

MONTHLY
LUNCHTIME SEMINAR
SERIES

42nd session:

CLIENTS SPEAK: THE
ETHICS OF
REPRESENTATION

Judge Lynn M. Egan
Judge Patricia O'Brien Sheahan
Mr. Joseph W. Balesteri
Mr. Scott H. Beckman

July 22, 2016

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 19 years. She has presided over high volume motion calls, an Individual Commercial Calendar, an Individual General Calendar and bench and jury trials. She is currently the only Cook County judge assigned to a General Individual Calendar in the Law Division, which includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, infliction of emotional distress, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, fraud, conspiracy, breach of fiduciary duty, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls in the Law & Chancery Divisions & the Municipal Districts are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling over 250 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court ordered medical exams, attorney-client/work product privileges, sanctions and damages. She also serves as a mentor for new judges and was recently appointed to the Illinois Courts Commission, a seven-member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 7,500 hours of CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in Cisarik v. Palos Community Hospital. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

JUDGE PATRICIA O'BRIEN SHEAHAN

Judge Sheahan is a Cook County Circuit Court judge, currently assigned to the First Municipal District, where she presides over a post judgment and miscellaneous remedies call. She previously covered a civil non-jury trial courtroom and a civil jury motion call. Judge Sheahan serves on the Board of Directors of the Illinois Judges Association.

Prior to her election in 2014, Judge Sheahan served as Associate General Counsel of the Rehabilitation Institute of Chicago (RIC), where she oversaw all litigation and claims against RIC, including case investigations, pre-trial discovery and settlement negotiations. Additionally, she handled and defended all employment/labor matters and claims before the EEOC, the NLRB and the IDHR, including fact conferences, mediations and evidentiary hearings. She also represented RIC in a wide variety of other complex disputes ranging from employment contracts, insurance coverage and probate matters.

Before joining RIC, Judge Sheahan worked as a litigation associate at Baker & McKenzie, LLP and gained extensive federal and state court experience in a wide range of complex civil litigation matters, including medical malpractice, employment, products liability, and class action suits. She also represented clients at the appellate level, including the Illinois Supreme Court and multiple appellate districts throughout the state of Illinois.

Throughout her career, Judge Sheahan devoted substantial time to pro bono and public interest work. She has been active with the Center for Disability and Elder Law and served for 12 years as a member of its Governing Board of Directors, as well as its Advisory Board. She also served as Vice President of the Easy K Foundation, which is a not-for-profit residential home for individuals with developmental disabilities.

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Joseph Balesteri is a partner at Power Rogers & Smith, where he devotes his practice to catastrophic injury litigation. Prior to joining the firm in 2000, Mr. Balesteri worked as a defense attorney with the law firm of Hinshaw & Culbertson, within the medical malpractice/professional liability department. During that time, Mr. Balesteri primarily represented doctors, nurses and hospitals.

Since joining Power Rogers & Smith, Mr. Balesteri's efforts on behalf of his clients have resulted in over \$500 million of recovery. Additionally, he has been consistently recognized by his peers.

In 2004, he was selected in a survey conducted by the Law Bulletin as a "Leading Lawyer" at the age of 34, a distinction earned by fewer than 5% of all personal injury attorneys licensed in Illinois. In 2005, he was selected by his peers as a "Super Lawyer" in medical malpractice litigation at the age of 35, another distinction earned by fewer than 5% of all Illinois malpractice attorneys. In 2008, Mr. Balesteri was featured in Chicago Lawyer magazine following a survey of judges and veteran trial lawyers as a rising star of the trial bar; and in 2010, he was selected as a "Top 100" trial lawyer by the National Trial Lawyers. In 2014, he was elected President of the Society of Trial Lawyers and in 2015, he was selected as a "Top 100" lawyer by the Illinois Super Lawyer Publication.

In 2015, Mr. Balesteri was also appointed by the Illinois Supreme Court to the Committee on Equality, which is charged with developing recommendations to improve fairness and equal access to our justice system.

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Scott H. Beckman is the Vice President of Claims for ISMIE Mutual Insurance Company. In his role at ISMIE Scott provides leadership for the claims function for the company along with operational development involving reinsurance structures and strategic planning for new business and expansion. Previously, Scott held the position of Vice President of Risk Management, Insurance and Claims for Advocate Health Care Network for twenty years. During his tenure at Advocate, he served as the Chairman for three medical liability captives and segregated portfolio companies.

Scott is the current Chairman of the board for the Captive Insurance Companies Association (from 2014-2016) and current Chair of the CICA Programming Committee (from 2012-2016); Past-Chair of the RIMS Conference Programming Committee; Vice-Chair of the RIMS Finance Committee and Member of the RIMS 2020 Strategic Task Force. He has previously served as Chairman of several Association Tort Reform Committees and former Member of Healthcare Advisory Boards and New Insurance Product Committees for several multi-national insurance companies. He is an elected member of the Federation of Defense & Corporation Counsel and member of the PLAA.

In 2008, Scott was the recipient of National Risk Manager of the Year Award from Business Insurance Magazine. He has been recognized in 2013 and 2015 Captive Review Magazine as one of the Power 50 influential persons in the Captive industry. He has been a licensed practicing attorney in Illinois since receiving his JD from Loyola University School of Law in January, 1984.

SECTION A

- **“Clients Speak: The Ethics of Representation,”**
by Judge Lynn M. Egan, July 2016.

CLIENTS SPEAK: THE ETHICS OF REPRESENTATION

by

Judge Lynn M. Egan

July 2016

*“The practice of law is a public trust. Lawyers are the trustees of the system by which citizens resolve disputes among themselves, punish and deter crime, and determine their relative rights and responsibilities toward each other and their government. Lawyers therefore are responsible for ***maintaining public confidence in the system of justice by acting competently and with loyalty to the best interests of their clients; by working to improve that system to meet the challenges of a rapidly changing society; and by defending the integrity of the judicial system against those who would corrupt, abuse or defraud it.”*

DeLuna v. Burciaga, 223 Ill.2d 49, 72-73 (2006)(citing Illinois Rules of Professional Conduct, Preamble.).

I. Not Merely Aspirational

Although the legal professional enjoys substantial autonomy due to the fact that it is largely self-governing, this autonomy is not synonymous with optional compliance with the Rules of Professional Conduct. In fact, the professional autonomy enjoyed by the legal profession “carries with it special responsibilities.” *Illinois Rules of Professional Conduct, Preamble*, ¶ 12. Those responsibilities not only include individual compliance, but also the duty to “aid in securing their [compliance] by other lawyers.” *Id.*

This latter duty can be particularly challenging, especially in the context of law firms with numerous attorneys. However, it must be remembered that the relationship between attorney and client constitutes a fiduciary relationship that imposes “weighty obligations.” *DeLuna, supra* at 72-73. Thus, once an attorney becomes aware of a violation of the Rules of Professional Conduct, action must be taken. *See generally, In the Matter of Pellegrino*, 07 CH 90, Sept. 30, 2008(Law firm partners terminated & reported associate to the ARDC for travel expense fraud.). Indeed, failure to act may, itself, constitute misconduct. “Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.” *Illinois Rules of Professional Conduct, Preamble*, ¶ 19.

Of course, this obligation does not allow the Rules to be “invoked by opposing parties as procedural weapons.” *Illinois Rules of Professional Conduct, Preamble*, ¶ 20.

II. Communication – Thou Shall Keep in Touch!

Review of the ARDC decisions reveals that lack of prompt, candid or complete communication with clients is a recurring source of the complaints filed against attorneys. Indeed, thousands of cases involving alleged violations of Rule 1.4 are reported on the ARDC website. In fact, in just the last five years, 91 cases included

such an allegation. See, Section B. Thus, it is imperative that lawyers understand the scope and nature of the duties imposed under the applicable Rule.

A. Rule 1.4

(a) "A lawyer shall:

- 1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- 2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- 3) keep the client reasonable informed about the status of the matter;
- 4) promptly comply with reasonable requests for information; and
- 5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

The duty under Rule 1.4 is "a two-part duty to communicate with...clients in order to keep them both "reasonably informed about the status" of their cases and to "promptly comply" with their requests for information. *In re Smith*, 168 Ill.2d 269, 282 (1995). Keeping the client informed is essential because it is the only way the client can make intelligent decisions about the litigation. *Id.* See also, *In re Ring*, 141 Ill.2d 128, 140 (1990). Not surprisingly, responding promptly to requests for information applies to all clients, even those considered legally sophisticated. *In re Smith*, *supra* at 282. However, it is considered "particularly important for those clients who may be unfamiliar with the workings of our legal system." *Id.*

CAUTION: Neglect or failure to communicate in criminal cases has been deemed more egregious than civil cases involving monetary damages. "Therefore, 'more severe discipline is appropriate to deter neglect in criminal cases than in civil cases.'" *In re Ring*, *supra* at 145.

B. Silence is Never Golden Under Rule 1.4

The first part of the duty under Rule 1.4 imposes "an affirmative duty on lawyers to take the necessary steps to keep clients informed about their cases." *Id.* This means that the lawyer, not the client, is responsible for initiating contact in a timely and diligent manner. *Id.* Part of the rationale for placing this obligation on the attorney is the fact that most clients are simply not qualified to closely monitor their attorney's conduct. *DeLuna*, *supra* at 73.

The second part of the duty requires promptness by the attorney, even if only to let the client know that a substantive response is not feasible at the time. In such a situation, the attorney may task a staff member with contacting the client in order to acknowledge the request and indicating when a response will be forthcoming. *Illinois Rules of Professional Conduct, Rule 1.4, Committee Comments, ¶ 4.*

NOTE: The information provided to clients must be adequate to enable the client “to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.” *Id.* at ¶ 5. Generic statements are insufficient, particularly if a specific finding contrary to the client’s interest has been entered. See, *In re Habib*, 14 PR 0156 (March 11, 2016)(Attorney violated Rule 1.4 by merely telling client the case was “not going well” rather than revealing that a default order had been entered.). Best practice is to provide the client with a copy of the actual court order or verbally provide specific information about the substance of the order. Of course, if an oral explanation is provided, the lack of corroborating evidence may be to the attorney’s detriment once disciplinary proceedings have begun. *Id.*

C. Thou Shalt Not Lie – Ever!!

Although Rule 8.4(c) expressly includes deceit and misrepresentation as examples of professional misconduct that are independently sanctionable, the cases involving Rule 1.4 make clear that lack of candor during client communications or before the ARDC is an exacerbating factor that frequently leads to more serious discipline. See generally, *In re Mason*, 122 Ill.2d 163 (1988)(Even though attorney’s failure to file a statutory notice with the CTA did not warrant discipline, his lack of candor before the ARDC justified censure.). Accord, *In re Ring*, 141 Ill.2d 128 (1990)(Telling client there were no appealable issues instead of admitting that appeal had been dismissed due to attorney’s failure to file brief was sanctionable as deceit.).

III. Authority to Mediate/Settle¹

“The decision of whether to settle a civil matter is one of the most fundamental and important rights reserved to the client.” *Ring v. Deming II*, 2015 IL App (1st), 131731-U, ¶ 10. Thus, the ultimate decision about whether to settle a case “must be made by the client.” *Id.*

Although the attorney must engage in “reasonable communication” with the client in order to facilitate an informed decision, an attorney must always obtain specific authorization from the client to settle. *Id.* Not surprisingly, therefore, a fee agreement that surrenders settlement authority to the attorney without advance consultation violates the Rules of Professional Conduct, specifically including Rules 1.4 and 1.2. *Id.* Because Rule 1.2 expressly covers allocation of authority between a client and attorney, it is appropriate to note the following specific provision:

A. Rule 1.2. Scope of Representation & Allocation of Authority Between Client & Lawyer

- a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is

¹ Thanks to Mr. Joseph Balesteri for compiling the research on this topic.

impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

Many lawyers and judges assume that an attorney's presence at a voluntary settlement conference or mediation is synonymous with the authority to settle. It is not. As noted by the Illinois Supreme Court in Brewer v. National Railroad Passenger Corp., 165 Ill.2d 100, 105-106 (1995), "the authority of an attorney to represent a client...is separate from and does not involve the authority to compromise or settle the lawsuit." As a result, the authority to settle "will not be presumed" and if opposing counsel "fails to make inquiry or to demand proof of the attorney's authority, opposing counsel deals with the attorney at his or her own peril." Accord, Shapo v. Tires 'N' Tracks, Inc., 336 Ill.App.3d 387 (1st Dist., 2002).

CAUTION: When a settlement is made out of court, rather than reduced to a judgment order, "opposing counsel is put on notice to ascertain the attorney's authority" because the client is not bound by the agreement without proof of express authority to the specific terms of the agreement and the party alleging authority bears the burden of proof. Id. See also, Brewer, supra at 106.

B. Know the Identity of Your Client – All of Them!

When claims are brought pursuant to the Wrongful Death Act, it must be remembered that plaintiff's attorney owes a legal duty to all beneficiaries, not just the special administrator. In re Estate of Powell, 2014 IL 115997, ¶ 20. Because a wrongful death action is brought for the exclusive benefit of the surviving spouse and next of kin, they are the true parties in interest and the attorney's duty extends to them at the distribution stage. Id. at ¶ 20-22.

Although the special administrator has the sole right to control the lawsuit, including the decision to settle (Cushing v. Greyhound Lines, Inc., 2012 IL App (1st) 100768, ¶ 92), this authority does not limit the scope of the attorney's duty. Failure to understand this basic concept may place the attorney in a conflict situation if the decedent's beneficiaries are at odds about distribution of settlement proceeds.

CAUTION: An attorney who erroneously advocates for one beneficiary over another is subject to serious consequences, including forfeiture of all fees or referral to the ARDC. See, Baez v. Rosenberg, 409 Ill.App.3d 525 (1st Dist., 2011) & Cushing, supra

C. Specify the Terms – Or Suffer the Consequences

Oftentimes, parties will engage in settlement discussions while a dispositive motion is pending. While this practice can be advantageous due to the risks to both sides prior to

resolution of the motion, best practice dictates that attorneys confer with their clients and each other about the length of time such offers will remain open.

Merely assuming that such an offer expires upon resolution of the motion can lead to unintended results. See generally, *Kalis v. Colgate Palmolive*, 337 Ill.App.3d 898 (1st Dist., 2003)(Settlement offer accepted after defendant prevailed on summary judgment motion. Appellate Court held: "If a contract offer does not include a limitation on the time period for its acceptance, it will lapse if not accepted within a reasonable time.").

D. Burden of Proof

When the plaintiff denies an attorney's authority to settle, the burden of proof requires plaintiff to set forth specific facts that establish lack of authority by a preponderance of the evidence. *Blutcher v. EHS Trinity Hospital*, 321 Ill.App.3d 131, 140 (1st Dist., 2001). Once done, the burden then shifts to the defendant to show not only the attorney's authority to settle, but the plaintiff's consent "after knowledge of the facts." *Id.*

IV. Fees & Billing

Long ago, the Illinois Supreme Court noted, "in fixing fees, as well as in the institution of litigation, it is well for a lawyer to bear in mind that his profession is concerned with the administration of justice and is not a mere moneymaking trade." *In re Doss*, 367 Ill. 570 (1937).

In order to give specific guidance to the above declaration, Illinois Rule of Professional Conduct 1.5 provides as follows:

- (a) "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.
- (b) The scope of the representation and the basis or rate of the fee and expenses 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...
- (c) ***A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or 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 contingent fee is calculated."

NOTE: Contingent fee agreements are prohibited in criminal cases or domestic relations matters if payment is contingent on securing divorce or the amount of alimony/support or property settlement. *Illinois Rules of Professional Conduct 1.5(d)(1) & (2).*

SECTION B

- **Rule 1.4 ARDC Decisions**

Rule 1.4 ARDC Decisions in Past 5 Years

1. In re Leijuana Doss, 14PR0143 (May 24, 2016)
2. In re Casey VanWinkle, 15PR0086 (April 29, 2016)
3. In re Robert Habib, 14PR0156 (March 11, 2016)
4. In re Cameron Davidson, 14PR0169 (March 10, 2016)
5. In re Dewey Haime, 14PR0153 (March 9, 2016)
6. In re Nancy Carlson, 12PR0045 (March 8, 2016)
7. In re George Krasnik, 15PR0001 (February 18, 2016)
8. In re Matthew Wildermuth, 12PR0175 (February 10, 2016; April 20, 2015)
9. In re Ronald Kesinger, 14PR0083 (January 21, 2016)
10. In re Vincent O'Brien, 14PR0024 (January 21, 2016; May 27, 2015)
11. In re Jamie Zeas, 14PR0069 (January 14, 2016)
12. In re Steven Berg, 12PR0155 (December 21, 2015; March 17, 2015)
13. In re Joseph Harris, 12PR0114 (December 18, 2015; June 18, 2015)
14. In re Teresa Woods, 14PR0181 (December 7, 2015)
15. In re Anne Beckert, 13PR0126 (November 20, 2015)
16. In re Edmund Moran, 14PR0023 (September 18, 2015)
17. In re Paul Shelton, 13PR0039 (September 14, 2015; February 19, 2015)
18. In re Joel Runkle, 14PR0150 (September 3, 2015)
19. In re John Lynch, 14PR0127 (August 27, 2015)
20. In re Jerome Murphy, 14PR0171 (August 20, 2015)
21. In re Barbara Revak, 12PR0165 (August 14, 2015)
22. In re Roland Kesinger, 15PR0042 (July 13, 2015)
23. In re Thomas Margolis, 14PR0031 (June 10, 2015; January 6, 2015)
24. In re David Wisniewski, 14PR0163 (June 9, 2015)

25. In re David Novoselsky, 11PR0043 (April 10, 2015; June, 26, 2014)
26. In re Peter Muldoon, 14PR0116 (April 3, 2015)
27. In re Darren Fish, 13PR0065 (April 2, 2015; August 6, 2014)
28. In re Lawrence Hyman, 13PR0110 (March 25, 2015; September 19, 2014)
29. In re Ralph Tellefsen, 13PR0049 (March 18, 2015)
30. In re Raymond Huff, 14PR0059 (February 23, 2015)
31. In re Andre Grant, 13PR0096 (January 28, 2015)
32. In re Dennis Fang, 12PR0100 (January 5, 2015)
33. In re Jeffrey Aleman, 12PR0058 (December 10, 2014)
34. In re Thomas Macey, 12PR0057 (December 10, 2014)
35. In re Zijo Metovic, 12PR0117 (September 23, 2014)
36. In re Douglas Cannon, 11PR0051 (September 17, 2014; February 24, 2014)
37. In re John Longwell, 13PR0055 (August 6, 2014)
38. In re Joseph McCaffery, 10PR0153 (June 24, 2014)
39. In re Michael Duval, 12PR0018 (June 12, 2014)
40. In re Joseph McCaffery, 12PR0123 (May 19, 2014)
41. In re Alan Applebee, 12PR0049 (May 16, 2014; October 30, 2013)
42. In re Michael Fleck, 11PR0054 (February 26, 2014; August 9, 2013)
43. In re Marlin Kirby, 10PR0098 (February 19, 2014; July 26, 2013)
44. In re Nickolas Bell, 12PR0151 (January 24, 2014)
45. In re Therese Garza, 12PR0035 (January 24, 2014; July 24, 2013)
46. In re Rufus Cook, 10PR0106 (December 30, 2013; March 4, 2013)
47. In re Frank Santilli, 12PR0029 (December 23, 2013)
48. In re Jesse Gilsdorf, 12PR0006 (December 10, 2013; June 4, 2013)
49. In re Richard Forst, 12PR0097 (November 1, 2013)

50. In re Sharon Williams, 11PR0107 (September 30, 2013; February 8, 2013)
51. In re Karris Bilal, 09PR0111 (August 30, 2013; November 29, 2012)
52. In re Herbert Bates, 11PR0108 (August 7, 2013; October 5, 2012)
53. In re Karim Dure, 12PR0137 (July 29, 2013)
54. In re James Childs, 09PR0138 (July 24, 2013; October 31, 2012)
55. In re Steven Bahrmasel, 08PR0086 (July 2, 2013; July 20, 2012)
56. In re Chester Nosal, 11PR0118 (May 22, 2013)
57. In re Rogelio Pena, 11PR0050 (April 19, 2013)
58. In re Richard Scholz, 11PR0114 (March 28, 2013)
59. In re Shawn Luedde, 12PR0045 (March 27, 2013)
60. In re Jeffrey Olson, 11PR0152 (February 21, 2013)
61. In re George Woodcock, 11PR0005 (January 24, 2013; May 9, 2012)
62. In re John Carroll, 09PR0078 (January 3, 2013; January 18, 2012)
63. In re Alvin Brooks, 10 PR0172 (December 13, 2012)
64. In re Valerie Hermann, 10PR0103 (November 2, 2012)
65. In re Ronald Kesinger, 11PR0025 (October 24, 2012; April 6, 2012)
66. In re Angelika Kuehn, 11PR0145 (July 24, 2012)
67. In re Avalon Betts-Gaston, 08PR0005 (July 18, 2012; March 30, 2011)
68. In re Shaveda Scott, 09PR0102 (May 25, 2012; July 26, 2011)
69. In re John Narmont, 09PR0027 (May 10, 2012; April 21, 2011)
70. In re Scott Beal, 10PR0088 (May 3, 2012; July 28, 2011)
71. In re Rex Reu, 10PR0122 (April 25, 2012; July 27, 2011)
72. In re Oscar Gallo, 07PR0110 (February 23, 2012; April 14, 2011)
73. In re Kyle Kinzy, 09PR0074 (February 23, 2012)
74. In re Eugene Beeler, 11PR0056 (January 1, 2012)

75. In re John Wunsch, 10PR0183 (December 13, 2011)
76. In re Sheldon Banks, 11PR0008 (December 2, 2011)
77. In re Monte Rolls, 10PR0105 (November 14, 2011)
78. In re Robert Kennedy, 11PR0015 (October 26, 2011)
79. In re Edward Voci, 09PR0077 (October 6, 2011)
80. In re Christopher Millet, 06PR0047 (August 18, 2011)
81. In re Tommy Payne, 10 PR0171 (July 6, 2011)
82. In re David Shults, 10PR0031 (June 24, 2011)
83. In re Emmett Marshall, 08PR0091 (June 20, 2011)
84. In re Edward Mahon, 10PR0068 (May 31, 2011)
85. In re Thomas Howard, 10PR0059 (May 25, 2011)
86. In re Paul Shelton, 09PR0058 (May 20, 2011)
87. In re Matthew Jacobson, 10PR0039 (May 6, 2011)
88. In re Brian Leach, 10PR0011 (April 29, 2011)
89. In re Ronald Gertzman, 09PR0100 (March 15, 2011)
90. In re Jeffrey McCarthy, 09PR0007 (February 28, 2011)
91. In re Crystal Bush, 09PR0073 (February 10, 2011)

Rule 1.4 Case law in Past 5 Years

1. People v. Isaccman, 2013 IL App (2d), 110968-U
2. MDA City Apartments LLC v. DLA Piper LLP (US), 2012 IL App (1st), 111047
3. Garvy v. Seyfarth Shaw LLP, 2012 IL App (1st), 110115

SECTION C

- **“Top Tips,”** by Judge Patricia O’Brien Sheahan, Mr. Joseph W. Balesteri & Mr. Scott H. Beckman, July 2016.

TOP TIPS

By

Judge Patricia O'Brien Sheahan

Mr. Joseph W. Balesteri

Mr. Scott H. Beckman

July 2016

1. **Stay focused on your client(s)** and remember that you may have fiduciary duties to more than one client.
2. **Always respond to client** calls or correspondence/emails in a timely manner.
 - a) Communication includes listening! Listen to your client(s) & address their concerns – even if you are unable to immediately resolve them.
 - b) Keep your clients engaged & informed. Big events such as trial setting and potential settlement require direct, open & honest communication as soon as practical.
 - c) Speak clearly & directly with your client(s); provide practical advice as opposed to esoteric theories. If you have concerns about your client's case, you must explain those concerns so informed decisions can be made.
 - d) Take time to inquire about a corporate client's reporting structure in order to best address communication needs, i.e., frequency of status reports for executive leadership & Board of Directors.
 - e) Explain fee or billing structure. Hourly billing should be current and communicative.
3. **Never mislead** your client – not ever!
4. **Obtain specific authority to settle** after obtaining your client's informed consent.

- a) Explain the risks & benefits of settlement & trial to your client based upon specific evidence & experience.
 - b) Be mindful of the financial considerations of your client.
5. **Document, document, document.** Memorialize discussions about fees/billing practices, limitations of representation, litigation strategy & settlement authority.

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JUDGE LYNN M. EGAN

JUDGE PATRICIA O'BRIEN SHEAHAN

MR. JOSEPH W. BALESTERI

MR. SCOTT H. BECKMAN

JULY 22, 2016

WHAT'S THE BIG DEAL?

**“THE PRACTICE OF LAW IS A PUBLIC TRUST”
&
“LAWYERS ARE THE TRUSTEES OF THE
SYSTEM”**

DELUNA V. BURCIAGA, 223 ILL.2D 49, 72-73 (2006)

SELF-GOVERNING ≠ NO RULES

- The Illinois Rules of Professional Conduct establish standards of conduct for attorneys.
- The Rules are not voluntary or merely aspirational.
- The Rules require not just individual compliance, but the duty to aid in securing compliance by other attorneys.
- In fact, Rule 8.3 requires attorneys to report professional misconduct. See also, *In re Himmel*, 125 Ill.2d 531 (1988).

WHAT ARE THE CONSEQUENCES?

- Failure to act consistent with the Rules of Professional Conduct “is a basis for invoking the disciplinary process.”
- May also be evidence of breach of the applicable standard of care, thereby triggering malpractice claim.

Ill. Sup. Ct. R. Prof. Conduct, Preamble, ¶ 19.

IT'S ALL RELATED

- Although many of the Rules of Professional Conduct address specific situations, certain Rules include overarching duties applicable to every context.
- **Rule 1.3:** Act with diligence & promptness.
- **Rule 8.4:** No dishonesty, fraud, deceit or any conduct that is “prejudicial to the administration of justice.”

RULE 1.4: COMMUNICATION

This Rule imposes the following two-part duty:

- 1) Keep clients reasonably informed about case status. The attorney, not the client, is responsible for initiating contact.
- 2) Promptly comply with client requests for information.

NOTE: Failure to communicate has been deemed more egregious in criminal cases, justifying more severe discipline than in civil cases. *In re Ring, 141 Ill.2d 128, 145 (1990).*

COMMUNICATION TIPS

- Always respond to client calls, letters/emails in a timely manner, even if only to tell client that a substantive response not feasible at the time. May delegate this to staff member.
- For corporate/institutional clients, inquire about reporting structure.
- Explain fee or billing structure. Hourly billing should be communicative.
- Communication includes listening!
- Speak clearly & directly with clients. Give practical advice rather than esoteric theories.
- **NEVER** mislead your client!

AUTHORITY TO MEDIATE/SETTLE

“The decision of whether to settle a civil matter is one of the most fundamental & important rights reserved to the client.”

Ring v. Deming II, 2015 IL App (1st), 131731-U, ¶ 10.

RULE 1.2: ALLOCATION OF AUTHORITY

a) “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter.”

The decision about whether to settle a case “must be made by the client.”

Ring v. Deming II, 2015 IL App (1st) 131731-U, ¶ 10.

SETTLEMENT TIPS

- Prior to mediation or settlement conference, explain the risks & benefits of settlement & trial to client.
- Obtain specific authority to settle after obtaining client's informed consent.
- Work out issues with co-defendants before mediation or settlement conference in order to avoid distractions & ensure meaningful negotiations.
- Be mindful of your client's financial concerns.
- Know the identity of all to whom you owe a duty!

FEES/BILLING

“In fixing fees, as well as in the institution of litigation, it is well for a lawyer to bear in mind that his profession is concerned with the administration of justice and is not a mere moneymaking trade.”

In re Doss, 367 Ill. 570 (1937)

RULE 1.5

- Lawyers shall not charge an “unreasonable fee” or an “unreasonable amount for expenses.”
- The basis or rate of the fee & expenses shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
- A contingent fee agreement shall be in writing signed by the client & shall state the method by which the fee is to be determined, specifically including percentages in the event of settlement, trial or appeal.

BILLING/FEE TIPS

- Document fee agreement/billing structure.
- Know client's billing guidelines. Make sure associates/other firm members comply with them.
- Audit your bills internally before sending them to the client.
- Resolve billing disputes amicably.
- Remember: no contingent fee agreements in criminal cases or domestic relations matters where payment dependent on securing divorce or amount of alimony/support. *Ill.Sup.Ct.R.Prof.Conduct 1.5(d)(1) & (2).*

ADDITIONAL GUIDANCE

Ethics Advisory Opinions

- Illinois State Bar Association (ISBA) Ethics Advisory Opinions: www.illinoisbar.org (1984 – present);
- Illinois Attorney General Opinions: www.ag.state.il.us (1992 – present);
- Illinois Judges Association: www.ija.org (1993 – present) Ethics advisory opinions concerning the Judicial Code.