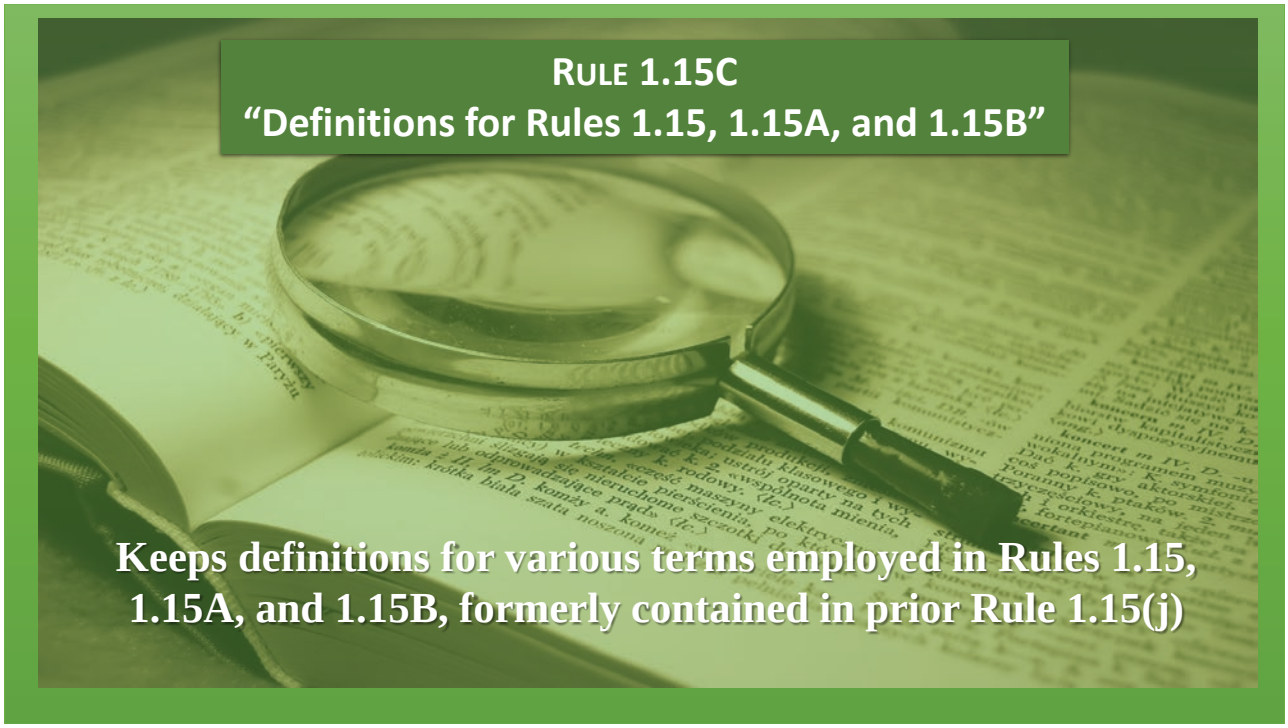

**The new home for all the requirements for trust accounts including IOLTA accounts, disbursing real estate transaction funds and overdraft notifications. It also includes instructions on handling unidentified funds.**

## New!

- **Rule 1.15B(a) & Rule 1.15B(b)** (formerly, Rules 1.15(f) & (g)) regarding use of IOLTA accounts versus non-IOLTA trust accounts based on whether interest on held monies may earn net income for a client or third person

- **Rule 1.15B(c)** describes banks that are eligible to hold IOLTA accounts.

**Keeps existing rules regarding:*
1) Handling unidentified funds in IOLTA accounts;
2) Overdraft notification program; and,
3) Lawyers' disbursement of real estate transaction funds using Real Estate Funds Accounts.


RULE 1.15C
"Definitions for Rules 1.15, 1.15A, and 1.15B"
Keeps definitions for various terms employed in Rules 1.15, 1.15A, and 1.15B, formerly contained in prior Rule 1.15(j)


Time For
Questions?
YIELD

# RESOURCES

- For Additional FREE CLE Check Out the ARDC's New Online Learning Portal – www.iardc.org
- Send questions regarding the content of this Program to the ARDC Education Department - Education@iardc.org
- ARDC Ethics Inquiry Hotline for Guidance on Rules:
  Chicago office – (312) 565-2600 or (800) 826-8625
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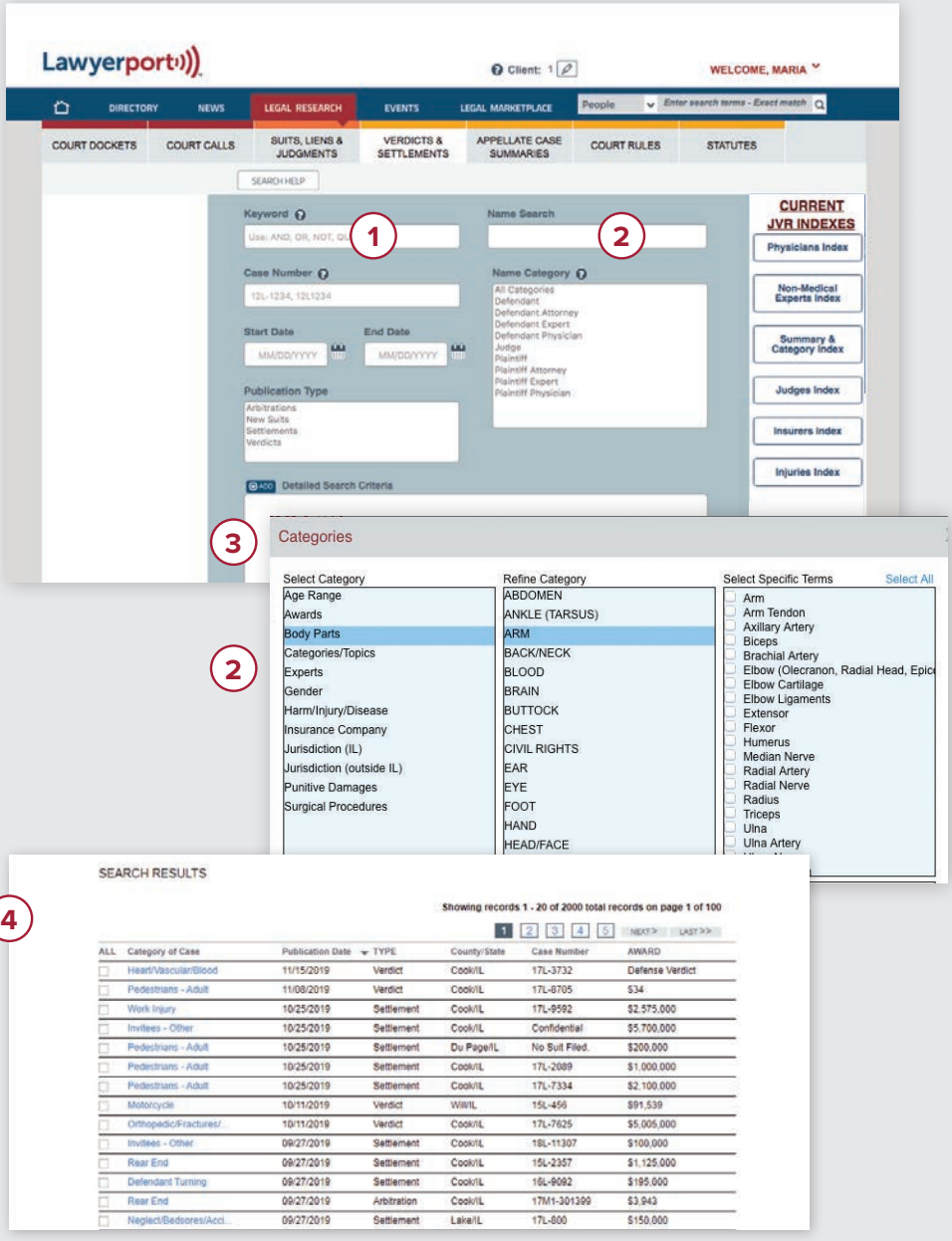


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