ETHICS 2023

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May 31st

AM PROGRAM

Trouble in Paradise: When Law Firm Operations Fail

CHRISTINE P. ANDERSON
Director of Probation & Intake Group Manager, *Illinois ARDC*

MARY F. ANDREONI
Ethics Education Senior Counsel, *Illinois ARDC*

RICHARD C. GLEASON, II
Litigation Counsel, *Illinois ARDC*

AMANDA J. HAMILTON
Partner, *Konicek & Dillon, P.C.*

KATHRYNE "KATIE" R. HAYES
Associate, *Collins Bargione & Vuckovich*

MATTHEW J. O'HARA
Partner, *Smith, Gambrell & Russell, LLP*

VICTOR J. PIOLI
Partner, *Johnson & Bell Ltd.*

JOHN C. SCIACOTTA
Partner, *Aronberg Goldgehn*

STEPHANIE L. STEWART
Partner, *Robinson Stewart Montgomery & Doppke LLC*

DR. DIANA UCHIYAMA
Executive Director, *Lawyers' Assistance Program*

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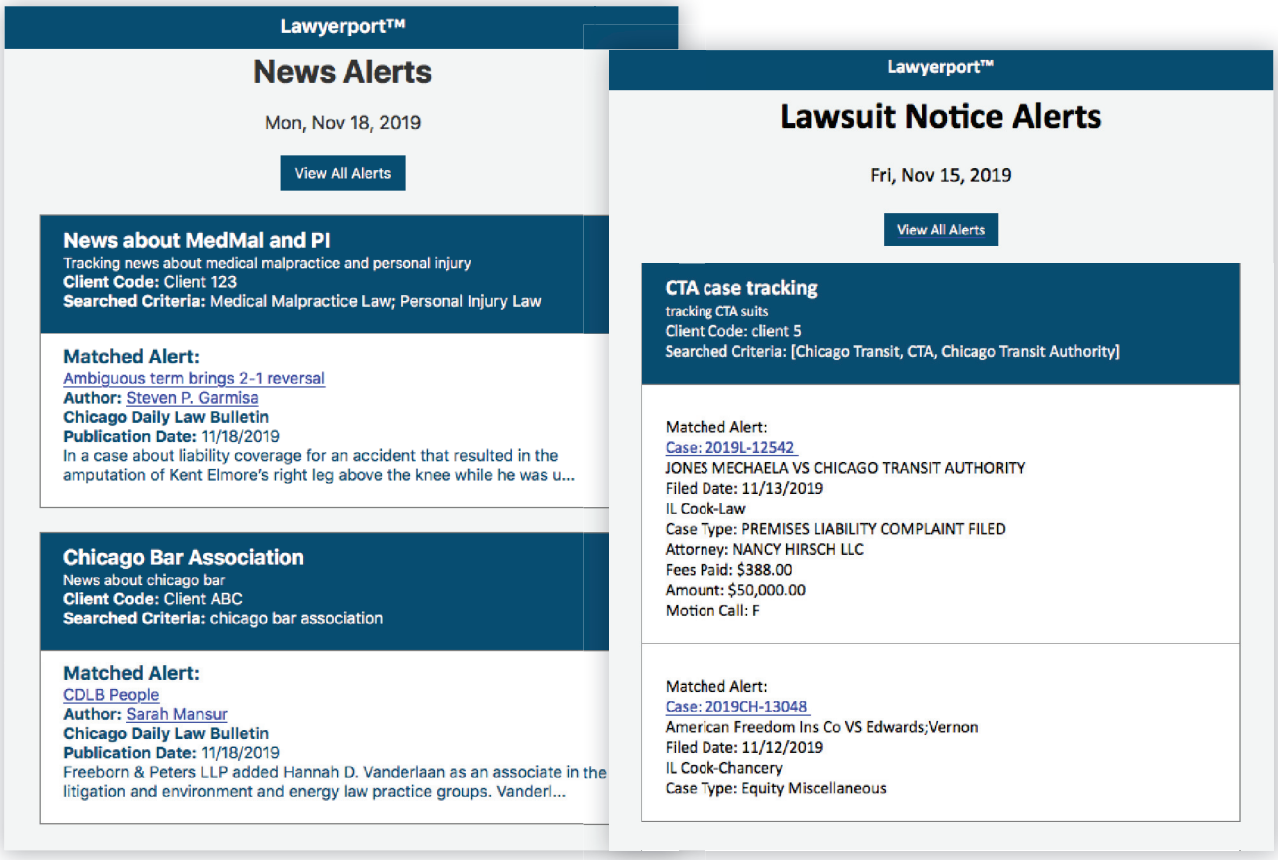

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Filed Date: 11/13/2019
IL Cook-Law
Case Type: PREMISES LIABILITY COMPLAINT FILED
Attorney: NANCY HIRSCH LLC
Fees Paid: $388.00
Amount: $50,000.00
Motion Call: F

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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 morning program focuses on some of the challenges that can arise in the operation of a law firm and how those challenges can devolve into ethical issues. The morning ses¬sions will address issues that can arise related to fee arrangements, disputes regarding operating agreements and when there is substance abuse by an attorney at the firm. Our expert speakers of ARDC leaders and professional responsibility experts will examine these real world scenarios and provide practical guidance for navigating around the ethical pitfalls.

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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AM PROGRAM

Trouble in Paradise: When Law Firm Operations Fail

PANEL 1 — 8:30am - 9:30am

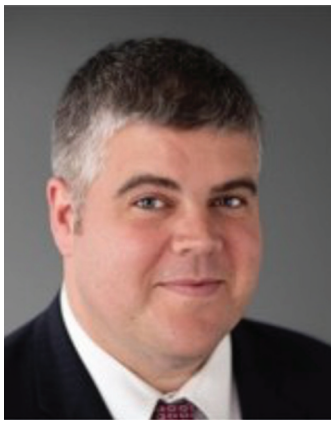
Fee Arrangements – Referral Fees and Shared Cases

Panel Leader: **Richard C. Gleason, II,** Litigation Counsel, *Illinois ARDC*

Panelists: **Amanda J. Hamilton,** Partner, *Konicek & Dillon, P.C.*

Victor J. Pioli, Shareholder, *Johnson & Bell Ltd*

Stephanie L. Stewart, Partner, *Robinson Stewart Montgomery & Doppke LLC*



Richard C. Gleason, II, Litigation Counsel, *Illinois ARDC*

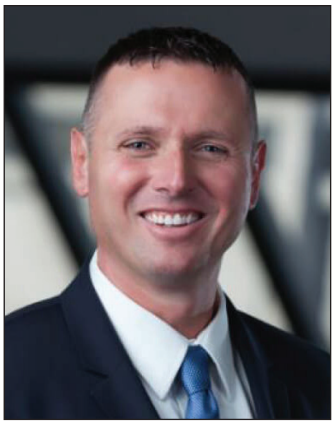
Rich Gleason is Litigation Counsel at the Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC), where he investigates and prosecutes allegations of lawyer misconduct. He received his undergraduate degree from University of Iowa and his law degree from Northern Illinois University. Prior to joining the ARDC, Rich worked as a managing partner at O'Mara, Gleason, & O'Callaghan, LLC in Chicago and as a Cook County Assistant State's Attorney.

Amanda J. Hamilton, Partner, *Konicek & Dillon, P.C.*

Amanda is a partner at Konicek & Dillon, P.C. where she concentrates her practice in the fields of appellate law, professional liability, commercial litigation, and ethics. Amanda has experience litigating civil and criminal matters in jury trials, bench trials, and regularly argues before the Illinois Appellate Courts and the Illinois Supreme Court.

Amanda began her career in Washington, D.C., first as a White House intern and then as a Presidential Appointee to the U.S. Department of State, where she worked in the Bureau of Public Affairs under the leadership of Secretary Condoleezza Rice.

Amanda has been recognized by Leading Lawyers as being in the top 2% of attorneys under 40 every year since 2015 and has been selected to the Super Lawyers list of Rising Stars since 2020. She is a member of the Illinois Appellate Lawyers Association, the Illinois State Bar Association, the DuPage County Bar Association, and the Kane County Bar Association. She has been published in the Illinois Bar Journal, the Kane County Bar Briefs, and teaches seminars on the subjects of legal ethics and recent appellate decisions.



Victor J. Pioli, Shareholder, *Johnson & Bell Ltd*

Victor is a member of Johnson & Bell's Business Litigation and Professional Liability practice groups, where he handles a variety of commercial matters, including trial and appellate work on behalf of both plaintiffs and defendants in state and federal courts. His clients range from large corporations and government entities to individuals. Victor also concentrates his practice defending professionals in malpractice matters and has successfully tried several cases to verdict. Victor serves as editor of the American Law Firm Association's (ALFA) Professional Liability Newsletter and has written about a variety of issues including email fraud and an analysis of relations with a jury consultant. His peers have also recognized him with an AV rating from Martindale-Hubbell.

Stephanie L. Stewart, Partner, *Robinson Stewart Montgomery & Doppke LLC*

Stephanie is a partner at Robinson Stewart Montgomery & Doppke LLC where she serves as both a consulting and a testifying expert in the legal ethics field and regularly advises and represents governmental entities, corporations, law firms, and individual lawyers and other professionals in ethics matters.

Recognized by her peers as a "Super Lawyer" and/or "Leading Lawyer" in the area of professional liability since 2007, Stephanie has successfully represented hundreds of lawyers and other professionals before the ARDC, the Illinois Department of Professional and Financial Regulation (IDFPR), the Illinois Board of Admissions to the Bar, the Judicial Inquiry Board, and in state and federal civil litigation matters.

After graduating from Northwestern University Pritzker School of Law, Stephanie served as a prosecutor at the Illinois Attorney Registration and Disciplinary Commission ("ARDC") where she investigated and litigated hundreds of attorney disciplinary cases. In 1999, she was promoted to Senior Counsel to the Administrator of the ARDC, a position she held until leaving the ARDC for private practice in 2002.

Ethical Considerations of Fee Splitting

Amanda J. Hamilton
Konicek & Dillon, P.C.

Pre-1980

- Illinois prohibited the sharing of fees between lawyers who were not in the same firm where the only service provided by one attorney was the referral of a client to the other.
- Referenced Code of Professional Responsibilities by the American Bar Association, Disciplinary Rule 2-107:
- "(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his firm or law office, unless:
  - (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
  - (2) The division is made in proportion to the services performed and responsibility assumed by each.
  - (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.
- (B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement."

1980 Code of Prof'l Resp. R. 2-107

- "(a) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm, unless
- (1) the client consents in a writing signed by him to employment of the other lawyer, which writing shall fully disclose (a) that a division of fees will be made, (b) the basis upon which the division will be made, including the economic benefit to be received by the other lawyer as a result of the division, and (c) the responsibility to be assumed by the other lawyer for performance of the legal services in question;
- (2) the division is made in proportion to the services performed and responsibility assumed by each, except where the primary service performed by one lawyer is the referral of the client to another lawyer and (a) the receiving lawyer fully discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit and (b) the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as if he were a partner of the receiving lawyer; and
- (3) the total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client.
- (4) For purposes of this rule, 'economic benefit' shall include (a) the amount of participation in the fee received with regard to the particular matter; (b) any other form of remuneration passing to the referring lawyer from the receiving lawyer, whether or not with regard to the particular matter; and (c) an established practice of referrals to and from or from and to the receiving lawyer and the referring lawyer.
- (b) This disciplinary rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement." Ill. S. Ct. Code of Prof'l Resp. R. 2-107 (eff. July 1, 1980).

1990 IRPC – Rule 1.5(f)

- "Except as provided in Rule 1.5(j), a lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm, unless the client consents to employment of the other lawyer by signing a writing which discloses:
  - (1) that division of fees will be made;
  - (2) the basis upon which the division will be made, including the economic benefit to be received by the other lawyer as a result of the division; and
  - (3) the responsibility to be assumed by the other lawyer for performance of the legal services in question.

- (f) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

STEP 1: Type of Fee Splitting Agreement

Type 1: "In proportion to the services performed by each lawyer"

Type 2: "Referral of the client to another lawyer AND each lawyer assumes joint financial responsibility for the representation"

STEP 2: Client Agreement in Writing

- "The client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing."

STEP 3: "The total fee is reasonable"

(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, if apparent to the client, that the acceptance of the particular employment will 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, contingent, or some type of retainer.

When a Fee Sharing Agreement Fails

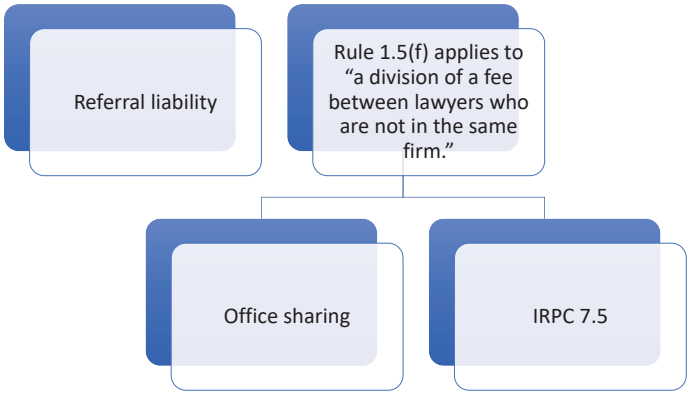
Requirements for *Quantum Meruit* Recovery

- "To recover under a quantum meruit theory, a plaintiff must prove that
  (1) it performed a service to benefit the defendant,
  (2) it did not perform the service gratuitously,
  (3) defendant accepted the service, and
  (4) no contract existed to prescribe payment for the service."

Factors Considered for "Reasonable Value of Services"

- "The time and labor required,
- The attorney's skill and standing,
- The nature of the cause,
- The novelty and difficulty of the subject matter,
- The attorney's degree of responsibility in managing the case,
- The usual and customary charge for that type of work in the community, and
- The benefits resulting to the client."

Additional Considerations



Further Reading on IRPC 1.5(f) and *Quantum Meruit*

- *Andrew W. Levenfeld and Associates, Ltd. v. O'Brien*, 2023 IL App (1st) 211638
- *Donald W. Fohrman & Associates, Ltd. v. Marc D. Alberts, P.C., 2014 IL App (1st) 123351*
- *Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2017 IL 121297
- *Forest Preserve District of Cook County v. Continental Community Bank and Trust Company*, 2017 IL App (1st) 170680
- *Will v. Northwestern University*, 378 Ill.App.3d 280 (1st Dist. 2007)

Sharing Cases and Fees - **Hypothetical #1**

The Client hired Attorney A to represent him in a dispute over the Client's interest in an oil field located in Marion County, Illinois.

Client has a written contingency agreement with Attorney A.

Attorney A will receive:

- 12.5% before the trial
- 20% at the trial before the appeal
- 25% after the appeal

Attorney A asks Attorney B to help him with the case, and Attorney B agrees. Attorney A and Attorney B move forward without a fee agreement, because Attorney A agrees to "take care" of Attorney B. The fee agreement between the Client and Attorney A says Attorney A has associated with Attorney B to assist him in the case and that Attorney B would work at the expense of Attorney A.

Throughout the case, Attorney B does most of the work including filing pleadings, motions, and attending mediation. Eventually, Attorney A withdraws from the case to care for his father. After this, Attorney B did not want to stay in the case under Attorney A's fee agreement with the Client.

Now, Attorney B demands:

- 1/3 of the first million dollars
- 25% of any additional recovery after

The case settles for $2,500,000.00 plus 1% interest in future oil returns. Attorney B receives their fee of $800,000.00 and gives $50,000.00 to Attorney A and $50,000.00 to his associate. The Client sues Attorney B over fees and settles for $75,000,00.

ARDC brings a disciplinary complaint against Attorney B, charging them with conflict of interest, overreaching, and undue influence. Did Attorney B engage in unethical conduct?

In re Woodcock, Jr. 2011PR00005 (2013)

Attorney B is charged with improper conflict of interest by changing fee agreement with Client mid-representation.

- Violation of Rule 1.8 considered improper business transaction with Client

Attorney B argues that he was punished for doing what rules require him to do to continue to represent the Client after Attorney A withdrew. This required:

- Attorneys to reach an agreement re: fees and put the agreement in writing because of **existing relationship with Client at time of fee agreement**
- Attorney B required to come forward with evidence that the agreement was fair, equitable and free from undue influence

Attorney B did not fully disclose all relevant facts to Client and advised to seek independent advice.

Attorney B was found to have engaged in overreaching and undue influence and was given a one year suspension recommended by Hearing Board, by which the Court imposed a 6 month suspension.

Can a Lawyer be Disciplined for Failing to Honor a Referral Fee Agreement with Another Lawyer?

YES!

- *In re Levy, 08 CH 4 (2013)*
- Attorney A refers cases to Attorney B
- Fee agreements (drafted by Attorney B) disclosed division of fees between the lawyers, economic benefit to be received by Attorney A and responsibility to be assumed by Attorney A for performance of legal services.
- Attorney B settles cases and does not tell Attorney A.
- Attorney A claims he is entitled to more than half of the $385,000.00 in Attorneys' fees on cases under referral fee agreements.

Hearing Board

- Requirements for fee sharing agreements were not met.
- Because there was no enforceable fee sharing agreement, Attorney B could not be disciplined for failing to comply with an unenforceable agreement.
- All clients did not sign; Attorney A did not sign and thus demonstrated that he accepted responsibility for the matters.
- No dishonest conduct, just failure to segregate funds in dispute in violation of Rule 1.15.

Hearing Board recommended reprimand

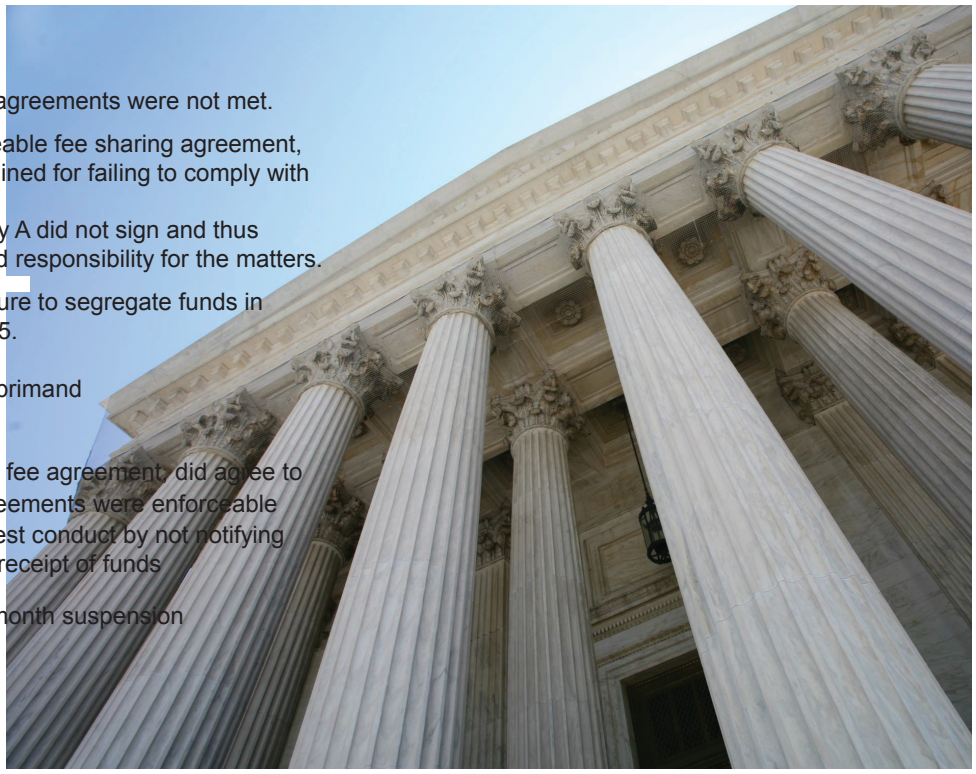
Review Board

- Attorney A not required to sign fee agreement, did agree to accept responsibility; thus agreements were enforceable
- Attorney B engaged in dishonest conduct by not notifying Attorney A of settlements and receipt of funds

Review Board recommended 6 month suspension

Supreme Court

Reprimand



Hypothetical 2: Outsourcing Via App

Mark, a solo practitioner, realizes that he is unable to cover his client's routine status call in her commercial litigation matter at the Daley Center tomorrow at 9:00 am before Judge Scary because he has to be in Lake County for a hearing on another matter at the same time. Mark remembers seeing an advertisement for a new app called Run2Court, which for a flat fee of $99, will send a lawyer to court to cover the call for him. Mark pays to have the service cover the status call and sends a copy of the client's intake sheet and the status call information.

The next day, a Run2Court lawyer is on the way to cover the call, but he arrives late because Mark mistakenly provided the wrong courtroom for Judge Scary. Unfortunately, Judge Scary is particularly unforgiving that day and since no one steps up when the case is initially called at 9:01, he dismisses the case for want of prosecution. Run2Court refuses to refund the fee to Mark arguing that the dismissal is due to his error and he is annoyed but not too worried because he plans to immediately file a motion to vacate the dismissal pursuant to Rule 2-1301.

Mark's client is responsible for costs and fees on an hourly basis so when he sends his monthly invoice he reflects the cost of Run2Court, but charges her at their agreed hourly rate of $275 an hour rather than $99. When the client receives the bill she questions the Run2Court charge and inquires as to what happened at the status call. Mark explains the circumstances and the client is livid that Mark hired someone else on her case without her approval and vows to send a complaint to the ARDC.

1. **Has Mark engaged in unethical conduct by failing to obtain the client's consent to hire Run2Court?**
2. **Has Mark violated Rule 1.6 (Confidentiality of Information) by sharing client information without the client's authority?**
3. **Do Mark's duties under Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) prohibit him from placing responsibility for his client's matter in the hands of an outside lawyer he does not know?**
4. **Is Mark permitted to mark up the fee charged by Run2Court and bill the client at his standard hourly rate?**
5. **If Mark is unable to get the dismissal vacated, is there likely to be malpractice coverage via either his carrier or the Run2Court lawyer's carrier?**

Can A Contract Lawyer's Fees Be Marked Up By the Retaining Lawyer?

It depends on whether the contract lawyer's services are billed as a cost/expense, or billed along with the retaining lawyer's as fees for legal services. (ABA Formal Ethics Op. 00-420 (2000) & 08-451 (2008))

If the services are billed as an expense, the retaining lawyer should not charge more than the actual cost plus a reasonable allocation of overhead directly associated with the contract lawyer.

If the services are billed along with the retaining lawyer's services, the fees may be marked up subject to the reasonableness requirement of Rule 1.5; it will also be reasonable for client to expect that the lawyer has supervised the work of the contract lawyer or adopted that work as her own.

If use of a contract lawyer is contemplated, disclose possible reasonable markup of the contract lawyer's fees in the legal services agreement.

Referral Fees Paid To Non-Lawyer

- **FACT PATTERN**: Tommy and Jimmy have been best friends since high school. Tommy goes on to become a lawyer who specializes his practice in real estate law. Jimmy also enters the real estate business as a broker for large scale commercial transactions. Jimmy has a lucrative practice with many clients who frequently ask him for advice regarding retaining a lawyer to represent them on transactions. One day, Jimmy has the idea that he could help his clients by referring them to Tommy who can represent them on deals. Jimmy will only ask that Tommy pay him a small referral for sending his clients to Tommy for legal assistance. Jimmy reasons that this will be a "win-win" for everybody as Tommy will get new clients and collect fees, the clients will win because they will be represented by a top-notch lawyer like Tommy, and Jimmy will collect a small referral fee and accumulate goodwill with his clients by referring them to Tommy. Tommy agrees this is a good deal all around and agrees to proceed with Jimmy's proposal.

- Any issues with this arrangement between Tommy and Jimmy?

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Referral Fees Paid to Non-Lawyer

- **Rule 5.4(a)**

  "*A lawyer or law firm shall not share legal fees with a nonlawyer*, except that: (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons; (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter." (emphasis added)

- **Rule 5.4(b)**

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

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Fees Received From A Non-Lawyer

- **FACT PATTERN**: Tommy is also friends with Ronny who is an investment adviser. Ronny knows that Tommy has a thriving legal practice with many wealthy clients. One day, Ronny suggests to Tommy that he should introduce him to some of his clients and if any of those clients end up investing funds with Ronny, Ronny agrees to pay Tommy a referral fee. Tommy is mindful of his failed referral fee arrangement with Jimmy, but reasons that Rule 5.4(a) only prohibits the sharing of "legal fees" with non-lawyers. This new arrangement with Ronny would not involve "legal fees," but investment adviser fees collected by Ronny. Tommy decides this is a solid arrangement and enters into an agreement with Ronny to refer his clients to Ronny in exchange for a referral fee to be paid by Ronny.

- Any issues with this arrangement between Tommy and Ronny?

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Fees Received From A Non-Lawyer

- **Rule 1.8(a)**

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

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

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

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

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Referral Fees Between Lawyers

- **Rule 1.5(e)**

  A division of a fee between lawyers who are not in the same firm may be made only if:

  (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;

  (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

  (3) the total fee is reasonable.

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Referral Fees Between Lawyers

- "Supreme court rules have the force of law and are indicative of public policy…Rules 1.5(f) and 1.5(g) are expressions of public policy." *Albert Brooks Friedman, Ltd. v. Malevitis*, 304 Ill.App.3d 979, 983-84 (1st Dist. 1999)

- "Our supreme court has stated that each of Rule 1.5(e)'s subsections is a separate and distinct condition that must be met before a fee-sharing agreement can be enforced…Because Rule 1.5 embodies Illinois' public policy of placing client's rights above any remedies for lawyers seeking to enforce fee-sharing agreements, fee-sharing agreements that violate Rule 1.5 also violate public policy and are unenforceable." *Larsen v. D Construction, Inc*., 2021 IL App (1st) 191999, ¶ 24

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Referral Fees Between Lawyers

- **FACT PATTERN**: In 2019, California Law Firm brought in Illinois Law Firm as local counsel to represent the families of victims of an airplane crash in a lawsuit based in the Northern District of Illinois. The two firms entered into a fee sharing agreement whereby they would split fees 50/50 to be adjusted if one firm ended up doing more or less of the work. The clients were not copied on the letter and never signed the agreement between the firms. In early 2020, the case settled with the airline. The settlement funds were disbursed to California Law Firm. California Law Firm never disbursed the funds to the clients. Nor did California Law Firm ever disburse any fees to Illinois Law Firm pursuant to its agreement with Illinois Law Firm. In December 2020, Illinois Law Firm files a petition for rule to show cause against California Law Firm on behalf of the clients related to the failure of California Law Firm to disburse the funds to the clients. Illinois Law Firm also files a separate lawsuit against California Law Firm seeking to collect the fees it claims it is owed pursuant to the agreement between the two firms. A year after the petition and lawsuit were filed by Illinois Law Firm, Illinois Law Firm has the clients execute an agreement in compliance with Rule 1.5. California Law Firm defends the lawsuit by Illinois Law Firm by arguing that it is too late and Rule 1.5 has not been complied with. What will the court decide?

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Referral Fees Between Lawyers

- *Edelson, PC v. Girardi*, Case No. 20 C 7115, 2022 U.S. Dist. LEXIS 141445 (N.D. Ill. Aug. 9, 2022)
  - Court denied summary judgment motion by defendant law firm
  - "[Illinois] Rule 1.5(e) is unlike other state rules concerning feesharing agreements because it includes no express requirement of client consent at or near the outset." *Edelson*, at *10.

JOHNSON&BELL TRIAL LAWYERS

Recovering Referral Fee When Rule 1.5 Not Complied With

- **FACT PATTERN:** Since 2003, Attorney A and Attorney B had a relationship whereby Attorney A would refer personal injury cases to Attorney B, and in return, Attorney B would pay Attorney A 1/3 of any fee received from representing any referred client. Attorney B would disclose this arrangement and have all clients sign off in compliance with Rule 1.5(e). This arrangement went off without any hitches for years with Attorney A referring clients and Attorney B paying 1/3 of fees earned. In 2008, a referred case from Attorney A settles for $7.9 million and Attorney B receives attorney's fees of $1,422,000. Attorney A then asks for his 1/3 share. Attorney B then realizes that he never disclosed Attorney A's referral fee and never had the client sign off on the arrangement in compliance with Rule 1.5(e). Nevertheless, Attorney B tells Attorney A that he is embarrassed by the oversight and that he would "make it right." Attorney B tells Attorney A that he only received an 18% contingency fee on the matter and that he would pay Attorney A 18% of his fee. Attorney B insists on receiving 1/3 of the contingency fee. A dispute ensues and Attorney B then takes the position that Attorney A is not entitled to any portion of the fee. Attorney A then sues Attorney B claiming breach of fiduciary duty.

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Recovering Referral Fee When Rule 1.5 Not Complied With

- *Naughton v. Pfaff*, 2016 Ill App (2d) 150360
  - "*Rule 1.5* as a whole embodies this state's public policy of prioritizing clients' rights over lawyers' remedies in seeking to enforce fee-sharing agreements. [citation omitted. We agree with *Fohrman* that *Holstein*'s attempt to distinguish breach-of-contract and breach-of-fiduciary-duty claims arising from the same fee-sharing agreement is inconsistent with the strict-compliance standard set forth in case law and with the public policy behind *Rule 1.5*." *Naughton*, at ¶ 65
  - "In sum, Naughton sought to recover his share of the fees from Julianna's case through a claim of breach of fiduciary duty, but as these damages stem from a fee-sharing agreement that was subject to *Rule 1.5* but not in compliance with the rule, Naughton's claim must fail." *Id.*
- *But see Holstein v. Grossman*, 246 Ill.App.3d 719 (1st Dist. 1993) (allowing breach of fiduciary duty claim based on joint venture theory to proceed despite violation of Rule 1.5)

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Miscellaneous

- Referral Fees with Judges – *Elane v. St. Bernard Hospital*, 284 Ill.App.3d 865 (1st Dist. 1996) (no inconsistency with Supreme Court Rule 65 because "legal responsibility proviso").
- Disbarred or Suspended Attorney – *In re: Storment*, 203 Ill.2d 378 (2002) ("legal responsibility" in Rule 1.5(g)(2) did not involve the practice of law)
- What if conflicted out of representation under Rule 1.7, can you refer case out and collect referral fee if comply with Rule 1.5(f)?
  - ISBA Op. 90-11
  - ABA Formal Op. 474 (2016)

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DELICIOUS AND CROWD-PLEASING HYPOTHETICALS

Rule 1.5(a): A lawyer shall not make an agreement for, charge, or collect an unreasonable amount for expenses.

A digression:

The difference between “shall” and “may”:

Preamble to the Rules: The difference between “shall” and “may”:

“Some of the rules are imperatives, cast in the terms “shall” or “shall not.” Those define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment.” [Comment 14]

Preamble to the Rules: The difference between “shall” and “may”:

“Some of the rules are imperatives, cast in the terms “shall” or “shall not.” Those define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment.” [Comment 14]

What’s the take-away?

“Shall” does not mean “should.” Violating the “shalls” can result in the forfeiture of fees and the imposition of discipline.

AND

Adhering to the “mays” with an eye towards informed client consent can save you a lot of headaches down the road.

Another digression: How fee cases come to my desk, informed consent, and signed writings.

Another digression: How fee cases come to my desk, informed consent, signed writings, and making your life easier.

Rule 1.0(e): “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Another digression: How fee cases come to my desk, informed consent, signed writings, and making your life easier.

Rule 1.0(e): “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

“Confirmed in Writing”: If it is not feasible to obtain or transmit a written confirmation, if required, at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, and written confirmation is required, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Hypothetical No.1 :

Gerard is engaged by his erstwhile clients to recover certain certificates of deposits the clients believe they are entitled to. Gerard agrees to represent the clients in exchange for a fee of one third of any assets he recovers on their behalf. Gerard's agreement is in writing. After accepting the representation, Gerard learns that all he needed to do was to register the certificates of deposit, and asserted a fee of $159,648.50 - one third of the recovery. Was Gerard's fee reasonable pursuant to Rule 1.5?

Hypothetical No.1 :

Gerry is engaged by his erstwhile clients to recover certain certificates of deposits the clients believe they are entitled to. Gerry agrees to represent the clients in exchange for a fee of one third of any assets he recovers on their behalf. Gerry's agreement is in writing. After accepting the representation, Gerry learns that all he needed to do was to register the certificates of deposit, and asserted a fee of $159,648.50 - one third of the recovery. Was Gerry's fee reasonable pursuant to Rule 1.5?

NO! In re Gerard, 132 Ill. 2d 507 (1989). The Court held that Gerard's fee was not reasonable, and that Gerard should have sought to reform the agreement once he learned that the scope of work was much narrower than what he and his clients initially anticipated.

Hypo No. 2: Kutty is approached by Buster. Buster tells Kutty that Buster was arrested and charged with misdemeanor battery the prior evening following a long bout of drinking at the local tavern. Buster says that he knows Kutty is a great lawyer, and asks Kutty to represent him in the criminal case. Kutty tells Buster he'll represent him in exchange for $20k. Buster agrees. Kutty takes the case, and gets the matter dismissed on the first court date. Were Kutty's fees reasonable?

Hypo No. 2: Kutty is approached by Buster. Buster tells Kutty that Buster was arrested and charged with misdemeanor battery the prior evening following a long bout of drinking at the local tavern. Buster says that he knows Kutty is a great lawyer, and asks Kutty to represent him in the criminal case. Kutty tells Buster he'll represent him in exchange for $20k. Buster agrees. Kutty takes the case, and gets the matter dismissed on the first court date. Were Kutty's fees reasonable?

No! In re Kutner, 78 Ill. 2d 157 (1979): $5k fee for representation of a defendant in his battery case constituted collection of an excessive fee (worth $19,362.81 today) warranting disciplinary sanctions against Kutner.

Hypo No. 3: Tyke agrees to represent a client who is seeking death benefits as a surviving spouse. As part of the contingent fee agreement, Tyke agrees to represent his client in exchange for one third of any recovery made on behalf of the client by way of a suit or claim for damages. Approximately four days after Tyke sent his notice of claim on behalf of his client, the insurance company sent the entire $21k benefit. Tyke asserted his $7k fee. Was Tyke within his rights to do so?

Hypo No. 3: Tyke agrees to represent a client who is seeking death benefits as a surviving spouse. As part of the contingent fee agreement, Tyke agrees to represent his client in exchange for one third of any recovery made on behalf of the client by way of a suit or claim for damages. Approximately four days after Tyke sent his notice of claim on behalf of his client, the insurance company sent the entire $21k benefit. Tyke asserted his $7k fee. Was Tyke within his rights to do so?

No! In re Teichner, 104 Ill. 2d 160: the attorney "was not entitled to any fee under a contingent fee agreement where there was no 'suit' or 'claim for damages' and the proceeds that resulted from a routine payment and where complainant would have received the same amount at the same time had she never seen Respondent."

"Within the framework of the attorney-discipline process, it is not only the prerogative but the duty of the Supreme Court to guard against the collection of an excessive fee."

Rule 1.5(b) The scope of the representation and the basis of rate of the fee and expense for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Hypothetical No. 4:
Sal was approached by his clients to represent them in obtaining life insurance proceeds on two $100k policies. Sal agrees to represent the clients in exchange for a fee of 20% of whatever he recovers on their behalf. Although it was originally anticipated there might be obstacles to collection, the claims are uncontested and the insurance company pays the face amounts of the policies. Sal's total fees were $41k. Are his fees compliant with Rule 1.5?

No! In re Salerno, 93 CH 188, MR 10433 (Nov. 30, 1994). Salerno's fees were found to be excessive. Salerno also attempted to minimize his liability by having the client sign releases in connection with the disbursement of funds. Salerno also failed to reduce the fee agreement to writing. Salerno was suspended for five months.

Rule 1.5(c): A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingency fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Hypothetical No. 5:

Linda is retained to represent a trustee of a trust, and agrees to work on a contingency. She fails to reduce her fee agreement to writing, but her client, the trustee, agreed to the terms of her payment. Is she ok?

Hypothetical No. 5:

Linda is retained to represent a trustee of a trust, and agrees to work on a contingency. She fails to reduce her fee agreement to writing, but her client, the trustee, agreed to the terms of her payment. Is she ok?

No! In re Spak, 188 Ill. 2d 53 (1999): Censure was appropriate sanction for an attorney's failure to reduce a contingency fee agreement to writing. The writing requirement of subsection (c) is mandatory and has no exceptions.

Hypothetical No. 6: Don runs a practice focusing on representing clients in workers compensation cases. He regularly refers his clients to a personal injury firm for the litigation of personal injury cases arising from those workplace injuries against non-employer parties. Don has an oral agreement with the personal injury firm that he receives one third of any fees they earn. Now, alleging that Don's agreement was never reduced to writing, the personal injury firm is refusing to give Don his referral fees. Does the personal injury firm have to pay Don his referral fees?

Hypothetical No. 6: Don runs a practice focusing on representing clients in workers compensation cases. He regularly refers his clients to a personal injury firm for the litigation of personal injury cases arising from those workplace injuries against non-employer parties. Don has an oral agreement with the personal injury firm that he receives one third of any fees they earn. Now, alleging that Don's agreement was never reduced to writing, the personal injury firm is refusing to give Don his referral fees. Does the personal injury firm have to pay Don his referral fees?

No! Donald Fohrman & Associates v. Marc D. Alberts, P.C., 2014 IL App (1st) 123351 (2014): Substantial compliance is insufficient with regard to this rule's requirements for division of fees; thus, because a worker's compensation firm did not ensure strict compliance and did not disclose to clients its alleged oral referral agreement with a personal injury firm or allege equal sharing responsibility, it was barred from recovering referral fees, even if the personal injury firm had agreed to a joint venture or had engaged in inequitable conduct as alleged.

Hypothetical No. 7: Ton agrees to refer his client to client to a personal injury firm, tells his client that both he and the new firm will remain jointly responsible for the representation, and that his fee will be one third of the one third fee charged by the personal injury firm. The client agrees to the referral arrangement. The personal injury firm takes on the case and achieves a substantial recovery on behalf of the client. Against the client's wishes, the personal injury firm then refuses to pay Ton his referral fee because the referral agreement was not reduced to writing. Is Ton going to get paid?

Hypothetical No. 7: Ton agrees to refer his client to client to a personal injury firm, tells his client that both he and the new firm will remain jointly responsible for the representation, and that his fee will be one third of the one third fee charged by the personal injury firm. The client agrees to the referral arrangement. The personal injury firm takes on the case and achieves a substantial recovery on behalf of the client. Against the client's wishes, the personal injury firm then refuses to pay Ton his referral fee because the referral agreement was not reduced to writing. Is Ton going to get paid?

No! Naughton v. Pfaf, 2016 IL App (2d) 150360 (2016): The obligation to ensure that a client signed a fee-division disclosure could not be delegated to defendant alone, and the lack of a signed disclosure precluded plaintiff from recovering under the alleged fee-sharing agreement underlying his breach of fiduciary duty claim.

What about…

- V. Sneak is a partner at a firm who has signed a partnership agreement with his firm to share all income derived from legal work with his firm.
- V. Sneak's neighbor is terribly injured, and asks Sneak for representation. As Sneak's firm does not practice in the area of personal injury, Lawyer A refers the matter to Rick Greeson, one of the greatest lawyers on the planet earth. Rick and Sneak enter into a referral agreement which is properly signed by the client in which Sneak personally, not his firm, will receive one-third of Sneak's one-third contingency.
- Rick, being one of the greatest lawyers on the planet earth, predictably obtains a recovery of $9 million, and then dutifully pays Sneak his $1 million referral fee.
- Sneak pockets the cash and does not share it with the firm. Sneak either donates all of the funds to worthwhile causes, or, in the alternative, buys an even bigger house in Winnetka that is even closer to the lake.
- Has Sneak violated Rule 1.5? Is Sneak in the clear?

Rule 8.4(c)

- It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

So...

- If it's discovered, V. Sneak is in, as we say in the industry, a jam.

ARDC Ethics Hotline

312.565.2600

PANEL 2 — 9:45am - 10:45am

Breach of Fiduciary Duty and Operating Agreement Disputes

Panel Leader: **Mary F. Andreoni,** Senior Counsel, Ethics Education, *Illinois ARDC*

Panelists: **Kathryne "Katie" R. Hayes,** Associate, *Collins Bargione & Vuckovich*

Matthew J. O'Hara, Partner, *Smith Gambrell & Russell*

John C. Sciaccotta, Partner, *Aronberg Goldgehn*

ARDC
ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION

Mary F. Andreoni, Senior Counsel, Ethics Education, *Illinois ARDC*

Mary is Ethics Education Senior Counsel for the Illinois Attorney Registration and Disciplinary Commission (ARDC) where she develops and implements the ARDC's ethics education initiatives. She has authored many articles including the ARDC publications, Client Trust Account Handbook, The Basic Steps to Ethically Closing a Law Practice, and Leaving a Law Firm: A Guide to the Ethical Obligations in Law Firm Departure and is a frequent contributor to the Illinois Courts Connect newsletter. She has also spoken at hundreds of programs on legal ethics.

Prior to joining the Commission, Mary was law clerk to Illinois Appellate Court Justice Mel R. Jiganti and later practiced commercial litigation with the law firm of Peterson & Ross in Chicago. While in practice, she also served as a board member on the ARDC Inquiry and Hearing Boards. Active in the Chicago Bar Association (CBA), she has served on a number of committees, and is past chair of the CBA Professional Responsibility Committee (2014-2015).

Kathryne "Katie" R. Hayes, Associate, *Collins Bargione & Vuckovich*

Katie is an attorney at Collins Bargione & Vuckovich. Her practice includes ARDC defense, legal malpractice, ethics counseling, commercial litigation and civil appeals. She serves as outside ethics counsel to solo practitioners and law firms in Chicago in various matters relating to professional responsibility and liability.

Katie was peer selected as a Leading Lawyer Emerging Lawyer (2023, 2022) in the areas of Commercial Litigation and Professional Malpractice Defense Law: Including Legal/Technical/Financial. Katie also is a member of Illinois State Bar Association and the Chicago Bar Association and previously served as a co-chair of the CBA's YLS Professional Responsibility Committee. She was appointed to serve as the Vice-Chair of the ISBA Standing Committee on Professional Conduct for 2022-2023 and to serve as the Vice-Chair of the ISBA Attorney Registration & Disciplinary Commission committee for 2022-2023.

Matthew J. O'Hara, Partner, *Smith Gambrell & Russell*

Matt is a Partner in the Litigation Practice of Smith, Gambrell & Russell, LLP and a member of the Firm's Executive Committee. Matt was previously a Partner with Freeborn & Peters, which combined with SGR 2023.

Matt is a business trial lawyer who concentrates his practice in the litigation and trial of complex commercial matters in federal and state courts and matters involving the law of lawyering. He has tried cases involving the federal securities laws, antitrust laws, breach of fiduciary duty, trade secrets, trademark infringement, breach of contract, legal malpractice, contract reformation, unjust enrichment, license agreements, executive employment, the Uniform Commercial Code, fraud, and criminal defense. Matt also litigates private shareholder and partnership disputes, fraudulent transfers, defamation, and other commercial matters. He has represented clients in investigations by the Securities and Exchange Commission, the Federal Trade Commission, and the Illinois Attorney Registration and Disciplinary Commission. He is also experienced in briefing and arguing state and federal appeals. In the legal industry, Matt represents law firms and lawyers in litigation, counseling, and disciplinary defense, and serves as an expert witness in cases involving legal ethics and professional liability.

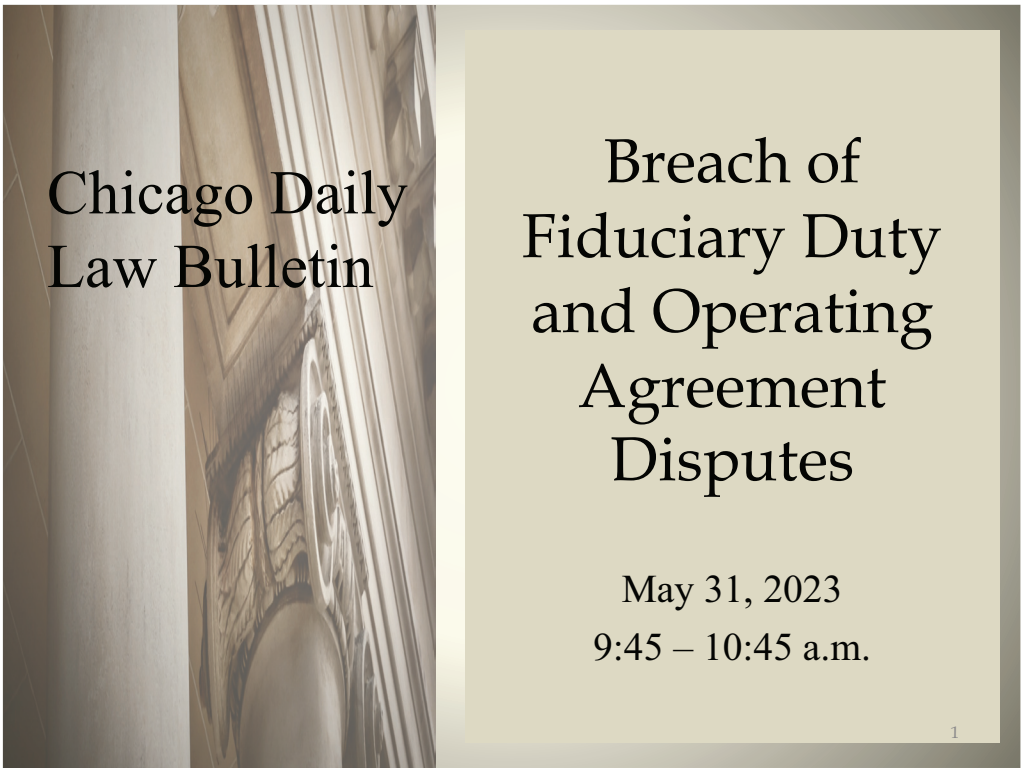
Matt is very active in providing pro bono legal services, receiving the Constitutional Rights Foundation Chicago's "Bill of Rights in Action" Award in 2008. He has been quoted concerning his pro bono representations in a variety of publications and on a number of news programs.

John C. Sciaccotta, Partner, *Aronberg Goldgehn Davis & Garmisa*

John is a member of Aronberg Goldgehn Davis & Garmisa and is active in firm leadership, including the firm's Executive Management Committee, the founder and co-chair of the firm's Business Divorce practice group, the chair of the Commercial Litigation marketing group, a founding member of the firm's DEI Committee, and co-chair of the firm's Marketing Committee.

John has more than 35 years of trial and litigation experience advocating for clients in complex civil litigation, arbitration, mediation and business counseling matters with a special emphasis on complex civil trial and appellate cases brought in federal and state courts and tribunals throughout the United States.

John represents publicly and privately held domestic and foreign business entities, lenders, employers, municipalities, government bodies and individuals in transactional matters and disputes. John has substantial experience representing real estate owners/developers, business owners in a wide array of industries, professional service organizations, partnerships, limited liability companies, manufacturing, construction, technology, professional sales companies, municipalities, hedge funds and broker/dealers, governmental bodies, banks and lending institutions. He has significant experience working with professional sports leagues, owners and players, including representing the Arena Football League, its individual teams and owners for many years. In addition, John has been appointed as a Neutral Arbitrator and Mediator for many years to resolve and arbitrate business related disputes. He serves on the Commercial Panel of the American Arbitration Association's National Roster of Arbitrators.



Agenda

- Starting Your New Law Firm – John C. Sciaccotta
- Operating Agreements: Recognizing and Anticipating Potential Problems – Kathryne Hayes
- Attorneys in Transition: Ethical Considerations for Joining a New Firm, Leaving a Firm, or Merging Firms – Matthew J. O'Hara
- Disciplinary Consequences of Breach of Fiduciary Duty Within the Law Firm – Mary F. Andreoni

2

Breach of Fiduciary Duty and Operating Agreement Disputes

Starting Your New Law Firm

Ethics 2023

Presented By:

John C. Sciaccotta

ARONBERG GOLDGEHN

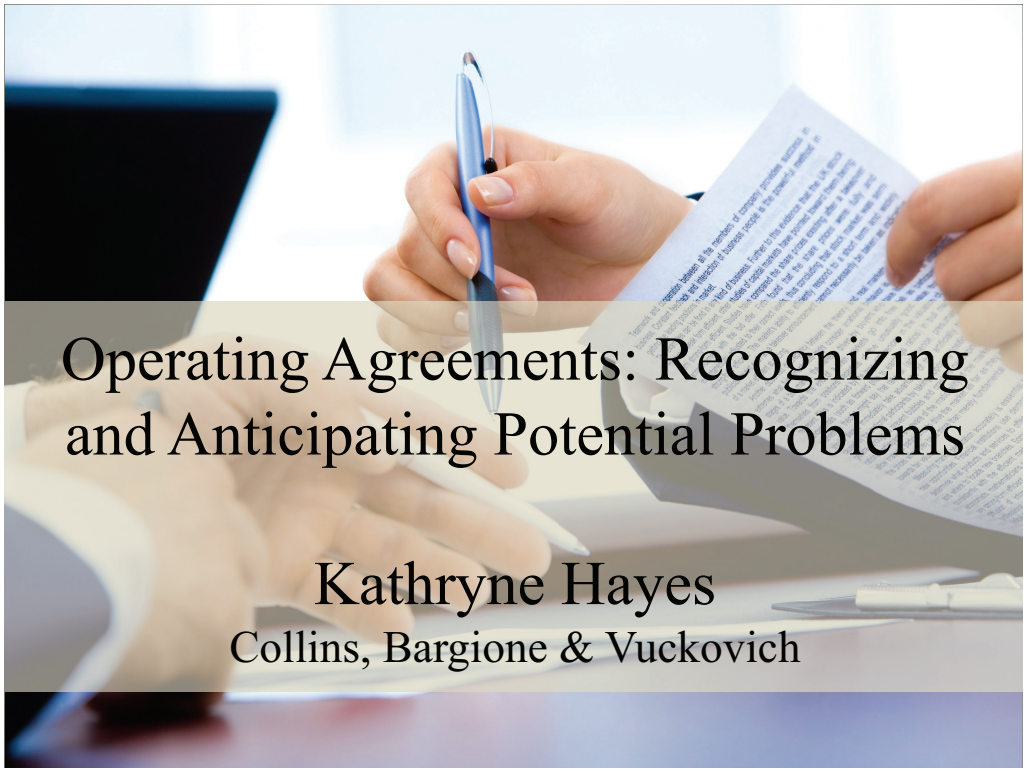
I. Starting Your New Law Firm

1. Business firm
   a) Types: LLC, Corporation, Partnership
   b) Limited liability issues
2. Name of firm
3. Insurance related issues
4. Bank account issues
   a) Trust and operating

I. Starting Your New Law Firm (cont'd)

5. Operating agreement provisions – specifically related to fee sharing
   a) Equity partners share profits/losses
   b) Performance targets
   c) Equity partners share in expenses
   d) Equal voting rights among equity partners
   e) Referral Fees and Co-Counsel Fees (RPC. 1.5)
   f) Arbitration/mediation clause in the operating agreement
   g) Withdrawal Provisions

X. Final Thoughts



Operating Agreements: Recognizing and Anticipating Potential Problems

Kathryne Hayes
Collins, Bargione & Vuckovich

Law firms operating as limited liability companies

- Illinois Limited Liability Company Act (805 ILCS 180/et seq.); see also Ill. Sup. Ct. R. 721
- What are some of the differences between common law partnerships and limited liability companies?

Operating agreement

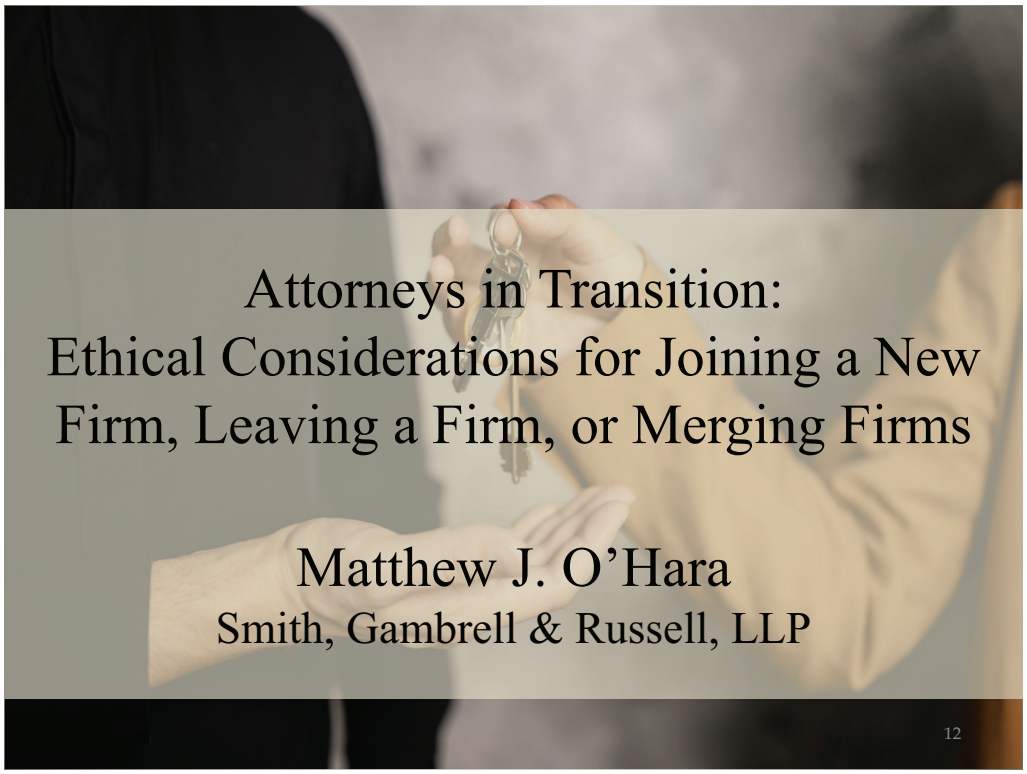
- Does an LLC need to have a written operating agreement?
- "[G]enerally, an LLC operating agreement is to be enforced according to general contract principles, unless it conflicts with a statute." *In re Marriage of Schlichting*, 2014 IL App (2d) 140158, ¶ 63.
- When an operating agreement specifically requires a member to sign to be admitted a member who does not sign is not a member. *Cumulus Radio Corp. v. Olson*, 2015 U.S. Dist. Lexis 29252, at *18 (C.D. Ill. 2015)
- 805 ILCS 180/15-5(g) states: "A person that becomes a member of a limited liability company is deemed to assent to the operating agreement."

Fiduciary duties/decision making process within the law firm

- Manager or member managed? 805 ILCS 180/15-3 (General standards of member and manager's conduct)
- Common law fiduciary duties (805 ILCS 180/15-3(a))
- Fiduciary duties may be altered under the LLC Act. 805 ILCS 180/15-5
- Cannot waive/alter application of the Rules of Professional Conduct
- For example, if you waive duty of loyalty, must still consider conflicts of interest

Withdrawing members or dissolving the LLC

- When does the fiduciary duty owed to the company terminate?
- Is an LLC required to purchase a dissociated members interest? 805 ILCS 180/35-60 was repealed. See *Tsai v. Karlik*, 2021 IL App (1st) 182200-U
- Agreements to share fees after withdrawal or winddown of LLC? (Comment 12 to Amended Rule 1.5; see also *Larsen v. D Constr Inc.*, 2021 IL App (1st) 191999.)



Transitioning to Another Firm

- Pre-departure considerations:
  - Fiduciary duty as a member of the law firm
  - Preparatory steps
  - Confidentiality and conflicts checking
  - Restriction on right to practice – IRPC 5.6

Confidentiality

- Rule 1.6 is very broad
- Limited exception to check conflicts – R. 1.6(b)(7)
  - Only after substantive discussions
  - Not if the disclosure would prejudice your client

- Notice to Clients and Firm
  - Review partnership agreements with notice provisions
  - ABA Formal Op. 489 *Obligations Related to Notice When Lawyers Change Firms* (12/4/2019)
    - Advise firm first
    - Joint communication to clients preferred
    - Clients are not property
    - Don't offer to do client work if you don't have the expertise
    - Don't take client data for clients not leaving with you
    - Client files: you need permission to take client files
    - Timing the departure: compensation issues and disputes

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Restrictions on right to practice

- Non-competes unlawful. *Dowd & Dowd, Ltd. v. Gleason* (Ill. 1989)
- Rule prohibits making, *or even offering*, agreement restricting right to practice
- Partnership agreements and notice provisions:
  - *Cummins v. Bickel & Brewer* (N.D. Ill. 2001)
  - *Stevens v. Rooks Pitts & Poust* (1st Dist. 1997)
  - *Burke v. Lakin Law Firm* (S.D. Ill. 2008)
  - *Hoff v. Mayer, Brown & Platt* (1st Dist. 2002)

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- Post-departure considerations:
  - Duty to deal with each other openly, fairly and honestly
  - Coordinate file transfers
  - Assist former firm collect accounts receivable from your clients
  - Don't burn bridges or disparage
  - Respect client choice

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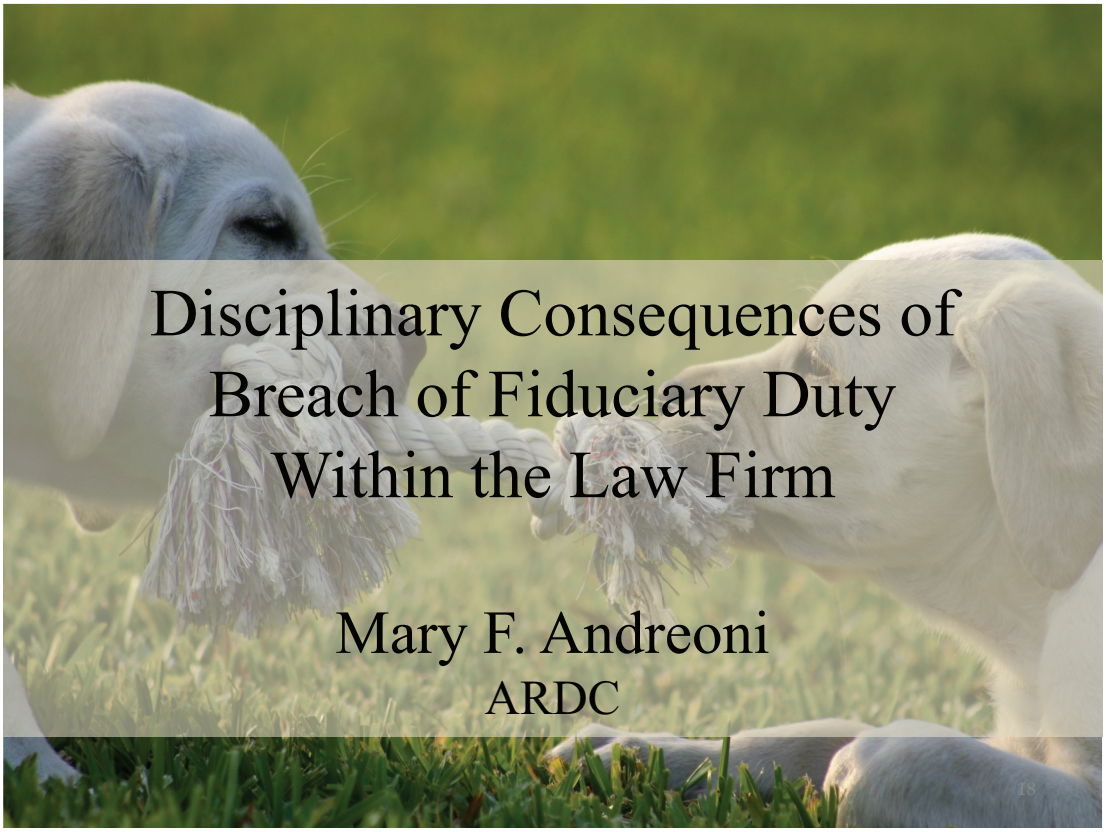

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IRPC 8.4 Misconduct

"It is professional misconduct for a lawyer to:

***

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

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

***

19

In re Shifrin, M.R. 29897, 2018PR72 (Ill. Sept. 2019)

- Non-equity partner at a law firm.
- Discovered he could alter firm's computer system showing origination credits.
- Added more than $200,000 originated from the firm's managing partner and his best friend at the law firm to his book of business.
- Took place over a four-year period earning him $30,000 more in compensation.
- Testified at hearing that he was frustrated with the firm's compensation system.
- 1-year suspension

In re Wettermann, M.R. 30542 2020PR00031 (1/21/21)

- Over a five-year period, submitted more than 380 requests that his firm reimburse him for travel, lodging, and dining expenses relating to client matters, totaling approximately $360,000.
- Firm determined either that the trips had not been taken or that there was insufficient proof to show that the expenses had actually been incurred.
- Licensed in 1995, Wettermann was disbarred on consent.

21

In re Hankes, 2019PR00102, M.R. 31005 (Jan. 20, 2022)

- Three-year suspension for partner lawyer who, over the course of about 20 months, submitted false bills to his firm for over $100,000, and from the payments made on those bills, took nearly $80,000 that belonged to his clients by submitting false expense statements and reimbursement requests.
- Licensed in 2006.

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In re Maciasz, M.R. 23960, 2006PR80 (Ill. 2010)

- One-year suspension for secretly operating his own separate law practice while employed as a full-time attorney at successive law firms.
- Licensed in 1992, he submitted an employment application to the second law firm that contained false information, including falsified tax records, in order to hide his outside income and clients from the firm and failed to disclose outside clients on conflicts form submitted to employer.

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- **In re Paleczny, M.R. 30940, 2021PR00051** (Sept. 23, 2021). Licensed in 2018 Recorded more than 2,000 hours on a closed pro bono case beginning in 2019 until February 2021, earning a $12,000 bonus as a result. 1 year suspension.
- **In re Gerstetter, M.R. 30922, 2021PR00050** (Sept. 23, 2021). Licensed in 2018. Inflated hours on a document review project from 2019 to June 2020 resulting in an overcharge of more than $40,000 to a law firm client. The law firm refunded the client's overpayment. 60 days suspension.

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Departing Law Firm Members

- **In re Potere, M.R. 030805, 2018PR00030 (Sept. 23, 2021)** - former associate downloaded sensitive documents, including financial documents, client billing rates, and associate reviews and salary offers then threatened to leak the information to the legal blog Above the Law unless his demands for over $200,000 and artwork were met. Disbarred.

- **In re Park, M.R. 25897, 2012PR00027 (March 15, 2013)** - former partner downloaded at least 75,000 electronic files from Ladas' computer network onto his own external memory devices. Those documents included firm's client files, a client directory, the firm's foreign associate directory, and other electronic files, such as forms and templates. Suspended 1 year.

- **In re O'Connor, M.R. 19328, 2001PR00096 (May 17, 2004)** - during the process of dissolution, former partner disclosed to opposing counsel confidential information regarding the amount the client would accept for settlement of a case arising out of a dispute over the partners' relative entitlement to assets of the firm. Suspended 30 days.

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Transitioning to Another Firm

- Duties Owed to Clients
  - Communication with clients impacted by departure
  - Avoid prejudice upon withdrawal
  - Respect a client's fundamental right to choose
- Duties Owed to Firm
  - Deal with each other openly, fairly and honestly
  - Know what is or isn't firm property
  - No pre-departure solicitation of clients

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ARDC Resources

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☆ **ARDC Publications**

Guide to Ethical Obligations in Leaving a Law Firm (rev. Jan. 2020)

Basic Steps to Closing a Law Practice (rev. Feb. 2017)

☆ **Rules of Professional Conduct & Disciplinary Law**

ARDC website at: *www.iardc.org*

☆ **Guidance on the Rules & IL Lawyer's Professional Duties**

Call the ARDC Ethics Inquiry Hotline:
312-565-2600 (Chicago); 217-546-3523 (Springfield)

☆ **FREE online CLE seminars at ARDC web site**:

https://www.iardc.org/CLESeminars.html

☆ **Lawyers' Assistance Program**:

1-800-LAP-1233

☆ **Talk it out with other lawyers**

See IRPC 1.6(b)(4)

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Questions

PANEL 3 — 10:55am - 11:55am

Substance Abuse by Attorneys at Your Firm (Substance Abuse/Wellness)

Panel Leader: **Christine P. Anderson,** Director of Probation & Intake Group Manager, *Illinois ARDC*

Panelist: **Dr. Diana Uchiyama,** Executive Director, *Lawyers' Assistance Program*

Christine P. Anderson, Director of Probation & Intake Group Manager, *Illinois ARDC*

Christine serves as Director of Probation and Intake Group Manager for the Illinois Attorney Registration and Disciplinary Commission of the Illinois Supreme Court (ARDC). Christine has investigated and prosecuted hundreds of cases of attorney misconduct and has argued several disciplinary cases before the Supreme Court of Illinois. Additionally, she has managed an attorney litigation group and has been the staff liaison to certain bar association committees. She currently monitors the attorneys placed on probation, supervision, diversion and conditional admission. Christine is also a frequent presenter at continuing legal education programs on topics related to professional responsibility and lawyer regulation.

Dr. Diana Uchiyama, Executive Director, *Lawyers' Assistance Program*

Diana is the Executive Director of the Lawyers' Assistance Program ("LAP"). Prior to joining LAP, she was the Administrator of Psychological Services for DuPage County where she oversaw a DASA licensed substance use treatment program, including a MISA program, and DHS Domestic Batterer Intervention Program for a court mandated population of clients. She has also worked for the Kane County Diagnostic Center, as both a Staff Psychologist and Juvenile Drug Court Coordinator, and has an extensive background doing court ordered psychological, sanity, fitness, and sex offender evaluations and therapy. She has implemented numerous changes to court ordered programs both in Kane and DuPage County and is a certified trauma informed care trainer.

Prior to obtaining her masters and doctorate in Clinical Psychology, Diana was an Assistant Public Defender in Cook County working in various felony courtrooms at 26th and California. She obtained her law degree from Pepperdine University School of Law.

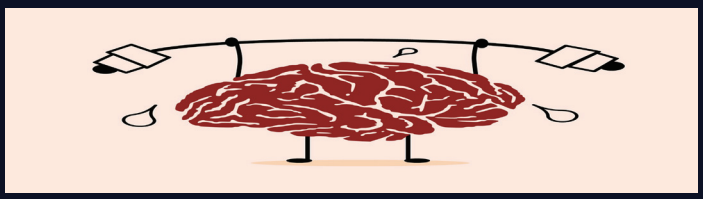
SUBSTANCE ABUSE AND ATTORNEYS IN YOUR FIRM

ETHICS 2023
IN-PERSON & STREAMING
Wednesday, May 31st

Law Bulletin Media
May 31, 2023

Dr. Diana Uchiyama
Illinois LAP
Executive Director

Christine Anderson
ARDC
Director of Probation



- Mental health and attorney wellness
- Practicing law and self-care
- The role of colleagues, peers, mentors and attorney regulation: providing meaningful help

"To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to wellbeing . . . the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust."

ABA National Task Force on Lawyer Well-Being
(August 14, 2017)

2022 Illinois Lawyer Population

- ✓ 95,711 of Active and Inactive
- ✓ 231 more lawyers than in 2021; average 0.6% net increase in lawyer population since 2015
- ✓ 28% increase in 2022 over prior year of lawyers moving to Retired status
- ✓ 66.5% of Active status lawyers are in private practice
- ✓ 50.5% of Active lawyers are solos or in firms of 2-10 lawyers; a decrease of 2.1% over 2021
- ✓ 40.0% female lawyers

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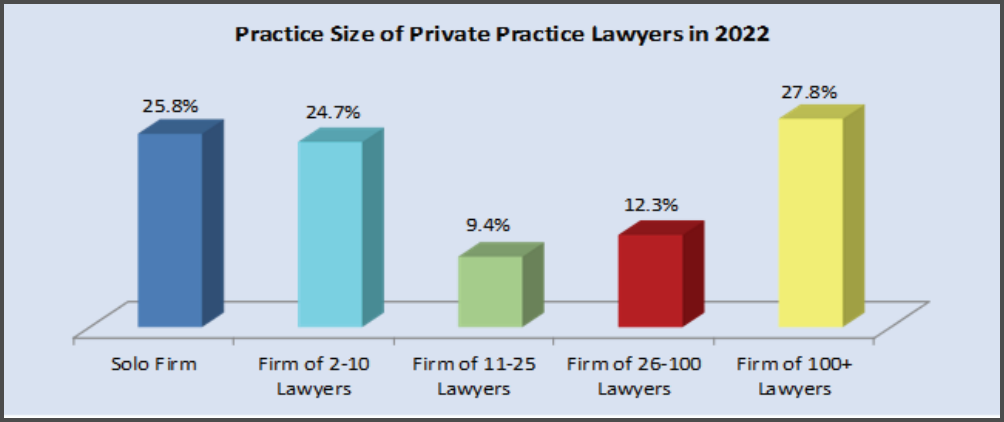
Private Practice Lawyers in 2022



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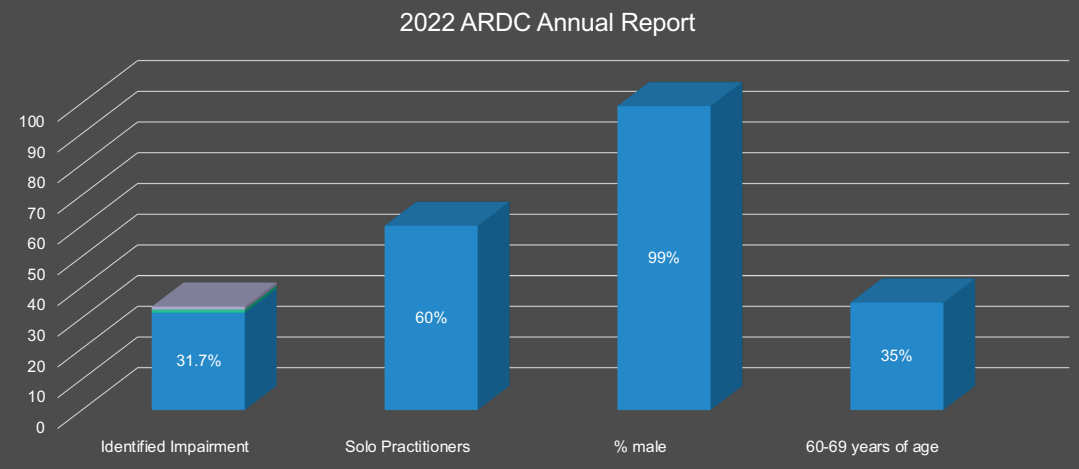
1 in every 3 lawyers disciplined each year in Illinois has been identified as having a substance use or mental impairment



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Lawyer Impairments 2022

Impairments Identified for Lawyers Disciplined in 2022, By Practice Setting

Practice Setting	*Solo Firm*	*Firm 2-10*	*Firm 11-25*	*Firm 26+*	*Gov't/ Judicial*	In-House Corporate	Academia	Not Engaged in Practice	Total
20 Lawyers* with Impairments									
Impairment									
Substances:									**12**
Alcohol	5	1		1				2	9
Cocaine	1								1
Cannabis									0
Amphetamine									0
Opioids									0
Other Substance	1	1							2
Mental Illness:									**15**
Depression	6	3		1				1	11
Bipolar	1								1
Schizophrenia	1							1	2
Personality Disorder									
Gambling									
Sexual Disorder									
Cognitive Decline	1								1
Other									

* Six lawyers had more than one identified impairment.

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Why Are Legal Professionals at High Risk of Mental Health & Substance Use Disorders?

- Conflict driven and adversarial profession (you see some of the worst of humanity)
- You need to be emotionally detached to get through your caseload
- Perfectionism
- Excessive self-reliance

These traits are great for a successful career but not so great for mental health.

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Why Are Legal Professionals at High Risk of Mental Health & Substance Use Disorders?

- High expectations and accountability
- Lack of work-life balance
- High stress level
- High stress levels & work-weeks >50 hrs. are consistent predictors of SUD's and their severity.
- 67% of attorneys/judges work more than 40 hours/week.
- Inherent pessimism

THE CONSPIRACY OF SILENCE

- Lawyers are trained to deal with and solve problems. Thus, it is most difficult for the lawyer to seek help since by doing so he/she feels he/she is admitting failure.
- Complicating this problem further is the tendency of the lawyer's peers to indulge in a conspiracy of silence (enabling) and lighten the normal stresses of our profession.
- Concerns that receiving help may impact future election/reputation in the community.

Lawyers who do not appropriately address their personal issues can harm the judicial system, destroy their own careers, and sometimes even lose their lives.

YOU MATTER!

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What Can The Firm Do?

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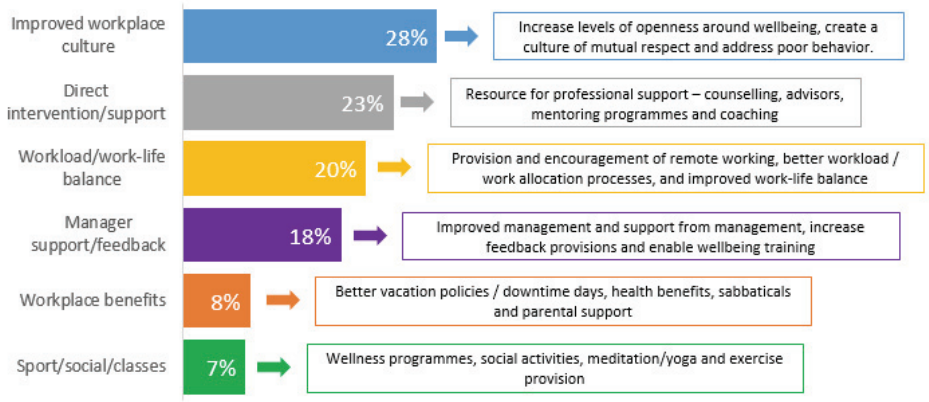
What more should a firm do?

Desired improvements largely focus on cultural change and intervention, better workload provision and increased support from management



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What Can the Firm Do?

- Appoint a Lawyer Well-Being Committee or a Well-Being Advocate (ABA Well-Being Pledge)
- Assess lawyers' well-being through ongoing assessments.
- Adopt model law firm policies for handling lawyer impairment.
- Establish a confidential reporting procedure for lawyers and staff concerned about a colleague's impairment.
- Establish procedures that allow for lawyers to seek confidential help.
- Work with lawyer assistance programs to secure services for impaired lawyers.
- Actively combat social isolation and encourage interconnectivity
- Monitor for signs of work addiction and poor self-care

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Firm Impairment Policy & Well-Being Templates

- Addressing Impairment Concerns
- Confidentiality Provisions
- Considerations Upon determination of Impairment
  - Leave of absence
  - Referral/Treatment
  - Restriction of Work Duties
  - Review of Activity
  - Remedial Action
  - Reporting to Discipline
  - Conditional Employment
  - Consequences of Violations

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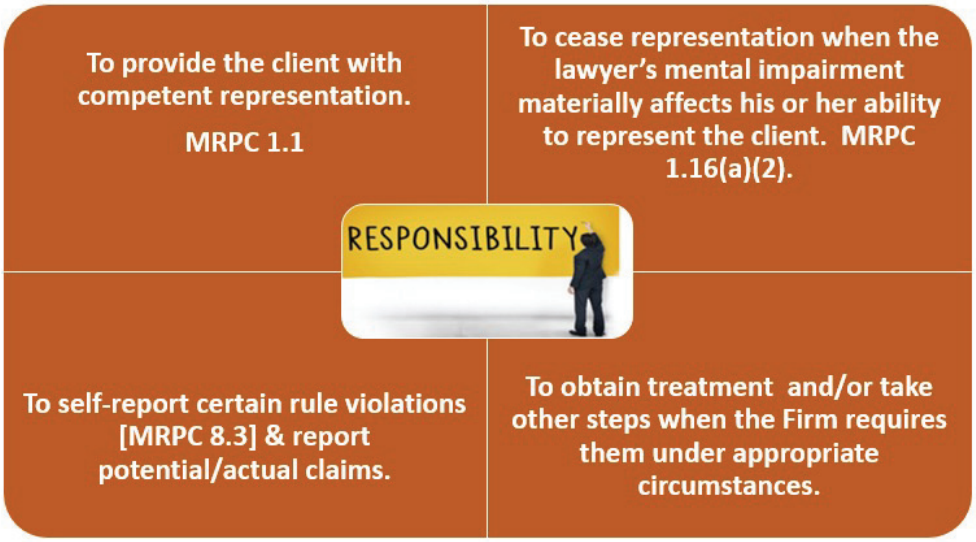
COURT RULES & ATTORNEY WELLNESS

THE IMPAIRED LAWYER'S RESPONSIBILITIES



www.lclpa.org 17

Duty of Impaired Attorney

IRPC 1.16: DECLINING OR TERMINATING REPRESENTATION

. . . a lawyer shall not represent a client, or . . . shall withdraw . . . if:

- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

Obligations of the Law Firm

- Supervisory Responsibilities – IRPC Rule 5.1 - requires lawyers with supervisory authority over other lawyers to make reasonable efforts to ensure the conduct of these individuals is consistent with the ethical obligations of a lawyer.

Obligations of the Law Firm

ABA Ethics Op. 03-429 *Obligations with Respect to Mentally Impaired Lawyer in the Firm*

Possible obligations of the law firm

Remove the lawyer from representing clients	Make disclosures to the clients, but balance against the lawyer's right to privacy	If the firm knows that the lawyer engaged in dishonest or criminal conduct, the firm might need to report the lawyer under Rule 8.3(a).

ABA Formal Ethics Op. 03-431

1. Misconduct attributable to a suspected physical, mental or emotional impairment must still be reported to disciplinary authorities
2. Advising to LAP = not a substitute for obligations under 8.3

Let's apply what we just learned . . .

Lawyer Betty Blues has filed a motion in court with many spelling errors and no supporting documentation or case law. Opposing counsel, Honest Abe, finds that the motion is unusual for Betty as her previous motions were always very thorough. Abe calls Betty's cell phone to discuss the matter but Betty's voicemail is full. Abe then calls Betty's office but is told that she is not in the office. Abe leaves a message for Betty but Betty does not return Abe's call. Again this is out of the ordinary as Betty is typically very prompt at returning calls.

At the next status date in the case, Betty does not appear in court. On the way back to the office, Abe sees Betty on the street and she appears to be very anxious and disheveled, which is again unusual for Betty. She tells Abe that she forgot about the status hearing that day. Abe believes he smells an odor of alcohol on Betty's breath.

Question 1

Abe is concerned about Betty.

What is the best course of action for Abe to take?

a) Should Abe contact the Lawyers' Assistance Program (LAP) regarding his concerns about Betty?
b) Should Abe file a disciplinary complaint against Betty?
c) Should Abe talk with Betty about what he has observed?
d) Should Abe do nothing?

Question 2

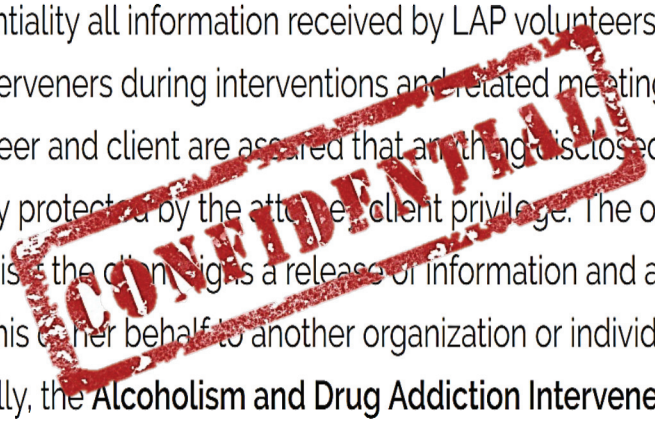
What if Betty contacts the LAP and speaks to an attorney intervener and during her conversation with the intervener she admits that she lied to her client about the status of their case and also spent money the client had given her to pay for a court expense to pay her own overdue credit card bill. Does the LAP intervener have an obligation under the Rules of Professional Conduct to report Lawyer B to the ARDC?

Yes or No

Confidentiality is the Cornerstone of LAP

Confidentiality is guaranteed. **Illinois Supreme Court Rule 1.6**. cloaks in confidentiality all information received by LAP volunteers and trained interveners during interventions and related meetings. Both the volunteer and client are assured that anything disclosed is specifically protected by the attorney client privilege. The only exception is if the client signs a release of information and asks LAP to report on his or her behalf to another organization or individual.

Additionally, the **Alcoholism and Drug Addiction Interveners and Reporter Immunity Law** guarantees immunity for LAP Volunteers and those who participate in its work.



Question 3

What if Betty talks with her law partner and admits to the partner that she lied to the client about the status of the case and spent money the client had given her to pay for a court expense to pay her own overdue credit card bill. Does the law partner have an obligation under the Rules of Professional Conduct to report Betty to the ARDC?

Yes or No

Duty to Report Rule 8.3

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

- Requires disclosure by a lawyer of information involving a criminal act that reflects adversely on another lawyer's honesty, trustworthiness or fitness and/or conduct involving dishonesty, fraud, deceit, or misrepresentation
- The "appropriate professional authority" must be notified

Resources

- **National Task Force on Lawyer Well-Being Report & Recommendation**
- https://lawyerwellbeing.net/
- **Well-Being Template for Legal Employers**
- https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/well-being-template-for-legal-employers-final-3-19.pdf
- **Well-Being Toolkit for Lawyers & Legal Employers**
- https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_well-being_toolkit_for_lawyers_legal_employers.pdf
- **Well-being Toolkit Nutshell: 80 Tips for Lawyer Thriving**
- https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_Well-Being_Toolkit_Flier_Nutshell.pdf
- **ABA Well-Being Pledge Campaign**
- https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_working_group_pledge_and_campaign.PDF
- **ABA Well-Being Pledge Commitment Form**
- https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_working_group_pledge_commitment_form.pdf

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3

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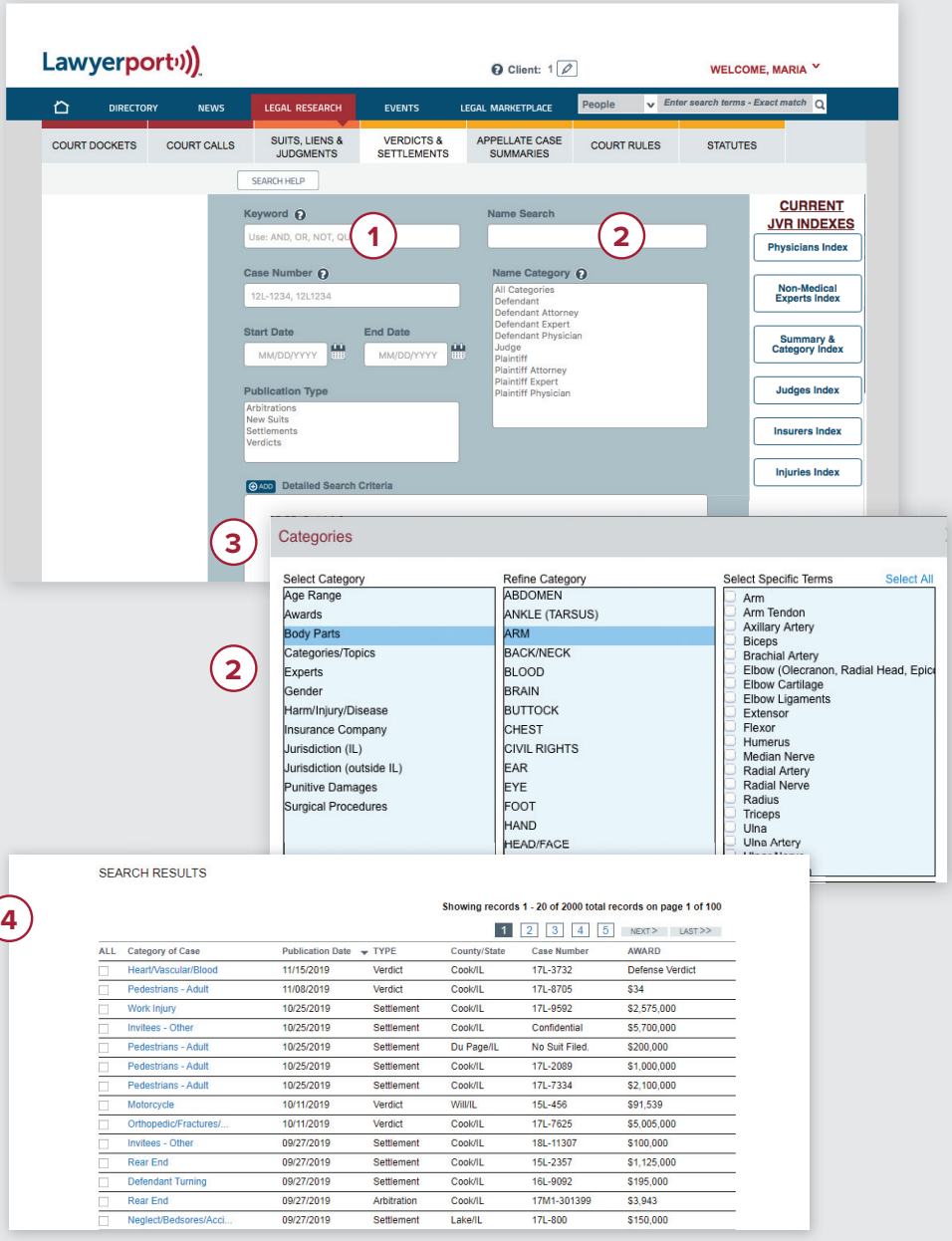
4

UNDERSTAND TRENDS BY INJURY AND JURISDICTION

Understand case history for your judge and opponent

SEARCHABLE DATABASE



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