ISBE HEARING OFFICER TRAINING

ETHICAL ISSUES FOR IHOs

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10:45 a.m. - 12:00 p.m.
Agenda

• Overview of Lawyer Regulation in Illinois and the Investigation and Disciplinary Process

• Some Ethical Issues for IHOs
  – UPL Concerns: Non-Attorney Involvement in Administrative Hearings
  – Dealing with Pro Se Parties
  – Ex Parte Communications
  – Professionalism: Dealing with Incivility Issues & Reporting Lawyer Misconduct

• ARDC Resources
Overview of Lawyer Regulation in Illinois and the Investigation and Disciplinary Process
Ethics in Illinois?
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Ethics in Illinois
Review of a Lawyer’s Conduct

- Civil
- Contempt
- Criminal
- Regulatory (ARDC)
Illinois Attorney Population

- Over 90,000 attorneys in Illinois
- Over 62,000 attorneys report Illinois as their principal place of business
- Illinois has the 4th largest attorney population in the United States
Statistics on Requests for Investigations

- **6,000** - Average number of requests for investigations docketed over the past 5 years
- **4,000** - Average number of attorneys subject to an investigation each year
- **80%** - Percentage of grievances come from clients
- **60%** - Percentage of grievances involving issues of poor lawyer-client relations
- **5%** - Percentage of attorneys that become subject of an investigation
Demographics of Grievances

- Nature of lawyer’s practice is most significant factor in determining if he/she will be the subject of a grievance.

- Top areas:
  - Criminal Law (27%)
  - Domestic Relations (17%)
  - Tort Law (10%)
  - Real Estate (9%)
  - Probate (6%)
Investigative Process

- Confidential Investigation - S.Ct.R. 766(a)(1)
- Docketed and assigned to a Commission lawyer to review
- Lawyer-respondent required to respond in writing to Commission’s request for information - Com.R. 53
- Closure by ARDC communicated to complaining witness and lawyer-respondent - Com.R. 54
- Expungement of investigative records three years after closure in most cases - S.Ct.R. 778
- Immunity for persons communicating with ARDC - S.Ct.R. 775
Intake Division vs. Litigation Division

Initial grievance received

- No misconduct alleged
  - File closed by intake

- Minor misconduct alleged and no multiple files
  - Investigation conducted by intake and likely closed without further action

- Serious misconduct alleged, multiple files, or not cooperating with intake
  - File transferred to litigation where investigation conducted
Formal Complaints

• 4-5% - Percentage of investigations that turn into formal complaints

• In 2012:
  – 112 disciplinary complaints were filed
  – 103 sanctions against 102 lawyers
  – 43% were Cook County practitioners
  – 22% had one or more identified substance abuse or mental impairment
  – 88% were sole practitioners
What Factors Cause an Investigation to Lead to a Formal Complaint?

- Client or third party harm
- Pattern of misconduct on the part of the respondent
- Dishonest or fraudulent conduct
- Lack of remorse
- Not cooperating with the ARDC investigation
Some Ethical Issues for Lawyers Acting as IHOs
UPL Concerns: Non-Attorney Involvement
Unauthorized Practice of Law

• Only licensed lawyers are allowed to practice law

• Only the IL Supreme Court has authority to regulate and define the “practice of law”

• Court has defined the “practice of law” as:
  – giving of legal advice or
  – services requiring use of legal knowledge or skill

• Rationale – to protect clients and the integrity of the legal system

• *People ex rel. Chicago Bar Ass’n. v. Goodman*, 366 Ill. 346, 352, 8 N.E.2d 991, 945 (1937); *People ex rel. Illinois State Bar Ass’n v. Peoples Stock Yards State Bank*, 344 Ill. 462, 475, 176 N.E. 901, 907 (1931)
Non-Lawyer Representation in Administrative Hearings

• Not the “practice of law” when:
  – participation limited to submission of fact-based information which requires no legal argument or skill

  – *E.g.*, *Chicago Bar Ass’n v. Quinlan & Tyson, Inc.*, 34 Ill. 2d 116, 214 N.E.2d 771 (1966) (not the practice of law for real estate brokers to fill in blanks on customary contract-of-sale forms or offers to purchase because these documents “require no more than ordinary business intelligence and do not require the skill peculiar to one trained and experienced in the law.”)
Non-Lawyer Representation in Administrative Hearings

• Other factors:
  – Administrative regs. explicitly permit a party, incl. a corporation, to act through a non-attorney representative

  – Nature of proceedings – unlike court proceedings, administrative hearings are more informal, fact-finding process that is less likely to require formal legal arguments or governed by strict adherence to rules of evidence
• Not UPL:
  • *Grafner v. Dept. of Employment Security*, 393 Ill.App.3d 791, 914 N.E.2d 520 (1st Dist. IL 2009) (parish’s representative not engaged in practice of law in asking clarifying questions of witnesses and no evidence the representative made tactical decisions, undertake legal analysis, exercise independent legal judgment or make legal arguments).

• UPL:
  – *ISBA Ethics Op. 13-03* (Jan. 2013) (nonlawyer representation in FINRA arbitration generally UPL because subject matter requires knowledge of securities law and proceedings are typically adversarial and include filing of pleadings and possible discovery.)
Ethical Obligations of Arbitrator Dealing with Non-Lawyer Representation

• Concerns of Rule 5.5(a) – “[a] lawyer shall not…assist another in [the unauthorized practice of law].”

• Attorney’s participation, either as a hearing officer or party’s representative does not aid UPL - *ISBA Ethics Op. 93-15* (March 1994) & *13-03* (Jan. 2013)
New IL Supreme Court Rule 779
UPL Proceedings

• Adopted by Court – Dec. 2011

• ARDC authority to investigate and bring complaints against disbarred lawyers and non-lawyers for the unauthorized practice of law (UPL)

• Actions against disbarred lawyers and non-lawyers filed in circuit court

• Civil and/or contempt actions
Dealing with Pro Se Representation
Lawyer Serving as Third-Party Neutral: New Rule 2.4

• Standards and guidance to lawyers in alternative dispute resolution settings

• Duty to inform unrepresented parties –
  
  (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them and shall explain to them the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.
• **Third-party neutral** – “. . . is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction.” Comment [1] to Rule 2.4

• **Tribunal** – “A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.” Rule 1.0(m)
Rule 4.3: Communications with Unrepresented Persons

Rule 4.3 – “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested…”
Duties Under Rule 4.3

• clarify the lawyer’s role;

• make reasonable efforts to correct any misunderstandings about lawyer’s role;

• avoid giving legal advice; and

• avoid making inaccurate or misleading statements of law or fact (Rule 4.1).
Ex Parte Communications
Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

– Seek to influence a judge, juror, prospective juror or other official by means prohibited by law; or

– Communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order
IL Judicial Code Rule 63

Canon 3 A Judge Should Perform the Duties of Judicial Office Impartially and Diligently

A. Adjudicative Responsibilities. (5) A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.
Ex Parte Communications

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&
The “Ex Parte Party”

Former workers comp arbitrator involved in email exchanges with three lawyers appearing before her without copying the opposing side led to charges of improper ex parte communications

• In one email the lawyer asks the arbitrator how much the arbitrator thinks her cases are worth and in another complained to the arbitrator about opposing counsel, “Then he upped his demand to $80k, but said he hadn’t talked to his client yet. WTF?”

• The arbitrator replied, “I think we should just finish the trial and you say, F him.”

• In another email exchange with the arbitrator, the lawyer called a claimant “my pro se from hell” and “insane” and made disparaging comments about opposing counsel, calling him an “idiot,” “annoying” and “a bad lawyer.”


• Disciplinary action against arbitrator: In re Teague, M.R. 25817, 2011PR00076 (2 years suspension) (3/15/13)
Can Judges and Lawyers Be “Friends”

• Lawyers must be careful to not “knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.” Rule 8.4(f).

• A lawyer may violate this rule if she “friends” a judge before whom she may appear if the lawyer is in a jurisdiction that labels these social networking connections as unethical.

• But there is a split of authority as to whether such conduct is unethical.
  – Found to be ethical by the judicial ethics committees of Kentucky, New York, and South Carolina and ABA Formal Op. 462 (Feb. 21, 2013).
  – However, a Florida committee on judicial ethics reached the opposite conclusion - Florida Bar Ass’n Advisory Comm. on Judicial Ethics, Op. 2009-20 (2009).

• North Carolina judge received public reprimand for friending a litigant mid-trial – *In re Terry*, No. 08-234, Jud. Standards Com. Of N.C. (April 1, 2009)
Can judges and lawyers be “friends?”

• Yes.
  – Remain impartial
  – Maintain dignity
  – No comments on any pending matter
  – No legal advice
  – Stay abreast of changes in social media site and policies
  – Be extremely cautious
  – See e.g.:
    • ABA Formal Op. 462 (Feb. 21, 2013)
    • Ohio Op. 2010-7 (12/2010)
    • N.Y.Op. 08-176 (1/2009)
Can judges and lawyers be “friends”?

• No

  – Conveys impression that the lawyer “friends” are in a special position to influence the judge.

  – Can be “friends” with lawyers not appearing before him/her

  – Can post material on Facebook as long as it is within the Rules.

Professionalism: Dealing with Incivility
The Meaning of “Incivility” Under the Rules

- Taking action that merely serves to harass or maliciously injure another (R. 1.2(f); 3.1, 3.2 & 3.3)

- Using means to embarrass, delay or burden another (R. 4.4); obtaining/obstructing evidence by violating another's rights (R. 3.3, 3.4 & 4.4)

- Conduct prejudicial to the administration of justice; discriminatory treatment of others (R. 3.3 & 8.4(a)(5))

- Bringing the courts or legal profession into disrepute (S.Ct.R. 770)
**Cases Prosecuted**

Typically involve:

- History of multiple claims of unprofessional behavior;
- Physical harm or serious threats to do so;
- Use of foul or threatening language documented by letter, transcript or other writing;
- Diminished professional objectivity (lawyer took case too personally or was *pro se*); and/or
- Possible underlying problem of mental or substance impairment.
In re Melvin Hoffman, M.R. 24030, 08 SH 65 (Ill. Sept. 22, 2010)

Three-count complaint for false and reckless statements made regarding the qualifications and integrity of a circuit court judge and an ALJ as well as improper statements to a lawyer in another proceeding related to the lawyer’s religion

In administrative hearing with the Illinois Department of Children and Family Services:

- Referred to proceedings - "this is a kangaroo court;"

- Called opposing counsel as “[the judge's] "fellow employee;""

- Said to ALJ he would be "embarrassed to have to take such jobs [as Administrative Law Judge];" and

- Stated that the proceeding was "no more a fair hearing than they had in Russia when they were operating under the Soviet system."

Six months suspension and until further order of the Court
Duty to Report Lawyer Misconduct (a/k/a “Himmel” duty): Rule 8.3

ILRPC 8.3 sets forth the **mandatory** duty as follows:


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(c) This Rule does not require disclosure of information otherwise protected by the attorney-client privilege or by law or information gained by a lawyer or judge while participating in an approved lawyers’ assistance program or an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred.
ARDC Resources
For the Rules of Professional Conduct & Disciplinary Law

ARDC website at: www.iardc.org

For Guidance on the Rules and an IL Lawyer’s Professional Duties

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

Talk it out with other lawyers
See ILRPC 1.6(b)(4)