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Legal Ethics Update 2025 – Part 1

January 2025

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Questions – Please submit questions during the program by chat or during/after the program by email to Paige Tungate at ptungate@downeylawgroup.com

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CLE Information

- *Kansas Credit* – If you are seeking Kansas credit, you will need to enter the two Attendance Verification Words and your Kansas Bar information into the Program Survey
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- Three ways to access Program Survey:

1. Link available in the *CHAT*
2. Link available in *the slides* (here or at www.DowneyEthicsCLE.com)
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https://www.surveymonkey.com/r/update0125

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Missouri Discipline Update

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From: Marybeth.Stieferman@courts.mo.gov <Marybeth.Stieferman@courts.mo.gov> **On Behalf Of** OCDCregionX@courts.mo.gov
Sent: [DATE]
To: [ATTORNEY]
Subject: OCDC Complaint File #24-0000-X – [ATTORNEY] / [COMPLAINT]

Dear [ATTORNEY]:

The Office of Chief Disciplinary Counsel (OCDC) and the Regional Disciplinary Committees are authorized by the Supreme Court of Missouri to investigate possible professional misconduct by attorneys.

Attached to this email is a complaint that was submitted against you. This email constitutes a demand, pursuant to Rule 4-8.1, that you provide this office with a complete written response to this complaint. Your response must reach us **by [RESPONSE DATE]**. If you choose to respond by email, your response should be emailed to **OCDCregionX@courts.mo.gov**. If you fail to respond, the complaint will be investigated and a decision will be made without your input. Additionally, you may be subject to separate discipline pursuant to Rule 4-8.1(c).

Please follow these guidelines:

- Your written response must contain your signature.
- Provide a narrative of the events described in the complaint, but limit your response to a factual recitation.
- Include supporting evidence where relevant, but be selective with regard to those attachments. Except in extraordinary cases, your total response, including attachments and exhibits, should not exceed 25 pages. Do not provide more than 25 pages without obtaining permission from this office.
- You may respond by replying to this email but only if your written response and the attachments are all in a pdf format and comply with the page limits described here. Otherwise, you should mail your response to this office at the address listed above.
- **Your response and all attachments or exhibits will be sent to the Complainant for comments unless you identify specific items or sections containing confidential information that you believe should not be shared with the Complainant**.

The complaint, your response, and any comments provided by the Complainant will be considered by members of the Region X Disciplinary Committee as part of their investigation. The Committee may also consider other matters not referenced in the complaint.

Discipline After Criminal Conviction

- Duty to self-report conviction
- OCDC is pursuing discipline against lawyers convicted of crimes
- Filing informations (formal charges) against attorneys who were under criminal investigation

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Redaction Update

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IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

MICHAEL GROSS, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
V	)	CASE NO. 24AC-CC04658
	)	
STATE OF MISSOURI, ET AL.,	)	
	)	
Defendants.	)	

AMENDED PARTIAL JUDGMENT ON THE PLEADINGS NUNC PRO TUNC

Partial Judgment 12-20-2024 amended 1-2-2025

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RSMo. § 509.520.1

Notwithstanding any provision of law to the contrary, beginning August 28, 2023, pleadings, attachments, exhibits filed with the court in any case, as well as any judgments or orders issued by the court, or other records of the court shall not include the following confidential and personal identifying information:

(1) The full Social Security number of any party or any child;

(2) The full credit card number, financial institution account number, personal identification number, or password used to secure an account of any party;

(3) The full motor vehicle operator license number;

(4) Victim information, including the name, address, and other contact information of the victim;

(5) Witness information, including the name, address, and other contact information of the witness;

(6) Any other full state identification number;

(7) The name, address, and date of birth of a minor and, if applicable, any next friend; or

(8) The full date of birth of any party; however, the year of birth shall be made available, except for a minor.

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3. Plaintiff's Motion for Judgment on the Pleadings as to Counts I and II of the Plaintiff's First Amended Petition are GRANTED. A plain reading of Mo. Rev Stat. § 509.520.1 makes victim and witness names, addresses and contact information "confidential and personal identifying information" under subsections 4 and 5 and therefore requires their redaction in court filings pursuant to Supreme Court Rule of Civil Procedure 55.025 (a)(3) and Missouri Supreme Court Operating Rule 2.02(c)(3); thus subsections 4 and 5 of Mo. Rev. Stat. § 509.520.1 violate the First and Fourteenth Amendments of the United States Constitution and the Open Courts requirement of Article I, § 14 of the Missouri Constitution;
4. Subsections 4 and 5 of Mo. Rev. Stat. § 509.520.1 are hereby declared unconstitutional and thereby unenforceable; and

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Multi-Jurisdictional Practice Issues

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Missouri Informal Opinion 2024-12 (August 2024)

Question: Lawyer is planning to retire after a long career of practicing law in Missouri. Lawyer is moving to another state, but Lawyer plans to continue to wind up Lawyer's practice in Missouri and occasionally participate virtually in meetings with clients and appear virtually in Missouri courts. Is Lawyer permitted to wind up Lawyer's practice in Missouri from another State?

Answer: Lawyer needs to determine if the other state from which Lawyer plans to wind up Lawyer's Missouri practice and occasionally participate virtually in client meetings and appearances in Missouri courts constitutes the unauthorized practice of law in the other state. Rule 4-5.5(a) provides that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction...." If the other state would determine Lawyer's conduct to be the unauthorized practice of law, then Lawyer may not proceed without violating Rule 4-5.5(a).

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Missouri Informal Opinion 2024-13 (August 2024)

Lawyer represents Client in a litigation matter pending before a state court in a neighboring jurisdiction.

Lawyer is licensed to practice in Missouri and has obtained a limited admission pro hac vice for the matter in neighboring jurisdiction.

Lawyer asks whether to follow the Missouri Rules of Professional Conduct or the rules of the neighboring jurisdiction.

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Missouri Informal Opinion 2024-13 Answer

Lawyer is subject to the disciplinary authority of Missouri regardless of where the conduct occurs and may be subject to the disciplinary authority of the neighboring jurisdiction pursuant to Rule 4-8.5(a). Rule 4-8.5 states as follows:

> (b) In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction.
>
> A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

In this matter, Lawyer should follow the rules of the neighboring jurisdiction, as that is where the tribunal is located, and that is where the matter is pending before a state court in the neighboring jurisdiction.

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ISBA Informal Opinion 24-01 (March 2024)

- An Illinois lawyer acting as local counsel for an out-of-state lawyer shares the same duties to the client as the lawyer acting as lead counsel.
- While local counsel and the client may agree to limit the role of local counsel upon informed consent, that lawyer remains subject to the Illinois Rules of Professional Conduct.
- A lawyer may only enter a general appearance in an Illinois state court criminal matter and is subject to the rules and orders of the court, including any orders requiring local counsel's appearance at any or all court proceedings.

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Response to Frustrating Litigation Tactics

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In re Gamble (KS 11-2024)

“Lawyer sanctioned for conduct in highly contested divorce case

“Respondent made ‘unnecessary’ and ‘objectionable’ remarks about D.L.R. and her family, and he attached newspaper articles regarding D.L.R.’s extended family. The respondent could have effectively argued his client's position without including that information.

“Respondent pushed for an expedited hearing on a motion, and then “did not call any witnesses or offer any exhibits to further establish the contentions that he made in the second amended omnibus motion. Further, the respondent did not withdraw the objectionable statements made about D.L.R.

“The district court concluded that in the respondent's motion to strike and the second amended omnibus motion, the respondent included irrelevant information for the purpose of diminishing S.G., lodged inflammatory attacks on J.D., D.L.R. and their law firm that served no legal purpose, and improperly accused S.G.’s counsel of forum shopping.

“The court concluded that the respondent's argument that S.G. misled the court about where she lived prior to mid-November 2019, lacked merit. The court concluded that an emergency situation existed because D.G. displayed a firearm to S.G. and the children. The court concluded that it followed proper procedure and that the court's exercise of temporary jurisdiction was appropriate given all the circumstances. The court denied the respondent's motion for sanctions because it lacked merit. The court summarily rejected the respondent's claim that S.G., J.D., and D.L.R. engaged in a pattern of conduct involving deception. The court granted S.G.’s motion to strike and awarded attorneys’ fees against [respondent's client] in the amount of $1,000.”

Dissent (in 4-3 decision)

"no crying in baseball" or litigation dissent

Quoting respondent's expert:

> "Mr. Gamble vigorously and zealously represented his client in the underlying matter. He was obviously frustrated and indignant over what he saw as a misuse of the court system and complete failure to abide by the clear intentions, language, and directions of the child custody jurisdiction act."

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Candor Contrary to Client's Interest . . . ?

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People v. Mischke
(Ill. App. 2d 12-2024)

- Defendant sentenced to concurrent 26 and 7 year prison terms
- Defense counsel argued on appeal that terms were mandatorily consecutive
- Appellate court agreed, remanding case to trial court who imposed same terms consecutively
- Defendant then sought relief for ineffective assistance of counsel

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Rule 4-3.3(a)(2)

A lawyer shall not knowingly:

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .

Court finds defendant made an informed decision to argue after appropriate consultation with appellate counsel, based largely on defendant's affidavit

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Oral Argument

[A]ppellate counsel acknowledged that, if we vacated defendant's sentences and remanded for resentencing, the trial court could impose an aggregate sentence longer than 26 years.

Particularly, he recognized, the trial court could reimpose the existing sentences but make them consecutive, for an aggregate sentence of 33 years.

But appellate counsel also recognized that, "theoretically," the court "could give [defendant] less."

We then asked appellate counsel whether defendant was "aware of these risks." We specifically mentioned the risk that his aggregate sentence could be increased on remand due to misconduct since sentencing.

Appellate counsel responded, "I want to answer very carefully, because I have confidentiality restrictions, and I don't want to . . . repeat my conversations with my client, other than to note that our office policy is to communicate[.]" Appellate counsel added, "And I comply with our office policies in every case[.]" We presume, and have no reason to believe otherwise, that appellate counsel's "communicat[ion]" with defendant conveyed both the risk and the potential benefit we had queried counsel about.

Lawyer as Witness Rule

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Matter of Marriage of MD and SD (Kan. October 2024)

- Grandfather and attorney represented Father in divorce
- Mother sought to disqualify

- Court initially denied motion to disqualify
- Court later granted motion to disqualify due to Grandfather serving as witness

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Rule 4-3.7

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 4-1.7 or Rule 4-1.9.

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Referral Arrangements

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In re Agron (Mo. 12-2024)

- Agron received referrals from NAC
  - Paid NAC employee RW $500 to solicit personal injury potential client
  - Later responded to complaint about RW working as “runner” by saying RW was “wholly unknown” to Agron
  - Later admitted knowing RW and that NAC was a pay-for-referral service, and having paid NAC $77,500 for referrals
  - Agron suspended indefinitely with no leave to reapply for 12 months

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Rule 4-7.2(c)

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that:

(1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule 4-7.2;

(2) a lawyer may pay the reasonable cost of advertising, written communication, or other notification required in connection with the sale of a law practice as permitted by Rule 4-1.17; and

(3) a lawyer may pay the usual charges of a qualified lawyer referral service registered under Rule 4-9.1 or other not-for-profit legal services organization.

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Rule 4-5.4(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 undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 4-1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(4) 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

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

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Rule 4-9.1

(a) The operation of this Rule 4-9.1 and compliance with its provisions shall be supervised by the chief disciplinary counsel. The chief disciplinary counsel shall develop and promulgate regulations, procedures, and forms not inconsistent with this Rule 4-9.1, including the amount of the fee to register a qualified service, subject to approval by this Court.

(b) Lawyers eligible to practice in this state may participate in a service that refers them to prospective clients, but only if the service is a qualified service because it conforms to this Rule 4-9.1.

(c) A qualified service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer, or other agencies that can provide the assistance the clients need in light of their financial circumstances, spoken language, any disability, geographical convenience, and the nature and complexity of their problems.

(d) Only a qualified service may call itself a lawyer referral service or operate for a direct or indirect purpose of referring potential clients to particular lawyers, whether or not the term 'referral service' is used.

(e) A qualified service must be open to all lawyers licensed to practice in this state who:

(1) maintain an office within the geographical area served,

(2) pay reasonable fees established by the service, and

(3) maintain in force a policy of errors and omissions insurance in an amount at least equal to the minimum established by the chief disciplinary counsel.

A qualified service shall establish and publish a procedure for admitting, suspending, or removing lawyers from its roll of panelists.

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Rule 4-9.1

(f) No fee generating referral may be made to any lawyer who has an ownership interest in, or who operates or is employed by, a qualified service or who is associated with a law firm that has an ownership interest in, or operates or is employed by, a qualified service.

(g) A qualified service shall periodically survey client satisfaction with its operations and shall investigate and take appropriate action with respect to client complaints against panelists, the service, and its employees.

(h) A qualified service may establish specific subject matter panels, including moderate and no fee panels, foreign language panels, alternative dispute resolution panels, and other special panels that respond to the referral needs of the consumer public, eligibility for which shall be determined on the basis of experience and other substantial objectively determinable criteria.

(i) A qualified service shall:

(1) register with the chief disciplinary counsel and demonstrate its compliance with this Rule 4-9.1 before commencing to operate;

(2) update the materials filed with the chief disciplinary counsel within 30 days of any material change; and

(3) on or before June 30 annually, file with the chief disciplinary counsel a report of its operations and finances during the previous twelve months demonstrating its continued compliance with this Rule 4-9.1.

Rule 4-9.1

(j) This Rule 4-9.1 does not apply to:

(1) a group or prepaid legal plan, whether operated by a union trust, mutual benefit or aid association, corporation, or other entity or person that provides unlimited or a specified amount of telephone advice or personal communication at no charge to the members or beneficiaries, other than a periodic membership or beneficiary fee, and that furnishes or pays for legal services to its beneficiaries;

(2) a plan of prepaid legal services insurance authorized to operate in this state;

(3) individual lawyer-to-lawyer referrals;

(4) lawyers jointly advertising their own services in a manner that discloses that such advertising is solely to solicit clients for themselves;

(5) any pro bono legal assistance program that does not accept any fee from clients for referrals; or

(6) any organization maintaining a 26 USC 501(c)(3) exemption that maintains a referral list only incident to its other activities.

(k) A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance or for purposes of complying with the survey under Rule 4-9.1(g) shall be deemed a privileged lawyer-client communication.

(l) The chief disciplinary counsel may deny, suspend, or cancel any registration upon making a finding of a material violation of any provisions of this Rule 4-9.1. Any person who is substantially and individually aggrieved by the action of the chief disciplinary counsel may, within 30 days of receiving notice of the action, petition this Court for review of the action of the chief disciplinary counsel. This Court may direct that the issues raised in the petition be briefed and argued as though a petition for an original remedial writ has been sustained. This Court may sustain, modify, or vacate the action of the chief disciplinary counsel or dismiss the petition.

(m) Any person violating the provisions of this Rule 4-9.1 shall be deemed to be engaged in the unauthorized practice of law.

Attorney Liens

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Brunson v. Carmax Business Servs. (N.D. Ill. 9-2024)

- Lawyer represented plaintiff on FDCPA and other claims arising from breach of peace relating to Tesla repossession
- Fee agreement awarded greater of (a) hourly fees; (b) court-awarded fees; or (c) 40% of all recovery
- Lawyer then withdrew prior to answering counterclaim and all discovery

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Reasons Lien Defeated

- 770 ILCS 5/1 lien not timely perfected
  - Notice of lien served on defendants after attorney-client relationship ended
    - Had been served on defense counsel earlier
    - Actual notice not sufficient – must match statutory requirements
- Equitable lien lost because withdrawal was not for "good cause"
  - No "complete breakdown" of attorney-client relationship
  - No showing client "was unwilling to follow" attorney's advice, for example
  - That a client is "highly challenging" or that communications were "difficult" is not enough

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Quantum Meruit After Termination

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Andrew W. Levenfeld & Associates v. O'Brien (IL 9-2024)

- Law firms undertook probate litigation for (a) 15% of first $10m and 10% of any additional recovery or (b) time-based charges, whichever is greater
- Law firms worked 19 months/3100 hours and obtained settlement offer for client
- Client discharged law firms and settled matter for c. $16M, basically the offer law firms had obtained for Client

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Defenses Rejected

- Alleged error in failing to hire valuation expert – plaintiff accepted settlement law firms had obtained
- Violation of Rule 1.5(e) – no disclosure of fees for each attorney

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Calculation of *Quantum Meruit*

Circuit court concluded that a calculation of fees based on the contingency term of the attorney-client agreement would result in the reasonable value of their services and thus an appropriate quantum meruit award.

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Unenforceable v. Void Contracts

- "When determining whether an attorney is entitled to recover for its services in *quantum meruit*, Illinois courts recognize a distinction between an attorney-client agreement that is unenforceable because it contains an illegal term or fails to include a legally required term, on the one hand, and one that is void as against public policy because the subject of the agreement is prohibited by law, on the other.
- "This distinction, between a contract that is illegal versus one that is unenforceable due to some illegality in its manner of execution . . . also impacts the standard of review. The determination of whether a contract is void ab initio as violative of public policy, thus precluding recovery under the contract or in quantum meruit, is reviewed de novo. . . . In contrast, if the subject of the contract itself is not void as against public policy, but plaintiffs violated a rule or statute in the manner of its formation or execution, the circuit court has broad discretion to determine whether recovery in quantum meruit is precluded depending on the egregiousness of the particular conduct involved."

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Bedin v. Mueller
(Ill. App. 1st 7-2024)

- Examines award of quantum meruit to attorneys who did not satisfy Rule 1.5(d) requiring a written contingency fee agreement

- Allowed *quantum meruit* recovery despite absence of signed written agreement

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Privilege in Corporate Context (with Illinois twist)

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Youngblood v. Menard, Inc. (S.D. Ill. 8-2024)

- Plaintiff sued for trip and fall entering Menard's store
- Assistant store manager had told cashier and hardware manager that suit had been filed and that Menard's counsel would be contacting them
- In deposition, Plaintiff's counsel asked cashier when she was told about allegations in lawsuit
- Menard's counsel objected based upon attorney-client privilege, saying privilege began before they met

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Arguments

- Plaintiff – defense counsel cannot serve as personal counsel for Welker, Houghland, or Marlo in connection with the present lawsuit because they are lower-level employees outside of Defendant Menard's corporate control group

- Menard's – defense counsel established a permissible independent relationship with the employees

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Analysis (Illinois Law)

- "[T]he corporate control group analysis is not applicable. When counsel represents a corporation, Illinois courts consider only members of the corporation's 'control group' to be the client for the purpose of asserting the attorney-client privilege."

- A corporation's control group includes two types of employees: top management who have the ability to make final decisions for the corporation, as well as other corporate employees if, (1) the employee advises top management, (2) top management would not normally make a decision in the employees' area of expertise without the employees' advice or opinion; and (3) the employees' advice or opinion actually formed the basis of the top management's final decision

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Independent Relationship Formed

- Each of these individuals sought out defense counsel for representation at their deposition. Thus, defense counsel was clearly providing the witnesses with a legal service.
- Further, given the mutual concerns each of the three witnesses shared with Menard in avoiding potential or actual liability in the underlying slip and fall case, the three witnesses had a reasonable expectation that their communications with counsel would remain confidential and not disclosed to outside third parties.
- Finds *International Brotherhood of Teamsters* is distinguishable because *Teamsters* did not involve a joint representation

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Claim of Improper Solicitation — Illinois Rule 7.3

A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

Court finds record is insufficient to show improper solicitation occurred

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Arbitration of Malpractice Claims

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Dick-Ipsen v. Humphrey Farrington & McClain PC (IL App. 1st 8-2024)

- Law firm sought to compel arbitration of legal malpractice claim
- Plaintiff/client opposed arbitration, arguing the arbitration agreement was "procedurally and substantively unconscionable."
- Arbitration Clause:

> ARBITRATION. Claims, disputes or controversies between [the law firm] and [plaintiff] arising out of or relating to this Agreement or breach thereof shall be subject to non-binding mediation. In the event no mediated resolution is reached, then the claim, dispute or controversy shall be resolved exclusively by arbitration before a single arbitrator in Kansas City, Missouri, in accordance with the Rules of the American Arbitration Association currently in effect. The determination of the arbitrator shall be final and binding on us, and may be entered in any court of competent jurisdiction to enforce it.

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Rule 4-1.8(h)

A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

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Rule 4-1.8 cmt [17]

Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation.

Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement.

Rule 4-1.8(h) does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.

Nor does Rule 4-1.8(h) limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 4-1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

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Dick-Ipsen Holding

"Here, the trial court found the arbitration provision to be procedurally unconscionable. We make the same finding here. Critical to our finding is the failure of defendants to fully inform plaintiff about the meaning and consequences of the arbitration clause. We do not find that the Rules of Professional Conduct themselves serve to make the arbitration agreement unenforceable. Instead, we find that the Rules of Professional Conduct provide guidance on the existing standards for attorney conduct in Illinois and serve as a lens through which we can review the circumstances of the contract formation to decide whether enforcing an arbitration provision would be unconscionable.

"Procedural unconscionability generally refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it."

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"[W]e are not proclaiming any rule to govern the conduct of attorneys, nor are we imposing any type of discipline on defendants for their failure to comply with the Rule.

"We simply hold that, under the totality of the circumstances in this case, the arbitration provision is not enforceable against plaintiff. The Rules of Professional Conduct merely illuminate our analysis that enforcing the arbitration provision here would be unconscionable."

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Duty to Investigate Competency of Client

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Carey v. Hartz (Ill. App. 12-2024)

- Lawyers helped client amend estate plan to favor one son
- Other son obtained guardianship and brought legal malpractice claim against lawyer

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No Duty to Investigate Competency

- While plaintiff suggests that an affirmative duty to determine a client's competence is supported by public policy, we disagree.
- Plaintiff is correct that there is a public policy in favor of protecting the elderly from abuse and harm. Similarly, there is a public policy in favor of "vigilant protection" of the disabled.
- There is also, however, a public policy in support of testamentary freedom.
- Our supreme court has long balanced these policies by establishing a presumption that a person is capable of exercising that testamentary freedom unless it has been established that they are unable to do so.
- We therefore cannot find that public policy requires us to impose an affirmative duty for an attorney to assess a client's competence.

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If On Notice of Disability, Must Act

- Both parties appear to accept that, if defendants were on notice of Newman's disability at the time they rendered services, defendants would have been obligated to determine the extent of that disability with respect to her capacity to alter her estate plan.
- Such an obligation is consistent with the provisions of Rule 1.14, and at least one court has suggested that a failure to comply with Rule 1.14 may support a claim for legal negligence in such a circumstance.
- In this case, then, we consider whether the second amended complaint alleged sufficient facts to support plaintiff's claim that defendants were on notice of Newman's disability at the time they rendered services.

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- Here, there are well-pleaded facts in the complaint which allege that Newman lacked the capacity to modify her estate plan at the time she engaged defendants' services and that her diminished capacity would have been apparent upon any significant questioning.
- Consequently, we find that plaintiff stated a cause of action for legal malpractice, and dismissal of that count of the complaint was therefore improper.

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ABA Opinion 513 (August 2024)

As recently revised, Model Rule 1.16(a) provides that: "A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation." To reduce the risk of counseling or assisting a crime or fraud, some level of inquiry and assessment is required before undertaking each representation. Further inquiry and assessment is required when the lawyer becomes aware of a change in the facts and circumstances relating to the representation that raises questions about whether the client is using the lawyer's services to commit or further a crime or fraud.

The lawyer's inquiry and assessment will be informed by the nature and extent of the risk that the current or prospective client seeks to use, or persists in using, the lawyer's services to commit or further a crime or fraud. If after having conducted a reasonable, risk-based inquiry, the lawyer determines that the representation is unlikely to involve assisting in a crime or fraud, the lawyer may undertake or continue the representation. If the lawyer has "actual knowledge" that the lawyer's services will be used to commit or further criminal or fraudulent activity, the lawyer must decline or withdraw from the representation.

When the lawyer's initial inquiry leaves the lawyer with unresolved questions of fact about whether the current or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, the lawyer must make additional efforts to resolve those questions through further reasonable inquiry before accepting or continuing the representation. The lawyer need not resolve all doubts. Rather, if some doubt remains even after the lawyer has conducted a reasonable inquiry, the lawyer may proceed with the representation as long as the lawyer concludes that doing so is unlikely to involve assisting or furthering a crime or fraud.

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Litigating Disqualification Issues

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State v. Moore (Mo. App. W.D. 7-2024)

- Attorney represented criminal defendant at two hearings then joined prosecutor's office
- Conflict was imputable to entire office
- Court could not grant motion to strike motion to disqualify for inadequacy of pleading
  - Defense counsel learned of conflict shortly before trial
  - Defense counsel filed motion raising possible conflict and asking for continuance of trial
  - Prosecution then attacked motion for failure to aver facts that attorney had acquired information that would be detrimental to defendant
  - Court sustained motion to strike when defense said it had no case stating that appearing on both sides of criminal case was enough

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Appellate Court Reverses Motion to Strike

Rule 55.27 is a rule of civil procedure, applicable to civil actions. Moore's case is criminal; his motion to disqualify was not a pleading in a civil action. Rule 55.27 was an improper justification for striking Moore's motion.

Second, Moore's motion set forth sufficient legal grounds and factual allegations to apprise the court of a potential conflict of interest which suggested an appearance of impropriety that necessitated further inquiry. Moore's motion to disqualify cited Rule 4-1.9(b) and Section 56.110.

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Rule 4-1.11(d)

Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 4-1.7 and 4-1.9; . . . .

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Holding in *Moore*

- Given cases such as *State ex rel. Burns* [(Mo. 2008)], which presumed prejudice where a former defense attorney thereafter prosecuted a defendant on a similar, but different, charge resulting in an "inherent" appearance of impropriety, the CCPO should have immediately screened E.G. from any participation in Moore's case and prevented Moore from communicating with other CCPO employees regarding the same.
- Had this occurred, it may have been unnecessary to disqualify the entire CCPO from Moore's prosecution.
- As E.G. was allowed to prosecute Moore's case alongside other members of the CCPO, with no assurances that Moore's right to a fair and conflict-free prosecution was protected, we believe a reasonable person with knowledge of these facts would find an appearance of impropriety if the CCPO were allowed to prosecute Moore's charges on remand.

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Fani Willis Disqualification

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SECOND DIVISION
BROWN,
MARKLE and LAND, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. https://www.gaappeals.us/rules

December 19, 2024

In the Court of Appeals of Georgia

A24A1595. ROMAN v. THE STATE.
A24A1596. SHAFER v. THE STATE.
A24A1597. CHEELEY v. THE STATE.
A24A1598. MEADOWS v. THE STATE.
A24A1599. TRUMP v. THE STATE.
A24A1600. LATHAM v. THE STATE.
A24A1601. GIULIANI v. THE STATE.
A24A1602. CLARK v. THE STATE.
A24A1603. FLOYD v. THE STATE.

BROWN, Judge.

Michael Roman, David Shafer, Robert Cheeley, Mark Meadows, Donald Trump, Cathleen Latham, Rudolph Giuliani, Jeffrey Clark, and Harrison Floyd (collectively "the appellants") were charged in a 97-page indictment with RICO violations and other crimes in connection with an alleged conspiracy to unlawfully change the outcome of the 2020 presidential election. Pursuant to a granted

- As our consideration of the appearance of impropriety is limited to the remedy fashioned by the trial court, we turn to Georgia law on this issue. While the parties advocate for diametrically opposed bright-line rules — disqualification of the district attorney's office can never result from an appearance of impropriety or disqualification should always result when the elected district attorney engages in activities that raise the appearance of impropriety — Georgia law requires neither as a matter of course. Instead, we must examine the particular facts and circumstances of each case while keeping some general principles in mind. First, the trial court's ruling on a motion to disqualify is reviewed for an abuse of discretion.

- Second, the issue of attorney disqualification is viewed as a continuum.

- At one end of the scale where disqualification is always justified and indeed mandated, even when balanced against a client's right to an attorney of choice, is the appearance of impropriety coupled with a conflict of interest or jeopardy to a client's confidences. In these instances, it is clear that the disqualification is necessary for the protection of the client.

- Somewhere in the middle of the continuum is the appearance of impropriety based on conduct on the part of the attorney. As discussed above, this generally has been found insufficient to outweigh the client's interest in counsel of choice. This is probably so because absent danger to the client, the nebulous interest of the public at large in the propriety of the Bar is not weighty enough to justify disqualification.

- Finally, at the opposite end of the continuum is the appearance of impropriety based not on conduct but on status alone. This is an insufficient ground for disqualification.

- After carefully considering the trial court's findings in its order, we conclude that it erred by failing to disqualify DA Willis and her office. The remedy crafted by the trial court to prevent an ongoing appearance of impropriety did nothing to address the appearance of impropriety that existed at times when DA Willis was exercising her broad pretrial discretion about who to prosecute and what charges to bring. While we recognize that an appearance of impropriety generally is not enough to support disqualification, this is the rare case in which disqualification is mandated and no other remedy will suffice to restore public confidence in the integrity of these proceedings.
- Accordingly, we reverse the trial court's denial of the appellants' motion to disqualify DA Willis and her office. As we conclude that the elected district attorney is wholly disqualified from this case, "the assistant district attorneys — whose only power to prosecute a case is derived from the constitutional authority of the district attorney who appointed them — have no authority to proceed."

Thank you

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Conclusory Matters

- ***Questions*** – If you have questions after the program, please email them to Paige Tungate at ptungate@downeylawgroup.com

- ***Post-Program Survey*** – A survey will be emailed to you about 30 minutes after this program. Also, here is the survey link:

https://www.surveymonkey.com/r/update0125

- ***Certificate of Completion*** – Available through the Post-Program Survey

- *Kansas Credit* – If you are seeking Kansas credit, you need to enter the two Attendance Verification Words and your Kansas information into the Post-Program Survey. *Please complete this information in the survey this week, so we can ensure you receive proper credit*

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https://www.surveymonkey.com/r/update0125

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Timed Agenda

12:00-05 Introduction

12:05-55 Discussion of recent developments in legal ethics

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Future Programs

January 21 - Tuesday at 3:00 PM CT - ***Addressing Bias - Ableism and Disability Discrimination***

February 6 - Thursday at 12:00 Noon CT - ***Ethical Issues in Joining and Leaving a Law Firm***

February 19 - Wednesday at 12:00 Noon CT - ***Privilege and Confidentiality Update***

February 27 – Thursday at 12:00 Noon CT – ***Addressing Bias: LGTBQ+ and Gender Issues***

Special Co-Presenter – Sara Marler of Marler Law Partners

March 4 -Tuesday at 3:00 PM CT - ***Legal Ethics of Lawyer Collaboration***

March 19 - Wednesday at 12:00 Noon CT - ***Trust Accounting Quiz - With Prizes***

April 10 - Thursday at 12:00 Noon CT - ***Legal Ethics and Client Development***

April 23 - Wednesday at 12:00 Noon CT - ***Addressing Bias - Ableism and Disability Discrimination***

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