

From: PAUL DULBERG paul_dulberg@comcast.net  
Subject: Supporting Documents
Date: November 17, 2018 at 12:48 PM
To: juliawilliams@clintonlaw.net
Cc: ed@clintonlaw.net

PD



main arguments
(2).zip



Misc.zip

4. That due to the actions and status of MAST in relation to POPOVICH, the actions and inactions of MAST are directly attributable to his employer, partnership, or principal, being THE LAW OFFICES OF THOMAS J. POPVICH, P.C.
5. Venue is therefore claimed proper in McHenry County, Illinois, as the Defendants transact substantial and regular business in and about McHenry County in the practice of law, where their office is located.
6. On or about June 28, 2011, your Plaintiff, DULBERG was involved in a horrendous accident, having been asked by his neighbors Caroline McGuire and William McGuire, in assisting a David Gagnon in the cutting down of a tree on the McGuire property. DULBERG lived in the neighborhood.
7. At this time, Gagnon lost control of the chainsaw he was using causing it to strike DULBERG. This caused substantial and catastrophic injuries to DULBERG, including but not limited to great pain and suffering, current as well as future medical expenses, in an amount in excess of \$260,000.00, along with lost wages in excess of \$250,000.00, and various other damages.
8. In May of 2012, DULBERG retained THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., pursuant to a written retainer agreement attached hereto as Exhibit A.
9. A copy of the Complaint filed by MAST on his own behalf, and on behalf of DULBERG, is attached hereto as Exhibit B, and the allegations of that Complaint are fully incorporated into this Complaint as if fully set forth herein.
10. An implied term of the retainer agreement attached hereto as Exhibit A, was that at all times, the Defendants would exercise their duty of due care towards their client and conform their acts and actions within the standard of care every attorney owes his client.

11. That as Exhibit B reveals, Defendants property filed suit against not only the operator of the chain saw, but also his principals, Caroline McGuire and William McGuire, who purportedly were supervising him in his work on the premises.
12. At the time of filing of the aforesaid Complaint, MAST certified pursuant to Supreme Court Rule 137, that he had made a diligent investigation of the facts and circumstances around the Complaint he filed, and further had ascertained the appropriate law. MAST evidently believed a very good and valid cause of action existed against Caroline McGuire and William McGuire.
13. The matter proceeded through the normal stages of litigation until sometime in late 2013 or early 2014, when MAST met with DULBERG and other family members and advised them there was no cause of action against William McGuire and Caroline McGuire, and told DULBERG he had no choice but to execute a release in favor of the McGuire's for the sum of \$5,000.00. DULBERG, having no choice in the matter, reluctantly agreed with MAST and to accept the sum of \$5,000.00 releasing not only William and Caroline McGuire, but also Auto-Owners Insurance Company from any further responsibility or liability in the matter. A copy of the aforesaid general release and settlement agreement is attached hereto as Exhibit C.
14. MAST and POPOVICH continued to represent DULBERG through to and including March of 2015, following which DULBERG and the Defendants terminated their relationship.
15. Continuously throughout the period of representation, MAST and POPOVICH represented repeatedly to DULBERG there was no possibility of any liability against William and/or Caroline McGuire and/or Auto-Owners Insurance Company, and lulled DULBERG into believing that the matter was being properly handled. Then, due to a claimed failure of communication, MAST and POPOVICH withdrew from the representation of DULBERG.

16. Thereafter, DULBERG retained other attorneys and proceeded to a binding mediation before a retired Circuit Judge, where DULBERG received a binding mediation award of \$660,000.00 in gross, and a net award of \$561,000.00. Unfortunately, a "high-low agreement" had been executed by DULBERG, reducing the maximum amount he could recover to \$300,000.00 based upon the insurance policy available. The award was substantially more than that sum of money, and could have been recovered from McGuire's had they not been dismissed from the Complaint. A copy of the aforesaid Mediation Award is attached hereto as **Exhibit D**.

17. The McGuire's were property owners and had property insurance covering injuries or losses on their property, as well as substantial personal assets, including the property location where the accident took place at 1016 West Elder Avenue, in the City of McHenry, Illinois.

McGuire's were well able to pay all, or a portion of the binding mediation award had they still remained parties.

18. DULBURG, in his relationship with POPOVICH and MAST, cooperated in all ways with them, furnishing all necessary information as required, and frequently conferred with them.

19. Until the time of the mediation award, DULBURG had no reason to believe he could not recover the full amount of his injuries, based on POPOVICH'S and MAST'S representations to DULBERG that he could recover the full amount of his injuries from Gagnon, and that the inclusion of the McGuire's would only complicate the case.

20. Following the execution of the mediation agreement with the "high-low agreement" contained therein, and the final mediation award, DULBURG realized for the first time that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuire's was a serious and substantial mistake. Following the

mediation, DULBERG was advised to seek an independent opinion from an attorney handling Legal Malpractice matters, and received that opinion on or about December 16, 2016.

21. MAST and POPOVICH, jointly and severally, breached the duties owed DULBURG by violating the standard of care owed DULBERG in the following ways and respects:

- a) Failed to take such actions as were necessary during their representation of DULBERG to fix liability against the property owners of the subject property (the McGuire's) who employed Gagnon, and sought the assistance of DULBERG;
- b) Failed to thoroughly investigate liability issues against property owners of the subject property;
- c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG;
- d) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property;
- e) Improperly urged DULBURG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- f) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuire's and their obvious liability were a very necessary party to the litigation;
- g) Falsely advised DULBURG throughout the period of their representation, that the actions taken regarding the McGuire's was proper in all ways and respects, and that DULBURG had no choice but to accept the settlement;

h) Failed to properly explain to DULBURG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;

i) Continually reassured DULBURG that the course of action as to the property owners was proper and appropriate;

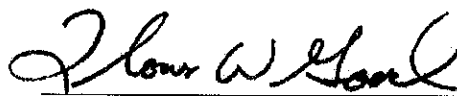
j) Were otherwise negligent in their representation of DULBERG, concealing from him necessary facts for DULBURG to make an informed decision as to the McGuire's, instead coercing him into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury.

22. That DULBERG suffered serious and substantial damages, not only as a result of the injury as set forth in the binding mediation award, but due to the direct actions of MAST and POPOVICH in urging DULBURG to release the McGuire's, lost the sum of well over \$300,000.00 which would not have occurred but for the acts of MAST and THE LAW OFFICES OF THOMAS J. POPOVICH, P.C.

WHEREFORE, your Plaintiff, PAUL DULBERG prays this Honorable Court to enter judgment on such verdict as a jury of twelve (12) shall return, together with the costs of suit and such other and further relief as may be just, all in excess of the jurisdictional minimums of this Honorable Court.

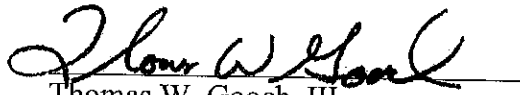
Respectfully submitted by,

PAUL DULBERG, Plaintiff, by his
attorneys THE GOOCH FIRM,



Thomas W. Gooch, III

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF TWELVE (12) PERSONS.


Thomas W. Gooch, III

Thomas W. Gooch, III
THE GOOCH FIRM
209 S. Main Street
Wauconda, IL 60084
847-526-0110
ARDC No.: 3123355
gooch@goochfirm.com
office@goochfirm.com

CONTRACT FOR LEGAL SERVICES

I agree to employ the LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter "my attorney") to represent me in the prosecution or settlement of my claim against persons or entities responsible for causing me to suffer injuries and damages on the _____ day of _____, 20____.

My attorney agrees to make no charge for legal services unless a recovery is made in my claim. The approval of any settlement amount cannot be made without my knowledge and consent.

I agree to pay my attorney in consideration for his legal services a sum equal to one-third (33 1/3%) of my recovery from my claim by suit or settlement; this will increase to 40% in the event my claim results in more than one (1) trial and/or an appeal of a trial. I understand my attorney may need to incur reasonable expenses in properly handling my claim including, but not limited to, expenses such as accident reports, filing fees, court reporters fees, video fees, records fees, and physician fees. I understand those expenses will be taken out of my settlement, in addition to my attorney's legal fee.

[Signature]
Client

Client

Date: _____

LAW OFFICES OF THOMAS J. POPOVICH

By: [Signature]

Date: _____

LAW OFFICES OF THOMAS J. POPOVICH, P.C.
3416 West Elm Street
McHenry, Illinois 60050
815/344-3797



COPY

MAY 15 2012

KATHARINE M. KALPE
McHENRY CTY. CLK.

STATE OF ILLINOIS)
)SS
COUNTY OF McHENRY)

IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,

Plaintiff,

vs.

No.:

12LA178

DAVID GAGNON, Individually, and as
Agent of CAROLINE MCGUIRE and BILL
MCGUIRE, and CAROLINE MCGUIRE
and BILL MCGUIRE, Individually,

Defendants.

COMPLAINT

NOW COMES the Plaintiff, PAUL DULBERG, by his attorneys, LAW OFFICES OF
THOMAS J. POPOVICH, P.C., and complaining against the Defendants, DAVID GAGNON,
Individually, and as Agent of CAROLINE MCGUIRE and BILL MCGUIRE, and CAROLINE
MCGUIRE and BILL MCGUIRE, individually, and states as follows:

Count I

Paul Dulberg vs. David Gagnon, individually, and as Agent of Caroline and Bill McGuire

1. On June 28, 2011, the Plaintiff, PAUL DULBERG, lived in the City of McHenry,
County of McHenry, Illinois.
2. On June 28, 2011, Defendants CAROLINE MCGUIRE and BILL MCGUIRE
lived, controlled, managed and maintained a single family home located at 1016 W. Elder

Avenue, in the City of McHenry, County of McHenry, Illinois.

NOTICE
BY LOCAL RULE 3.10
THIS CASE IS HEREBY SET FOR SCHEDULING
CONFERENCE IN COURTROOM 206 ON
11/18/2012 AT 9:00 AM PM
FAILURE TO APPEAR MAY RESULT IN THE CASE
BEING DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

NOTICE
BY LOCAL RULE 3.10
THIS CASE IS HEREBY SET FOR SCHEDULING
CONFERENCE IN COURTROOM 206 ON
11/18/2012 AT 9:00 AM PM
FAILURE TO APPEAR MAY RESULT IN THE CASE
BEING DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

ALL-STATE LEGAL®

PLAINTIFF'S
EXHIBIT

B

3. On June 28, 2011, the Defendant, DAVID GAGNON, was living and/or staying at his parent's home at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

4. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE contracted, hired the Defendant, DAVID GAGNON, to cut down, trim and/or maintain the trees and brush at their premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

5. On June 28, 2011, and at the request and with the authority and permission of the Defendants CAROLINE McGUIRE and BILL McGUIRE, and for their benefit, the Defendant, DAVID GAGNON, was working under their supervision and control while engaged in cutting, trimming and maintaining trees and brush at the premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

6. On June 28, 2011, as part of his work at the subject property, the Defendant, DAVID GAGNON, was authorized, instructed, advised and permitted to use a chainsaw to assist him in his work for Defendants, CAROLINE McGUIRE and BILL McGUIRE, which was owned by the McGuires.

7. On June 28, 2011, the Defendant, DAVID GAGNON, was under the supervision and control of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was working as their apparent and actual agent, and was then acting and working in the scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE.

8. On June 28, 2011, and while the Defendant, DAVID GAGNON, was working in the course and scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was under their supervision and control, Defendant, DAVID GAGNON was in use of a chainsaw while trimming a tree and branch.

9. On June 28, 2011, and while Defendant, DAVID GAGNON, was in use of a chainsaw while trimming a tree and branch, Defendant, DAVID GAGNON, asked for and/or requested the assistance of the Plaintiff, PAUL DULBERG, to hold the tree branch while Defendant, DAVID GAGNON, trimmed the branch with the chainsaw.

10. On June 28, 2011, and while Defendant, DAVID GAGNON, was in sole control, use and operation of the subject chainsaw, the chainsaw was caused to strike and injure the Plaintiff, PAUL DULBERG.

11. At all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew of Defendant, DAVID GAGNON's use of the chainsaw in the presence of the Plaintiff, PAUL DULBERG, and knew that such created a danger to the Plaintiff, PAUL DULBERG's safety.

12. That at all relevant times, the Defendants, DAVID GAGNON, as agent of CAROLINE McGUIRE and BILL McGUIRE, owed a duty to use care and caution in his operation of a known dangerous instrumentality.

13. On June 28, 2011, the Defendant, DAVID GAGNON, was negligent in one or more of the following ways:

- a. Failed to maintain control over the operating of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant, DAVID GAGNON's inability to control the chainsaw;
- d. Failed to keep a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

14. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

15. That at the above time and date, the Defendant's negligence can be inferred from the circumstances of the occurrence as the instrument of the injury was under the control of the Defendant and therefore, negligence can be presumed under the doctrine of *Res Ipsa Loquitur*.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants, DAVID GAGNON, and CAROLINE McGUIRE and BILL McGUIRE in an amount in excess of \$50,000.00, plus costs of this action.

Count II

Paul Dulberg vs. Caroline McGuire and Bill McGuire

15. That the Plaintiff, PAUL DULBERG, restates and realleges paragraphs 1 through 14, in Count I, above, as paragraphs 1 through 15 of Count II, as if fully alleged herein.

16. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, owned, controlled, maintained and supervised the premises whereat the accident to the Plaintiff, PAUL DULBERG, occurred.

17. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were in control of and had the right to advise, instruct and demand that the Defendant, DAVID GAGNON, act or work in a safe and reasonable manner.

18. That at all relevant times, the Defendant, DAVID GAGNON, was acting as the agent, actual and apparent, of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was acting at their request and in their best interests and to their benefit as in a joint enterprise.

19. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew DAVID GAGNON was operating a chainsaw with the assistance of the Plaintiff, PAUL DULBERG, and had the right to discharge or terminate the Defendant, DAVID GAGNON's work for any reason.

20. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, owed a duty to supervise and control Defendant, DAVID GAGNON's activities on the property so as not to create a unreasonable hazard to others, including the Plaintiff, PAUL DULBERG.

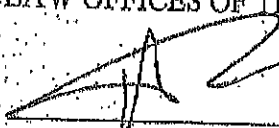
21. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were negligent in one or more of the following ways:

- a. Failed to control operation of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant's inability to control the chainsaw;
- d. Failed to keep the chainsaw a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

22. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

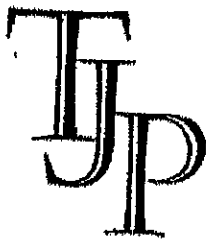
WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants,
CAROLINE McGUIRE and BILL McGUIRE, in an amount in excess of \$50,000.00, plus costs
of this action.

LAW OFFICES OF THOMAS J. POPOVICH, P.C.



One of the Attorneys for Plaintiff

Hans A. Mast
LAW OFFICES OF THOMAS J. POPOVICH, P.C.
3416 West Elm Street
Lake, Illinois 60050
(815) 344-3797
ARDC No. 06203684



The Law Offices of Thomas J. Popovich P.C.

3416 W. ELM STREET
McHENRY, ILLINOIS 60050
TELEPHONE: 815.344.3797
FACSIMILE: 815.344.5280
www.popovichlaw.com

THOMAS J. POPOVICH
HANS A. MAST
JOHN A. KORNAK

MARK J. VOGG
JAMES P. TUTAJ
ROBERT J. LUMBER
THERESA M. FREEMAN

January 24, 2014

Paul Dulberg
4606 Hayden Court
McHenry, IL 60051

RE: *Paul Dulberg vs. David Gagnon, Caroline McGuire and Bill McGuire*
McHenry County Case: 12 LA 178

Dear Paul:

Please find enclosed the General Release and Settlement Agreement from defense counsel for Caroline and Bill McGuire. Please Release and return it to me in the enclosed self-addressed stamped envelope at your earliest convenience.

Thank you for your cooperation.

Very truly yours,

COPY
HANS A. MAST

smq
Enclosure



WAUKEGAN OFFICE
210 NORTH MARTIN LUTHER
KING JR. AVENUE
WAUKEGAN, IL 60085

GENERAL RELEASE AND SETTLEMENT AGREEMENT

NOW COMES PAUL DULBERG, and in consideration of the payment of Five-Thousand (\$5,000.00) Dollars to him, by or on behalf of the WILLIAM MCGUIRE and CAROLYN MCGUIRE (aka Bill McGuire; improperly named as Caroline McGuire) and AUTO-OWNERS INSURANCE COMPANY, the payment and receipt of which is hereby acknowledged, PAUL DULBERG does hereby release and discharge the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, and any agents or employees of the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, of and from any and all causes of action, claims and demands of whatsoever kind or nature including, but not limited to, any claim for personal injuries and property damage arising out of a certain chain saw incident that allegedly occurred on or about June 28, 2011, within and upon the premises known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

IT IS FURTHER AGREED AND UNDERSTOOD that there is presently pending a cause of action in the Circuit Court of the 22nd Judicial Circuit, McHenry County, Illinois entitled "Paul Dulberg, Plaintiff, vs. David Gagnon, Individually, and as agent of Caroline McGuire and Bill McGuire, and Caroline McGuire and Bill McGuire, Individually, Defendants", Cause No. 2012 LA 178, and that this settlement is contingent upon WILLIAM MCGUIRE and CAROLYN MCGUIRE being dismissed with prejudice as parties to said lawsuit pursuant to a finding by the Circuit Court that the settlement between the parties constitutes a good faith settlement for purposes of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*

IT IS FURTHER AGREED AND UNDERSTOOD that as part of the consideration for this agreement the undersigned represents and warrants as follows (check applicable boxes):

- ☐ I was not 65 or older on the date of the occurrence.
- ☐ I was not receiving SSI or SSDI on the date of the occurrence.
- ☐ I am not eligible to receive SSI or SSDI.
- ☐ I am not currently receiving SSI or SSDI.

IT IS FURTHER AGREED AND UNDERSTOOD:

- a. That any subrogated claims or liens for medical expenses paid by or on behalf of PAUL DULBERG shall be the responsibility PAUL DULBERG, including, but not limited to, any Medicare liens. Any and all reimbursements of medical expenses to subrogated parties, including Medicare's rights of reimbursement, if any, shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released herein.
- b. That any outstanding medical expenses are PAUL DULBERG's responsibility and all payment of medical expenses hereafter shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released

- c. That PAUL DULBERG agrees to save and hold harmless and indemnify the parties released herein against any claims made by any medical providers, including, but not limited to Medicare or parties subrogated to the rights to recover medical or Medicare payments.

IT IS FURTHER AGREED AND UNDERSTOOD by the parties hereto that this agreement contains the entire agreement between the parties with regard to materials set forth herein, and shall be binding upon and inure to the benefit of the parties hereto, jointly and severally, and the executors, conservators, administrators, guardians, personal representatives, heirs and successors of each.

IT IS FURTHER AGREED AND UNDERSTOOD that this settlement is a compromise of a doubtful and disputed claim and no liability is admitted as a consequence hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the dates set forth below.

Dated: _____

PAUL DULBERG

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

PAUL DULBERG personally appeared before me this date and acknowledged that she executed the foregoing Release and Settlement Agreement as his own free act and deed for the uses and purposes set forth therein.

Dated this _____ day of January, 2014.

Notary Public



Binding Mediation Award

Paul Dulberg

v.

David Gagnon

ADR Systems File # 33391BMAG

On December 8, 2016, the matter was called for binding mediation before the Honorable James P. Etchingham, (Ret.), in Chicago, IL. According to the agreement entered into by the parties, if a voluntary settlement through negotiation could not be reached the mediator would render a settlement award which would be binding to the parties. Pursuant to that agreement the mediator finds as follows:

Finding in favor of:

Paul Dulberg

Gross Award:

\$660,000.

Comparative fault:

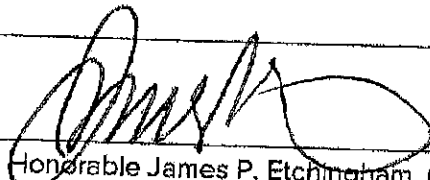
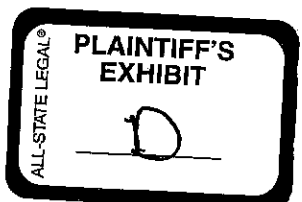
15

% (if applicable)

Net Award:

\$561,000

Comments/Explanation

Medical\$ 60,000.Future medical\$ 200,000.Lost wage\$ 250,000.PIS75,000.LNL75,000.

 The Honorable James P. Etchingham, (Ret.)


**IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS**

Katherine M. Keefe
Clerk of the Circuit Court
Electronically Filed
Transaction ID: 17111133930
17LA000377
02/07/2018
McHenry County, Illinois
22nd Judicial Circuit

PAUL DULBERG,

Plaintiff,

vs.

THE LAW OFFICES OF THOMAS J.
POPOVICH, P.C., and HANS MAST,

Defendants.

No. 17LA000377

DEFENDANTS' COMBINED MOTION TO DISMISS

Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, by and through their attorneys, GEORGE K. FLYNN, and CLAUSEN MILLER P.C., pursuant to 735 ILCS 5/2-615, 735 ILCS 5/2-619(a)(5) and 735 ILCS 5/2-619.1, move to dismiss Plaintiff's Complaint, and state as follows:

1. The Plaintiff Paul Dulberg ("Dulberg") retained defendants The Law Offices of Thomas J. Popovich P.C. ("Popovich") to prosecute a personal injury claim on his behalf against his next door neighbors, Carolyn and Bill McGuire and their adult son (Dulberg's lifelong friend), David Gagnon ("Gagnon")). Hans Mast ("Mast") handled the case for the firm. This legal malpractice case arises out of that underlying personal injury case.

2. In Illinois, to establish a legal malpractice claim, a plaintiff must plead and prove the existence of an attorney client relationship; a duty arising from that relationship; a breach of that duty, the proximate causal relationship between the breach of duty and the damage sustained; and actual damages. *Glass v. Pitler*, 276 Ill. App. 3d 344, 349 (1st Dist. 1995).

3. The plaintiff in a legal malpractice claim must plead a case within the case. *Ignarski v. Norbut*, 271 Ill. App. 3d 522 (1995).

4. Dulberg fails to allege requisite facts in support of each and every element of the “underlying” case or “case within the case” against the McGuires.

5. Dulberg’s complaint must be dismissed pursuant to 735 ILCS 5/2-615.

6. Dulberg admits in ¶13 of his Complaint, that he agreed to a \$5,000.00 settlement with the McGuires.

7. The doctrine of judicial estoppel provides that a party who assumes a particular position in a proceeding is estopped from assuming a contrary position in a subsequent proceeding. *Larson vs. O’Donnell*, 361 Ill. App. 3d 388, 398 (1st Dist. 2005), *rev’d on other grounds*. Dulberg is estopped from bringing this legal malpractice case because he expressly agreed to settle his case against the McGuires, and then continued to pursue his case against Gagnon. Dismissal is mandated under 735 ILCS 5/2-619(a)(9).

8. Dulberg has failed to file his legal malpractice complaint against Popovich and Mast within the two year statute of limitations for claims against attorneys. 735 ILCS 5/13-214.3 provides for a two year statute of limitations period which shall begin to run at “the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

9. Here, the Plaintiff did not file his Legal Malpractice Complaint against Defendants until November 28, 2017, at least seven (7) months too late.

10. His claim must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5).

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(5), and 735 ILCS 5/2-

619.1, respectfully request this Honorable Court dismiss Plaintiff's Complaint with prejudice,
and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

GEORGE K. FLYNN
CLAUSEN MILLER P.C.

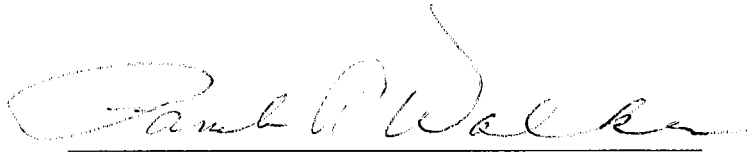
GEORGE K. FLYNN
CLAUSEN MILLER P.C.
ARDC No. 6239349
10 South LaSalle Street
Chicago, Illinois 60603-1098
(312) 855-1010
Attorneys for Defendants
gflynn@clausen.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was caused to be served by Email and/or U.S. Mail by depositing same in the U.S. Mail at 10 S. LaSalle Street, Chicago, IL 60603, and properly addressed, with first class postage prepaid, on the 7th day of February, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III
The Gooch Firm
209 S. Main Street
Wauconda, IL 60084
gooch@goochfirm.com

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

A handwritten signature in black ink, appearing to read "Paul A. Walker", is written over a horizontal line.

✓
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Katherine M. Keefe
Clerk of the Circuit Court
Electronically Filed
Transaction ID: 17111133930
17LA000377
02/07/2018
McHenry County, Illinois
22nd Judicial Circuit

MEMORANDUM IN SUPPORT OF DEFENDANTS'
COMBINED MOTION TO DISMISS

I. INTRODUCTION

Received 02-07-2018 01:20 PM / Circuit Clerk Accepted on 02-08-2018 09:41 AM / Transaction #17111133930 / Case #17LA000377
Page 1 of 39

the McGuires. Thereafter, he and Mast reached an impasse. Mast and the firm withdrew, and successor counsel continued to prosecute the case against Gagnon.

Dulberg now has a case of “buyer’s remorse,” admitting that he agreed to accept the McGuires’ settlement offer. He has not plead the requisite elements of a legal malpractice case against Popovich and Mast, or the requisite elements of the underlying case (the “case within the case”). Moreover, his agreement to settle the case with the McGuires, approved by the court along with a good faith finding of settlement, estops him from now taking a contrary position. Finally, his legal malpractice claim is barred by the applicable two-year statute of limitations.

II. STATEMENT OF FACTS

A. The Following Facts Can Be Gleaned From The Complaint (Exhibit 1) and Its Exhibits

On June 28, 2011, Dulberg was assisting David Gagnon in the cutting down of a tree on the property of Carolyn and Bill McGuire. (Exhibit 1, ¶ 6). Gagnon lost control of the chainsaw and caused personal injury to Dulberg. (Exhibit 1, ¶ 7). In May of 2012, Dulberg retained Popovich. (Exhibit 1, ¶8). On May 15, 2012, Mast filed a Complaint on behalf of Dulberg against Gagnon and McGuires in the Circuit Court of McHenry County, Illinois, Case No, 12 LA 178. (Exhibit 1, ¶ 9, and Exhibit 1B)¹. In late 2013, Dulberg settled with the McGuires and executed a Release in their favor in exchange for the payment of \$5,000.00. The McGuires and their insurance carrier, Auto Owners Insurance Company, were released. (Exhibit 1, ¶ 13 and Exhibit 1C). Defendants continued to represent Dulberg until March 2015. Dulberg retained successor counsel and proceeded to a binding mediation at which time he apparently executed a High-Low Agreement and received a mediation award (Exhibit 1, ¶ 16 and Exhibit 1D). After

¹ The exhibits to the underlying complaint in Case No. 12 LA 178 will be referenced as Exhibits 1A, 1B, 1C and 1D.

the mediation, Dulberg allegedly realized for the first time that the information Mast and Popovich had given him was false and misleading and that the dismissal of the McGuires was a serious and substantial mistake. He was advised to seek an independent opinion from an attorney handling legal malpractice matters and received that opinion on or about December 16, 2016. (Exhibit 1, ¶ 20).

B. Alleged Acts of Negligence

In Exhibit 1, ¶ 21, Dulberg alleges that Defendants failed to take actions as were necessary to fix liability against the property owners of the subject property (the McGuires), alleging that they employed Gagnon and sought the assistance of Dulberg. It is alleged that they failed to thoroughly investigate liability issues against the property owners, failed to conduct necessary discovery, failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property, and improperly urged Dulberg to accept a "non-sensical" settlement from the property owners. It is also alleged that Defendants concealed necessary facts from Dulberg preventing him from making an informed decision as to the McGuires and "coercing" him in signing a Release and Settlement Agreement.

III. DULBERG FAILS TO STATE A CLAIM FOR LEGAL MALPRACTICE UNDER 735 ILCS 5/2-615

A. Legal Standard

It is clearly established that Illinois is a fact pleading jurisdiction, requiring the plaintiff to present a legally and factually sufficient complaint. *Winfrey v. Chicago Park Dist.*, 274 Ill. App. 3d 939, 942 (1st Dist. 1995). A plaintiff must allege facts sufficient to bring his or her claim within the cause of action asserted. *Jackson vs. South Holland Dodge*, 197 Ill. 2d 39 (2001). To pass muster a complaint must state a cause of action in two ways: first, it must be legally sufficient -- it must set forth a legally recognized claim as its avenue of recovery, and

second, the complaint must be factually sufficient -- it must plead facts, which bring the claim within a legally recognized cause of action as alleged. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981). Dismissal of a complaint is mandatory if one fails to meet both requirements. *Misselhorn v. Doyle*, 257 Ill. App. 3d 983, 985 (5th Dist. 1994). In ruling on a Section 2-615 motion, “only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered.” *Mount Zion State Bank and Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 115 (1995).

In Illinois, to establish a legal malpractice claim, a plaintiff must plead and prove the existence of an attorney client relationship; a duty arising from that relationship; a breach of that duty, the proximate causal relationship between the breach of duty and the damage sustained; and actual damages. *Glass v. Pitler*, 276 Ill. App. 3d 344, 349 (1st Dist. 1995). The injuries resulting from legal malpractice are not personal injuries but pecuniary injuries to intangible property interests. *Glass* at 349. Damages must be incurred and are not presumed. *Glass* at 349. It is the plaintiff’s burden to establish that “but for” the attorney’s negligence, the client would not have suffered the damages alleged. *Glass* at 349. “The proximate cause element of legal malpractice claim requires that the plaintiff show that but for the attorney’s malpractice, the client would have been successful in the undertaking the attorney was retained to perform. *Green v. Papa*, 2014 IL App. (5th) 1330029 (2014), quoting *Owens v. McDermott Will & Emery*, 316 Ill. App. 340 (2000), at 351. The plaintiff in a legal malpractice claim must plead a case within the case. *Ignarski v. Norbut*, 271 Ill. App. 3d 522 (1995).

B. Dulberg Fails to Plead Facts in Support of His Conclusory Allegations

Dulberg’s pleading and theory of recovery is confusing. Presumably, since Dulberg retained successor counsel in the underlying case, he is only complaining here about the

McGuires' underlying liability, and nothing with respect to case against David Gagnon (when an attorney is discharged and transfers a then viable matter to a successor attorney, the first lawyer cannot be held to have proximately caused the client's lost claim, see *Mitchell v. Shain, Fursel, and Burney, Ltd.*, 332 Ill. App 3d 618 (1st. Dist. 2002), and *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169 (1st Dist. 2004)).

Setting aside the Estoppel and Statute of Limitations issues which will be discussed below, Dulberg's complaint for legal malpractice is rife with unsupported conclusory allegations. Dulberg fails to allege requisite facts in support of each and every element of the "underlying" case or "case within the case" against the McGuires. Simply put, Dulberg fails to plead any facts in support of his conclusions that there was some liability against the McGuires. In ¶ 21 of his complaint, Dulberg alleges negligence against Popovich and Mast, but fails to identify what actions should have been taken and were not. In ¶ 21 (a), Dulberg fails to identify what investigation and discovery should have been undertaken. In ¶¶ 21 (b) and (c), Dulberg fails to identify or discuss the law that "defendants failed to understand." In ¶ 21 (d), Dulberg fails to plead any facts about why the settlement with the McGuires was improper or "non-sensical."

Under Illinois fact pleading requirements, much more is needed. In a case of alleged professional liability, the plaintiff cannot simply allege in conclusory terms that the defendants were negligent, and that the Plaintiff could have proved up liability against the underlying defendants. He must allege why and how. Dulberg's complaint must be dismissed pursuant to 735 ILCS 5/2-615.

IV. DULBERG'S SETTLEMENT WITH THE MCGUIRES AND THE DOCTRINE OF JUDICIAL ESTOPPEL BAR HIS LEGAL MALPRACTICE CLAIM

Dulberg admits in ¶13 of his Complaint, that he agreed to a \$5,000.00 settlement with the McGuires. Attached to this Complaint, is an unsigned copy of the Settlement Agreement, Exhibit 1C.² Because Dulberg agreed to the settlement with the McGuires, waived and released all claims against them and their insurance carrier, and allowed the Court to enter an Order on a Good Faith Finding of Settlement (a joint tortfeasor Gagnon remained in the case), he is now estopped from taking a contrary position that the settlement was appropriate, fair, knowing and voluntary.³

The doctrine of judicial estoppel provides that a party who assumes a particular position in a proceeding is estopped from assuming a contrary position in a subsequent proceeding. *Larson vs. O'Donnell*, 361 Ill. App. 3d 388, 398 (1st Dist. 2005), *rev'd on other grounds*. In *Larson*, a plaintiff became unemployed during the pendency of his divorce. At settlement, he agreed to pay a specified dollar amount for child support and specified dollar amount for maintenance, based on the income he earned prior to his having become unemployed. *Larson* at 391. The parties and their attorneys appeared before the court to present the marital settlement agreement for approval at a "prove up". *Larson* at 392. At the prove up hearing, the plaintiff gave unequivocal testimony that he understood the terms and conditions of the agreement and acknowledged the amounts he was required to pay under the agreement. *Larson* at 392. After entry of the judgment for dissolution of marriage, the plaintiff began paying support based on a

² It does not appear that Dulberg is denying the authenticity of the Settlement Agreement, despite the fact that his signature is not attached. Mast is in possession of a signed copy of the Settlement Agreement, which Dulberg executed on January 29, 2014.

³ For the Court's convenience, attached as Exhibits 2 and 3 are the Motion for the Good Faith Finding and Court's Order granting the Good Faith Finding of Settlement. The Court may take judicial notice of its own court docket see *All Purpose Nursing Service v. Human Rights Com.*, 205 Ill. App. 3d 816, 823 (1st Dist. 1990). Notably, the McGuires also filed a counterclaim for contribution against Gagnon in the underlying case.

percentage of his unemployment income rather than the amounts required by the judgement for dissolution. He was later held in contempt for failure to pay the amounts prescribed in the judgment of dissolution and attorney's fees were assessed against him in the divorce court. He sued his former attorneys for breach of fiduciary duty and legal malpractice. *Larson* at 393. The court held that the plaintiff in *Larson* was judicially estopped from attempting to create a question of fact regarding his "actual" understanding for purposes of summary judgment by later contradicting his previous position. *Larson* at 398.

Like *Larson*, Dulberg cannot now claim that he did not knowingly and voluntarily settle and release his claims against the McGuires. Moreover, Dulberg, like all adults, is "presumed to know the contents and meaning of the obligations he undertakes when he signs a written agreement." *Premier Elec. Const. Co. vs. Ragnar Benson, Inc.* 111 Ill. App. 3d 855, 865 (1st Dist. 1982). Accordingly, Dulberg is estopped from claiming that his agreement to settle the underlying case with the McGuires was not "knowing and voluntary," and he cannot claim that he was coerced. The final decision was his alone. Dulberg is estopped from now asserting a claim for legal malpractice against his former counsel. His Complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(9).

V. DULBERG'S CLAIM IS BARRED BY THE TWO YEAR STATUTE OF LIMITATIONS FOR CLAIMS AGAINST ATTORNEYS

Dulberg has failed to file his legal malpractice complaint against Popovich and Mast within the two year statute of limitations for claims against attorneys. 735 ILCS 5/13-214.3 provides for a two year statute of limitations period which shall begin to run at "the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought. *Ogle v. Hotto*, 273 Ill. App. 3d 313, 318 (5th Dist. 1995). 735 ILCS 5/13-214.3(b) reads as follows:

(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced within two years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

Dulberg's Complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5) because on its face, his claims are untimely.

Dulberg admits in ¶ 14 of Exhibit 1 that Popovich's and Mast's representation ceased in March of 2015. Without some exception to the rule, a claim for legal malpractice would have been required to be filed by March 2017. Here, the Plaintiff did not file his Legal Malpractice Complaint against Defendants until November 28, 2017 (Exhibit 1), at least seven (7) months too late. Apparently realizing that his claims are untimely, Dulberg attempts to rely on the "discovery rule." He alleges in ¶ 20, without any factual support, that the information regarding the McGuires' liability as a property owner, was "false and misleading." As discussed above, Dulberg fails to allege any specific facts about any false and misleading information or other specifics as to Mast and Popovich's negligent conduct. Dulberg fails to plead facts in support of the case within the case, i.e. the McGuires' liability in the underlying cause of action. Dulberg alleges that he was advised to seek an independent opinion from an attorney handling legal malpractice matters on or about December 16, 2016, but provides no other explanation about why he was unaware of a claim until December 16, 2016. What happened after he signed the agreement on January 29, 2014?

While there was nothing preventing Dulberg at the time of the McGuire settlement from seeking a second opinion concerning the propriety or "sense" in settling, Illinois law requires a plaintiff relying on the discovery rule to plead facts in support of reliance on the discovery rule.

In other words, the plaintiff must explain why he did not discover the cause of action until December 16, 2016. The plaintiff has the burden of proving the date of discovery. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill.2d 72, 85 (1995). Moreover, under Illinois law, *actual knowledge* of the alleged malpractice is not a necessary condition to trigger the running of the statute of limitations. *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (1st Dist. 2011) (“under the discovery rule, a statute of limitations may run despite the lack of actual knowledge of negligent conduct”) (emphasis in original)). A statute of limitations begins to run when the purportedly injured party “has a reasonable belief that the injury was caused by wrongful conduct, thereby creating an obligation to inquire further on that issue.” *Bluewater Partners v. Mason*, 2012 IL App (1st 102165 at *p. 50).

Here, Dulberg fails to allege any facts to support a delay or tolling of the statute. He retained subsequent counsel after the defendants withdrew, and could have requested a legal opinion regarding the McGuires’ liability then, why did he wait? His claim must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5).

V. CONCLUSION

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(5), and 735 ILCS 5/2-619.1, respectfully request this Honorable Court dismiss Plaintiff's Complaint with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

GEORGE K. FLYNN
CLAUSEN MILLER P.C.

GEORGE K. FLYNN
CLAUSEN MILLER P.C.
ARDC No. 6239349
10 South LaSalle Street
Chicago, Illinois 60603-1098
312/855-1010
Attorneys for Defendants
gflynn@clausen.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was caused to be served by Email and/or U.S. Mail by depositing same in the U.S. Mail at 10 S. LaSalle Street, Chicago, IL 60603, and properly addressed, with first class postage prepaid, on the 7th day of February, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III
The Gooch Firm
209 S. Main Street
Wauconda, IL 60084
gooch@goochfirm.com

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

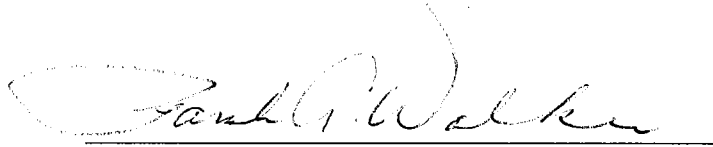
A handwritten signature in cursive script, appearing to read "Paul G. Walker", is written over a horizontal line.

EXHIBIT 1

THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,

Plaintiff,

v.

THE LAW OFFICES OF THOMAS J.
POPOVICH, P.C., and HANS MAST,

Defendant.

No. 17LA000377

Katherine M. Keefe
Clerk of the Circuit Court
Electronically Filed
Transaction ID: 17111117451
17LA000377
11/28/2017
McHenry County, Illinois
22nd Judicial Circuit

NOTICE

THIS CASE IS HEREBY SET FOR A
SCHEDULING CONFERENCE IN
COURTROOM 201 ON
02/27/2018, AT 9:00 AM.

FAILURE TO APPEAR MAY RESULT IN
THE CASE BEING DISMISSED OR AN
ORDER OF DEFAULT BEING ENTERED.

COMPLAINT AT LAW
(Legal Malpractice)

COMES NOW your Plaintiff, PAUL DULBERG (hereinafter also referred to as

"DULBERG"), by and through his attorneys, THE GOOCH FIRM, and as and for his Complaint
against THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter also referred to as
"POPOVICH"), and HANS MAST (hereinafter also referred to as "MAST"), states the
following:

1. Your Plaintiff, PAUL DULBERG, is a resident of McHenry County, Illinois, and was
such a resident at all times complained of herein.
2. Your Defendant, THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., is a law firm
operating in McHenry County, Illinois, and transacting business on a regular and daily basis in
McHenry County, Illinois.
3. Your Defendant, HANS MAST, is either an agent, employee, or partner of THE LAW
OFFICES OF THOMAS J. POPOVICH, P.C. MAST is a licensed attorney in the State of
Illinois, and was so licensed at all times relevant to this Complaint.

4. That due to the actions and status of MAST in relation to POPOVICH, the actions and inactions of MAST are directly attributable to his employer, partnership, or principal, being THE LAW OFFICES OF THOMAS J. POPVICH, P.C.

5. Venue is therefore claimed proper in McHenry County, Illinois, as the Defendants transact substantial and regular business in and about McHenry County in the practice of law, where their office is located.

6. On or about June 28, 2011, your Plaintiff, DULBERG was involved in a horrendous accident, having been asked by his neighbors Caroline McGuire and William McGuire, in assisting a David Gagnon in the cutting down of a tree on the McGuire property. DULBERG lived in the neighborhood.

7. At this time, Gagnon lost control of the chainsaw he was using causing it to strike DULBERG. This caused substantial and catastrophic injuries to DULBERG, including but not limited to great pain and suffering, current as well as future medical expenses, in an amount in excess of \$260,000.00, along with lost wages in excess of \$250,000.00, and various other damages.

8. In May of 2012, DULBERG retained THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., pursuant to a written retainer agreement attached hereto as Exhibit A.

9. A copy of the Complaint filed by MAST on his own behalf, and on behalf of DULBERG, is attached hereto as Exhibit B, and the allegations of that Complaint are fully incorporated into this Complaint as if fully set forth herein.

10. An implied term of the retainer agreement attached hereto as Exhibit A, was that at all times, the Defendants would exercise their duty of due care towards their client and conform their acts and actions within the standard of care every attorney owes his client.

11. That as Exhibit B reveals, Defendants property filed suit against not only the operator of the chain saw, but also his principals, Caroline McGuire and William McGuire, who purportedly were supervising him in his work on the premises.
12. At the time of filing of the aforesaid Complaint, MAST certified pursuant to Supreme Court Rule 137, that he had made a diligent investigation of the facts and circumstances around the Complaint he filed, and further had ascertained the appropriate law. MAST evidently believed a very good and valid cause of action existed against Caroline McGuire and William McGuire.
13. The matter proceeded through the normal stages of litigation until sometime in late 2013 or early 2014, when MAST met with DULBERG and other family members and advised them ~~there was no cause of action against William McGuire and Caroline McGuire, and told DULBERG he had no choice but to execute a release in favor of the McGuire's for the sum of \$5,000.00. DULBERG, having no choice in the matter, reluctantly agreed with MAST and to accept the sum of \$5,000.00 releasing not only William and Caroline McGuire, but also Auto-Owners Insurance Company from any further responsibility or liability in the matter. A copy of the aforesaid general release and settlement agreement is attached hereto as Exhibit C.~~
14. MAST and POPOVICH continued to represent DULBERG through to and including March of 2015, following which DULBERG and the Defendants terminated their relationship.
15. Continuously throughout the period of representation, MAST and POPOVICH represented repeatedly to DULBERG there was no possibility of any liability against William and/or Caroline McGuire and/or Auto-Owners Insurance Company, and lulled DULBERG into believing that the matter was being properly handled. Then, due to a claimed failure of communication, MAST and POPOVICH withdrew from the representation of DULBERG.

16. Thereafter, DULBERG retained other attorneys and proceeded to a binding mediation before a retired Circuit Judge, where DULBERG received a binding mediation award of \$660,000.00 in gross, and a net award of \$561,000.00. Unfortunately, a "high-low agreement" had been executed by DULBERG, reducing the maximum amount he could recover to \$300,000.00 based upon the insurance policy available. The award was substantially more than that sum of money, and could have been recovered from McGuire's had they not been dismissed from the Complaint. A copy of the aforesaid Mediation Award is attached hereto as Exhibit D.

17. The McGuire's were property owners and had property insurance covering injuries or losses on their property, as well as substantial personal assets, including the property location where the accident took place at 1016 West Elder Avenue, in the City of McHenry, Illinois.

McGuire's were well able to pay all, or a portion of the binding mediation award had they still remained parties.

18. DULBURG, in his relationship with POPOVICH and MAST, cooperated in all ways with them, furnishing all necessary information as required, and frequently conferred with them.

19. Until the time of the mediation award, DULBURG had no reason to believe he could not recover the full amount of his injuries, based on POPOVICH'S and MAST'S representations to DULBERG that he could recover the full amount of his injuries from Gagnon, and that the inclusion of the McGuire's would only complicate the case.

20. Following the execution of the mediation agreement with the "high-low agreement" contained therein, and the final mediation award, DULBURG realized for the first time that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuire's was a serious and substantial mistake. Following the

mediation, DULBERG was advised to seek an independent opinion from an attorney handling Legal Malpractice matters, and received that opinion on or about December 16, 2016.

21. MAST and POPOVICH, jointly and severally, breached the duties owed DULBURG by violating the standard of care owed DULBERG in the following ways and respects:

- a) Failed to take such actions as were necessary during their representation of DULBERG to fix liability against the property owners of the subject property (the McGuire's) who employed Gagnon, and sought the assistance of DULBERG;
- b) Failed to thoroughly investigate liability issues against property owners of the subject property;
- c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG;
- d) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property;
- e) Improperly urged DULBURG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- f) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuire's and their obvious liability were a very necessary party to the litigation;
- g) Falsely advised DULBURG throughout the period of their representation, that the actions taken regarding the McGuire's was proper in all ways and respects, and that DULBURG had no choice but to accept the settlement;

h) Failed to properly explain to DULBURG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;

i) Continually reassured DULBURG that the course of action as to the property owners was proper and appropriate;

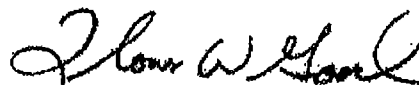
j) Were otherwise negligent in their representation of DULBERG, concealing from him necessary facts for DULBURG to make an informed decision as to the McGuire's, instead coercing him into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury.

22. That DULBERG suffered serious and substantial damages, not only as a result of the injury as set forth in the binding mediation award, but due to the direct actions of MAST and POPOVICH in urging DULBURG to release the McGuire's, lost the sum of well over \$300,000.00 which would not have occurred but for the acts of MAST and THE LAW OFFICES OF THOMAS J. POPOVICH, P.C.

WHEREFORE, your Plaintiff, PAUL DULBERG prays this Honorable Court to enter judgment on such verdict as a jury of twelve (12) shall return, together with the costs of suit and such other and further relief as may be just, all in excess of the jurisdictional minimums of this Honorable Court.

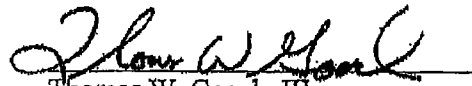
Respectfully submitted by,

PAUL DULBERG, Plaintiff, by his
attorneys THE GOOCH FIRM,



Thomas W. Gooch, III

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF TWELVE (12) PERSONS.


Thomas W. Gooch, III

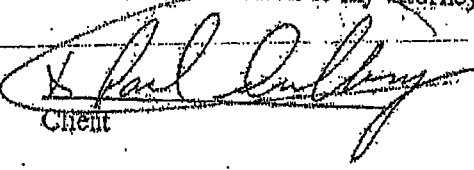
Thomas W. Gooch, III
THE GOOCH FIRM
209 S. Main Street
Wauconda, IL 60084
847-526-0110
ARDC No.: 3123355
gooch@goochfirm.com
office@goochfirm.com

CONTRACT FOR LEGAL SERVICES

I agree to employ the LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter "my attorney") to represent me in the prosecution or settlement of my claim against persons or entities responsible for causing me to suffer injuries and damages on the _____ day of _____, 20____.

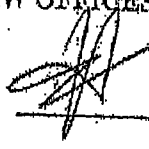
My attorney agrees to make no charge for legal services unless a recovery is made in my claim. The approval of any settlement amount cannot be made without my knowledge and consent.

I agree to pay my attorney in consideration for his legal services a sum equal to one-third (33 1/3%) of my recovery from my claim by suit or settlement; this will increase to ~~44~~ % in the event my claim results in more than one (1) trial and/or an appeal of a trial. I understand my attorney may need to incur reasonable expenses in properly handling my claim including, but not limited to, expenses such as accident reports, filing fees, court reporters fees, video fees, records fees, and physician fees. I understand those expenses will be taken out of my settlement, in addition to my attorney's legal fee.


Client

LAW OFFICES OF THOMAS J. POPOVICH

Client

By: 

Date: _____

Date: _____

LAW OFFICES OF THOMAS J. POPOVICH, P.C.
3416 West Elm Street
McHenry, Illinois 60050
815/344-3797



COPY
MAY 15 2012
KATHLEEN M. KAUF
McHENRY CITY CLERK

STATE OF ILLINOIS)
COUNTY OF McHENRY) SS

IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,
Plaintiff,

vs.

No.:

17LA178

DAVID GAGNON, Individually, and as
Agent of CAROLINE MCGUIRE and BILL
MCGUIRE, and CAROLINE MCGUIRE
and BILL MCGUIRE, Individually,

Defendants.

COMPLAINT

NOW COMES the Plaintiff, PAUL DULBERG, by his attorneys, LAW OFFICES OF
THOMAS J. POPOVICH, P.C., and complaining against the Defendants, DAVID GAGNON,
Individually, and as Agent of CAROLINE McGUIRE and BILL McGUIRE, and CAROLINE
McGUIRE and BILL McGUIRE, individually, and states as follows:

Count I

Paul Dulberg vs. David Gagnon, individually, and as Agent of Caroline and Bill McGuire

1. On June 28, 2011, the Plaintiff, PAUL DULBERG, lived in the City of McHenry,
County of McHenry, Illinois.

2. On June 28, 2011, Defendants CAROLINE McGUIRE and BILL McGUIRE
lived, controlled, managed and maintained a single family home located at 1016 W. Elder
Avenue, in the City of McHenry, County of McHenry, Illinois.

ALL STATE LEGAL
PLAINTIFF'S
EXHIBIT
B

NOTICE
BY LOCAL RULE 3.10

THIS CASE IS HEREBY SET FOR SCHEDULING
CONFERENCE IN COURTROOM 206 ON
JULY 18, 2012, AT 2:00 PM
FAILURE TO APPEAR MAY RESULT IN THE CASE
BEING DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

DEFENDANT'S NOTICE
BY LOCAL RULE 3.10
THIS CASE IS HEREBY SET FOR SCHEDULING
CONFERENCE IN COURTROOM 206 ON
JULY 18, 2012, AT 2:00 PM
FAILURE TO APPEAR MAY RESULT IN THE CASE
BEING DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

3. On June 28, 2011, the Defendant, DAVID GAGNON, was living and/or staying at his parent's home at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

4. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE contracted, hired the Defendant, DAVID GAGNON, to cut down, trim and/or maintain the trees and brush at their premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

5. On June 28, 2011, and at the request and with the authority and permission of the Defendants CAROLINE McGUIRE and BILL McGUIRE, and for their benefit, the Defendant, DAVID GAGNON, was working under their supervision and control while engaged in cutting, trimming and maintaining trees and brush at the premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

6. On June 28, 2011, as part of his work at the subject property, the Defendant, DAVID GAGNON, was authorized, instructed, advised and permitted to use a chainsaw to assist him in his work for Defendants, CAROLINE McGUIRE and BILL McGUIRE, which was owned by the McGuires.

7. On June 28, 2011, the Defendant, DAVID GAGNON, was under the supervision and control of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was working as their apparent and actual agent, and was then acting and working in the scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE.

8. On June 28, 2011, and while the Defendant, DAVID GAGNON, was working in the course and scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was under their supervision and control, Defendant, DAVID GAGNON was in use of a chainsaw while trimming a tree and branch.

9. On June 28, 2011, and while Defendant, DAVID GAGNON, was in use of a chainsaw while trimming a tree and branch, Defendant, DAVID GAGNON, asked for and/or requested the assistance of the Plaintiff, PAUL DULBERG, to hold the tree branch while Defendant, DAVID GAGNON, trimmed the branch with the chainsaw.

10. On June 28, 2011, and while Defendant, DAVID GAGNON, was in sole control, use and operation of the subject chainsaw, the chainsaw was caused to strike and injure the Plaintiff, PAUL DULBERG.

11. At all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew of Defendant, DAVID GAGNON's use of the chainsaw in the presence of the Plaintiff, PAUL DULBERG, and knew that such created a danger to the Plaintiff, PAUL DULBERG's safety.

12. That at all relevant times, the Defendants, DAVID GAGNON, as agent of CAROLINE McGUIRE and BILL McGUIRE, owed a duty to use care and caution in his operation of a known dangerous instrumentality.

13. On June 28, 2011, the Defendant, DAVID GAGNON, was negligent in one or more of the following ways:

- a. Failed to maintain control over the operating of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant, DAVID GAGNON's inability to control the chainsaw;
- d. Failed to keep a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

14. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

15. That at the above time and date, the Defendant's negligence can be inferred from the circumstances of the occurrence as the instrument of the injury was under the control of the Defendant and therefore, negligence can be presumed under the doctrine of *Res Ipsa Loquitur*.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants, DAVID GAGNON, and CAROLINE McGUIRE and BILL McGUIRE in an amount in excess of \$50,000.00, plus costs of this action.

Count II

Paul Dulberg vs. Caroline McGuire and Bill McGuire

15. That the Plaintiff, PAUL DULBERG, restates and realleges paragraphs 1 through 14, in Count I, above, as paragraphs 1 through 15 of Count II, as if fully alleged herein.

16. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, owned, controlled, maintained and supervised the premises whereat the accident to the Plaintiff, PAUL DULBERG, occurred.

17. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were in control of and had the right to advise, instruct and demand that the Defendant, DAVID GAGNON, act or work in a safe and reasonable manner.

18. That at all relevant times, the Defendant, DAVID GAGNON, was acting as the agent, actual and apparent, of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was acting at their request and in their best interests and to their benefit as in a joint enterprise.

19. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew DAVID GAGNON was operating a chainsaw with the assistance of the Plaintiff, PAUL DULBERG, and had the right to discharge or terminate the Defendant, DAVID GAGNON's work for any reason.

20. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, owed a duty to supervise and control Defendant, DAVID GAGNON's activities on the property so as not to create a unreasonable hazard to others, including the Plaintiff, PAUL DULBERG.

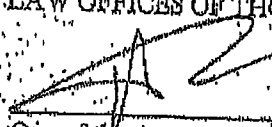
21. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were negligent in one or more of the following ways:

- a. Failed to control operation of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant's inability to control the chainsaw;
- d. Failed to keep the chainsaw a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

22. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

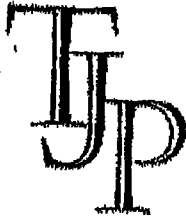
WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants,
CAROLINE McGUIRE and BILL McGUIRE, in an amount in excess of \$50,000.00, plus costs
of this action.

LAW OFFICES OF THOMAS J. POPOVICH, P.C.



One of the Attorneys for Plaintiff

Hans A. Mast
LAW OFFICES OF THOMAS J. POPOVICH, P.C.
3416 West Elm Street
Lake, Illinois 60050
(815) 344-3797
ARDC No. 06203624



The Law Offices of Thomas J. Popovich P.C.

3416 W. ELM STREET
McHENRY, ILLINOIS 60050
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THOMAS J. POPOVICH
HANS A. MAST
JOHN A. KONNAK

MARK J. VOGG
JAMES P. TUTAJ
ROBERT J. LUMBER
THERESA M. FREEMAN

January 24, 2014

Paul Dulberg
4606 Hayden Court
McHenry, IL 60051

RE: *Paul Dulberg vs. David Gagnon, Caroline McGuire and Bill McGuire*
McHenry County Case: 12 LA 178

Dear Paul:

Please find enclosed the General Release and Settlement Agreement from defense counsel for Caroline and Bill McGuire. Please Release and return it to me in the enclosed self-addressed stamped envelope at your earliest convenience.

Thank you for your cooperation.

Very truly yours,

COPY
HANS A. MAST

smg
Enclosure



WAUKESHA OFFICE
210 NORTH MARTIN LUTHER
KING JR. AVENUE
WAUKESHA, IL 60085

GENERAL RELEASE AND SETTLEMENT AGREEMENT

NOW COMES PAUL DULBERG, and in consideration of the payment of Five-Thousand (\$5,000.00) Dollars to him, by or on behalf of the WILLIAM MCGUIRE and CAROLYN MCGUIRE (aka Bill McGuire; improperly named as Caroline McGuire) and AUTO-OWNERS INSURANCE COMPANY, the payment and receipt of which is hereby acknowledged, PAUL DULBERG does hereby release and discharge the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, and any agents or employees of the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, of and from any and all causes of action, claims and demands of whatsoever kind or nature including, but not limited to, any claim for personal injuries and property damage arising out of a certain chain saw incident that allegedly occurred on or about June 28, 2011, within and upon the premises known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

IT IS FURTHER AGREED AND UNDERSTOOD that there is presently pending a cause of action in the Circuit Court of the 22nd Judicial Circuit, McHenry County, Illinois entitled "Paul Dulberg, Plaintiff, vs. David Gagnon, Individually, and as agent of Caroline McGuire and Bill McGuire, and Caroline McGuire and Bill McGuire, Individually, Defendants", Cause No. 2012 LA 178, and that this settlement is contingent upon WILLIAM MCGUIRE and CAROLYN MCGUIRE being dismissed with prejudice as parties to said lawsuit pursuant to a finding by the Circuit Court that the settlement between the parties constitutes a good faith settlement for purposes of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*

IT IS FURTHER AGREED AND UNDERSTOOD that as part of the consideration for this agreement the undersigned represents and warrants as follows (check applicable boxes):

- ☐ I was not 65 or older on the date of the occurrence.
- ☐ I was not receiving SSI or SSDI on the date of the occurrence.
- ☐ I am not eligible to receive SSI or SSDI.
- ☐ I am not currently receiving SSI or SSDI.

IT IS FURTHER AGREED AND UNDERSTOOD:

- a. That any subrogated claims or liens for medical expenses paid by or on behalf of PAUL DULBERG shall be the responsibility PAUL DULBERG, including, but not limited to, any Medicare liens. Any and all reimbursements of medical expenses to subrogated parties, including Medicare's rights of reimbursement, if any, shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released herein.
- b. That any outstanding medical expenses are PAUL DULBERG's responsibility and all payment of medical expenses hereafter shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released

- c. That PAUL DULBERG agrees to save and hold harmless and indemnify the parties released herein against any claims made by any medical providers, including, but not limited to Medicare or parties subrogated to the rights to recover medical or Medicare payments.

IT IS FURTHER AGREED AND UNDERSTOOD by the parties hereto that this agreement contains the entire agreement between the parties with regard to materials set forth herein, and shall be binding upon and inure to the benefit of the parties hereto, jointly and severally, and the executors, conservators, administrators, guardians, personal representatives, heirs and successors of each.

IT IS FURTHER AGREED AND UNDERSTOOD that this settlement is a compromise of a doubtful and disputed claim and no liability is admitted as a consequence hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the dates set forth below.

Dated: _____

PAUL DULBERG

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

PAUL DULBERG personally appeared before me this date and acknowledged that she executed the foregoing Release and Settlement Agreement as his own free act and deed for the uses and purposes set forth therein.

Dated this _____ day of January, 2014.

Notary Public



Binding Mediation Award

Paul Dulberg

v.

ADR Systems File # 33391BMAG

David Gagnon

On December 8, 2016, the matter was called for binding mediation before the Honorable James P. Etchingham, (Ret.), in Chicago, IL. According to the agreement entered into by the parties, if a voluntary settlement through negotiation could not be reached the mediator would render a settlement award which would be binding to the parties. Pursuant to that agreement the mediator finds as follows:

Finding in favor of:

Paul Dulberg

Gross Award:

\$660,000.

Comparative fault:

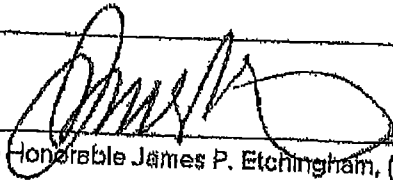
15

% (if applicable)

Net Award:

\$561,000

Comments/Explanation

Medical\$ 60,000.Future medical\$ 200,000.Lost wage\$ 250,000.P+L75,000.L+L75,000.

 The Honorable James P. Etchingham, (Ret.)

ADR Systems • 20 North Clark Street • Floor 28 • Chicago, IL 60602
 312.950.2260 • Info@adrsystems.com • www.adrsystems.com

Received 11-28-2017 04:31 PM / Circuit Clerk Accepted on 11-29-2017 09:53 AM / Transaction #17111117451 / Case #17LA0007

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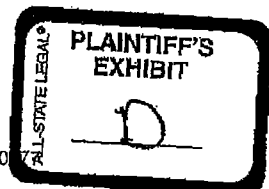


EXHIBIT 2

40/

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT
COUNTY OF McHENRY

PAUL DULBERG,

Plaintiff,

vs.

DAVID GAGNON, Individually, and as
Agent of CAROLINE MCGUIRE and BILL
MCGUIRE, and CAROLINE MCGUIRE
and BILL MCGUIRE, Individually,

Defendants.

Case No. 12 LA 178

FILED

JAN 13 2014

KATHERINE M. KEEFE
McHENRY CTY. CIR. CLK.

**MOTION FOR GOOD FAITH FINDING AND FOR ORDER OF
DISMISSAL WITH PREJUDICE BY DEFENDANTS BILL MCGUIRE
AND CAROLYN MCGUIRE**

Defendants, BILL MCGUIRE (aka William McGuire) and CAROLYN MCGUIRE (improperly named Caroline), by and through their attorneys, Cicero, France, Barch & Alexander, P.C., hereby move this Court to dismiss all claims against them with prejudice and further request this Court to find that the settlement set forth in this motion was made in good faith and within the meaning and contemplation of the Illinois Contribution Among Joint Tortfeasors Act, 740 ILCS 100/1, et seq. In support of their Motion, Defendants Bill McGuire and Carolyn McGuire state as follows:

1. On or about March 15, 2012, Plaintiff Paul Dulberg filed a multiple count complaint seeking damages for personal injuries he generally attributes to a chain saw incident that occurred on or about June 28, 2011, at and upon the premises owned by Defendants Bill McGuire and Carolyn McGuire, known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

2. Plaintiff generally alleges that Defendant David Gagnon injured him with a chain

saw while working under the supervision and control of Defendants Bill McGuire and Carolyn McGuire. Defendant David Gagnon denies any and all liability for Plaintiff Paul Dulberg's injuries. Defendants Bill McGuire and Carolyn McGuire also deny any and all liability for Plaintiff Paul Dulberg's injuries and further deny that Defendant David Gagnon was under their control and supervision and working or acting as their employee or agent at the time of the alleged chain saw incident.

3. On February 1, 2013, Defendants Bill McGuire and Carolyn McGuire filed a cross-claim for contribution against Defendant David Gagnon. The cross-claim for contribution seeks contribution from Defendant David Gagnon for injuries claimed by Plaintiff Paul Dulberg and is based upon the terms and provisions of the Illinois Contribution Among Joint Tortfeasors Act, 740 ILCS 100/1, et seq.

4. Plaintiff Paul Dulberg and Defendants Bill McGuire and Carolyn McGuire have negotiated a settlement of all claims which Plaintiff brought or could have brought against Defendants Bill McGuire and Carolyn McGuire. The settlement was negotiated at arm's length over a substantial period of time, and with the advice of counsel on the part of both parties. There is no collusion or fraud on the part of any of the parties to the negotiation.

5. Pursuant to Section 100/2(c) of the Contribution Act, an alleged tortfeasor that settles with a claimant in good faith shall be discharged from liability for contribution to any other tortfeasors.

6. Defendants Bill McGuire and Carolyn McGuire deny and continue to deny liability to Plaintiff Paul Dulberg and further contest the nature and scope of the injuries Plaintiff Paul Dulberg attributes to the subject chain saw incident.

7. The lump-sum payment of \$5,000.00 to Plaintiff Paul Dulberg by or on behalf of

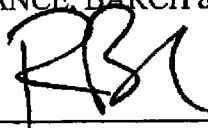
Defendants Bill McGuire and Carolyn McGuire constitutes adequate consideration for purposes of a good faith settlement under Section 100/2(c) of the Contribution Act.

8. Defendants Bill McGuire and Carolyn McGuire respectfully suggest that the settlement with Plaintiff Paul Dulberg is and was made in good faith within the meaning of the Illinois Contribution Among Joint Tortfeasors Act, 740 ILCS 100/2(c).

WHEREFORE, the Defendants, BILL MCGUIRE and CAROLYN MCGUIRE, respectfully pray for the Court as follows:

- (1) For an Order declaring that the settlement between Plaintiff Paul Dulberg and Defendants Bill McGuire and Carolyn McGuire was made and entered into in good faith within the meaning of the Illinois Contribution Among Joint Tortfeasors Act, 740 ILCS 100/1, et seq.;
- (2) For an Order dismissing all civil complaints, cross-claims, counterclaims and contribution claims currently pending against Defendants Bill McGuire and Carolyn McGuire, and arising out of or otherwise connected to the injuries claimed by Plaintiff Paul Dulberg, with prejudice;
- (3) For an Order declaring that any potential future claims against Defendants Bill McGuire and Carolyn McGuire, including, without limitation, claims for contribution arising out of or otherwise connected to the chain saw incident and injuries claimed by Plaintiff Paul Dulberg, are barred;
- (4) For an Order declaring for purposes of Illinois Supreme Court Rule 304(a) that there is no just reason to delay enforcement or appeal of the Dismissal Order; and
- (5) That this Court enter an order granting such further relief as this Court deems just.

CAROLYN MCGUIRE and BILL MCGUIRE, Defendants,
by their attorneys,
CICERO, FRANCE, BARCH & ALEXANDER, P.C.,

By 

RONALD A. BARCH (6209572)

Cicero, France, Barch & Alexander, P.C.
6323 East Riverside Blvd.
Rockford, IL 61114
815/226-7700
815/226-7701 (fax)

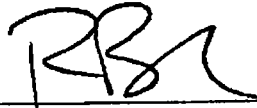
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was
served upon:

Attorney Perry A. Accardo
Law Office of M. Gerard Gregoire
200 N. LaSalle St., Ste 2650
Chicago, IL 60601-1092

Attorney Hans A. Mast
Law Offices of Thomas J. Popovich
3416 West Elm Street
McHenry, IL 60050

by depositing the same in the United States Post Office Box addressed as above, postage prepaid,
at Rockford, Illinois, at 5:00 o'clock p.m. on 1/9/14.



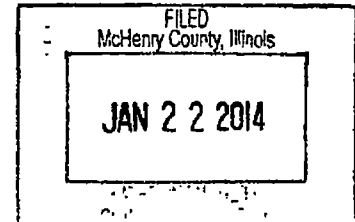
Cicero, France, Barch & Alexander, P.C.
6323 East Riverside Blvd.
Rockford, IL 61114
815/226-7700
815/226-7701 (fax)

EXHIBIT 3

ORD 1

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT
COUNTY OF McHENRY

PAUL DULBERG,	)	
	)	
Plaintiff,	)	Case No. 12 LA 178
	)	
vs.	)	
	)	
DAVID GAGNON, Individually, and as	)	
Agent of CAROLINE MCGUIRE and BILL	)	
MCGUIRE, and CAROLINE MCGUIRE	)	
and BILL MCGUIRE, Individually,	)	
	)	
Defendants.	)	



GOOD FAITH FINDING AND ORDER OF DISMISSAL

THIS CAUSE coming on to be heard on the Motion for Good Faith Finding and for Order of Dismissal with Prejudice filed by Defendants Bill McGuire and Carolyn McGuire, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

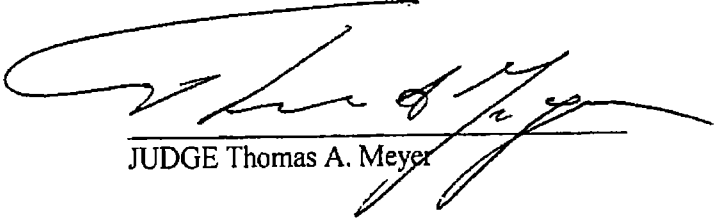
1. That settlement between Plaintiff Paul Dulberg and Defendants Bill McGuire and Carolyn McGuire (improperly named Caroline) constitutes a fair and reasonable and good faith settlement within the meaning of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 0.01 et seq.

2. That the good faith settlement shall henceforth constitute a bar to any and all claims that Plaintiff Paul Dulberg and Defendant David Gagnon and other known or unknown tortfeasors may have against Defendants Bill McGuire and Carolyn McGuire on account of or arising out of the injuries, if any, sustained by Plaintiff Paul Dulberg as a result of the alleged chain saw accident that occurred on June 28, 2011, whether by way of original action, third party claim, cross-claim, counterclaim, claim for contribution or otherwise.

3. That Defendants Bill McGuire and Carolyn McGuire be and are hereby dismissed from the above-captioned lawsuit as party defendants and cross-claimants, with prejudice, and in bar of further suit.

4. That that there is no just reason to delay the enforcement or appeal of this good faith finding and order of dismissal.

DATED: _____


JUDGE Thomas A. Meyer

Prepared by:
Ronald A. Barch
Cicero, France, Barch & Alexander, PC
6323 East Riverside Blvd.
Rockford, IL 61114
815/226-7700

N.E.2d 1198, 1200 (1st Dist. 1994). Section 2-615 motions “raise but a single issue: whether, when taken as true, the facts alleged in the Complaint set forth a good and sufficient cause of action.” *Visvardis v. Ferleger* 375 Ill.App.3d 719, 723, 873 N.E.2d 436, 440 (Ill.App.1 Dist. 2007), quoting *Scott Wetzel Services v. Regard*, 271 Ill.App.3d 478, 480, 208 Ill. Dec. 98, 648 N.E.2d 1020 (1995).

2. When the legal sufficiency of a Complaint is challenged by a section 2-615 Motion to Dismiss, all well-pleaded facts in the Complaint are taken as true and a reviewing court must determine whether the allegations of the Complaint, construed in a light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81, 806 N.E.2d 632, 634 (2004); *King v. First Capital Financial Services Corp.* 215 Ill.2d 1, 12, 828 N.E.2d 1155, 1161 (2005). A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that will entitle the plaintiff to recover. *Zedella v. Gibson*, 165 Ill.2d 181, 185, 650 N.E.2d 1000 (1995).

STANDARD OF REVIEW FOR SECTION 2-619

3. A section 2-619 motion should be denied unless a Plaintiff cannot prove a set of facts that would entitle him to relief sought. *Safeway Ins. Co. v. Daddono*, 334 Ill. App 3d 215, 218 (1st Dist. 2002). A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that will entitle the plaintiff to recover. *Zedella v. Gibson*, 165 Ill.2d 181, 185, 650 N.E.2d 1000 (1995).

4. The Court must view all the factual allegations in the light most favorable to the plaintiff. *Lloyd v. County of DuPage*, 303 Ill.App.3d 544, 688 707 N.E.2d 1252, 1258 (2d Dist. 1999). Also the court must construe the facts liberally in favor of the plaintiff. *Id.* In ruling on a

2-619 motion, the court may consider pleadings, affidavits and depositions. *Weisblatt v. Colky*, 265 Ill.App.3d 622, 625, 637 N.E.2d 1198, 1200 (1st Dist. 1994). The purpose of a Motion to Dismiss under section 2-619 of the Code of Civil Procedure is to afford litigants a means to dispose of issues of law and easily proved issues of fact at the outset of a case, reserving disputed questions of fact for a jury trial. *Zedella*, at 185, 650 N.E.2d 1000.

ARGUMENT
(under 2-615)

I. Dulberg sufficiently states a cause of action for legal malpractice.

1. In his Complaint, DULBERG sufficiently set forth the necessary elements of legal malpractice. “To prevail on a legal malpractice claim, the plaintiff client must plead and prove that the defendant attorneys owed the client a duty of due care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the client suffered injury.” *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 306-307 (Ill. 2005).

2. First, when DULBERG agreed to retain POPOVICH and POPOVICH agreed to represent DULBERG, a duty of due care was established based on the attorney-client relationship between DULBERG and POPOVICH. (See Complaint attached hereto without exhibits as Exhibit B, ¶ 8-10.) Thereafter, POPOVICH owed DULBERG a duty of due care as his attorney and POPOVICH breached that duty.

3. DULBERG’s malpractice action is proper because DULBERG properly established that due to POPOVICH’s malpractice, the case was settled for an amount much lower than what DULBERG expected. “Attorney malpractice action should be allowed where it can be shown that the plaintiff had to settle for a lesser amount than she could reasonably expect without the malpractice.” *Brooks v. Brennan*, 255 Ill.App. 3d 260, 270 (5th Dist., 1994).

4. In his Complaint, DULBERG specifically alleges that he was essentially forced to settle his case for \$5,000.00 against the McGuires and the Auto-Owners Insurance Company. (See Complaint attached hereto as Exhibit B, ¶13, 21(j).) Thereafter at the binding arbitration DULBERG's gross award of \$660,000.00 was cut to only \$300,000.00 due to a "high-low agreement" that was executed as part of the McGuire settlement. DULBERG further pleads that had the McGuires not been dismissed from the case, he would have recovered more. (See Complaint attached hereto as Exhibit B, ¶16, 22.)

5. DULBERG properly plead proximate cause and damages in his Complaint. (See Complaint attached hereto as Exhibit B, ¶21, 22.)

6. *Fox v. Seiden*, 382 Ill.App. 3d 288, 294 (1st Dist. 2008) is analogous to this case because the *Fox* Plaintiff similarly pled proximate cause and the Appellate Court held that this was sufficient, "the plaintiff alleged, 'But for [the law firm's] negligence and malfeasance, [Miriam] would not have had judgment entered against her for attorney's fees under the [Act].' We find the alleged facts, liberally construed, taken as true, and viewed in the light most favorable to the plaintiff, sufficiently plead the element of proximate cause." *Id.*, at 299.

7. Specifically, DULBERG properly established that "but for" the acts of the Defendants in urging DULBERG to release the McGuires, DULBERG suffered substantial damages. (See Complaint attached hereto as Exhibit B, ¶ 22.)

8. More importantly, the issues of proximate cause and damages must be determined by a jury or trier of fact after all proper evidence and testimony is presented at trial. Proximate cause is a **question of fact** to be decided by a jury. (internal citation omitted) (Emphasis added) *Hooper v. County of Cook*, 366 Ill.App.3d 1, 7 (1st Dist., 2006). "The determination of damages is a **question of fact** that is within the discretion of the jury and is

entitled to substantial deference.” (Emphasis added.) *Linhart v. Bridgeview Creek Development, Inc.*, 391 Ill.App.3d 630, 636 (1st Dist., 2009).

9. POPOVICH states in his Motion that DULBERG’s pleading and theory is confusing. (See Defendants’ Memorandum attached hereto as Exhibit A, pg.4). However, there is nothing confusing about the issues at hand. DULBERG clearly and sufficiently pled in his Complaint that the wrongful acts, i.e. POPOVICH urging settlement and release of the McGuires in the case caused DULBERG to lose out on over \$300,000.00.

10. Defendants, in their Motion to Dismiss, are requiring of DULBERG to plead his entire case in a single Complaint.

11. “Plaintiff is not required to prove his case at this stage of the pleadings and the damages as alleged are sufficient to show he was damaged by Defendants’ actions and cause of action for legal malpractice. *Fox v. Seiden, supra*, at 294; *Platson v. NSM America, Inc.*, 322 Ill.App. 3d 138, 143 (2nd Dist., 2001) (‘Cases are not to be tried at the pleadings stage, so a claimant need only show a possibility of recovery, not an absolute right to recover, to survive a 2-615 Motion.’). Here, DULBERG has shown at least a possibility of recovery based on the malpractice of POPOVICH, thus should survive Defendants’ 2-615 Motion.

12. The allegations set forth by DULBERG are not conclusions and are sufficient to withstand a Section 2-615 dismissal. By looking at the Complaint, DULBERG has clearly set forth each of the elements of legal malpractice.

13. Further, because this instant case is filled with factual questions, dismissing the Complaint at this stage of the pleadings is improper and this Honorable Court should deny Defendants’ Motion in order to allow the case to be fully and properly litigated.

(Under 2-619)

II. Dulberg's claims are not barred by judicial estoppel.

14. Next, Defendants argue that DULBERG's claim is barred by judicial estoppel. (See Defendants' Memorandum attached hereto as Exhibit A, pg. 6). This is not factually accurate.

15. Judicial estoppel is an equitable doctrine evoked only at the Courts' discretion and designed to protect the integrity of the judicial system by preventing parties from taking inconsistent positions. *Seymour v. Collins*, 39 N.E. 3d 961 (Ill., 2015). The *Seymour* Court held five elements were required for judicial estoppel to apply; there must be two positions which are factually inconsistent in separate proceedings where there is an intent that the trier of fact accept as true all the allegations and the person who the doctrine is asserted against must have received a benefit. *Id.*

16. In this case, there have not been two factually inconsistent positions because DULBERG never held the position that he understood and was informed of all the terms of the settlement. The issue of whether Defendants properly informed DULBERG has never been dealt with in a previous proceeding.

17. Defendants argue that "like all adults" DULBERG is presumed to know the contents and meaning of the settlement agreement he signed. (See Defendants' Memorandum attached hereto as Exhibit A, pg. 7). However, the Defendants had a fiduciary duty to DULBERG to explain to him the contents of the settlement agreement and to explain the meaning of said agreement. That is part of the thrust of the malpractice, which of course is a factual question.

18. In his Complaint, DULBERG alleges that MAST told DULBERG that “he had no choice but to execute a release” and that “there was no possibility of any liability” against the McGuires or the Insurance Company. (See Complaint attached hereto as Exhibit B, ¶ 13, 15.)

19. Based on these representations, DULBERG reluctantly signed the settlement agreement, as he had no choice and was relying on the representations of his attorneys.

20. Defendants argue that because the Court in the underlying case entered a good faith finding Order, Plaintiff should be judicially estopped. (See Defendants’ Memorandum attached hereto as Exhibit A pg. 6). This is not the case. Although a good faith finding was entered in the underlying case, the Order did not contemplate whether there was any malpractice by the attorneys. The Court clearly did not know what the Defendants told or failed to tell DULBERG to urge him to sign the agreement. Therefore the good faith finding Order has no bearing on DULBERG’s legal malpractice suit.

21. Defendants rely on the case of *Larson v. O’Donnell*, 361 Ill.App.3d 388 (1st Dist., 2005) in support of their argument that judicial estoppel is applicable, however this instant case is factually distinguishable from the *Larson* case, which was a divorce case.

22. The Court in *Larson, supra*, found that judicial estoppel applied to the Plaintiff’s legal malpractice claims because at the dissolution prove up hearing, record clearly states that the Plaintiff testified that he understood all of the terms of the settlement, that knew when he signed the agreement that he had an obligation to pay a specific dollar amount in child support and maintenance. The *Larson* Court found that the Plaintiff was estopped from bringing the legal malpractice Complaint that alleged that he did not know the terms of the settlement. Larson even interrupted the divorce prove up to supply additional facts and information as to his correct

income. *Larson v. O'Donnell*, *supra*, generally. Further, *Larson* has been distinguished and not followed. See *Wolfe v. Wolf*, 375 Ill.App.3d 702 (1st Dist., 2007).

23. In this case, there is no record of DULBERG specifically testifying to knowing exactly what the terms of the settlement agreement. Unlike the *Larson* Plaintiff, DULBERG is not claiming that he does not understand the \$5,000.00 settlement, but instead, DULBERG was never informed by his attorneys that a “high-low” agreement would limit his recovery against the remaining Defendants. DULBERG was never informed by the Defendants how the terms of the settlement would affect the future of his case. More importantly, DULBERG was trusting his attorneys when signing the settlement agreement. At no time did DULBERG interject in any proceedings to state that he understood all of the terms of the settlement or provided additional facts as the *Larson* Plaintiff.

24. Based on Defendants’ fiduciary duty, the Defendants had a duty to properly inform DULBERG of all of the risks of entering the settlement agreement. “The fiduciary duty owed by an attorney to a client encompasses the obligations of fidelity, honesty, and good faith.” *Metrick v. Chatz*, 266 Ill.App.3d 649, 656 (1st Dist., 1994).

25. In the case of *Wolfe v. Wolf*, 375 Ill.App.3d 702 (1st Dist., 2007) the Defendant argued that the Plaintiff was judicially estopped from bringing a claim for legal malpractice when she testified that she understood and agreed to all the terms of the marital settlement agreement and subsequently filed a legal malpractice complaint alleging that she did not understand and agree to the marital settlement agreement. However the Court held that the Plaintiff was not judicially estopped from bringing her legal malpractice action because the testimony at the dissolution proceeding was based on negligent acts and misrepresentations made

to the Plaintiff by the Defendant, and that she did not discover those negligent acts and misrepresentations until after the settlement agreement had been entered. *Id.*, generally.

26. This instant case is more factually similar to the *Wolfe* case than the *Larson* Case because DULBERG is not alleging that he misunderstood the obligations under the settlement agreement as in *Larson*, instead he is alleging that the negligence of POPOVICH did not permit DULBERG to make an informed decision about accepting the settlement, as in *Wolfe*. POPOVICH continuously represented to DULBERG that there was no possibility of any liability against the McGuires and/or the Insurance Company.

27. Therefore by following the Court in *Wolfe v. Wolf*, 375 Ill.App.3d 702 (1st Dist., 2007) this Honorable Court must find that DULBERG is not judicially estopped from bringing his claims against POPOVICH.

III. Dulberg's claims are not time barred.

28. Lastly in their Motion to Dismiss, Defendants argue that DULBERG's claims are barred by the statute of limitations. (See Defendants' Memorandum attached hereto as Exhibit A, pg. 7). This is incorrect because after review of the allegation of the Complaint this Court should find that the Complaint has been timely filed based on the discovery rule.

29. The discovery rule tolls the limitations period to the time the plaintiff knew or reasonably should have known of the injury. *Snyder v. Heidelberger*, 953 N.E.2d 415, 419 (Ill. 2011).

30. The Illinois Supreme Court held that the discovery rule applies to legal malpractice claims. *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill.2d 240, 249 (Ill. 1994). The Supreme Court has made this issue quite clear, finding as such and further finding the

limitations period begins to run when a plaintiff knows or reasonably should know of his injury AND that the injury was wrongfully caused. (Emphasis added) *Id.*

31. The time at which a party has or should have the requisite knowledge under the discovery rule to maintain a cause of action is ordinarily a **question of fact**. (Emphasis added) *Jackson Jordan, Inc. v. Leydig, Voit & Mayer, at 250*; see also *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 416-417 (Ill, 1981).

32. Due to the attorney client relationship with the Defendants, DULBERG is presumed unable to distinguish any misapplication or negligence by the Defendants, on his own. “The relationship between an attorney and the client is one in which the attorney is charged with a duty to act skillfully and diligently on the client's behalf. Given the duty, the client is presumed unable to discern any misapplication of legal expertise.” *Goodman v. Harbor Market, Ltd.*, 278 Ill.App.3d 684, 659-690 (1st Dist., 1995).

33. There would be a constant destruction of the attorney-client relationship if clients were required to determine their attorney’s malpractice at the exact time of incident. “If the client must ascertain malpractice at the moment of its incidence, the client must hire a second professional to observe the work of the first, an expensive and impractical duplication, clearly destructive of the confidential relationship between the practitioner and his client. Therefore, it is the realized injury to the client, not the attorney's misapplication of the expertise, which marks the point in time for measuring compliance with a statute of limitations period.” (internal citations omitted) *Goodman v. Harbor Market, Ltd.*, 278 Ill.App.3d 684, 689-690 (1st Dist., 1995).

34. DULBERG's Complaint was filed on November 28, 2017. The Complaint clearly sets forth when DULBERG became aware of the negligence of the Defendants as argued below. (See Complaint attached hereto as Exhibit B, ¶19, 20).

35. As pled in the Complaint, it was not until December 16, 2016 that DULBERG was informed by outside counsel that he may have a claim for legal malpractice:

“19. Until the time of the mediation award, DULBURG had no reason to believe he could not recover the full amount of his injuries, based on POPOVICH'S and MAST'S representations to DULBERG that he could recover the full amount of his injuries from Gagnon, and that the inclusion of the McGuire's would only complicate the case.

20. Following the execution of the mediation agreement with the “high-low agreement” contained therein, and the final mediation award, DULBURG realized for the first time that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuire's was a serious and substantial mistake. Following the mediation, DULBERG was advised to seek an independent opinion from an attorney handling Legal Malpractice matters, and received that opinion on or about December 16, 2016.”
(See Complaint attached hereto as Exhibit B, ¶19, 20).

36. DULBERG would have had until December 16, 2018 to bring his claims, or at the earliest by December 8, 2018, two years after DULBERG received the binding mediation award. Thus, the Complaint filed on November 28, 2017 is timely filed.

37. Defendants incorrectly pled that DULBERG did not provide any other explanation about why he was unaware of a claim until December 16, 2016. (See Defendants' Memorandum attached hereto as Exhibit A, pg. 8). This is incorrect because DULBERG's Complaint specifically alleges why DULBERG for the first time realized that the information Defendants gave DULBERG was false or misleading—after the mediation on December 8, 2016. (See Complaint attached hereto as Exhibit B, ¶19-20). DULBERG did not discover that the settlement with the McGuires would limit his recovery until the mediation award was entered and had no reason to believe he could not recover the full amount of his injuries.

38. DULBERG's Complaint is also timely filed based on Defendants' fraudulent concealment. (See Complaint attached hereto as Exhibit B, ¶15, 19, 20, 21(g)(i)(j)).

39. Fraudulent concealment stops the running of the limitations period until the cause of action is discovered. *Henderson Square Condominium Ass'n v. LAB Townhomes, L.L.C.*, 2014 IL App (1st) 130764, ¶94 (1st Dist., 2014).

40. To state a claim of fraudulent concealment, a Plaintiff must allege that "the defendant concealed a material fact when he was under a duty to disclose that fact to plaintiff." (internal citation omitted) *DeLuna v. Burciaga*, 223 Ill.2d 49, 77 (Ill, 2006).

The *DeLuna* Court discussed certain situations where there is a duty to disclose a material fact. First, if plaintiff and defendant are in a fiduciary or confidential relationship, then defendant is under a duty to disclose all material facts. Second, a duty to disclose material facts may arise out of a situation where plaintiff places trust and confidence in defendant, thereby placing defendant in a position of influence and superiority over plaintiff. (internal citations omitted) *DeLuna v. Burciaga, supra*.

41. Moreover, Defendants' silence gives rise to DULBERG's claim for fraudulent concealment, because DULBERG trusted his attorneys. "Silence by a person in a position of trust concerning the facts giving rise to a cause of action amounts to fraudulent concealment." See *Doe v. Boy Scouts of America*, 66 N.E.3d 433, 456 (1st Dist., 2016),

42. DULBERG and Defendants were clearly in a fiduciary and confidential relationship: the attorney-client relationship. Defendants were under a duty to disclose all material facts and information to DULBERG. Defendants failed to do so.

43. "Whether an injured party justifiably relied upon defendants' words or silence depends on the surrounding circumstances and is a **question of fact** that is best left to the trier of

fact.” (*Emphasis added*) (citation omitted) *Abazari v. Rosalind Franklin University of Medicine and Science*, 2015 IL App (2d) 140952, ¶37 (2nd Dist., 2015).

44. DULBERG would have had 5 years from the date of discovery to bring his cause of action under fraudulent concealment. “If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards.” *See* 735 ILCS 5/13-215.

45. DULBERG’s Complaint states that DULBERG discovered the negligence of the Defendants on December 16, 2016 when he was informed by outside counsel of his claim for malpractice, or at the earliest by December 8, 2016 when DULBERG learned that he was limited in recovering his damages under the binding mediation.

46. Therefore DULBERG would have until December 2021 to file his claims under fraudulent concealment. DULBERG filed his claims well within the five-year fraudulent concealment statute.

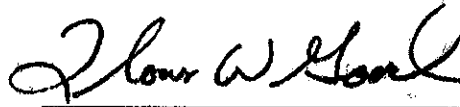
CONCLUSION

After review of the allegations in the Complaint, this Honorable Court must find that DULBERG properly filed his claim for legal malpractice and is not judicially estopped from bringing those claims. Also, the claims are not time barred based on the discovery rule and fraudulent concealment. More importantly, due to the factual questions in this case, granting the Motion to Dismiss would be inappropriate. However, in the event this Court grants the Motion, DULBERG requests a reasonable time to file a First Amended Complaint.

WHEREFORE your Plaintiff PAUL DULBERG prays this Honorable Court denies and Dismiss Defendants’ Combined Motion to Dismiss, and for all other relief this Honorable Court

deems equitable and just. If this Court grants Defendants' Motion to Dismiss, PAUL DULBERG prays for a reasonable amount of time to file a First Amended Complaint.

Respectfully submitted by
THE GOOCH FIRM, on behalf of
PAUL DULBERG, Plaintiff,



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IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

PAUL DULBERG,

Plaintiff,

vs.

THE LAW OFFICES OF THOMAS J.
POPOVICH, P.C., and HANS MAST,

Defendants.

Katherine M. Keefe
Clerk of the Circuit Court
Electronically Filed
Transaction ID: 1711113930
17LA000377
02/07/2018
McHenry County, Illinois
22nd Judicial Circuit

Received Per Local Rule 1.19c

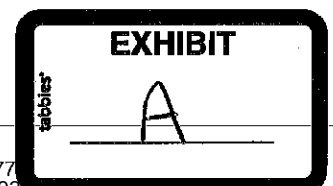
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MEMORANDUM IN SUPPORT OF DEFENDANTS'
COMBINED MOTION TO DISMISS

Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, by and through their attorneys, GEORGE K. FLYNN, and CLAUSEN MILLER P.C., pursuant to 735 ILCS 5/2-615, 735 ILCS 5/2-619(a)(5) and 735 ILCS 5/2-619.1, submit this Memorandum in Support of Defendants' Combined Motion to Dismiss Plaintiff's Complaint with prejudice, and state as follows:

I. INTRODUCTION

The Plaintiff Paul Dulberg (“Dulberg”) retained defendants The Law Offices of Thomas J. Popovich P.C. (“Popovich”) to prosecute a personal injury claim on his behalf against his next door neighbors, Carolyn and Bill McGuire and their adult son (Dulberg’s lifelong friend), David Gagnon (“Gagnon”). Hans Mast (“Mast”) handled the case for the firm. Dulberg was on the McGuires’ property, assisting Gagnon trim some tree branches with a chainsaw, when Dulberg’s right arm was lacerated by the chainsaw. Dulberg agreed to a settlement with



the McGuires. Thereafter, he and Mast reached an impasse. Mast and the firm withdrew, and successor counsel continued to prosecute the case against Gagnon.

Dulberg now has a case of “buyer’s remorse,” admitting that he agreed to accept the McGuires’ settlement offer. He has not plead the requisite elements of a legal malpractice case against Popovich and Mast, or the requisite elements of the underlying case (the “case within the case”). Moreover, his agreement to settle the case with the McGuires, approved by the court along with a good faith finding of settlement, estops him from now taking a contrary position. Finally, his legal malpractice claim is barred by the applicable two-year statute of limitations.

II. STATEMENT OF FACTS

A. The Following Facts Can Be Gleaned From The Complaint (Exhibit 1) and Its Exhibits

On June 28, 2011, Dulberg was assisting David Gagnon in the cutting down of a tree on the property of Carolyn and Bill McGuire. (Exhibit 1, ¶ 6). Gagnon lost control of the chainsaw and caused personal injury to Dulberg. (Exhibit 1, ¶ 7). In May of 2012, Dulberg retained Popovich. (Exhibit 1, ¶8). On May 15, 2012, Mast filed a Complaint on behalf of Dulberg against Gagnon and McGuires in the Circuit Court of McHenry County, Illinois, Case No, 12 LA 178. (Exhibit 1, ¶ 9, and Exhibit 1B)¹. In late 2013, Dulberg settled with the McGuires and executed a Release in their favor in exchange for the payment of \$5,000.00. The McGuires and their insurance carrier, Auto Owners Insurance Company, were released. (Exhibit 1, ¶ 13 and Exhibit 1C). Defendants continued to represent Dulberg until March 2015. Dulberg retained successor counsel and proceeded to a binding mediation at which time he apparently executed a High-Low Agreement and received a mediation award (Exhibit 1, ¶ 16 and Exhibit 1D). After

¹ The exhibits to the underlying complaint in Case No. 12 LA 178 will be referenced as Exhibits 1A, 1B, 1C and 1D.

the mediation, Dulberg allegedly realized for the first time that the information Mast and Popovich had given him was false and misleading and that the dismissal of the McGuires was a serious and substantial mistake. He was advised to seek an independent opinion from an attorney handling legal malpractice matters and received that opinion on or about December 16, 2016. (Exhibit 1, ¶ 20).

B. Alleged Acts of Negligence

In Exhibit 1, ¶ 21, Dulberg alleges that Defendants failed to take actions as were necessary to fix liability against the property owners of the subject property (the McGuires), alleging that they employed Gagnon and sought the assistance of Dulberg. It is alleged that they failed to thoroughly investigate liability issues against the property owners, failed to conduct necessary discovery, failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property, and improperly urged Dulberg to accept a "non-sensical" settlement from the property owners. It is also alleged that Defendants concealed necessary facts from Dulberg preventing him from making an informed decision as to the McGuires and "coercing" him in signing a Release and Settlement Agreement.

III. DULBERG FAILS TO STATE A CLAIM FOR LEGAL MALPRACTICE UNDER 735 ILCS 5/2-615

A. Legal Standard

It is clearly established that Illinois is a fact pleading jurisdiction, requiring the plaintiff to present a legally and factually sufficient complaint. *Winfrey v. Chicago Park Dist.*, 274 Ill. App. 3d 939, 942 (1st Dist. 1995). A plaintiff must allege facts sufficient to bring his or her claim within the cause of action asserted. *Jackson vs. South Holland Dodge*, 197 Ill. 2d 39 (2001). To pass muster a complaint must state a cause of action in two ways: first, it must be legally sufficient -- it must set forth a legally recognized claim as its avenue of recovery, and

second, the complaint must be factually sufficient -- it must plead facts, which bring the claim within a legally recognized cause of action as alleged. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981). Dismissal of a complaint is mandatory if one fails to meet both requirements. *Misselhorn v. Doyle*, 257 Ill. App. 3d 983, 985 (5th Dist. 1994). In ruling on a Section 2-615 motion, “only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered.” *Mount Zion State Bank and Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 115 (1995).

In Illinois, to establish a legal malpractice claim, a plaintiff must plead and prove the existence of an attorney client relationship; a duty arising from that relationship; a breach of that duty, the proximate causal relationship between the breach of duty and the damage sustained; and actual damages. *Glass v. Pitler*, 276 Ill. App. 3d 344, 349 (1st Dist. 1995). The injuries resulting from legal malpractice are not personal injuries but pecuniary injuries to intangible property interests. *Glass* at 349. Damages must be incurred and are not presumed. *Glass* at 349. It is the plaintiff’s burden to establish that “but for” the attorney’s negligence, the client would not have suffered the damages alleged. *Glass* at 349. “The proximate cause element of legal malpractice claim requires that the plaintiff show that but for the attorney’s malpractice, the client would have been successful in the undertaking the attorney was retained to perform. *Green v. Papa*, 2014 IL App. (5th) 1330029 (2014), quoting *Owens v. McDermott Will & Emery*, 316 Ill. App. 340 (2000), at 351. The plaintiff in a legal malpractice claim must plead a case within the case. *Ignarski v. Norbut*, 271 Ill. App. 3d 522 (1995).

B. Dulberg Fails to Plead Facts in Support of His Conclusory Allegations

Dulberg’s pleading and theory of recovery is confusing. Presumably, since Dulberg retained successor counsel in the underlying case, he is only complaining here about the

McGuire's underlying liability, and nothing with respect to case against David Gagnon (when an attorney is discharged and transfers a then viable matter to a successor attorney, the first lawyer cannot be held to have proximately caused the client's lost claim, see *Mitchell v. Shain, Fursel, and Burney, Ltd.*, 332 Ill. App 3d 618 (1st Dist. 2002), and *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169 (1st Dist. 2004)).

Setting aside the Estoppel and Statute of Limitations issues which will be discussed below, Dulberg's complaint for legal malpractice is rife with unsupported conclusory allegations. Dulberg fails to allege requisite facts in support of each and every element of the "underlying" case or "case within the case" against the McGuire's. Simply put, Dulberg fails to plead any facts in support of his conclusions that there was some liability against the McGuire's. In ¶ 21 of his complaint, Dulberg alleges negligence against Popovich and Mast, but fails to identify what actions should have been taken and were not. In ¶ 21 (a), Dulberg fails to identify what investigation and discovery should have been undertaken. In ¶¶ 21 (b) and (c), Dulberg fails to identify or discuss the law that "defendants failed to understand." In ¶ 21 (d), Dulberg fails to plead any facts about why the settlement with the McGuire's was improper or "non-sensical."

Under Illinois fact pleading requirements, much more is needed. In a case of alleged professional liability, the plaintiff cannot simply allege in conclusory terms that the defendants were negligent, and that the Plaintiff could have proved up liability against the underlying defendants. He must allege why and how. Dulberg's complaint must be dismissed pursuant to 735 ILCS 5/2-615.

IV. DULBERG'S SETTLEMENT WITH THE MCGUIRES AND THE DOCTRINE OF JUDICIAL ESTOPPEL BAR HIS LEGAL MALPRACTICE CLAIM

Dulberg admits in ¶13 of his Complaint, that he agreed to a \$5,000.00 settlement with the McGuires. Attached to this Complaint, is an unsigned copy of the Settlement Agreement, Exhibit 1C.² Because Dulberg agreed to the settlement with the McGuires, waived and released all claims against them and their insurance carrier, and allowed the Court to enter an Order on a Good Faith Finding of Settlement (a joint tortfeasor Gagnon remained in the case), he is now estopped from taking a contrary position that the settlement was appropriate, fair, knowing and voluntary.³

The doctrine of judicial estoppel provides that a party who assumes a particular position in a proceeding is estopped from assuming a contrary position in a subsequent proceeding. *Larson vs. O'Donnell*, 361 Ill. App. 3d 388, 398 (1st Dist. 2005), *rev'd on other grounds*. In *Larson*, a plaintiff became unemployed during the pendency of his divorce. At settlement, he agreed to pay a specified dollar amount for child support and specified dollar amount for maintenance, based on the income he earned prior to his having become unemployed. *Larson* at 391. The parties and their attorneys appeared before the court to present the marital settlement agreement for approval at a "prove up". *Larson* at 392. At the prove up hearing, the plaintiff gave unequivocal testimony that he understood the terms and conditions of the agreement and acknowledged the amounts he was required to pay under the agreement. *Larson* at 392. After entry of the judgment for dissolution of marriage, the plaintiff began paying support based on a

² It does not appear that Dulberg is denying the authenticity of the Settlement Agreement, despite the fact that his signature is not attached. Mast is in possession of a signed copy of the Settlement Agreement, which Dulberg executed on January 29, 2014.

³ For the Court's convenience, attached as Exhibits 2 and 3 are the Motion for the Good Faith Finding and Court's Order granting the Good Faith Finding of Settlement. The Court may take judicial notice of its own court docket see *All Purpose Nursing Service v. Human Rights Com.*, 205 Ill. App. 3d 816, 823 (1st Dist. 1990). Notably, the McGuires also filed a counterclaim for contribution against Gagnon in the underlying case.

percentage of his unemployment income rather than the amounts required by the judgement for dissolution. He was later held in contempt for failure to pay the amounts prescribed in the judgment of dissolution and attorney's fees were assessed against him in the divorce court. He sued his former attorneys for breach of fiduciary duty and legal malpractice. *Larson* at 393. The court held that the plaintiff in *Larson* was judicially estopped from attempting to create a question of fact regarding his "actual" understanding for purposes of summary judgment by later contradicting his previous position. *Larson* at 398.

Like *Larson*, Dulberg cannot now claim that he did not knowingly and voluntarily settle and release his claims against the McGuires. Moreover, Dulberg, like all adults, is "presumed to know the contents and meaning of the obligations he undertakes when he signs a written agreement." *Premier Elec. Const. Co. vs. Ragnar Benson, Inc.* 111 Ill. App. 3d 855, 865 (1st Dist. 1982). Accordingly, Dulberg is estopped from claiming that his agreement to settle the underlying case with the McGuires was not "knowing and voluntary," and he cannot claim that he was coerced. The final decision was his alone. Dulberg is estopped from now asserting a claim for legal malpractice against his former counsel. His Complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(9).

V. DULBERG'S CLAIM IS BARRED BY THE TWO YEAR STATUTE OF LIMITATIONS FOR CLAIMS AGAINST ATTORNEYS

Dulberg has failed to file his legal malpractice complaint against Popovich and Mast within the two year statute of limitations for claims against attorneys. 735 ILCS 5/13-214.3 provides for a two year statute of limitations period which shall begin to run at "the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought. *Ogle v. Hotto*, 273 Ill. App. 3d 313, 318 (5th Dist. 1995). 735 ILCS 5/13-214.3(b) reads as follows:

(b) An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced within two years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

Dulberg's Complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5) because on its face, his claims are untimely.

Dulberg admits in ¶ 14 of Exhibit 1 that Popovich's and Mast's representation ceased in March of 2015. Without some exception to the rule, a claim for legal malpractice would have been required to be filed by March 2017. Here, the Plaintiff did not file his Legal Malpractice Complaint against Defendants until November 28, 2017 (Exhibit 1), at least seven (7) months too late. Apparently realizing that his claims are untimely, Dulberg attempts to rely on the "discovery rule." He alleges in ¶ 20, without any factual support, that the information regarding the McGuires' liability as a property owner, was "false and misleading." As discussed above, Dulberg fails to allege any specific facts about any false and misleading information or other specifics as to Mast and Popovich's negligent conduct. Dulberg fails to plead facts in support of the case within the case, i.e. the McGuires' liability in the underlying cause of action. Dulberg alleges that he was advised to seek an independent opinion from an attorney handling legal malpractice matters on or about December 16, 2016, but provides no other explanation about why he was unaware of a claim until December 16, 2016. What happened after he signed the agreement on January 29, 2014?

While there was nothing preventing Dulberg at the time of the McGuire settlement from seeking a second opinion concerning the propriety or "sense" in settling, Illinois law requires a plaintiff relying on the discovery rule to plead facts in support of reliance on the discovery rule.

In other words, the plaintiff must explain why he did not discover the cause of action until December 16, 2016. The plaintiff has the burden of proving the date of discovery. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill.2d 72, 85 (1995). Moreover, under Illinois law, *actual knowledge* of the alleged malpractice is not a necessary condition to trigger the running of the statute of limitations. *SK Partners I, LP v. Metro Consultants, Inc.*, 408 Ill. App. 3d 127, 130 (1st Dist. 2011) (“under the discovery rule, a statute of limitations may run despite the lack of actual knowledge of negligent conduct”) (emphasis in original)). A statute of limitations begins to run when the purportedly injured party “has a reasonable belief that the injury was caused by wrongful conduct, thereby creating an obligation to inquire further on that issue.” *Bluewater Partners v. Mason*, 2012 IL App (1st 102165 at *p. 50).

Here, Dulberg fails to allege any facts to support a delay or tolling of the statute. He retained subsequent counsel after the defendants withdrew, and could have requested a legal opinion regarding the McGuires’ liability then, why did he wait? His claim must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5).

V. CONCLUSION

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(5), and 735 ILCS 5/2-619.1, respectfully request this Honorable Court dismiss Plaintiff's Complaint with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

GEORGE K. FLYNN
CLAUSEN MILLER P.C.

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THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,

Plaintiff,

v.

THE LAW OFFICES OF THOMAS J.
POPOVICH, P.C., and HANS MAST,

Defendant.

No. 17LA000377

Katherine M. Keefe
Clerk of the Circuit Court
Electronically Filed
Transaction ID: 17111117451
17LA000377
11/28/2017
McHenry County, Illinois
22nd Judicial Circuit

NOTICE

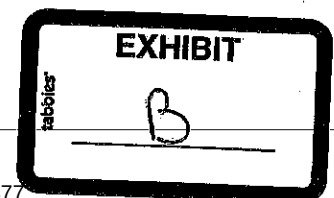
**THIS CASE IS HEREBY SET FOR A
SCHEDULING CONFERENCE IN
COURTROOM 201 ON
02/27/2018, AT 9:00 AM.
FAILURE TO APPEAR MAY RESULT IN
THE CASE BEING DISMISSED OR AN
ORDER OF DEFAULT BEING ENTERED.**

COMPLAINT AT LAW
(Legal Malpractice)

COMES NOW your Plaintiff, PAUL DULBERG (hereinafter also referred to as

"DULBERG"), by and through his attorneys, THE GOOCH FIRM, and as and for his Complaint
against THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter also referred to as
"POPOVICH"), and HANS MAST (hereinafter also referred to as "MAST"), states the
following:

1. Your Plaintiff, PAUL DULBERG, is a resident of McHenry County, Illinois, and was
such a resident at all times complained of herein.
2. Your Defendant, THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., is a law firm
operating in McHenry County, Illinois, and transacting business on a regular and daily basis in
McHenry County, Illinois.
3. Your Defendant, HANS MAST, is either an agent, employee, or partner of THE LAW
OFFICES OF THOMAS J. POPOVICH, P.C. MAST is a licensed attorney in the State of
Illinois, and was so licensed at all times relevant to this Complaint.



4. That due to the actions and status of MAST in relation to POPOVICH, the actions and inactions of MAST are directly attributable to his employer, partnership, or principal, being THE LAW OFFICES OF THOMAS J. POPVICH, P.C.
5. Venue is therefore claimed proper in McHenry County, Illinois, as the Defendants transact substantial and regular business in and about McHenry County in the practice of law, where their office is located.
6. On or about June 28, 2011, your Plaintiff, DULBERG was involved in a horrendous accident, having been asked by his neighbors Caroline McGuire and William McGuire, in assisting a David Gagnon in the cutting down of a tree on the McGuire property. DULBERG lived in the neighborhood.
7. At this time, Gaguon lost control of the chainsaw he was using causing it to strike DULBERG. This caused substantial and catastrophic injuries to DULBERG, including but not limited to great pain and suffering, current as well as future medical expenses, in an amount in excess of \$260,000.00, along with lost wages in excess of \$250,000.00, and various other damages.
8. In May of 2012, DULBERG retained THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., pursuant to a written retainer agreement attached hereto as Exhibit A.
9. A copy of the Complaint filed by MAST on his own behalf, and on behalf of DULBERG, is attached hereto as Exhibit B, and the allegations of that Complaint are fully incorporated into this Complaint as if fully set forth herein.
10. An implied term of the retainer agreement attached hereto as Exhibit A, was that at all times, the Defendants would exercise their duty of due care towards their client and conform their acts and actions within the standard of care every attorney owes his client.

11. That as Exhibit B reveals, Defendants properly filed suit against not only the operator of the chain saw, but also his principals, Caroline McGuire and William McGuire, who purportedly were supervising him in his work on the premises.
12. At the time of filing of the aforesaid Complaint, MAST certified pursuant to Supreme Court Rule 137, that he had made a diligent investigation of the facts and circumstances around the Complaint he filed, and further had ascertained the appropriate law. MAST evidently believed a very good and valid cause of action existed against Caroline McGuire and William McGuire.
13. The matter proceeded through the normal stages of litigation until sometime in late 2013 or early 2014, when MAST met with DULBERG and other family members and advised them there was no cause of action against William McGuire and Caroline McGuire, and told DULBERG he had no choice but to execute a release in favor of the McGuire's for the sum of \$5,000.00. DULBERG, having no choice in the matter, reluctantly agreed with MAST and to accept the sum of \$5,000.00 releasing not only William and Caroline McGuire, but also Auto-Owners Insurance Company from any further responsibility or liability in the matter. A copy of the aforesaid general release and settlement agreement is attached hereto as Exhibit C.
14. MAST and POPOVICH continued to represent DULBERG through to and including March of 2015, following which DULBERG and the Defendants terminated their relationship.
15. Continuously throughout the period of representation, MAST and POPOVICH represented repeatedly to DULBERG there was no possibility of any liability against William and/or Caroline McGuire and/or Auto-Owners Insurance Company, and lulled DULBERG into believing that the matter was being properly handled. Then, due to a claimed failure of communication, MAST and POPOVICH withdrew from the representation of DULBERG.

16. Thereafter, DULBERG retained other attorneys and proceeded to a binding mediation before a retired Circuit Judge, where DULBERG received a binding mediation award of \$660,000.00 in gross, and a net award of \$561,000.00. Unfortunately, a "high-low agreement" had been executed by DULBERG, reducing the maximum amount he could recover to \$300,000.00 based upon the insurance policy available. The award was substantially more than that sum of money, and could have been recovered from McGuire's had they not been dismissed from the Complaint. A copy of the aforesaid Mediation Award is attached hereto as Exhibit D.

17. The McGuire's were property owners and had property insurance covering injuries or losses on their property, as well as substantial personal assets, including the property location where the accident took place at 1016 West Elder Avenue, in the City of McHenry, Illinois.

McGuire's were well able to pay all, or a portion of the binding mediation award had they still remained parties.

18. DULBURG, in his relationship with POPOVICH and MAST, cooperated in all ways with them, furnishing all necessary information as required, and frequently conferred with them.

19. Until the time of the mediation award, DULBURG had no reason to believe he could not recover the full amount of his injuries, based on POPOVICH'S and MAST'S representations to DULBERG that he could recover the full amount of his injuries from Gagnon, and that the inclusion of the McGuire's would only complicate the case.

20. Following the execution of the mediation agreement with the "high-low agreement" contained therein, and the final mediation award, DULBURG realized for the first time that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuire's was a serious and substantial mistake. Following the

mediation, DULBERG was advised to seek an independent opinion from an attorney handling Legal Malpractice matters, and received that opinion on or about December 16, 2016.

21. MAST and POPOVICH, jointly and severally, breached the duties owed DULBURG by violating the standard of care owed DULBERG in the following ways and respects:

- a) Failed to take such actions as were necessary during their representation of DULBERG to fix liability against the property owners of the subject property (the McGuire's) who employed Gagnon, and sought the assistance of DULBERG;
- b) Failed to thoroughly investigate liability issues against property owners of the subject property;
- c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG;
- d) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property;
- e) Improperly urged DULBURG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- f) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuire's and their obvious liability were a very necessary party to the litigation;
- g) Falsely advised DULBURG throughout the period of their representation, that the actions taken regarding the McGuire's was proper in all ways and respects, and that DULBURG had no choice but to accept the settlement;

h) Failed to properly explain to DULBURG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;

i) Continually reassured DULBURG that the course of action as to the property owners was proper and appropriate;

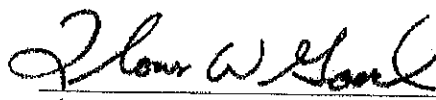
j) Were otherwise negligent in their representation of DULBERG, concealing from him necessary facts for DULBURG to make an informed decision as to the McGuire's, instead coercing him into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury.

22. That DULBERG suffered serious and substantial damages, not only as a result of the injury as set forth in the binding mediation award, but due to the direct actions of MAST and POPOVICH in urging DULBURG to release the McGuire's, lost the sum of well over \$300,000.00 which would not have occurred but for the acts of MAST and THE LAW OFFICES OF THOMAS J. POPOVICH, P.C.

WHEREFORE, your Plaintiff, PAUL DULBERG prays this Honorable Court to enter judgment on such verdict as a jury of twelve (12) shall return, together with the costs of suit and such other and further relief as may be just, all in excess of the jurisdictional minimums of this Honorable Court.

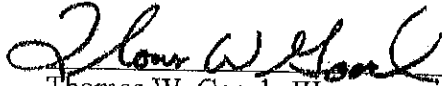
Respectfully submitted by,

PAUL DULBERG, Plaintiff, by his
attorneys THE GOOCH FIRM,



Thomas W. Gooch, III

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF TWELVE (12) PERSONS.


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**IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS**

PAUL DULBERG,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 17LA000377
	)	
THE LAW OFFICES OF THOMAS J.	)	
POPOVICH, P.C., and HANS MAST,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF COMBINED MOTION TO DISMISS

Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, by and through their attorneys, GEORGE K. FLYNN, and CLAUSEN MILLER P.C., pursuant to 735 ILCS 5/2-615, 735 ILCS 5/2-619(a)(5) and 735 ILCS 5/2-619.1, submit this Reply in Support of Defendants' Motion to Dismiss Plaintiff's Complaint at Law, and state as follows:

I. INTRODUCTION

One of the underpinnings of Dulberg's legal malpractice claim, is that a "high low agreement" he executed somehow caused him to settle his personal injury case for an amount lower than what he "expected." But Dulberg has failed to attach any such "high low agreement" to his complaint. He has also failed to identify the terms of the agreement in his complaint, and how the terms somehow affected his case. While in ¶ 3 of his Response he argues that the "high low agreement" was executed as part of the McGuire settlement, in view of Illinois Supreme Court Rule 137, he has not and cannot allege *in his complaint* that a "high low agreement" was executed as part of the McGuire settlement, or that Popovich or Mast had anything to do with it. In any case, the execution of a "high low agreement" by Dulberg in connection with the McGuire settlement makes little sense at the time, in view of Dulberg's later mediation and

settlement with the co-defendant, David Gagnon. Dulberg's mention of the "high low" coupled with his failure to explain its terms or significance, renders it a legal world equivalent of a "MacGuffin."

Dulberg cannot allege that he was "forced" to settle his case with the McGuires for \$5,000. He had every right to reject a settlement, or to retain new counsel. In fact, he alleges that Popovich withdrew over 21 months before the case was concluded (he retained successor counsel to handle the case). Moreover, he willingly agreed to a settlement with the McGuires while continuing to prosecute his case against Gagnon. He also fails to allege how he would have fared any better against the McGuires, "but for" Popovich's alleged malpractice, and fails to explain why he waited over 2 years after Popovich withdrew in order to sue the firm. For these reasons, Dulberg's complaint must be dismissed with prejudice.

II. DULBERG FAILS TO PLEAD FACTS IN SUPPORT OF EACH REQUISITE ELEMENT OF A LEGAL MALPRACTICE CLAIM

Dulberg fails to support any of his conclusions that Popovich and Mast committed legal malpractice with factual support. It is not sufficient under Illinois law that the elements of a cause of action simply be regurgitated. In a legal malpractice action, not only must the elements of the legal malpractice claim be supported with facts, so must the allegations of the underlying case. However, Dulberg only makes conclusory statements in ¶ 21 of his Complaint, that additional actions should have been taken in the underlying case. But Dulberg fails to identify what those actions should have been.

Dulberg alleges that he was forced to settle his case against the McGuires for \$5,000.00. He does not allege in his Complaint whether the McGuires made a settlement offer, or whether Dulberg made a settlement demand. Did Mast forward a written settlement offer to Dulberg? Did he accept it and mail back an executed release? How was he pressured to settle? Dulberg

also fails to explain the effect of a “high low agreement” that he allegedly executed. Dulberg attaches a page from a binding mediation award he allegedly received against David Gagnon, but he fails to attach the unexplained high low agreement. 735 ILCS 5/2-606, states in pertinent part:

If a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her.

Dulberg fails to attach the high low agreement, or otherwise explain the terms of the agreement and its significance. He also fails to explain why he would enter a high low agreement with the McGuires 21 months prior to a mediation with Gagnon.

Because Dulberg fails to plead facts in support of each and every element of his legal malpractice claim and his underlying claim and how he would have prevailed “but for” the negligence of Popovich and Mast, his case must be dismissed pursuant to 735 ILCS 5/2-615.

III. DULBERG IS ESTOPPED FROM REPUDIATING HIS SETTLEMENT AGREEMENT

Dulberg asserts that he is not estopped from taking a position in this case that he did not understand the terms of his \$5,000.00 settlement agreement with the McGuires. His attempt to distinguish *Larson v. O'Donnell*, 375 Ill. App. 3d 702 (1st Dist. 2007) fails. Dulberg argues that unlike *Larson*, here there is no record of Dulberg testifying to knowing exactly what the terms of the settlement agreement[sic][were]. (Response, p. 8). However, here there is no dispute that Dulberg knowingly executed the settlement release in favor of the McGuires. Moreover, in a case cited by Dulberg, *Seymour v. Collins*, 2015 IL 118432 the Illinois Supreme Court wrote that “a statement under oath was not among the requirements for judicial estoppel.” *Seymour* at *P38.

Dulberg also continues to argue in pages 8 and 9 of his Response that he was unable to make an informed decision about accepting settlement because he was never informed “by his attorneys that a “high low” agreement would limit his recovery against the remaining defendants.” (Response, ¶¶ 23 and 26). As discussed above, Dulberg has not and cannot allege in his complaint that Popovich or Mast had any involvement with any such “high low” agreement. Accordingly, his argument that they failed to inform him of the effects of the agreement, and how it could limit his recovery against the remaining defendants, is not well plead and amounts to a “red herring”. In fact, in ¶ 20 of his complaint, Dulberg sets forth the time frame of the execution of the “high low” agreement: “Following the execution of the mediation agreement with the “high low agreement” contained therein, and the final mediation award, Dulberg realized for the first time that the information MAST and POPOVICH had given Dulberg was false and misleading...” Which is it? Is he claiming that the “high low” was executed in 2015 prior to Popovich’s and Mast’s withdrawal, or at mediation (almost 2 years later in 2017)? Obviously Popovich and Mast could not have counseled Dulberg regarding a “high low” agreement he apparently executed 21 months after their attorney-client relationship ended. The allegations concerning the “high low” agreement are not well plead and are dispositive of Dulberg’s claims under section 2-615 and 735 ILCS 5/2-619 (a)(9).

IV. DULBERG’S RELIANCE ON THE DISCOVERY RULE TO DELAY THE COMMENCEMENT OF THE STATUTE OF LIMITATIONS IS UNAVAILING

Dulberg confirms in his Response that he is attempting to rely on the discovery rule in order to toll the statute of limitations. He also relies on language from the case of *Goodman v. Harbor Market, Ltd.*, 278 Ill. App. 3d (1st Dist. 1995) for the proposition that he is “presumed unable to distinguish any misapplication or negligence by the Defendants, on his own [sic].” He also alleges that he was provided with a legal opinion after the December 16, 2016 mediation

[with Gagnon] at which time he learned for the first time “that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuires was a serious and substantial mistake.” (Response, p. 11). How was the information misleading?

Again, Dulberg fails to describe how the settlement and dismissal of the McGuires was a mistake. But more importantly, he does not allege what happened in the 21 months after defendants were discharged as his counsel. Under Illinois law, he cannot simply bury his head in the sand. There was nothing preventing Dulberg from inquiring about the McGuires’ liability from his successor counsel, also a personal injury attorney. If he felt pressured into settling with the McGuires, why did he not seek a second opinion at the time of the settlement?

Dulberg has the burden of proving the date of discovery, and here he has failed to even allege sufficient facts to support a tolling of the limitations period. For that reason, his complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5).

V. CONCLUSION

WHEREFORE, for the reasons stated in their Motion to Dismiss and Memorandum in Support, and as stated herein, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(5), and 735 ILCS

5/2-619.1, respectfully request this Honorable Court dismiss Plaintiff's Complaint at Law with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

GEORGE K. FLYNN
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was caused to be served by Email and/or U.S. Mail by depositing same in the U.S. Mail at 10 S. LaSalle Street, Chicago, IL 60603, and properly addressed, with first class postage prepaid, on the 10th day of April, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III
The Gooch Firm
209 S. Main Street
Wauconda, IL 60084
gooch@goochfirm.com

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

A handwritten signature in cursive script, appearing to read "Tom W. Gooch, III", is written over a horizontal line.

The arguments within the complaints and the motions to dismiss are all contained within the following 5 documents:

COMPLAINT AT LAW

DEFENDANTS' COMBINED MOTION TO DISMISS (2-07-2018)

MEMORANDUM IN SUPPORT OF DEFENDANTS' COMBINED MOTION TO DISMISS
(2-07-2018)

PLAINTIFF'S RESPONSE TO DEFENDANTS' COMBINED MOTION TO DISMISS
(3-27-2018)

DEFENDANTS' REPLY IN SUPPORT OF COMBINED MOTION TO DISMISS

A number of corrections are needed. In these notes I go over each document and list each correction that I feel is necessary by page and section number.

COMPLAINT AT LAW

page 4, section 16: correction: the binding mediation was not chosen by Dulberg. He was forced into mediation by a direct order of the bankruptcy trustee. (Proof in Boudin case files, BK Docs folder) The trustee filed a motion for authority to enter into "Binding Mediation Agreement". The bankruptcy judge ordered the motion granted.

A "high-low agreement" was not executed by Dulberg. It was ordered by the trustee and Dulberg was not given a choice.

page 3, section 13: All statements are true. Detailed evidence of

how Mast told Dulberg that Dulberg should accept \$5,000 or he will receive nothing at all can be found in the email exchange within files 2-180.pdf to 2-207.pdf in the email folder.

page 5, section 21: All items are correct. In addition, Mast informed Dulberg that Gagnon was insured for only \$100,000. For 3 years working with Mast, Dulberg was informed and believed that the Gagnon insurance policy had a limit of \$100,000 dollars. (proof: see file 2-104.pdf among email files). Dulberg later found out through successor attorneys that the actual insurance limit is \$300,000. (proof: see boudin files, "def home insurance policy")

DEFENDANTS' COMBINED MOTION TO DISMISS (2-07-2018)

Page 1, section 1: minor correction: McGuire's are not next-door neighbors. They live in different sub-divisions. Gagnon is not Dulberg's lifelong friend.

MEMORANDUM IN SUPPORT OF DEFENDANTS' COMBINED MOTION TO DISMISS (2-07-2018)

Page 1, bottom of page: Dulberg was ordered into binding mediation by a motion of the bankruptcy trustee granted by the bankruptcy judge. Dulberg never executed a high-low agreement. The bankruptcy trustee ordered the the acceptance of the high-low agreement. Dulberg was not given a choice.

Page 5: It is stated that,

"Simply put, Dulberg fails to plead any facts in support of his conclusions that there was some liability against the McGuires."

After Dulberg stopped being represented by Mast, Dulberg contacted a tree and chainsaw expert named Dr Bobby L. Lanford, PhD. When Dulberg retained a new attorney, Dr Lanford was hired as an expert witness for Dulberg. The findings and conclusions of Dr Lanford are that both Gagnon and the McGuires were responsible for the accident.

It is stated that, "In section 21 of his complaint, Dulberg alleges negligence against Popovich and Mast, but fails to identify what actions should have been taken and were not."

Mast should have inquired from an expert witness in chainsaws and/or in homeowner liability law whether the McGuires are fully or partially responsible for the accident. There is no evidence that Mast considered this option even though Dulberg, who is not an attorney, followed this course on his own.

It is stated: " In section 21 (a), Dulberg fails to identify what investigation and discovery should have been undertaken."

In retrospect, it seems obvious that an attorney should consult with at least one experienced expert witness on chainsaws or on homeowner liability law involving chainsaws before agreeing to settle a lawsuit with a homeowner in connection with a chainsaw accident for such a low amount.

It is stated: "In section 21 (b) and (c), Dulberg fails to identify or discuss the law that "defendants failed to understand."

The chainsaw and tree expert that Dulberg contacted on his own, Dr Lanford, clearly states reasons why the homeowners are at least partially responsible for the accident. (evidence: see the Boudin folder called "Dr Bob") Also, as Dulberg met with attorneys after he was no longer represented by Mast, most every attorney he consulted

told him that they thought that the small settlement with the homeowners was a mistake.

Page 8: It is stated:

"He alleges in section 20, without any factual support, that the information regarding the McGuires' liability as a property owner, was "false and misleading." As discussed above, Dulberg fails to allege any specific facts about any false and misleading information or other specifics as to Mast and Popovich's negligent conduct. Dulberg fails to plead facts in support of the case within the case, i.e. the McGuires' liability in the underlying cause of action."

There is no evidence that Mast consulted any expert witness on chainsaws or homeowner liability. Mast informed Dulberg repeatedly that he should accept the offer of \$5,000 or he will receive nothing. Mast told Dulberg that opposing counsel for McGuire will successfully petition the court to dismiss the lawsuit if Dulberg does not accept the \$5,000 promptly and he will receive nothing.

It was only later during the arbitration settlement when Dulberg knew the actual settlement amount, received the opinion of an expert witness on trees and chainsaws, and was told by other attorneys that he believed the agreement with the McGuires was a mistake that he realized that the information from Mast concerning the McGuires' liability was false and misleading.

It is stated: "Dulberg alleges that he was advised to seek an independent opinion from an attorney handling legal malpractice matters on or about December 16, 2016, but provides no other explanation about why he was unaware of a claim until December 16, 2016. What happened after he signed the agreement on January 29, 2014?"

Dulberg clearly states it was the amount awarded by the arbitration

judge that helped him realize that the course of action taken by Mast was a mistake and the claims made by Mast were quite misleading. In addition, the expert testimony of Dr Lanford and the opinion of other attorneys who disagreed with Mast reinforced this realization when he understood that the actual settlement amount could not be collected due to the low settlement of the McGuire lawsuit.

The arbitration meeting was held December 08, 2016. He sought an opinion from an attorney handling legal malpractice matters about 1 week later.

Page 9, top of page: It is stated,

"In other words, the plaintiff must explain why he did not discover the cause of action until December 16, 2016. The plaintiff has the burden of proving the date of discovery."

Dulberg clearly explained that he did not discover the cause of action until he received an arbitration award on December 08, 2018. It is not difficult to prove when the arbitration meeting took place.

PLAINTIFF'S RESPONSE TO DEFENDANTS' COMBINED MOTION TO DISMISS (3-27-2018)

Page 3, section 3: It is stated:

"DULBERG's malpractice action is proper because DULBERG properly established that due to POPOVICH's malpractice, the case was settled for an amount much lower than what DULBERG expected."

Correction: Dulberg did not know what to expect until he knew of the

final arbitration settlement amount. It was only after this settlement, reading the expert witness findings and conclusions, and listening to the opinions of other attorneys that Dulberg had an idea of what he could reasonably expect.

Only after the arbitration was over could Dulberg for the first time form a reasonable opinion as to what one could expect in his situation.

Page 4, section 4: Correction: It is very important to understand that the "high-low agreement" was never executed as part of the McGuire settlement. It was executed as part of the arbitration agreement of December 08, 2016. Also, Dulberg never executed the high-low agreement. The bankruptcy trustee made the decision to accept a high-low agreement. Dulberg was not given a choice. The bankruptcy judge ordered that the trustee is authorized to enter into a "binding mediation agreement" without Dulberg's consent. (evidence: see Boudin files, BK Docs folder).

According to the final arbitration decision, the expert findings and conclusions of Dr Lanford, and the opinion of other attorneys contacted by Dulberg, evidence suggests that Dulberg would have recovered more if the McGuires had not been dismissed from the case.

Page 6, section 16: This is absolutely true. Evidence from emails (files 2-180.pdf to 2-207.pdf, email folder) clearly demonstrates that Dulberg disagreed with the low settlement offer and only reluctantly agreed after being informed that he will receive either \$5,000 or nothing and if he delayed he would receive nothing. The larger body of email evidence shows he was never comfortable with the settlement and felt pressured into it by being given a very narrow range of poor choices.

Page 8, section 23: It is stated,

"In this case there is no record of DULBERG specifically testifying to knowing exactly what the terms of the settlement agreement."

This is true. And there is much email evidence demonstrating that he never understood why the McGuires were not at least partially liable for a chainsaw injury that happened on their property.

Correction: Mast has nothing to do with any high-low agreement. The high-low agreement was accepted by the bankruptcy trustee as part of the December 08, 2016 arbitration settlement. THIS HAS NOTHING TO DO WITH MAST OR POPOVICH.

It is stated,

"Unlike in Larson Plaintiff, DULBERG was never informed by his attorneys that a "high-low" agreement would limit his recovery against the remaining defendants."

This is untrue because the statement implies that Mast is in some way connected to or responsible for a high-low agreement that took place 2 years after the McGuire settlement of \$5,000 was offered. This statement and others like it confuse the McGuires' settlement with the arbitration agreement ordered by the bankruptcy trustee 2 years later.

The high-low agreement has nothing to do with Mast or Popovich and they are in no way responsible for it. Arguing as if they are responsible for or connected to the high-low agreement will allow the judge to dismiss the complaint. This mistake needs to be fixed.

DEFENDANTS' REPLY IN SUPPORT OF COMBINED MOTION TO DISMISS

Page 1, Introduction:

It is stated,

"One of the underpinnings of Dulberg's legal malpractice claim, is that a "high low agreement" he executed somehow caused him to settle his personal injury case for an amount lower than what he "expected." But Dulberg has failed to attach any

such "high low agreement" to his complaint. He has also failed to identify the terms of the agreement in his complaint, and how the terms somehow affected his case. While in ^ 3 of his Response he argues that the "high low agreement" was executed as part of the McGuire settlement, in view of Illinois Supreme Court Rule 137, he has not and cannot allege in his complaint that a "high low agreement" was executed as part of the McGuire settlement, or that Popovich or Mast had anything to do with it. In any case, the execution of a "high low agreement" by Dulberg in connection with the McGuire settlement makes little sense at the time, in view of Dulberg's later mediation and settlement with the co-defendant, David Gagnon."

Unfortunately, these arguments for the defendants are true. The high-low agreement was not executed as part of the McGuire settlement. It is a mistake to suggest that it was and it allows the defendants to easily find a glaring inconsistency in otherwise strong arguments. They took advantage of the mistake and this weakness to have the original complaint dismissed.

Dulberg should have been reading the arguments more carefully and should have spotted the mistake when it was first made.

I will summarise the mistakes clearly:

- a) Dulberg did not execute any high-low agreement. It was forced on Dulberg on the authority of the bankruptcy trustee. The authority was ordered by the bankruptcy judge. Dulberg was never given a choice.
- b) Dulberg had no idea what to "expect" until he heard the final judgement reached in arbitration on December 08, 2016. He couldn't have known what expectation would be reasonable without first learning the results of arbitration, reading the findings and conclusions of expert witnesses, and learning of the opinions of other attorneys.
- c) The actual terms of the high-low agreement are not included in the complaint. The fact that the bankruptcy trustee had the authority to agree to a high-low agreement by order of the bankruptcy judge without permission or consent of Dulberg is not mentioned in the complaint.
- d) The high-low agreement was not executed as part of the McGuire settlement in December, 2013 and January, 2014. It was executed as part of the binding arbitration agreement ordered by the bankruptcy trustee in December, 2016.

e) Popovich and Mast had nothing to do with the execution of the high-low agreement in December, 2016.

f) The claim that the execution of the high-low agreement was made by Dulberg in connection to the McGuire settlement makes little sense. The terms of the two different settlements are being confused.

Page 2: It is written,

"Dulberg cannot allege that he was "forced" to settle his case with the McGuires for \$5,000. He had every right to reject a settlement, or to retain new counsel. "

This is untrue. The email evidence from November, 2013 to January, 2014 (files 2-180.pdf to 2-207.pdf in the email folder) clearly demonstrates that Dulberg was informed that he was sure to receive nothing if he didn't accept the \$5,000 and he had a very limited amount of time to decide before this final offer would be withdrawn.

It is written,

"He also fails to allege how he would have fared any better against the McGuires, "but for" Popovich's alleged malpractice, and fails to explain why he waited over 2 years after Popovich withdrew in order to sue the firm"

The expert witness findings and conclusions of Dr Lanford which were part of the binding arbitration agreement clearly and reasonably describe how both Gagnon and the McGuires are liable for the chainsaw accident. There is no evidence that Mast consulted or planned to consult any expert witness related to chainsaws, trees, or homeowner liability law before informing Dulberg he had no case against the McGuires. If he had done so and communicated with a person who shares the same clear and reasonable opinions as Dr Lanford, Mast could easily have realized that his later advice to Dulberg was very poorly thought out.

It is written:

"He does not allege in his Complaint whether the McGuires made a settlement offer, or whether Dulberg made a settlement demand. Did Mast forward a written settlement offer to Dulberg? Did he accept it and mail back an executed release? How was he pressured to settle?

The written record clearly shows that the McGuires' attorney made a settlement offer. (evidence in Boudin folder "Release of William McGuire/Carolyn McGuire") The email record from November, 2013 to January, 2014 clearly shows that Dulberg was unhappy with the offer and couldn't understand how Mast could claim that the homeowners were not at least partially liable for the accident. (Evidence in files 2-180.pdf to 2-207.pdf in email folder). The email evidence clearly shows the details of how he was pressured to settle.

Page 3, It is stated:

"He also fails to explain why he would enter a high low agreement with the McGuires 21 months prior to a mediation with Gagnon."

He never did. This claim was a mistake that should not have been included in the complaint.

Page 4, top of page: It is stated,

"Dulberg also continues to argue in pages 8 and 9 of his Response that he was unable to make an informed decision about accepting settlement because he was never informed "by his attorneys that a "high low" agreement would limit his recovery against the remaining defendants.""

This is an incorrect claim that should not have appeared in the complaint. A high-low agreement was not part of the McGuire

settlement. It was part of the binding arbitration agreement 2 years later.

Page 4, It is written:

"As discussed above, Dulberg has not and cannot allege in his complaint that Popovich or Mast had any involvement with any such "high low" agreement. Accordingly, his argument that they failed to inform him of the effects of the agreement, and how it could limit his recovery against the remaining defendants, is not well plead and amounts to a "red herring". In fact, in ^ 20 of his complaint, Dulberg sets forth the time frame of the execution of the "high low" agreement: "Following the execution of the mediation agreement with the "high low agreement" contained therein, and the final mediation award, Dulberg realized for the first time that the information MAST and POPOVICH had given Dulberg was false and misleading. .." Which is it? Is he claiming that the "high low" was executed in 2015 prior to Popovich's and Mast's withdrawal, or at mediation (almost 2 years later in 2017)? Obviously Popovich and Mast could not have counseled Dulberg regarding a "high low" agreement he apparently executed 21 months after their attorney-client relationship ended. The allegations concerning the "high low" agreement are not well plead and are dispositive of Dulberg's claims under section 2-615 and 735 ILCS 5/2-619 (a)(9)."

The confusion as to when and by whom the high-low agreement was executed and very poor editing by Dulberg gave the defendants a very easy way to have the original complaint thrown out. They manage to use pretty weak arguments to dismiss the original complaint simply by taking advantage of this blunder.

Page 5, It is written:

"Again, Dulberg fails to describe how the settlement and dismissal of the McGuires was a mistake. But more importantly, he does not allege what happened in the 21 months after defendants were discharged as his counsel. Under Illinois law, he cannot simply bury his head in the sand. There was nothing preventing Dulberg from inquiring about the McGuires' liability from his successor counsel, also a personal injury attorney. If he felt pressured into settling with the McGuires, why did he not seek a second opinion at the time of the settlement?"

It was a mistake because the expert witness who specializes in trees and chainsaws explicitly points out that the homeowners are partially responsible for the injury using very simple, logical and reasonable arguments. It was a mistake because Mast never sought this type of expert opinion. Because the Mast counsel directly contradicted the expert witness later contacted by Dulberg. Because most every lawyer with which Dulberg communicated afterward suggested that settling with the homeowners for such a low amount was a mistake. Dulberg did inquire about the McGuires' liability on his own and from his successor counsel. His successor council told him that they believe that settling with the McGuires was a mistake. It was the successor counsel that recommended contacting an attorney that works with malpractice cases. But Dulberg still couldn't have known whether the counsel of Mast and Popovich limited his final recovery until he could find out what the recovery would be. He found that out during the arbitration hearing, understood that the actions and advice of Mast and Popovich did indeed limit his recovery, and acted promptly.

In conclusion: These notes show that the arguments in the original complaint are quite strong with the exception of a few incorrect statements that keep reoccurring throughout the documents. The defendants spotted these repeating mistakes and took advantage of them to have the original complaint dismissed.

The actual counter-arguments of the defendants are not very good. They won a temporary victory simply by taking advantage of plaintiff mistakes, magnifying them, and turning them against us. The opposing side doesn't have strong counter-arguments and evidence exists within the written record to counter pretty much every one of their claims.

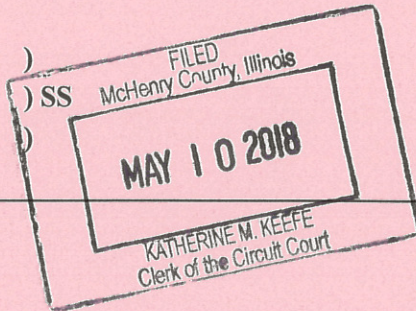
Current problems for us: We must know our facts better. It is my opinion that if these notes are read carefully and each of these mistakes is understood, addressed and corrected, the amended complaint will be much, much harder to counter.

IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT

Ln. 6

STATE OF ILLINOIS

COUNTY OF MCHENRY



GEN. NO.

17 LA 377

☐ Jury

☐ Non-Jury

Dulberg

VS.

Mast, et al

Date: 5-10-18

Plaintiff's
Attorney

S. Walczyk

Defendant's
Attorney

G Flynn

ORDER

This matter before the Court on hearing on Defendants' combined Motion to Dismiss, both parties present by counsel, the Court fully advised in the premises

IT IS ORDERED:

1. Defendants' 2-615 motion to Dismiss is granted, and the 2-619 motion is denied.
2. Plaintiff granted 28 days to file a First Amended Complaint (6/7/18)
3. Defendants granted 28 days thereafter to Answer or otherwise plead (7/5/18)
4. Matter is set for status of pleadings on July 20, 2018 at 9:00 am in 201.

Prepared by: S. Walczyk / Gooch Firm

Attorney for: Dulberg

Attorney Registration No.: 6315819

Judge:

THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,

Plaintiff,

v.

THE LAW OFFICES OF THOMAS J.
POPOVICH, P.C., and HANS MAST,

Defendant.

No. 17 LA 377

FIRST AMENDED COMPLAINT AT LAW
(Legal Malpractice)

COMES NOW your Plaintiff, PAUL DULBERG (hereinafter also referred to as “DULBERG”), by and through his attorneys, THE GOOCH FIRM, and as and for his First Amended Complaint against THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter also referred to as “POPOVICH”), and HANS MAST (hereinafter also referred to as “MAST”), states the following:

1. Your Plaintiff, PAUL DULBERG, is a resident of McHenry County, Illinois, and was such a resident at all times complained of herein.
2. Your Defendant, THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., is a law firm operating in McHenry County, Illinois, and transacting business on a regular and daily basis in McHenry County, Illinois.
3. Your Defendant, HANS MAST, is either an agent, employee, or partner of THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. MAST is a licensed attorney in the State of Illinois, and was so licensed at all times relevant to this Complaint.

4. That due to the actions and status of MAST in relation to POPOVICH, the actions and inactions of MAST are directly attributable to his employer, partnership, or principal, being THE LAW OFFICES OF THOMAS J. POPVICH, P.C.

5. Venue is therefore claimed proper in McHenry County, Illinois, as the Defendants transact substantial and regular business in and about McHenry County in the practice of law, where their office is located.

6. On or about June 28, 2011, your Plaintiff, DULBERG was involved in a horrendous accident, having been asked by his neighbors Caroline McGuire and William McGuire, in assisting a David Gagnon in the cutting down of a tree on the McGuire property. DULBERG lived in the same area.

7. At this time, Gagnon lost control of the chainsaw he was using causing it to strike and cut DULBERG's arm. This caused substantial and catastrophic injuries to DULBERG, including but not limited to great pain and suffering, current as well as future medical expenses, in an amount in excess of \$260,000.00, along with lost wages in excess of \$250,000.00, and various other damages.

8. In May of 2012, DULBERG retained THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., pursuant to a written retainer agreement attached hereto as **Exhibit A**.

9. A copy of the Complaint filed by MAST on his own behalf, and on behalf of DULBERG, is attached hereto as **Exhibit B**, and the allegations of that Complaint are fully incorporated into this Complaint as if fully set forth herein.

10. An implied term of the retainer agreement attached hereto as **Exhibit A**, was that at all times, the Defendants would exercise their duty of due care towards their client and conform their acts and actions within the standard of care every attorney owes his client.

11. That as **Exhibit B** reveals, Defendants properly filed suit against not only the operator of the chain saw, but also his principals, Caroline McGuire and William McGuire, who purportedly were supervising him in his work on the premises.

12. At the time of filing of the aforesaid Complaint, MAST certified pursuant to Supreme Court Rule 137, that he had made a diligent investigation of the facts and circumstances around the Complaint he filed, and further had ascertained the appropriate law. MAST evidently believed a very good and valid cause of action existed against Caroline McGuire and William McGuire.

13. Also MAST incorrectly informed DULBERG that the insurance policy limit for the Gagnon was only \$100,000.00, when in reality the policy was \$300,000.00.

14. The matter proceeded through the normal stages of litigation until sometime in late 2013 or early 2014, when MAST began urging DULBERG to settle the matter against William McGuire and Caroline McGuire for \$5,000.00.

15. On November 18, 2013, MAST wrote two emails to DULBERG urging DULBERG to accept the \$5,000.00, "the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery...." * * * "So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case". (See Emails attached as **Group Exhibit C.**)

16. Similarly, on November 20, 2013 MAST emailed DULBERG urging him to accept the \$5,000.00 otherwise “the McGuires will get out for FREE on a motion.” (See Emails attached as **Group Exhibit C.**)

17. On or around December 2013 or January 2014, MAST met with DULBERG and other family members and again advised them there was no cause of action against William McGuire and Caroline McGuire, and verbally told DULBERG that he had no choice but to execute a release in favor of the McGuires for the sum of \$5,000.00 and if he did not, he would get nothing.

18. DULBERG, having no choice in the matter, reluctantly agreed with MAST to accept the sum of \$5,000.00 releasing not only William and Caroline McGuire, but also Auto-Owners Insurance Company from any further responsibility or liability in the matter. A copy of the aforesaid general release and settlement agreement is attached hereto as **Exhibit D.**

19. Continuously throughout the period of representation, MAST and POPOVICH represented repeatedly to DULBERG there was no possibility of any liability against William and/or Caroline McGuire and/or Auto-Owners Insurance Company, and lulled DULBERG into believing that the matter was being properly handled

20. After accepting the \$5,000 settlement, DULBERG wrote MAST an email on January 29, 2014 stating “I trust your judgment.” (See Email attached as **Exhibit E.**)

21. MAST and POPOVICH continued to represent DULBERG into 2015 and continuously assured him that his case was being handled properly.

22. On February 22, 2015, as to any chance of settling the remainder of his case against Gagnon MAST wrote to DULBERG that, “There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only

alternative is to take the case to trial and I am not interested in doing that.” (See Email attached as **Exhibit F.**)

23. MAST and POPOVICH represented DULBERG through to and including March of 2015, following which DULBERG and the Defendants terminated their relationship due to a claimed failure of communication. MAST and POPOVICH withdrew from the representation of DULBERG.

24. Thereafter, DULBERG retained other attorneys and proceeded to a Court ordered binding mediation before a retired Circuit Judge, where DULBERG received a binding mediation award of \$660,000.00 in gross, and a net award of \$561,000.00. However, due to the settlement with the McGuires, DULBERG was only able to collect \$300,000.00 based upon the insurance policy available. A copy of the aforesaid Mediation Award is attached hereto as **Exhibit G.**

25. The McGuires were property owners and had property insurance covering injuries or losses on their property, as well as substantial personal assets, including the property location where the accident took place at 1016 West Elder Avenue, in the City of McHenry, Illinois. McGuires were well able to pay all, or a portion of the binding mediation award had they still remained parties.

26. DULBERG, in his relationship with POPOVICH and MAST, cooperated in all ways with them, furnishing all necessary information as required, and frequently conferred with them.

27. Until the time of the mediation award, DULBERG had no reason to believe he could not recover the full amount of his injuries, based on POPOVICH’S and MAST’S representations to DULBERG that he could recover the full amount of his injuries from Gagnon, and that the inclusion of the McGuires would only complicate the case.

28. Following the execution of the mediation agreement and the final mediation award, DULBERG realized for the first time in December of 2016 that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuires was a serious and substantial mistake.

29. It was not until the mediation in December 2016, based on the expert's opinions that DULBERG retained for the mediation, that DULBERG became reasonably aware that MAST and POPOVICH did not properly represent him by pressuring and coercing him to accept a settlement for \$5,000.00 on an "all or nothing" basis.

30. DULBERG was advised to seek an independent opinion from a legal malpractice attorney and received that opinion on or about December 16, 2016.

31. MAST and POPOVICH, jointly and severally, breached the duties owed DULBERG by violating the standard of care owed DULBERG in the following ways and respects:

a) Failed to take such actions as were necessary during their representation of DULBERG to fix liability against the property owners of the subject property (the McGuires) who employed Gagnon, and sought the assistance of DULBERG, for example hiring a liability expert;

b) Failed to thoroughly investigate liability issues against property owners of the subject property;

c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG, for example hiring a liability expert;

d.) Failed to investigate the insurance policy amounts of the McGuires and Gagnon;

e.) Incorrectly informed DULBERG that Gagnon's insurance policy was "only \$100,000.00" and no insurance company would pay close to that;

- f) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property by consulting an expert regarding these issues;
- g) Improperly urged DULBERG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- h) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuires and their obvious liability were a very necessary party to the litigation;
- i) Falsely advised DULBERG throughout the period of their representation, that the actions taken regarding the McGuires was proper in all ways and respects, and that DULBERG had no choice but to accept the settlement;
- j) Coerced DULBERG, verbally and through emails. into accepting the settlement with the McGuires for \$5,000.00 by misleading him into believing that had no other choice but to accept the settlement or else "the McGuires will get out for FREE on a motion".
- k) Concealed from DULBERG the necessary facts for him to make an informed decision as to the McGuires, instead coercing him verbally and through emails into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury;
- l) Failed to properly explain to DULBERG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;
- m) Continually reassured DULBERG that the course of action as to the property owners was proper and appropriate;

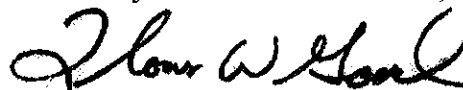
- n) Failed to retain a liability expert to prove DULBERG's damages;
- o) Were otherwise negligent in their representation of DULBERG.

32. That DULBERG suffered serious and substantial damages, not only as a result of the injury as set forth in the binding mediation award, but due to the direct actions of MAST and POPOVICH in urging DULBERG to release the McGuires, lost the sum of well over \$300,000.00 which would not have occurred but for the acts of MAST and THE LAW OFFICES OF THOMAS J. POPOVICH, P.C.

WHEREFORE, your Plaintiff, PAUL DULBERG prays this Honorable Court to enter judgment on such verdict as a jury of twelve (12) shall return, together with the costs of suit and such other and further relief as may be just, all in excess of the jurisdictional minimums of this Honorable Court.

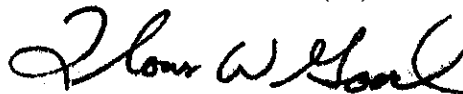
Respectfully submitted by,

PAUL DULBERG, Plaintiff, by his
attorneys THE GOOCH FIRM,



Thomas W. Gooch, III

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF TWELVE (12) PERSONS:



Thomas W. Gooch, III

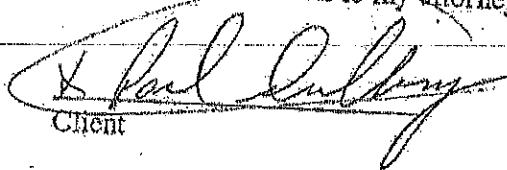
Thomas W. Gooch, III
THE GOOCH FIRM
209 S. Main Street
Wauconda, IL 60084
847-526-0110
ARDC No.: 3123355
gooch@goochfirm.com
office@goochfirm.com

CONTRACT FOR LEGAL SERVICES

I agree to employ the LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter "my attorney") to represent me in the prosecution or settlement of my claim against persons or entities responsible for causing me to suffer injuries and damages on the _____ day of _____, 20____.

My attorney agrees to make no charge for legal services unless a recovery is made in my claim. The approval of any settlement amount cannot be made without my knowledge and consent.

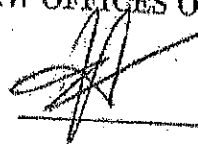
I agree to pay my attorney in consideration for his legal services a sum equal to one-third (33 1/3%) of my recovery from my claim by suit or settlement; this will increase to ~~1/3~~ % in the event my claim results in more than one (1) trial and/or an appeal of a trial. I understand my attorney may need to incur reasonable expenses in properly handling my claim including, but not limited to, expenses such as accident reports, filing fees, court reporters fees, video fees, records fees, and physician fees. I understand those expenses will be taken out of my settlement, in addition to my attorney's legal fee.


Client

Client

Date: _____

LAW OFFICES OF THOMAS J. POPOVICH

By: 

Date: _____

LAW OFFICES OF THOMAS J. POPOVICH, P.C.
3416 West Elm Street
McHenry, Illinois 60050
815/344-3797

EXHIBIT

A

COPY

MAY 15 2012

KATHRYN M. KADLE
McHENRY CTY. CRT. CLK.

STATE OF ILLINOIS)
COUNTY OF McHENRY) SS

IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,

Plaintiff,

vs.

No.:

17LA178

DAVID GAGNON, Individually, and as
Agent of CAROLINE MCGUIRE and BILL
MCGUIRE, and CAROLINE MCGUIRE
and BILL MCGUIRE, Individually,

Defendants.

COMPLAINT

NOW COMES the Plaintiff, PAUL DULBERG, by his attorneys, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and complaining against the Defendants, DAVID GAGNON, Individually, and as Agent of CAROLINE MCGUIRE and BILL MCGUIRE, and CAROLINE MCGUIRE and BILL MCGUIRE, individually, and states as follows:

Count I

Paul Dulberg vs. David Gagnon, individually, and as Agent of Caroline and Bill McGuire

1. On June 28, 2011, the Plaintiff, PAUL DULBERG, lived in the City of McHenry, County of McHenry, Illinois.

2. On June 28, 2011, Defendants CAROLINE MCGUIRE and BILL MCGUIRE lived, controlled, managed and maintained a single family home located at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

NOTICE
BY LOCAL RULE 3.10

THIS CASE IS HEREBY SET FOR SCHEDULING
CONFERENCE IN COURTROOM 20 ON
JUNE 28, 2012, AT 2:00 PM
FAILURE TO APPEAR MAY RESULT IN THE CASE
BEING DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

NOTICE
LOCAL RULE 3.10
THIS CASE IS HEREBY SET FOR SCHEDULING
CONFERENCE IN COURTROOM 20 ON
JUNE 28, 2012, AT 2:00 PM
FAILURE TO APPEAR MAY RESULT IN THE CASE
BEING DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

EXHIBIT



3. On June 28, 2011, the Defendant, DAVID GAGNON, was living and/or staying at his parent's home at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

4. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE contracted, hired the Defendant, DAVID GAGNON, to cut down, trim and/or maintain the trees and brush at their premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

5. On June 28, 2011, and at the request and with the authority and permission of the Defendants CAROLINE McGUIRE and BILL McGUIRE, and for their benefit, the Defendant, DAVID GAGNON, was working under their supervision and control while engaged in cutting, trimming and maintaining trees and brush at the premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

6. On June 28, 2011, as part of his work at the subject property, the Defendant, DAVID GAGNON, was authorized, instructed, advised and permitted to use a chainsaw to assist him in his work for Defendants, CAROLINE McGUIRE and BILL McGUIRE, which was owned by the McGuires.

7. On June 28, 2011, the Defendant, DAVID GAGNON, was under the supervision and control of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was working as their apparent and actual agent, and was then acting and working in the scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE.

8. On June 28, 2011, and while the Defendant, DAVID GAGNON, was working in the course and scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was under their supervision and control, Defendant, DAVID GAGNON was in use of a chainsaw while trimming a tree and branch.

9. On June 28, 2011, and while Defendant, DAVID GAGNON, was in use of a chainsaw while trimming a tree and branch, Defendant, DAVID GAGNON, asked for and/or requested the assistance of the Plaintiff, PAUL DULBERG, to hold the tree branch while Defendant, DAVID GAGNON, trimmed the branch with the chainsaw.

10. On June 28, 2011, and while Defendant, DAVID GAGNON, was in sole control, use and operation of the subject chainsaw, the chainsaw was caused to strike and injure the Plaintiff, PAUL DULBERG.

11. At all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew of Defendant, DAVID GAGNON's use of the chainsaw in the presence of the Plaintiff, PAUL DULBERG, and knew that such created a danger to the Plaintiff, PAUL DULBERG's safety.

12. That at all relevant times, the Defendants, DAVID GAGNON, as agent of CAROLINE McGUIRE and BILL McGUIRE, owed a duty to use care and caution in his operation of a known dangerous instrumentality.

13. On June 28, 2011, the Defendant, DAVID GAGNON, was negligent in one or more of the following ways:

- a. Failed to maintain control over the operating of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant, DAVID GAGNON's inability to control the chainsaw;
- d. Failed to keep a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

14. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

15. That at the above time and date, the Defendant's negligence can be inferred from the circumstances of the occurrence as the instrument of the injury was under the control of the Defendant and therefore, negligence can be presumed under the doctrine of *Res Ipsa Loquitur*.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants, DAVID GAGNON, and CAROLINE McGUIRE and BILL McGUIRE in an amount in excess of \$50,000.00, plus costs of this action.

Count II

Paul Dulberg vs. Caroline McGuire and Bill McGuire

15. That the Plaintiff, PAUL DULBERG, restates and realleges paragraphs 1 through 14, in Count I, above, as paragraphs 1 through 15 of Count II, as if fully alleged herein.

16. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, owned, controlled, maintained and supervised the premises whereat the accident to the Plaintiff, PAUL DULBERG, occurred.

17. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were in control of and had the right to advise, instruct and demand that the Defendant, DAVID GAGNON, act or work in a safe and reasonable manner.

18. That at all relevant times, the Defendant, DAVID GAGNON, was acting as the agent, actual and apparent, of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was acting at their request and in their best interests and to their benefit as in a joint enterprise.

19. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew DAVID GAGNON was operating a chainsaw with the assistance of the Plaintiff, PAUL DULBERG, and had the right to discharge or terminate the Defendant, DAVID GAGNON's work for any reason.

20. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, owed a duty to supervise and control Defendant, DAVID GAGNON's activities on the property so as not to create an unreasonable hazard to others, including the Plaintiff, PAUL DULBERG.

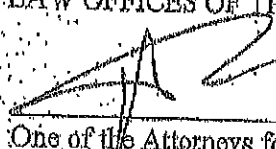
21. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were negligent in one or more of the following ways:

- a. Failed to control operation of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant's inability to control the chainsaw;
- d. Failed to keep the chainsaw a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

22. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants,
CAROLINE McGUIRE and BILL McGUIRE, in an amount in excess of \$50,000.00, plus costs
of this action.

LAW OFFICES OF THOMAS J. POPOVICH, P.C.



One of the Attorneys for Plaintiff

Hans A. Mast
LAW OFFICES OF THOMAS J. POPOVICH, P.C.
3416 West Elm Street
Lake, Illinois 60050
(815) 344-3797
ARDC No. 06203684

From: Paul Dulberg <pdulberg@comcast.net>
Subject: Fwd: Dave's Best and oldest friend John
Date: December 28, 2016 10:33:35 AM CST
To: paul_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>
Date: November 20, 2013 at 7:26:53 AM CST
To: Hans Mast <hansmast@comcast.net>
Subject: Re: Dave's Best and oldest friend John

Morning Hans,
Ok we can meet. I will call Sheila today and set up a time.
Please send me a link to the current Illinois statute citing that the property owner is not liable for work done on their property resulting in injury to a neighbor.
I need to read it myself and any links to recent case law in this area would be helpful as well.
Thanks,
Paul

Paul Dulberg
847-497-4250
Sent from my iPad

On Nov 20, 2013, at 6:59 AM, Hans Mast <hansmast@comcast.net> wrote:

Paul, lets meet again to discuss. The legality of it all is that a property owner does not have legal liability for a worker (whether friend, son or otherwise) who does the work on his time, using his own independent skills. Here, I deposed the McGuires, and they had nothing to do with how Dave did the work other than to request the work to be done. They had no control on how Dave wielded the chain saw and cut you. Its that simple. We don't have to accept the \$5,000, but if we do not, the McGuires will get out for FREE on a motion. So that's the situation.

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>
To: Hans Mast <hansmast@comcast.net>
Sent: Tue, 19 Nov 2013 02:29:56 -0000 (UTC)
Subject: Re: Dave's Best and oldest friend John

I still don't get how they don't feel responsible for work done on their property by their own son that ended up cutting through 40% of my arm.

Perhaps their negligence is the fact that they didn't supervise the work close enough but they did oversee much of the days activity with David. Just because Dave was doing the work doesn't mean they were not trying to tell their kid what to do. They told him plenty of times throughout the day what to do. How is that not supervising?

Paul

Paul Dulberg
847-497-4250

Sent from my iPad

On Nov 18, 2013, at 8:07 PM, Hans Mast <hansmast@comcast.net> wrote:

Paul whether you like it or not they don't have a legal liability for your injury because they were not directing the work. So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case

Sent from my iPhone

On Nov 18, 2013, at 7:40 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Only 5, That's not much at all.

Is this a take it or leave it or do we have any other options?

If you want a negligence case for the homeowners ask what happened immediately after the accident.

Neither of them offered me any medical assistance nor did either of them call 911 and all Carol could think of besides calling David an idiot was calling her homeowners insurance.



They all left me out in the yard screaming for help while they were busy making sure they were covered.

She even went as far as to finally call the Emergency Room after I was already there just to tell me she was covered.

How selfish are people when they worry about if their insured over helping the person who was hurt and bleeding badly in their yard.

I'm glad she got her answer and had to share it with me only to find out her coverage won't even pay the medical bills.

I'm not happy with the offer.

As far as John Choyinski, he knows he has to call you and said he will tomorrow.

Paul

Paul Dulberg
847-497-4250
Sent from my iPad

On Nov 18, 2013, at 1:28 PM, Hans Mast <hansmast@comcast.net> wrote:

Im waiting to hear from John. I tried calling him last week, but no one answered.

In addition, the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery....

Let me know what you think..

Hans

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>

To: Hans Mast <hansmast@comcast.net>

Sent: Fri, 15 Nov 2013 22:41:26 -0000 (UTC)

Subject: Dave's Best and oldest friend John

Hans,

Just spoke with John Choyinski again about talking with you.

I am leaving your number with him as he has agreed to talk with you about David Gagnon.

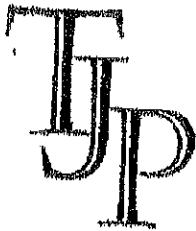
I believe he will try and call sometime tomorrow.

Paul

Oh and I know that nothing that happened right after the incident makes any difference as to the validity of the injuries but David's conduct immediately after the incident does show his lack of moral values for other humans and what he was willing and was not willing to do to help me get medical help. For his actions towards me or any other human being is enough to sue the shit out him alone. It is the things that happened afterwards that upset me the most.

Sorry for the rant but Dave was a complete ass all the way and deserves this.

Paul Dulberg
847-497-4250
Sent from my iPad



The Law Offices of Thomas J. Popovich P.C.

3416 W. ELM STREET
McHENRY, ILLINOIS 60050
TELEPHONE: 815.344.3797
FACSIMILE: 815.344.5280
www.popovichlaw.com

THOMAS J. POPOVICH
HANS A. MAST
JOHN A. KORMAK

MARK J. VOGG
JAMES P. TUTAJ
ROBERT J. LUMBER
THERESA M. FREEMAN

January 24, 2014

Paul Dulberg
4606 Hayden Court
McHenry, IL 60051

RE: *Paul Dulberg vs. David Gagnon, Caroline McGuire and Bill McGuire*
McHenry County Case: 12 LA 178

Dear Paul:

Please find enclosed the General Release and Settlement Agreement from defense counsel for Caroline and Bill McGuire. Please Release and return it to me in the enclosed self-addressed stamped envelope at your earliest convenience.

Thank you for your cooperation.

Very truly yours,

COPY
HANS A. MAST

smq
Enclosure

EXHIBIT

D

WAUKEGAN OFFICE
210 NORTH MARTIN LUTHER
KING JR. AVENUE
WAUKEGAN, IL 60085

GENERAL RELEASE AND SETTLEMENT AGREEMENT

NOW COMES PAUL DULBERG, and in consideration of the payment of Five-Thousand (\$5,000.00) Dollars to him, by or on behalf of the WILLIAM MCGUIRE and CAROLYN MCGUIRE (aka Bill McGuire; improperly named as Caroline McGuire) and AUTO-OWNERS INSURANCE COMPANY, the payment and receipt of which is hereby acknowledged, PAUL DULBERG does hereby release and discharge the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, and any agents or employees of the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, of and from any and all causes of action, claims and demands of whatsoever kind or nature including, but not limited to, any claim for personal injuries and property damage arising out of a certain chain saw incident that allegedly occurred on or about June 28, 2011, within and upon the premises known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

IT IS FURTHER AGREED AND UNDERSTOOD that there is presently pending a cause of action in the Circuit Court of the 22nd Judicial Circuit, McHenry County, Illinois entitled "Paul Dulberg, Plaintiff, vs. David Gagnon, Individually, and as agent of Caroline McGuire and Bill McGuire, and Caroline McGuire and Bill McGuire, Individually, Defendants", Cause No. 2012 LA 178, and that this settlement is contingent upon WILLIAM MCGUIRE and CAROLYN MCGUIRE being dismissed with prejudice as parties to said lawsuit pursuant to a finding by the Circuit Court that the settlement between the parties constitutes a good faith settlement for purposes of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*

IT IS FURTHER AGREED AND UNDERSTOOD that as part of the consideration for this agreement the undersigned represents and warrants as follows (check applicable boxes):

- ☐ I was not 65 or older on the date of the occurrence.
- ☐ I was not receiving SSI or SSDI on the date of the occurrence.
- ☐ I am not eligible to receive SSI or SSDI.
- ☐ I am not currently receiving SSI or SSDI.

IT IS FURTHER AGREED AND UNDERSTOOD:

- a. That any subrogated claims or liens for medical expenses paid by or on behalf of PAUL DULBERG shall be the responsibility PAUL DULBERG, including, but not limited to, any Medicare liens. Any and all reimbursements of medical expenses to subrogated parties, including Medicare's rights of reimbursement, if any, shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released herein.
- b. That any outstanding medical expenses are PAUL DULBERG's responsibility and all payment of medical expenses hereafter shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released

- c. That PAUL DULBERG agrees to save and hold harmless and indemnify the parties released herein against any claims made by any medical providers, including, but not limited to Medicare or parties subrogated to the rights to recover medical or Medicare payments.

IT IS FURTHER AGREED AND UNDERSTOOD by the parties hereto that this agreement contains the entire agreement between the parties with regard to materials set forth herein, and shall be binding upon and inure to the benefit of the parties hereto, jointly and severally, and the executors, conservators, administrators, guardians, personal representatives, heirs and successors of each.

IT IS FURTHER AGREED AND UNDERSTOOD that this settlement is a compromise of a doubtful and disputed claim and no liability is admitted as a consequence hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the dates set forth below.

Dated: _____

PAUL DULBERG

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

PAUL DULBERG personally appeared before me this date and acknowledged that she executed the foregoing Release and Settlement Agreement as his own free act and deed for the uses and purposes set forth therein.

Dated this _____ day of January, 2014.

Notary Public

From: Paul Dulberg <pdulberg@comcast.net>
Subject: Fwd: McGuire settlement
Date: December 28, 2016 10:21:55 AM CST
To: paul_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>
Date: January 29, 2014 at 1:59:31 PM CST
To: Hans Mast <hansmast@comcast.net>
Subject: Re: McGuire settlement

Ok, it's signed and in the mail.

Hope that some yahoo in the govt. doesn't someday decide to go after everyone they think they might get a dollar out of and end up holding me responsible for the McGuires fees incurred while they fight it out.

I'm not in the business of warranting, insuring or protecting the McGuires from government. Especially for only 5 grand. For that kind of protection it could cost millions but I trust your judgement.

Paul

Paul Dulberg
847-497-4250
Sent from my iPad

On Jan 29, 2014, at 11:49 AM, Hans Mast <hansmast@comcast.net> wrote:

SSD has to be part of it...its not going to effect anything...
We can't prevent disclosure of the amount...

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>
To: Hans Mast <hansmast@comcast.net>
Sent: Wed, 29 Jan 2014 17:47:39 -0000 (UTC)
Subject: Re: McGuire settlement

What and why do those questions have any relevance at all and why do they need to be part of this agreement?
Particularly the one about being eligible.

Also, I cannot warranty against what SSDI, Medicare or any other government institution wishes to do.

Is it possible to make this agreement blind to the McGuires or David Gagnon?

What I mean is can we make it so that the amount of money cannot be told to them in any way?

It would drive David's ego crazy if he thought it was a large sum and was banned from seeing how much it is.

Paul Dulberg
847-497-4250

Sent from my iPad

On Jan 29, 2014, at 10:51 AM, Hans Mast <hansmast@comcast.net> wrote:

Its not a big deal...if you weren't receiving it than don't check it...not sure what the question is...

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>
To: Hans Mast <hansmast@comcast.net>
Sent: Wed, 29 Jan 2014 16:16:04 -0000 (UTC)
Subject: McGuire settlement

Here is a copy of the first page.

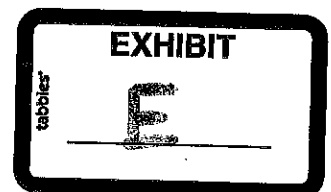
It has check boxes and one of the check boxes says;

I am not eligible to receive SSI or SSDI.

Another says;

I am not receiving SSI or SSDI.

As you know, I have applied for SSDI and SSI



From: Paul Dulberg <pdulberg@comcast.net>
Subject: Fwd: Memo
Date: December 27, 2016 6:11:20 PM CST
To: paul_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>
Date: February 22, 2015 at 7:42:25 PM CST
To: Hans Mast <hansmast@att.net>
Subject: Re: Memo

To believe David's version of events you must believe I was committing suicide.
Who in their right mind puts his arm into a chainsaw?

I figured you would cop out again...

Now I'm left wondering...
How hard is it to sue an atty?

And yes I am and have been looking for someone who will take this case...

The issue of my word vs David Gagnons... Did he cut me or did I cut myself?

Of coarse he cut me.

Next issue please?

Paul Dulberg
847-497-4250
Sent from my iPad

On Feb 22, 2015, at 7:20 PM, Hans Mast <hansmast@att.net> wrote:

Paul I no longer can represent you in the case. We obviously have differences of opinion as to the value of the case. I've been telling you over a year now the problems with the case and you just don't see them. You keep telling me how injured you are and completely ignore that it doesn't matter if you passed away from the accident because we still have to prove that the defendant was at fault. While you think it is very clear - it is not. My guess is that seven out of 10 times you will lose the case outright. That means zero. That's why I have been trying to convince you to agree to a settlement. You clearly do not want to. There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only alternative is to take the case to trial and I am not interested in doing that. I will wait for you to find a new attorney. I can't assist you any further in this case. Just let me know.

Sent from my iPhone

On Feb 22, 2015, at 7:14 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Let's not be harsh, We have a couple of weeks till dr Kujawa's billing arrives.
I agree showing me the memo is a good idea it's just not the accuracy I expected.
I know I'm being confrontative about all of this but let's face it, my working days are over let alone a career I have been building since I was in high school. My dreams of family are over unless I have enough to provide and pay for the care of children and a roof.
What's left for me?
Facebook, scrap booking, crafts, etc... A life of crap...
With ongoing pain and grip issues in my dominate arm/hand that are degenerative.

This is as total as it gets for us in the working class short of being paralyzed or dead.

I need someone who is on my side, top of their game and will see to it that I'm comfortable after all this is over.

What I feel is an attempt to settle for far less than this is remotely worth just to get me off the books.





Binding Mediation Award

Paul Dulberg

V.

ADR Systems File # 33391EMAG

David Gagnon

On December 8, 2016, the matter was called for binding mediation before the Honorable James P. Etchingham, (Ret.), in Chicago, IL. According to the agreement entered into by the parties, if a voluntary settlement through negotiation could not be reached the mediator would render a settlement award which would be binding to the parties. Pursuant to that agreement the mediator finds as follows:

Finding in favor of:

Paul Dulberg

Gross Award:

\$660,000.

Comparative fault:

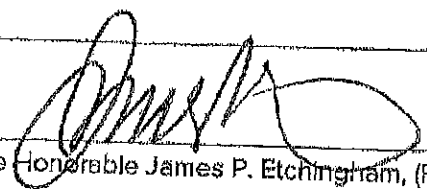
15

% (if applicable)

Net Award:

\$561,000

Comments/Explanation

Medical\$ 60,000.Future medical\$ 200,000.Lost wage\$ 250,000.P & S75,000.L & L75,000.

 The Honorable James P. Etchingham, (Ret.)


Comments on FIRST AMENDED COMPLAINT

Very well stated arguments. Some possible corrections and changes...

page 2, section 7: "lost control ..." could be changed to "inadvertently cut the arm of DULBERG"

Question: How were the amounts \$260,000 and \$250,000 arrived at?

page 3, section 11: "property" should read "properly".

page 3, section 13: Incorrect. MAST incorrectly informed DULBERG that the insurance policy limit for Gagnon was only \$100,000, when in reality the policy limit was \$300,000. (Proof: see file 2-104.pdf in email folder).

At no time was DULBERG ever informed of the McGuires' policy terms or limits.

In addition, when MAST later gave DULBERG all documents related to his case, DULBERG noticed that the Gagnon policy information and the McGuires' policy information was not included among the files. The medical depositions were also missing from the files. (Much email proof of this.)

page 3, section 15: correct. direct quotes from file 2-207.pdf and 2-205.pdf email exchanges from file 2-208.pdf to file 2-182.pdf show clearly that DULBERG does not agree or understand why McGuires are not liable for injury.

page 3, section 16: correct. Direct quote from 2-201.pdf. Extracted from the sentence: "We don't have to accept the \$5,000, but if we do not, the McGuires will get out for FREE on a motion."

page 4, section 17: Why the quotations? It cannot be proven that this is a direct quote, though the emails quoted above can be proven. Not sure about the quote. Not sure that the meeting was the day before a court appearance.

Why the statement "DULBERG would not see a dime from either case"? McGuires' and Gagnon's? No proof of this. Not sure of the claim.

He claimed the McGuires would be dismissed for nothing if DULBERG did not accept the offer promptly. This can be proven through DULBERG as a witness and by his brother, THOMAS KOST, who was also present at the meeting. The claim can also be proven through emails.

page 4, section 18: It is written "having no choice in the matter". This can be replaced by "feeling he had no choice in the matter". (This is proven through the email record from file 2-208.pdf to 2-182.pdf.) In the email exchanges he is clearly in disagreement with McGuires' liability and clearly reluctant to accept the offer.

page 4, section 20: correct. Proof of direct quote in file 2-180.pdf.

page 4, section 22: correct. Proof of direct quote is in file 2-104.pdf

page 6, section 29: "reasonable" should read "reasonably". "forcing" could be changed to "pressuring".

page 7, section 31 j): correct. Direct quote from file 2-201.pdf.

**IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS**

PAUL DULBERG,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 17LA000377
	)	
THE LAW OFFICES OF THOMAS J.	)	
POPOVICH, P.C., and HANS MAST,	)	
	)	
Defendants.	)	

NOTICE OF MOTION

TO: Mr. Thomas W. Gooch, III
The Gooch Firm
209 S. Main Street
Wauconda, IL 60084
gooch@goochfirm.com

On **July 20, 2018 at 9:00 a.m.**, or as soon thereafter as counsel may be heard, we shall appear before the **Honorable Judge Thomas A. Meyer**, or any Judge sitting in his stead in **Courtroom 201**, in the **McHenry County Government Center, 2200 N. Seminary Avenue, Woodstock, Illinois** and present **Defendants' Motion to Dismiss and Memorandum in Support of Defendants' Motion to Dismiss First Amended Complaint at Law**, copies of which is attached and served upon you herewith.

/s/ George K. Flynn

GEORGE K. FLYNN
CLAUSEN MILLER P.C.

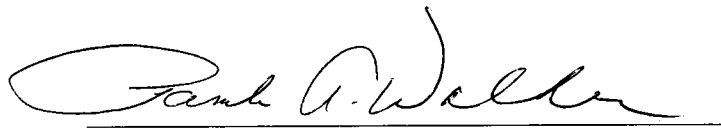
GEORGE K. FLYNN
CLAUSEN MILLER P.C.
ARDC No. 6239349
10 South LaSalle Street
Chicago, Illinois 60603-1098
312-855-1010
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was caused to be served by Email on the 5th day of July, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III
The Gooch Firm
209 S. Main Street
Wauconda, IL 60084
gooch@goochfirm.com

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

A handwritten signature in black ink, appearing to read "Frank A. Walker", is written over a horizontal line.

**IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS**

PAUL DULBERG,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 17LA000377
	)	
THE LAW OFFICES OF THOMAS J.	)	
POPOVICH, P.C., and HANS MAST,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, by and through their attorneys, GEORGE K. FLYNN, and CLAUSEN MILLER P.C., pursuant to 735 ILCS 5/2-615, move to dismiss Plaintiff's First Amended Complaint at Law, and state as follows:

1. The Plaintiff Paul Dulberg ("Dulberg") retained defendants The Law Offices of Thomas J. Popovich P.C. ("Popovich") to prosecute a personal injury claim on his behalf against his next door neighbors, Carolyn and Bill McGuire and their adult son (Dulberg's lifelong friend), David Gagnon ("Gagnon")). Hans Mast ("Mast") handled the case for the firm. This legal malpractice case arises out of that underlying personal injury case.

2. It is clearly established that Illinois is a fact pleading jurisdiction, requiring the plaintiff to present a legally and factually sufficient complaint. *Winfrey v. Chicago Park Dist.*, 274 Ill. App. 3d 939, 942 (1st Dist. 1995). A plaintiff must allege facts sufficient to bring his or her claim within the cause of action asserted. *Jackson vs. South Holland Dodge*, 197 Ill. 2d 39 (2001).

3. In Illinois, to establish a legal malpractice claim, a plaintiff must plead and prove the existence of an attorney client relationship; a duty arising from that relationship; a breach of that duty, the proximate causal relationship between the breach of duty and the damage sustained; and actual damages. *Glass v. Pitler*, 276 Ill. App. 3d 344, 349 (1st Dist. 1995).

4. The plaintiff in a legal malpractice claim must plead a case within the case. *Ignarski v. Norbut*, 271 Ill. App. 3d 522 (1st Dist. 1995).

5. Dulberg fails to allege requisite facts in support of a legal malpractice claim, including each and every element of the “underlying” case or “case within the case” against the McGuires.

6. Dulberg’s complaint must be dismissed pursuant to 735 ILCS 5/2-615.

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615, respectfully request this Honorable Court dismiss Plaintiff’s First Amended Complaint at Law with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

GEORGE K. FLYNN
CLAUSEN MILLER P.C.

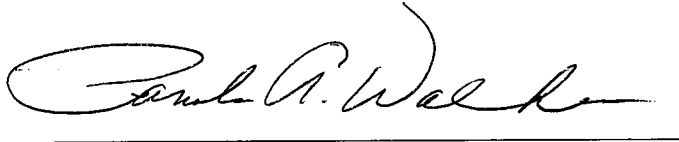
GEORGE K. FLYNN
CLAUSEN MILLER P.C.
ARDC No. 6239349
10 South LaSalle Street
Chicago, Illinois 60603-1098
(312) 855-1010
Attorneys for Defendants
gflynn@clausen.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was caused to be served by Email on the 5th day of July, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III
The Gooch Firm
209 S. Main Street
Wauconda, IL 60084
gooch@goochfirm.com

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.



**IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS**

PAUL DULBERG,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 17LA000377
	)	
THE LAW OFFICES OF THOMAS J.	)	
POPOVICH, P.C., and HANS MAST,	)	
	)	
Defendants.	)	

**MEMORANDUM IN SUPPORT OF DEFENDANTS’
MOTION TO DISMISS FIRST AMENDED COMPLAINT AT LAW**

Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, by and through their attorneys, GEORGE K. FLYNN, and CLAUSEN MILLER P.C., pursuant to 735 ILCS 5/2-615, submit this Memorandum in Support of Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint at Law with prejudice, and state as follows:

I. INTRODUCTION

The Plaintiff Paul Dulberg (“Dulberg”) retained defendants The Law Offices of Thomas J. Popovich P.C. (“Popovich”) to prosecute a personal injury claim on his behalf against his next door neighbors, Carolyn and Bill McGuire and their adult son (Dulberg’s lifelong friend), David Gagnon (“Gagnon”). Hans Mast (“Mast”) handled the case for the firm. Dulberg was on the McGuires’ property, assisting Gagnon trim some tree branches with a chainsaw, when Dulberg’s right arm was lacerated by the chainsaw. Dulberg agreed to a settlement with the McGuires. Thereafter, he and Mast reached an impasse. Mast and the firm withdrew, and successor counsel continued to prosecute the case against Gagnon.

Dulberg now has a case of “buyer’s remorse,” admitting that he reluctantly agreed to accept the McGuires’ settlement offer. He has attempted to state a claim against Popovich and Mast for legal malpractice. However, he has not plead the requisite elements of a legal malpractice case against Popovich and Mast, or the requisite elements of the underlying case (the “case within the case”).

II. PROCEDURAL HISTORY

On November 28, 2017, Plaintiff filed his single count Complaint at Law for legal malpractice. Defendants moved to dismiss. On May 10, 2018, the Court granted Defendants’ Motion to Dismiss pursuant to 735 ILCS 5/615 (see Order attached as Exhibit 1). During the hearing on Defendants’ Motion to Dismiss, Judge Meyer ordered that the Plaintiff plead with more particularity and specificity regarding any allegations that he was misled. The Court also ordered the Plaintiff to provide more specificity and particularity with respect to any claims that information provided by Defendants to the Plaintiff was false and misleading. Plaintiff filed its First Amended Complaint at Law on June 7, 2018.

III. STATEMENT OF FACTS

A. The Following Facts Can Be Gleaned From The First Amended Complaint (Exhibit 2) and Its Exhibits

On June 28, 2011, Dulberg was assisting David Gagnon in the cutting down of a tree on the property of Carolyn and Bill McGuire. (Exhibit 2, ¶ 6). Gagnon lost control of the chainsaw and caused personal injury to Dulberg. (Exhibit 2, ¶ 7). In May of 2012, Dulberg retained Popovich. (Exhibit 2, ¶8). On May 15, 2012, Mast filed a Complaint on behalf of Dulberg against Gagnon and the McGuires in the Circuit Court of McHenry County, Illinois, Case No, 12

LA 178. (Exhibit 2, ¶ 9, and Exhibit 2B)¹. In late 2013, Dulberg settled with the McGuires and executed a Release in their favor in exchange for the payment of \$5,000.00. The McGuires and their insurance carrier, Auto Owners Insurance Company, were released. (Exhibit 2, ¶ 18 and Exhibit 2D). Defendants continued to represent Dulberg until March 2015. (Exhibit 2, ¶ 21). Dulberg retained successor counsel and proceeded to a binding mediation and received a mediation award (Exhibit 2, ¶ 24 and Exhibit 2G). After the mediation, Dulberg allegedly realized for the first time that the information Mast and Popovich had given him was false and misleading and that the dismissal of the McGuires was a serious and substantial mistake. He was advised to seek an independent opinion from an attorney handling legal malpractice matters and received that opinion on or about December 16, 2016. (Exhibit 2, ¶ 28-29).

B. Alleged Acts of Negligence

Popovich's and Mast's alleged malpractice revolves around the settlement of the underlying case between Dulberg and McGuires. The allegations of a breach of the standard of care are all contained in ¶ 31, subsections a) through o) inclusive. Paragraph 31 states as follows:

31. MAST and POPOVICH, jointly and severally, breached the duties owed DULBERG by violating the standard of care owed DULBERG in the following ways and respects:

- a) Failed to take such actions as were necessary during their representation of DULBERG to fix liability against the property owners of the subject property (the McGuires) who employed Gagnon, and sought the assistance of DULBERG, for example hiring a liability expert;
- b) Failed to thoroughly investigate liability issues against property owners of the subject property;

¹ The exhibits to the underlying complaint in Case No. 12 LA 178 will be referenced as Exhibits 2A, 2B, 2C, 2D, 2E, 2F, and 2G.

- c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG, for example hiring a liability expert;
- d) Failed to investigate the insurance policy amounts of the McGuires and Gagnon;
- e) Incorrectly informed DULBERG that Gagnon's insurance policy was "only \$100,000.00" and no insurance company would pay close to that;
- f) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property by consulting an expert regarding these issues;
- g) Improperly urged DULBERG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- h) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuires and their obvious liability were a very necessary party to the litigation;
- i) Falsely advised DULBERG throughout the period of their representation, that the actions taken regarding the McGuires was proper in all ways and respects, and that DULBERG had no choice but to accept the settlement;
- j) Coerced DULBERG, verbally and through emails, into accepting the settlement with the McGuires for \$5,000.00 by misleading him into believing that [sic] had no other choice but to accept the settlement or else "the McGuires will get out for FREE on a motion".
- k) Concealed from DULBERG the necessary facts for him to make an informed decision as to the McGuires, instead coercing him verbally and through emails into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury;
- l) Failed to properly explain to DULBERG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;
- m) Continually reassured DULBERG that the course of action as to the property owners was proper and appropriate;

- n) Failed to retain a liability expert to prove DULBERG's damages;
- o) Were otherwise negligent in their representation of DULBERG.

IV. DULBERG FAILS TO STATE A CLAIM FOR LEGAL MALPRACTICE UNDER 735 ILCS 5/2-615

A. Legal Standard

It is clearly established that Illinois is a fact pleading jurisdiction, requiring the plaintiff to present a legally and factually sufficient complaint. *Winfrey v. Chicago Park Dist.*, 274 Ill. App. 3d 939, 942 (1st Dist. 1995). A plaintiff must allege facts sufficient to bring his or her claim within the cause of action asserted. *Jackson vs. South Holland Dodge*, 197 Ill. 2d 39 (2001). To pass muster a complaint must state a cause of action in two ways: first, it must be legally sufficient -- it must set forth a legally recognized claim as its avenue of recovery, and second, the complaint must be factually sufficient -- it must plead facts, which bring the claim within a legally recognized cause of action as alleged. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981). Dismissal of a complaint is mandatory if one fails to meet both requirements. *Misselhorn v. Doyle*, 257 Ill. App. 3d 983, 985 (5th Dist. 1994). In ruling on a Section 2-615 motion, "only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *Mount Zion State Bank and Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 115 (1995).

In Illinois, to establish a legal malpractice claim, a plaintiff must plead and prove the existence of an attorney client relationship; a duty arising from that relationship; a breach of that duty, the proximate causal relationship between the breach of duty and the damage sustained; and actual damages. *Glass v. Pitler*, 276 Ill. App. 3d 344, 349 (1st Dist. 1995). The injuries

resulting from legal malpractice are not personal injuries but pecuniary injuries to intangible property interests. *Glass* at 349. Damages must be incurred and are not presumed. *Glass* at 349. It is the plaintiff's burden to establish that "but for" the attorney's negligence, the client would not have suffered the damages alleged. *Glass* at 349. "The proximate cause element of legal malpractice claim requires that the plaintiff show that but for the attorney's malpractice, the client would have been successful in the undertaking the attorney was retained to perform. *Green v. Papa*, 2014 IL App. (5th) 1330029 (2014), quoting *Owens v. McDermott Will & Emery*, 316 Ill. App. 340 (1st Dist. 2000), at 351. The plaintiff in a legal malpractice claim must plead a case within the case. *Ignarski v. Norbut*, 271 Ill. App. 3d 522 (1st Dist. 1995).

B. Dulberg Fails to Plead Facts in Support of His Conclusory Allegations

Dulberg's second attempt at stating a claim fails no better than his first. He still fails to plead with specificity and particularity as to how he was misled, or how any information provided to him was false and misleading. His allegations are pled in conclusory fashion throughout. He also fails to plead any facts concerning the McGuires' liability in the underlying case. His allegations concern the viability of a tort claim against property owners. Accordingly, he must plead facts in support of the property owners' [the McGuires] liability in the underlying case. Instead, Dulberg pleads only conclusions. More is necessary under Illinois law.

Dulberg has failed to follow the court's direction from the hearing on Defendant's Motion to Dismiss. The allegations of negligence contained in ¶ 31 fail to allege any facts in support of the conclusions. For example, what necessary discovery was not conducted? (¶ 31 (c)) What is the law pertaining to a property owner's duties and responsibilities? (¶ 31 (f)). How did defendants falsely advise Dulberg that the actions taken regarding the McGuires was proper? (¶ 31 (i)). What was concealed from Dulberg? (¶ 31 (k)). The bottom line is that Dulberg has yet to explain how the McGuires would have been found liable. The only thing that can be gleaned

from the facts alleged in the Complaint and First Amended Complaint, is that Dulberg was injured on their property. He fails to explain how the McGuire's breached any duty to him, and how they would have been liable.

Additionally, Dulberg's allegations of coercion are not supported by his own pleadings. It is reasonably inferred from the pleadings that Dulberg had ample time to retain another attorney (in fact later he did). Exhibit E to his First Amended Complaint establishes that he deliberated over the decision to settle, and mailed a signed release back to Mast. So how was he coerced, when he alleges that he met with Mast, and then later mailed the executed release?

Moreover, his allegations regarding the failure to retain an expert are unsupported. He also fails to explain why his successor counsel did not retain an expert at the appropriate time if necessary. Lastly, Dulberg can never properly allege proximately caused damages regarding the allegation in ¶ 31 (e), that Gagnon's insurance coverage was \$300,000 and not \$100,000. In fact, Dulberg admits in ¶ 24 that he recovered \$300,000 in available coverage from Gagnon. If Mast incorrectly reported the available coverage, it did not cause any damage, as Dulberg's successor counsel was apparently able to recover the full amount of available coverage against the individual who injured Dulberg with a chainsaw.

Under Illinois fact pleading requirements, much more is needed. In a case of alleged professional liability, the plaintiff cannot simply allege in conclusory terms that the defendants were negligent, and that the Plaintiff could have proved up liability against the underlying defendants. He must allege why and how. Dulberg has failed twice. His First Amended Complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-615.

V. CONCLUSION

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 respectfully request this Honorable Court dismiss Plaintiff's Complaint with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

GEORGE K. FLYNN
CLAUSEN MILLER P.C.

GEORGE K. FLYNN
CLAUSEN MILLER P.C.
ARDC No. 6239349
10 South LaSalle Street
Chicago, Illinois 60603-1098
(312) 855-1010
Attorneys for Defendants
gflynn@clausen.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was caused to be served by Email and/or U.S. Mail by depositing same in the U.S. Mail at 10 S. LaSalle Street, Chicago, IL 60603, and properly addressed, with first class postage prepaid, on the 5th day of July, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III
The Gooch Firm
209 S. Main Street
Wauconda, IL 60084
gooch@goochfirm.com

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

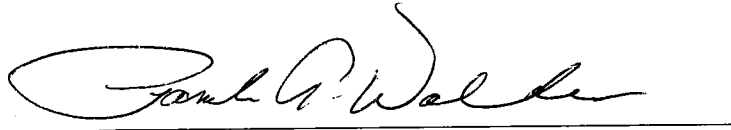


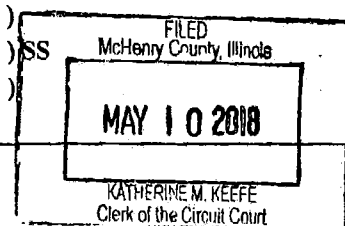
EXHIBIT 1

IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT

Ln. 6

STATE OF ILLINOIS

COUNTY OF MCHENRY



GEN. NO.

17 LA 377

☐ Jury ☐ Non-Jury

Dulberg

vs.

Mast, et al

Date: 5-10-18

Plaintiff's

Attorney

S. Walczyk

Defendant's

Attorney

G. Flynn

ORDER

This matter before the Court on hearing on Defendants' combined Motion to Dismiss, both parties present by counsel, the Court fully advised in the premises

IT IS ORDERED:

1. Defendants' 2-615 motion to Dismiss is granted, and the 2-619 motion is denied
2. Plaintiff granted 28 days to file a First Amended Complaint (6/7/18)
3. Defendants granted 28 days thereafter to Answer or otherwise plead (7/5/18)
4. Matter is set for status of pleadings on July 20, 2018 at 9:00 am in 201.

Prepared by: S. Walczyk / Court Clerk

Attorney for: Dulberg

Attorney Registration No.: 6315819

Judge:

[Signature]

EXHIBIT 2

THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE TWENTY SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,
Plaintiff,

v.

THE LAW OFFICES OF THOMAS J.
POPOVICH, P.C. and HANS MAST,
Defendants.

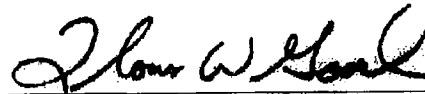
No.: 17 LA 377

Katherine M. Keefe
Clerk of the Circuit Court
Electronically Filed
Transaction ID: 17111166062
17LA000377
06/07/2018
McHenry County Illinois
22nd Judicial Circuit

NOTICE OF FILING

TO: George Flynn (gflynn@clausen.com)
Clausen Miller, P.C.
10 South LaSalle Street, 16th Floor
Chicago IL 60603

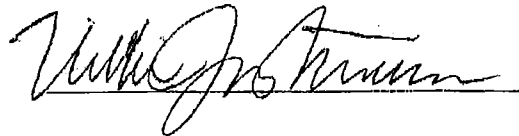
PLEASE TAKE NOTICE that on **June 7, 2018** I caused to be filed with the Clerk of the Circuit Court of McHenry County, Illinois the attached *Plaintiff's First Amended Complaint at Law*.



Thomas W. Gooch, III

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedures, the undersigned certifies that she served a copy of the foregoing to whom it is addressed via the McHenry County I2File Efile System and via email transmission to on June 7, 2018.



THE GOOCH FIRM
209 South Main Street
Wauconda, Illinois 60084
847 526 0110
gooch@goochfirm.com
office@goochfirm.com
ARDC No.: 3123355

THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,

Plaintiff,

v.

THE LAW OFFICES OF THOMAS J.
POPOVICH, P.C., and HANS MAST,

Defendant.

No. 17 LA 377

Katherine M. Keefe
Clerk of the Circuit Court
Electronically Filed
Transaction ID: 17111166062
17LA000377
06/07/2018
McHenry County, Illinois
22nd Judicial Circuit

FIRST AMENDED COMPLAINT AT LAW
(Legal Malpractice)

COMES NOW your Plaintiff, PAUL DULBERG (hereinafter also referred to as "DULBERG"), by and through his attorneys, THE GOOCH FIRM, and as and for his First Amended Complaint against THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter also referred to as "POPOVICH"), and HANS MAST (hereinafter also referred to as "MAST"), states the following:

1. Your Plaintiff, PAUL DULBERG, is a resident of McHenry County, Illinois, and was such a resident at all times complained of herein.
2. Your Defendant, THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., is a law firm operating in McHenry County, Illinois, and transacting business on a regular and daily basis in McHenry County, Illinois.
3. Your Defendant, HANS MAST, is either an agent, employee, or partner of THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. MAST is a licensed attorney in the State of Illinois, and was so licensed at all times relevant to this Complaint.

4. That due to the actions and status of MAST in relation to POPOVICH, the actions and inactions of MAST are directly attributable to his employer, partnership, or principal, being THE LAW OFFICES OF THOMAS J. POPVICH, P.C.

5. Venue is therefore claimed proper in McHenry County, Illinois, as the Defendants transact substantial and regular business in and about McHenry County in the practice of law, where their office is located.

6. On or about June 28, 2011, your Plaintiff, DULBERG was involved in a horrendous accident, having been asked by his neighbors Caroline McGuire and William McGuire, in assisting a David Gagnon in the cutting down of a tree on the McGuire property. DULBERG lived in the same area.

7. At this time, Gagnon lost control of the chainsaw he was using causing it to strike and cut DULBERG's arm. This caused substantial and catastrophic injuries to DULBERG, including but not limited to great pain and suffering, current as well as future medical expenses, in an amount in excess of \$260,000.00, along with lost wages in excess of \$250,000.00, and various other damages.

8. In May of 2012, DULBERG retained THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., pursuant to a written retainer agreement attached hereto as **Exhibit A**.

9. A copy of the Complaint filed by MAST on his own behalf, and on behalf of DULBERG, is attached hereto as **Exhibit B**, and the allegations of that Complaint are fully incorporated into this Complaint as if fully set forth herein.

10. An implied term of the retainer agreement attached hereto as **Exhibit A**, was that at all times, the Defendants would exercise their duty of due care towards their client and conform their acts and actions within the standard of care every attorney owes his client.

11. That as **Exhibit B** reveals, Defendants properly filed suit against not only the operator of the chain saw, but also his principals, Caroline McGuire and William McGuire, who purportedly were supervising him in his work on the premises.
12. At the time of filing of the aforesaid Complaint, MAST certified pursuant to Supreme Court Rule 137, that he had made a diligent investigation of the facts and circumstances around the Complaint he filed, and further had ascertained the appropriate law. MAST evidently believed a very good and valid cause of action existed against Caroline McGuire and William McGuire.
13. Also MAST incorrectly informed DULBERG that the insurance policy limit for the Gagnon was only \$100,000.00, when in reality the policy was \$300,000.00.
14. The matter proceeded through the normal stages of litigation until sometime in late 2013 or early 2014, when MAST began urging DULBERG to settle the matter against William McGuire and Caroline McGuire for \$5,000.00.
15. On November 18, 2013, MAST wrote two emails to DULBERG urging DULBERG to accept the \$5,000.00, "the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery...." * * * "So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case". (See Emails attached as **Group Exhibit C.**)

16. Similarly, on November 20, 2013 MAST emailed DULBERG urging him to accept the \$5,000.00 otherwise "the McGuires will get out for FREE on a motion." (See Emails attached as **Group Exhibit C.**)

17. On or around December 2013 or January 2014, MAST met with DULBERG and other family members and again advised them there was no cause of action against William McGuire and Caroline McGuire, and verbally told DULBERG that he had no choice but to execute a release in favor of the McGuires for the sum of \$5,000.00 and if he did not, he would get nothing.

18. DULBERG, having no choice in the matter, reluctantly agreed with MAST to accept the sum of \$5,000.00 releasing not only William and Caroline McGuire, but also Auto-Owners Insurance Company from any further responsibility or liability in the matter. A copy of the aforesaid general release and settlement agreement is attached hereto as **Exhibit D.**

19. Continuously throughout the period of representation, MAST and POPOVICH represented repeatedly to DULBERG there was no possibility of any liability against William and/or Caroline McGuire and/or Auto-Owners Insurance Company, and lulled DULBERG into believing that the matter was being properly handled

20. After accepting the \$5,000 settlement, DULBERG wrote MAST an email on January 29, 2014 stating "I trust your judgment." (See Email attached as **Exhibit E.**)

21. MAST and POPOVICH continued to represent DULBERG into 2015 and continuously assured him that his case was being handled properly.

22. On February 22, 2015, as to any chance of settling the remainder of his case against Gagnon MAST wrote to DULBERG that, "There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only

alternative is to take the case to trial and I am not interested in doing that.” (See Email attached as **Exhibit F.**)

23. MAST and POPOVICH represented DULBERG through to and including March of 2015, following which DULBERG and the Defendants terminated their relationship due to a claimed failure of communication. MAST and POPOVICH withdrew from the representation of DULBERG.

24. Thereafter, DULBERG retained other attorneys and proceeded to a Court ordered binding mediation before a retired Circuit Judge, where DULBERG received a binding mediation award of \$660,000.00 in gross, and a net award of \$561,000.00. However, due to the settlement with the McGuires, DULBERG was only able to collect \$300,000.00 based upon the insurance policy available. A copy of the aforesaid Mediation Award is attached hereto as **Exhibit G.**

25. The McGuires were property owners and had property insurance covering injuries or losses on their property, as well as substantial personal assets, including the property location where the accident took place at 1016 West Elder Avenue, in the City of McHenry, Illinois. McGuires were well able to pay all, or a portion of the binding mediation award had they still remained parties.

26. DULBERG, in his relationship with POPOVICH and MAST, cooperated in all ways with them, furnishing all necessary information as required, and frequently conferred with them.

27. Until the time of the mediation award, DULBERG had no reason to believe he could not recover the full amount of his injuries, based on POPOVICH’S and MAST’S representations to DULBERG that he could recover the full amount of his injuries from Gagnon, and that the inclusion of the McGuires would only complicate the case.

28. Following the execution of the mediation agreement and the final mediation award, DULBERG realized for the first time in December of 2016 that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuires was a serious and substantial mistake.

29. It was not until the mediation in December 2016, based on the expert's opinions that DULBERG retained for the mediation, that DULBERG became reasonably aware that MAST and POPOVICH did not properly represent him by pressuring and coercing him to accept a settlement for \$5,000.00 on an "all or nothing" basis.

30. DULBERG was advised to seek an independent opinion from a legal malpractice attorney and received that opinion on or about December 16, 2016.

31. MAST and POPOVICH, jointly and severally, breached the duties owed DULBERG by violating the standard of care owed DULBERG in the following ways and respects:

- a) Failed to take such actions as were necessary during their representation of DULBERG to fix liability against the property owners of the subject property (the McGuires) who employed Gagnon, and sought the assistance of DULBERG, for example hiring a liability expert;
- b) Failed to thoroughly investigate liability issues against property owners of the subject property;
- c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG, for example hiring a liability expert;
- d.) Failed to investigate the insurance policy amounts of the McGuires and Gagnon;
- e.) Incorrectly informed DULBERG that Gagnon's insurance policy was "only \$100,000.00" and no insurance company would pay close to that;

f) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property by consulting an expert regarding these issues;

g) Improperly urged DULBERG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;

h) Failed to appreciate and understand further moneys could not be received as against Gagnon; and that the McGuires and their obvious liability were a very necessary party to the litigation;

i) Falsely advised DULBERG throughout the period of their representation, that the actions taken regarding the McGuires was proper in all ways and respects, and that DULBERG had no choice but to accept the settlement;

j) Coerced DULBERG, verbally and through emails, into accepting the settlement with the McGuires for \$5,000.00 by misleading him into believing that had no other choice but to accept the settlement or else "the McGuires will get out for FREE on a motion".

k) Concealed from DULBERG the necessary facts for him to make an informed decision as to the McGuires, instead coercing him verbally and through emails into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury;

l) Failed to properly explain to DULBERG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;

m) Continually reassured DULBERG that the course of action as to the property owners was proper and appropriate;

- n) Failed to retain a liability expert to prove DULBERG's damages;
 - o) Were otherwise negligent in their representation of DULBERG.
32. That DULBERG suffered serious and substantial damages, not only as a result of the injury as set forth in the binding mediation award, but due to the direct actions of MAST and POPOVICH in urging DULBERG to release the McGuires, lost the sum of well over \$300,000.00 which would not have occurred but for the acts of MAST and THE LAW OFFICES OF THOMAS J. POPOVICH, P.C.

WHEREFORE, your Plaintiff, PAUL DULBERG prays this Honorable Court to enter judgment on such verdict as a jury of twelve (12) shall return, together with the costs of suit and such other and further relief as may be just, all in excess of the jurisdictional minimums of this Honorable Court.

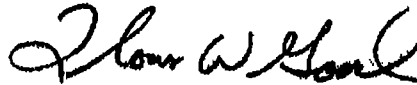
Respectfully submitted by,

PAUL DULBERG, Plaintiff, by his
attorneys THE GOOCH FIRM,



Thomas W. Gooch, III

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF TWELVE (12) PERSONS:



Thomas W. Gooch, III

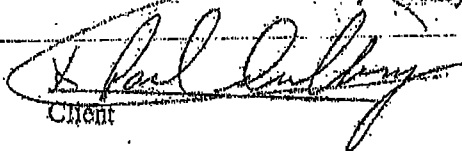
Thomas W. Gooch, III
THE GOOCH FIRM
209 S. Main Street
Wauconda, IL 60084
847-526-0110
ARDC No.: 3123355
gooch@goochfirm.com
office@goochfirm.com

CONTRACT FOR LEGAL SERVICES

I agree to employ the LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter "my attorney") to represent me in the prosecution or settlement of my claim against persons or entities responsible for causing me to suffer injuries and damages on the _____ day of _____, 20____.

My attorney agrees to make no charge for legal services unless a recovery is made in my claim. The approval of any settlement amount cannot be made without my knowledge and consent.

I agree to pay my attorney in consideration for his legal services a sum equal to one-third (33 1/3 %) of my recovery from my claim by suit or settlement; this will increase to ~~100~~ % in the event my claim results in more than one (1) trial and/or an appeal of a trial. I understand my attorney may need to incur reasonable expenses in properly handling my claim including, but not limited to, expenses such as accident reports, filing fees, court reporters fees, video fees, records fees, and physician fees. I understand those expenses will be taken out of my settlement, in addition to my attorney's legal fee.


Client

LAW OFFICES OF THOMAS J. POPOVICH

By: 

Client _____

Date: _____

Date: _____

LAW OFFICES OF THOMAS J. POPOVICH, P.C.
3416 West Elm Street
McHenry, Illinois 60050
815/344-3797

EXHIBIT

A

STATE OF ILLINOIS)
COUNTY OF McHENRY) SS

COPY

MAY 15 2012

KATHRYN M. KARPIS
McHENRY CITY, ILL. 61450

IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,
Plaintiff,

vs.

No.:

12LA178

DAVID GAGNON, Individually, and as
Agent of CAROLINE MCGUIRE and BILL
MCGUIRE, and CAROLINE MCGUIRE
and BILL MCGUIRE, Individually,

Defendants.

COMPLAINT

NOW COMES the Plaintiff, PAUL DULBERG, by his attorneys, LAW OFFICES OF
THOMAS J. POPOVICH, P.C., and complaining against the Defendants, DAVID GAGNON,
Individually, and as Agent of CAROLINE MCGUIRE and BILL MCGUIRE, and CAROLINE
MCGUIRE and BILL MCGUIRE, Individually, and states as follows:

Count I

Paul Dulberg vs. David Gagnon, Individually, and as Agent of Caroline and Bill McGuire

1. On June 28, 2011, the Plaintiff, PAUL DULBERG, lived in the City of McHenry,
County of McHenry, Illinois.

2. On June 28, 2011, Defendants CAROLINE MCGUIRE and BILL MCGUIRE
lived, controlled, managed and maintained a single family home located at 1016 W. Elder

Avenue, in the City of McHenry, County of McHenry, Illinois.

NOTICE
BY LOCAL RULE 3.10
THIS CASE IS HEREBY SET FOR SCHEDULING
CONFERENCE IN COURTROOM 20 ON
JULY 18, 2012 AT 2:00 PM
FAILURE TO APPEAR MAY RESULT IN THE CASE
BEING DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

NOTICE
LOCAL RULE 3.10
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BEING DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

EXHIBIT

B

3. On June 28, 2011, the Defendant, DAVID GAGNON, was living and/or staying at his parent's home at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

4. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE contracted, hired the Defendant, DAVID GAGNON, to cut down, trim and/or maintain the trees and brush at their premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

5. On June 28, 2011, and at the request and with the authority and permission of the Defendants CAROLINE McGUIRE and BILL McGUIRE, and for their benefit, the Defendant, DAVID GAGNON, was working under their supervision and control while engaged in cutting, trimming and maintaining trees and brush at the premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

6. On June 28, 2011, as part of his work at the subject property, the Defendant, DAVID GAGNON, was authorized, instructed, advised and permitted to use a chainsaw to assist him in his work for Defendants, CAROLINE McGUIRE and BILL McGUIRE, which was owned by the McGuires.

7. On June 28, 2011, the Defendant, DAVID GAGNON, was under the supervision and control of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was working as their apparent and actual agent, and was then acting and working in the scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE.

8. On June 28, 2011, and while the Defendant, DAVID GAGNON, was working in the course and scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was under their supervision and control, Defendant, DAVID GAGNON was in use of a chainsaw while trimming a tree and branch.

9. On June 28, 2011, and while Defendant, DAVID GAGNON, was in use of a chainsaw while trimming a tree and branch, Defendant, DAVID GAGNON, asked for and/or requested the assistance of the Plaintiff, PAUL DULBERG, to hold the tree branch while Defendant, DAVID GAGNON, trimmed the branch with the chainsaw.

10. On June 28, 2011, and while Defendant, DAVID GAGNON, was in sole control, use and operation of the subject chainsaw, the chainsaw was caused to strike and injure the Plaintiff, PAUL DULBERG.

11. At all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew of Defendant, DAVID GAGNON's use of the chainsaw in the presence of the Plaintiff, PAUL DULBERG, and knew that such created a danger to the Plaintiff, PAUL DULBERG's safety.

12. That at all relevant times, the Defendants, DAVID GAGNON, as agent of CAROLINE McGUIRE and BILL McGUIRE, owed a duty to use care and caution in his operation of a known dangerous instrumentality.

13. On June 28, 2011, the Defendant, DAVID GAGNON, was negligent in one or more of the following ways:

- a. Failed to maintain control over the operating of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant, DAVID GAGNON's inability to control the chainsaw;
- d. Failed to keep a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

14. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

15. That at the above time and date, the Defendant's negligence can be inferred from the circumstances of the occurrence as the instrument of the injury was under the control of the Defendant and therefore, negligence can be presumed under the doctrine of *Res Ipsa Loquitur*.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants, DAVID GAGNON, and CAROLINE McGUIRE and BILL McGUIRE in an amount in excess of \$50,000.00, plus costs of this action.

Count II

Paul Dulberg vs. Caroline McGuire and Bill McGuire

15. That the Plaintiff, PAUL DULBERG, restates and realleges paragraphs 1 through 14, in Count I, above, as paragraphs 1 through 15 of Count II, as if fully alleged herein.

16. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, owned, controlled, maintained and supervised the premises whereat the accident to the Plaintiff, PAUL DULBERG, occurred.

17. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were in control of and had the right to advise, instruct and demand that the Defendant, DAVID GAGNON, not or work in a safe and reasonable manner.

18. That at all relevant times, the Defendant, DAVID GAGNON, was acting as the agent, actual and apparent, of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was acting at their request and in their best interests and to their benefit as in a joint enterprise.

19. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew DAVID GAGNON was operating a chainsaw with the assistance of the Plaintiff, PAUL DULBERG, and had the right to discharge or terminate the Defendant, DAVID GAGNON's work for any reason.

20. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, owed a duty to supervise and control Defendant, DAVID GAGNON's activities on the property so as not to create an unreasonable hazard to others, including the Plaintiff, PAUL DULBERG.

21. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were negligent in one or more of the following ways:

- a. Failed to control operation of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant's inability to control the chainsaw;
- d. Failed to keep the chainsaw a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

22. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scared and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants,
CAROLINE McGUIRE and BILL McGUIRE, in an amount in excess of \$50,000.00, plus costs
of this action.

LAW OFFICES OF THOMAS J. POPOVICH, P.C.



One of the Attorneys for Plaintiff

Hans A. Mast
LAW OFFICES OF THOMAS J. POPOVICH, P.C.
3416 West Elm Street
Lake, Illinois 60050
(815) 344-3797
ARDC No. 06203684

From: Paul Dulberg <pdulberg@comcast.net>
Subject: Fwd: Dave's Best and oldest friend John
Date: December 28, 2016 10:33:35 AM CST
To: paul_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>
Date: November 20, 2013 at 7:26:53 AM CST
To: Hans Mast <hansmast@comcast.net>
Subject: Re: Dave's Best and oldest friend John

Morning Hans,
Ok we can meet. I will call Sheila today and set up a time.
Please send me a link to the current Illinois statute citing that the property owner is not liable for work done on their property resulting in injury to a neighbor.
I need to read it myself and any links to recent case law in this area would be helpful as well.
Thanks,
Paul

Paul Dulberg
847-497-4250
Sent from my iPad

On Nov 20, 2013, at 6:59 AM, Hans Mast <hansmast@comcast.net> wrote:

Paul, lets meet again to discuss. The legality of it all is that a property owner does not have legal liability for a worker (whether friend, son or otherwise) who does the work on his time, using his own independent skills. Here, I deposed the McGulres, and they had nothing to do with how Dave did the work other than to request the work to be done. They had no control on how Dave wielded the chain saw and cut you. Its that simple. We don't have to accept the \$5,000, but if we do not, the McGulres will get out for FREE on a motion. So that's the situation.

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>
To: Hans Mast <hansmast@comcast.net>
Sent: Tue, 19 Nov 2013 02:29:56 -0000 (UTC)
Subject: Re: Dave's Best and oldest friend John

I still don't get how they don't feel responsible for work done on their property by their own son that ended up cutting through 40% of my arm.

Perhaps their negligence is the fact that they didn't supervise the work close enough but they did oversee much of the days activity with David. Just because Dave was doing the work doesn't mean they were not trying to tell their kid what to do. They told him plenty of times throughout the day what to do. How is that not supervising?

Paul
Paul Dulberg
847-497-4250

Sent from my iPad

On Nov 18, 2013, at 8:07 PM, Hans Mast <hansmast@comcast.net> wrote:

Paul whether you like it or not they don't have a legal liability for your injury because they were not directing the work. So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case

Sent from my iPhone

On Nov 18, 2013, at 7:40 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Only 5, That's not much at all.
Is this a take it or leave it or do we have any other options?

If you want a negligence case for the homeowners ask what happened immediately after the accident.

Neither of them offered me any medical assistance nor did either of them call 911 and all Carol could think of besides calling David an idiot was calling her homeowners insurance.



They all left me out in the yard screaming for help while they were busy making sure they were covered.

She even went as far as to finally call the Emergency Room after I was already there just to tell me she was covered.

How selfish are people when they worry about if their insured over helping the person who was hurt and bleeding badly in their yard.

I'm glad she got her answer and had to share it with me only to find out her coverage won't even pay the medical bills.

I'm not happy with the offer.

As far as John Choyinski, he knows he has to call you and said he will tomorrow.

Paul

Paul Dulberg
847-497-4250
Sent from my iPad

On Nov 18, 2013, at 1:28 PM, Hans Mast <hansmast@comcast.net> wrote:

Im waiting to hear from John. I tried calling him last week, but no one answered.

In addition, the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery....

Let me know what you think..

Hans

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>

To: Hans Mast <hansmast@comcast.net>

Sent: Fri, 15 Nov 2013 22:41:26 -0000 (UTC)

Subject: Dave's Best and oldest friend John

Hans,

Just spoke with John Choyinski again about talking with you.

I am leaving your number with him as he has agreed to talk with you about David Gagnon.

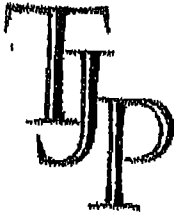
I believe he will try and call sometime tomorrow.

Paul

Oh and I know that nothing that happened right after the incident makes any difference as to the validity of the injuries but David's conduct immediately after the incident does show his lack of moral values for other humans and what he was willing and was not willing to do to help me get medical help. For his actions towards me or any other human being is enough to sue the shit out him alone. It is the things that happened afterwards that upset me the most.

Sorry for the rant but Dave was a complete ass all the way and deserves this.

Paul Dulberg
847-497-4250
Sent from my iPad



The Law Offices of Thomas J. Popovich P.C.

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JOHN A. KONAR

MARK J. VOOG
JAMES P. TUTAJ
ROBERT J. LUMBER
THERESA M. FREEMAN

January 24, 2014

Paul Dulberg
4606 Hayden Court
McHenry, IL 60051

RE: *Paul Dulberg vs. David Gagnon, Caroline McGuire and Bill McGuire*
McHenry County Case: 12 LA 178

Dear Paul:

Please find enclosed the General Release and Settlement Agreement from defense counsel for Caroline and Bill McGuire. Please Release and return it to me in the enclosed self-addressed stamped envelope at your earliest convenience.

Thank you for your cooperation.

Very truly yours,

COPY
HANS A. MAST

smq

Enclosure



EXHIBIT

D

WAUKESHA OFFICE
210 NORTH MARTIN LUTHER
KING JR. AVENUE
WAUKESHA, IL 60085

GENERAL RELEASE AND SETTLEMENT AGREEMENT

NOW COMES PAUL DULBERG, and in consideration of the payment of Five-Thousand (\$5,000.00) Dollars to him, by or on behalf of the WILLIAM MCGUIRE and CAROLYN MCGUIRE (aka Bill McGuire; improperly named as Caroline McGuire) and AUTO-OWNERS INSURANCE COMPANY, the payment and receipt of which is hereby acknowledged, PAUL DULBERG does hereby release and discharge the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, and any agents or employees of the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, of and from any and all causes of action, claims and demands of whatsoever kind or nature including, but not limited to, any claim for personal injuries and property damage arising out of a certain chain saw incident that allegedly occurred on or about June 28, 2011, within and upon the premises known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

IT IS FURTHER AGREED AND UNDERSTOOD that there is presently pending a cause of action in the Circuit Court of the 22nd Judicial Circuit, McHenry County, Illinois entitled "Paul Dulberg, Plaintiff, vs. David Gagnon, Individually, and as agent of Caroline McGuire and Bill McGuire, and Caroline McGuire and Bill McGuire, Individually, Defendants", Cause No. 2012-LA-178; and that this settlement is contingent upon WILLIAM MCGUIRE and CAROLYN MCGUIRE being dismissed with prejudice as parties to said lawsuit pursuant to a finding by the Circuit Court that the settlement between the parties constitutes a good faith settlement for purposes of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*

IT IS FURTHER AGREED AND UNDERSTOOD that as part of the consideration for this agreement the undersigned represents and warrants as follows (check applicable boxes):

- ☐ I was not 65 or older on the date of the occurrence.
- ☐ I was not receiving SSI or SSDI on the date of the occurrence.
- ☐ I am not eligible to receive SSI or SSDI.
- ☐ I am not currently receiving SSI or SSDI.

IT IS FURTHER AGREED AND UNDERSTOOD:

- a. That any subrogated claims or liens for medical expenses paid by or on behalf of PAUL DULBERG shall be the responsibility PAUL DULBERG, including, but not limited to, any Medicare liens. Any and all reimbursements of medical expenses to subrogated parties, including Medicare's rights of reimbursement, if any, shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released herein.
- b. That any outstanding medical expenses are PAUL DULBERG's responsibility and all payment of medical expenses hereafter shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released

- c. That PAUL DULBERG agrees to save and hold harmless and indemnify the parties released herein against any claims made by any medical providers, including, but not limited to Medicare or parties subrogated to the rights to recover medical or Medicare payments.

IT IS FURTHER AGREED AND UNDERSTOOD by the parties hereto that this agreement contains the entire agreement between the parties with regard to materials set forth herein, and shall be binding upon and inure to the benefit of the parties hereto, jointly and severally, and the executors, conservators, administrators, guardians, personal representatives, heirs and successors of each.

IT IS FURTHER AGREED AND UNDERSTOOD that this settlement is a compromise of a doubtful and disputed claim and no liability is admitted as a consequence hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the dates set forth below.

Dated: _____

PAUL DULBERG

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

PAUL DULBERG personally appeared before me this date and acknowledged that she executed the foregoing Release and Settlement Agreement as his own free act and deed for the uses and purposes set forth therein.

Dated this _____ day of January, 2014,

Notary Public

From: Paul Dulberg <pdulberg@comcast.net>
Subject: Fwd: McGuire settlement
Date: December 28, 2016 10:21:55 AM CST
To: paul_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>
Date: January 29, 2014 at 1:59:31 PM CST
To: Hans Mast <hansmast@comcast.net>
Subject: Re: McGuire settlement

Ok, It's signed and in the mail.
Hope that some yahoo in the govt. doesn't someday decide to go after everyone they think they might get a dollar out of and end up holding me responsible for the McGuire's fees incurred while they fight it out.
I'm not in the business of warranting, insuring or protecting the McGuire's from government. Especially for only 5 grand. For that kind of protection it could cost millions but I trust your judgement.
Paul

Paul Dulberg
847-497-4250
Sent from my iPad

On Jan 29, 2014, at 11:49 AM, Hans Mast <hansmast@comcast.net> wrote:

SSD has to be part of it...its not going to effect anything...
We can't prevent disclosure of the amount...

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>
To: Hans Mast <hansmast@comcast.net>
Sent: Wed, 29 Jan 2014 17:47:39 -0000 (UTC)
Subject: Re: McGuire settlement

What and why do those questions have any relevance at all and why do they need to be part of this agreement?
Particularly the one about being eligible.
Also, I cannot warranty against what SSDI, Medicare or any other government institution wishes to do.
Is it possible to make this agreement blind to the McGuire's or David Gagnon?
What I mean is can we make it so that the amount of money cannot be told to them in any way?
It would drive David's ego crazy if he thought it was a large sum and was banned from seeing how much it is.

Paul Dulberg
847-497-4250
Sent from my iPad

On Jan 29, 2014, at 10:51 AM, Hans Mast <hansmast@comcast.net> wrote:

Its not a big deal...if you weren't receiving it than don't check it...not sure what the question is...

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>
To: Hans Mast <hansmast@comcast.net>
Sent: Wed, 29 Jan 2014 16:16:04 -0000 (UTC)
Subject: McGuire settlement

Here is a copy of the first page.
It has check boxes and one of the check boxes says;
I am not eligible to receive SSI or SSDI.
Another says;
I am not receiving SSI or SSDI.
As you know, I have applied for SSDI and SSI



From: Paul Dulberg <pdulberg@comcast.net>
Subject: Fwd: Memo
Date: December 27, 2016 6:11:20 PM CST
To: paul_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>
Date: February 22, 2015 at 7:42:25 PM CST
To: Hans Mast <hansmast@att.net>
Subject: Re: Memo

To believe David's version of events you must believe I was committing suicide.
Who in their right mind puts his arm into a chainsaw?

I figured you would cop out again...

Now I'm left wondering...
How hard is it to sue an atty?

And yes I am and have been looking for someone who will take this case...

The issue of my word vs David Gagnons... Did he cut me or did I cut myself?

Of course he cut me.

Next issue please?

Paul Dulberg
847-497-4250
Sent from my iPad

On Feb 22, 2015, at 7:20 PM, Hans Mast <hansmast@att.net> wrote:

Paul I no longer can represent you in the case. We obviously have differences of opinion as to the value of the case. I've been telling you over a year now the problems with the case and you just don't see them. You keep telling me how injured you are and completely ignore that it doesn't matter if you passed away from the accident because we still have to prove that the defendant was at fault. While you think it is very clear - it is not. My guess is that seven out of 10 times you will lose the case outright. That means zero. That's why I have been trying to convince you to agree to a settlement. You clearly do not want to. There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only alternative is to take the case to trial and I am not interested in doing that. I will wait for you to find a new attorney. I can't assist you any further in this case. Just let me know.

Sent from my iPhone

On Feb 22, 2015, at 7:14 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Let's not be harsh, We have a couple of weeks till dr Kujawa's billing arrives.
I agree showing me the memo is a good idea it's just not the accuracy I expected.
I know I'm being confrontative about all of this but let's face it, my working days are over let alone a career I have been building since I was in high school. My dreams of family are over unless I have enough to provide and pay for the care of children and a roof.

What's left for me?

Facebook, scrap booking, crafts, etc... A life of crap...

With ongoing pain and grip issues in my dominate arm/hand that are degenerative.

This is as total as it gets for us in the working class short of being paralyzed or dead.

I need someone who is on my side, top of their game and will see to it that I'm comfortable after all this is over.

What I feel is an attempt to settle for far less than this is remotely worth just to get me off the books.





Binding Mediation Award

Paul Dulberg

V.

ADR Systems File # 33391EMAG

David Gagnon

On December 8, 2016, the matter was called for binding mediation before the Honorable James P. Etchingham, (Ret.), in Chicago, IL. According to the agreement entered into by the parties, if a voluntary settlement through negotiation could not be reached the mediator would render a settlement award which would be binding to the parties. Pursuant to that agreement the mediator finds as follows:

Finding in favor of:

Paul Dulberg

Gross Award:

\$660,000.

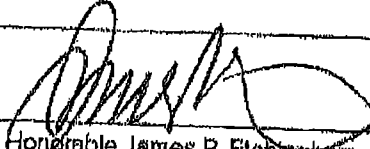
Comparative fault:

15 % (if applicable)

Net Award:

\$561,000

Comments/Explanation

Medical\$ 60,000.Future medical\$ 200,000.Lost wage\$ 250,000.PIS75,000.LNL75,000.

 The Honorable James P. Etchingham, (Ret.)

ADR Systems • 20 North Clark Street • Floor 26 • Chicago, IL 60602
 312.960.2260 • info@adrsystems.com • www.adrsystems.com

EXHIBIT

G

Received 11-28-2017 04:31 PM / Circuit Clerk Accepted on 11-29-2017 09:53 AM / Transaction #1711117451 / Case #17LA000

 Received 06-07-2018 01:29 PM / Circuit Clerk Accepted on 06-07-2018 03:53 PM / Transaction #17111166062 / Case #17LA000377
 Page 19 of 19
 Page 24 of 24

DULBERG AMENDED COMPLAINT MOTION TO DISMISS REPLY

Page 6, section B: It is written: "What necessary discovery was not conducted?"

1) There is no evidence that MAST pulled the homeowners policy of the property owners. When MAST turned over all documents on the case to DULBERG, neither the McGuire insurance policy nor the Gagnon insurance policy was included in the files. DULBERG repeatedly asked for the policy information but MAST never turned it over. Considering that MAST misrepresented the limits of the GAGNON insurance policy as being \$100,000 when it was actually \$300,000, there is no evidence that MAST was ever in possession of a copy of the terms of either insurance policy.

2) MAST never consulted a chainsaw expert. DULBERG later obtained a written opinion by a chainsaw expert in which the homeowners were cited as partly liable for the chainsaw accident. DULBERG introduced this expert witness to his new counsel. The new counsel then retained this expert witness and the expert witness helped them win their case by placing liability firmly on GAGNON and the property owners.

3) MAST never consulted a home owner premises liability expert. MAST originally filed a case against the property owners but one year later informed DULBERG that he had no grounds for a case against them. There is no evidence that a premises liability expert was ever consulted before making this decision.

4) There was no recognition by MAST that a circumstance which involved the felling of a tall tree and the use of a chainsaw could constitute an ultrahazardous situation which would further increase the level of liability the property owners had a duty to assume under Illinois law.

Page 6, section B: It is written: "What is the law pertaining to property owner's duties and responsibilities?"

The Premises Liability Act (740 ILCS 130/1), which provides, in pertinent part:

§ 2. The distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of any premises to such entrants is abolished.

The duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.

Therefore the law requires the property owners (MCGUIRES) owe the duty of reasonable care to the invitee (DULBERG). Furthermore, the felling of a tree and use of a chainsaw may be considered as an "ultrahazardous" circumstance which would require of the property owners the duty of a higher degree of liability (strict liability) toward the invitee (DULBERG).

Page 6, section B: It is written: " How did defendants falsely advise DULBERG that the actions taken regarding the McGuires was proper?"

MAST did so repeatedly through email exchanges and telephone conversations and in person with a witness present.

Page 6, section B: It is written: "What was concealed from DULBERG?"

The following were either concealed from DULBERG or simply not obtained or not known to MAST:

- 1) The terms of the MCGUIRES' insurance policy concerning coverage or specifics of premises liability.
- 2) The terms of the GAGNON insurance policy concerning coverage or specifics of liability.
- 3) Copies of the actual insurance policies.
- 4) A clear and accurate explanation of the Premises Liability Act (740 ILCS 130/1) regarding the MCGUIRES' duty of reasonable care toward an invitee onto their property.
- 5) A recognition that an invitee on the MCGUIRE property asked by the MCGUIRES to engage in chainsaw work could require the duty of a higher degree of liability than that of reasonable care due to the fact that the invitee (DULBERG) was asked to participate in what could be construed as an "ultrahazardous" undertaking.
- 6) Any explanation that the use of an expert witness concerning chainsaw use could be consulted to firmly establish the liability of GAGNON and the MCGUIRES concerning the accident. (As was later done by DULBERG.)
- 7) Any explanation that the use of an expert witness concerning premises liability law could be consulted to establish liability of the property owners (MCGUIRES) in providing the chainsaw to GAGNON without heeding the clear warnings stated in the owners manual.
- 8) Any explanation that the use of an expert witness concerning premises liability law could be consulted to establish liability of the property owners (MCGUIRES) for asking an invitee (DULBERG) to participate in what could be construed as an ultrahazardous situation, thus requiring the duty of strict care toward the invitee.
- 9) Insert something about time limit to drop MCGUIRE case here

Page 7: It is written: "Additionally, DULBERG's allegation of coercion are not supported by his own pleadings. It is reasonably inferred from the pleadings that DULBERG had ample time to retain another attorney (in fact later he did). Exhibit E to his first amended complaint establishes that he deliberated over the decision to settle, and mailed a signed release back to MAST. So how was he coerced, when he alleges he met with MAST, and then later mailed the executed release?"

(remains to be answered)

Page 7: It is written: "Moreover, his allegations regarding the failure to retain an expert are unsupported. He fails to explain why his successor counsel did not retain an expert at the appropriate time if necessary."

DULBERG did contact an expert on his own before he obtained successor counsel. He introduced the expert to his successor counsel when he entered into contract with them. His successor counsel retained the expert at DULBERG's expense and won their case with the help of this expert testimony.

There is no evidence that MAST ever consulted with an expert witness on chainsaws or with an expert witness on premises liability. When DULBERG later consulted a chainsaw expert, the expert stated that the MCGUIRES are indeed partly responsible for the chainsaw accident by purchasing and providing GAGNON with a chainsaw without ever reading or following the instructions in the operator's manual. The expert stated within his findings:

"Mr. and Mrs. McGuire who owned the saw apparently did not heed the warnings posted on page 2 of the owners manual which states, "Allow persons only who understand this manual to operate your chainsaw."

and

"After the review of the above evidence, it is my opinion tht Mr. Gagnon was fully responsible for this accident and his parents – the McGuires were also somewhat responsible by letting their son, Mr. Gagnon, use their chainsaw – a potentially dangerous tool – without enforcing the warnings and instructions available in the owner's manual."

Also, the first sentence within the introduction of the user's manual states, "To correctly use the chainsaw and prevent accidents, do not start work without having first carefully read this manual."

Had the owners of the chainsaw and of the property heeded the warning stated in bold font on page 2 of the owners manual, as the chainsaw expert stated, the accident never would have happened. Had MAST consulted with a chainsaw expert, he could have seen one of the ways in which the MCGUIRES were responsible for the accident by providing the chainsaw to GAGNON under such circumstances and asking DULBERG to help GAGNON.

Moreover, there is no evidence that MAST ever consulted a premises liability expert to understand how the Premises Liability Act (740 ILCS 130/1) and the duty of "reasonable care" of property owners toward an invitee (DULBERG) could be applied to the MCGUIRES in this specific case.

Page 7: It is written: "Lastly, DULBERG can never properly allege proximately caused damages regarding the allegation in section 31 (e), that GAGNON's insurance coverage was \$300,000 and not \$100,000. In fact, DULBERG admits in section 24 that he recovered \$300,000 in available coverage from GAGNON. If MAST incorrectly reported the available coverage, it did no cause any damage, as DULBERG's successor counsel was apparently able to recover the full amount of available coverage against the individual who injured DULBERG with a chainsaw."

DULBERG does not allege proximately caused damages directly as a result of MAST repeatedly and incorrectly stating or understanding GAGNON's insurance coverage as \$100,000 when it was in reality \$300,000. Dulberg does allege proximately caused damages as a result of MAST not pursuing the MCGUIRES premises liability and their

responsibility for providing GAGNON with a chainsaw which was used without reading or understanding the many warnings given within the owners manual. The fact that MAST incorrectly and repeatedly misrepresented GAGNON's insurance coverage limit as \$100,000 when it was in reality \$300,000 demonstrates either an intentional effort to mislead DULBERG or it demonstrates MAST never pulled, read carefully, or understood GAGNON's insurance policy. There is further reason to suspect that MAST never obtained a copy of either GAGNON's or MCGUIRES' insurance policy because copies of neither insurance policy were included in the case documents that MAST turned over to DULBERG as DULBERG was trying to retain new counsel. DULBERG pointed out the absence of both policies to MAST by email yet MAST still refused to allow DULBERG access to copies of either policy. Since it is not possible to know the MCGUIRES' type of premises liability coverage without pulling and reading the MCGUIRES' insurance policy, it is difficult to understand how MAST could have exercised due diligence in pursuing a case against the MCGUIRES.

IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

Ln 7

Dulberg
Plaintiff

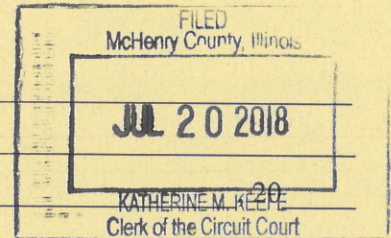
Circuit Clerk Use Only	
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_____	ORDJ
_____	ORDDWP

VS

Case Number 17 LA 377

Law Offices of Thomas Popovich et al
Defendant

ORDER



- ☒ Plaintiff(s) appear in person/by attorney S. Walczyk
- ☒ Defendant(s) appear in person/by attorney G Flynn
- ☐ Summons not served; alias summons to issue; return date _____
- ☐ Summons has been properly served on Defendant(s) _____
- ☐ Defendant(s) appear and admit liability. Judgment for Plaintiff(s) against Defendant(s) for \$ _____, plus interest of \$ _____ plus attorney fees of \$ _____ for a total of \$ _____ plus court costs.
- ☐ Defendant(s), having failed to appear or otherwise respond to the summons, is found in default. Judgment for Plaintiff(s) against Defendant(s) for \$ _____, plus interest of \$ _____ plus attorney fees of \$ _____ for a total of \$ _____ plus court costs.
- ☐ Case set for ☐ trial ☐ arbitration on _____, 20__ at _____ m. in Courtroom _____
- ☐ Defendant(s) shall file an Appearance within _____ days of today's date, or without further Notice to Defendant(s), the trial date will be stricken and a judgment by default will be entered against Defendant(s) and in favor of Plaintiff(s).

NOTICE TO DEFENDANT(S): THIS IS THE ONLY NOTICE YOU WILL RECEIVE OF THE TRIAL, OR ARBITRATION DATE AND YOUR OBLIGATION TO FILE AN APPEARANCE.

- ☐ Defendant(s) shall file an answer or other pleading within _____ days of today's date.
- ☒ This case is continued on Motion of ☐ Plaintiff; ☐ Defendant; ☐ By Agreement; ☐ Court; to September 12, 2018 at 10:00 a.m. for hearing on Motion to.
- ☐ Case called, Plaintiff(s) fail to appear. Case dismissed for Plaintiff's failure to prosecute. Dismiss
- ☐ Case dismissed with/without prejudice on Plaintiff's motion. FIRST Amended Complaint
- ☐ After trial of this case, the Court enters a Judgment for Plaintiff(s) against Defendant(s) for \$ _____, plus interest of \$ _____ plus attorney fees of \$ _____ for a total of \$ _____ plus court costs.
- ☐ After trial of this case, the Court enters a Judgment for Defendant(s) against Plaintiff(s).

- ☒ COURT FURTHER ORDERS: _____
- Plaintiff granted 28 days (8/17/18) to Respond.
- Defendants granted 14 days (8/31/18) to Reply.

Date: _____

Judge

THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE TWENTY SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,)
Plaintiff,)
) No.: 17 LA 377
v.)
)
THE LAW OFFICES OF THOMAS J.)
POPOVICH, P.C. and HANS MAST,)
Defendants.)

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FIRST
AMENDED COMPLAINT AT LAW**

NOW COMES, your Plaintiff, PAUL DULBERG, (hereinafter referred to as "DULBERG") by and through his attorneys, THE GOOCH FIRM, and for his Response to Defendants' THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. and HANS MAST (hereinafter collectively referred to as "Defendants") Motion to Dismiss states to the Court the following:

INTRODUCTION

Defendants brought their Motion to Dismiss First Amended Complaint at Law, pursuant to Section 2-615. (See Defendants' Memorandum in Support of Defendants' Motion to Dismiss attached hereto without exhibits as **Exhibit A.**) In their Motion, Defendants argue that DULBERG failed to state a claim for legal malpractice. However, after review of the facts in the Complaint, this Honorable Court will determine that DULBERG's First Amended Complaint is sufficient to survive this Motion to Dismiss.

STANDARD OF REVIEW FOR SECTION 2-615

1. A Motion to Dismiss pursuant to section 2-615 attacks the legal sufficiency of the Complaint by alleging defects on its face. *Weisblatt v. Colky*, 265 Ill.App.3d 622, 625 (1st Dist. 1994). Section 2-615 motions "raise but a single issue: whether, when taken as true, the facts

alleged in the Complaint set forth a good and sufficient cause of action.” *Visvardis v. Ferleger* 375 Ill.App.3d 719, 723 (1st Dist. 2007), quoting *Scott Wetzel Services v. Regard*, 271 Ill.App.3d 478, 480, 208 Ill. Dec. 98, 648 N.E.2d 1020 (1995).

2. When the legal sufficiency of a Complaint is challenged by a section 2–615 Motion to Dismiss, all well-pleaded facts in the Complaint are taken as true and a reviewing court must determine whether the allegations of the Complaint, construed in a light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004); *King v. First Capital Financial Services Corp.* 215 Ill.2d 1, 12 (2005). A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved that will entitled the plaintiff to recover. *Zedella v. Gibson*, 165 Ill.2d 181, 185 (1995).

ARGUMENT
(under 2-615)

I. Dulberg sufficiently states a cause of action for legal malpractice against the Defendants.

1. In his First Amended Complaint, DULBERG sufficiently set forth the necessary elements of legal malpractice. “To prevail on a legal malpractice claim, the plaintiff client must plead and prove that the defendant attorneys owed the client a duty of due care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the client suffered injury.” *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 306-307 (Ill., 2005).

2. In the Motion to Dismiss, Defendants allege that DULBERG has not pled necessary facts. For example, Defendants argue that DULBERG did not plead enough facts as to what necessary discovery was not conducted under paragraph 31(c) of the First Amended Complaint (See Motion to Dismiss attached as **Exhibit A**, pg. 6) This is not true.

3. In that same paragraph, DULBERG gives an example of what type of discovery was necessary, i.e. hiring a liability expert. (See First Amended Complaint, **Exhibit B**, ¶31(c).)

4. Had Defendants conducted expert discovery in DULBERG's case, the expert would have opined as to the liability of both Gagnon and the McGuires. DULBERG's allegations that an expert should have been hired by MAST is proper because had MAST hired an expert prior to releasing the McGuires, the expert could have opined as to their liability which would have resulted in the McGuires staying in the case and DULBERG being able to obtain a much higher mediation award. Further, this opinion should have been made prior to settling with the McGuires in order to determine whether \$5,000.00 was a reasonable amount.

5. In their Motion, Defendants question why DULBERG's subsequent counsel did not retain an expert. (See Motion to Dismiss attached as **Exhibit A**, pg. 7) In fact, DULBERG and his subsequent counsel *did* retain an expert for the mediation and were successful in the mediation due to the expert's opinion as to liability. (See First Amended Complaint, **Exhibit B**, ¶24, 29.) Thus this issue in Defendants' Motion is moot.

6. DULBERG also discussed necessary discovery regarding insurance policies of Gagnon and McGuires. MAST failed to conduct discovery to obtain these insurance policies. This is evidenced in the First Amended Complaint where DULBERG pled that MAST advised him that Gagnon's insurance policy limit was only \$100,000.00, when in reality it was later discovered that the limit was \$300,000.00. (See First Amended Complaint, **Exhibit B**, ¶13, 22.) This shows that MAST did not have the sufficient discovery as to Gagnon's insurance policy.

7. Defendants' next issue with the First Amended Complaint is that DULBERG did not specify the law pertaining to a property owner's duties and responsibilities that MAST

should have been familiar with while representing DULBERG. (See Motion to Dismiss attached as **Exhibit A**, pg. 6.)

8. The law that MAST should have understood under paragraph 31(f) of the First Amended Complaint is premises liability and the liabilities of the parties involved in the underlying case. “Under the Premises Liability Act, the duty owed by a premises owner or occupier to an invitee or a licensee is that of ‘reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.’” (internal citation omitted) *Rhodes v. Illinois Cent. Gulf R.R.*, 172 Ill.2d 213, 228 (Ill., 1996).

9. In this case, DULBERG was an invitee of the McGuires. “An invitee is defined as one who enters the premises of another with the owner’s or occupier’s express or implied consent for the mutual benefit of himself and the owner, or for a purpose connected with the business in which the owner is engaged.” *Rhodes v. Illinois Cent. Gulf R.R.*, *supra*. The McGuires had a duty of reasonable care to DULBERG as an invitee because DULBERG was on their property for their benefit, to cut down a tree. (See First Amended Complaint, **Exhibit B**, ¶6.)

10. MAST’s failure to become familiar with this law or chainsaw ownership liability, resulted in him coercing and pressuring DULBERG to accept a paltry settlement of \$5,000.00 with the McGuries, when in fact their liability was much more, as presented by the expert during the mediation. Based on this law, MAST would have seen that McGuires as homeowners did in fact owe a duty to DULBERG.

11. Also, had MAST reviewed the law on premises liability, he could have considered the law as to ultrahazardous circumstances and the strict liability of the homeowners. “Illinois has recognized strict liability principally in two instances:” * * * “(2) when a defendant engages

in ultrahazardous or abnormally dangerous activity as determined by the courts, giving particular consideration, *inter alia*, to the appropriateness of the activity to the place where it is maintained, in light of the character of the place and its surroundings.” (internal citations omitted) *Miller v. Civil Constructors, Inc.*, 272 Ill.App.3d 263, 266 (2nd Dist., 1995). MAST should have considered strict liability as to the McGuires prior to advising DULBERG to settle.

12. Throughout the First Amended Complaint, DULBERG lists different ways (via email and in person communication) that Defendants falsely advised DULBERG that releasing the McGuires from liability was the proper course to take. (See First Amended Complaint, **Exhibit B**, ¶15-21.)

13. Also, MAST emailed and verbally told DULBERG that if he did not agree to the \$5,000.00 settlement with the McGuires, he would get nothing. (See First Amended Complaint, **Exhibit B**, ¶15-21.)

14. Overall, DULBERG has pled with enough specificity what MAST and/or the Defendants did improperly to breach the standard of care.

15. As to the specific allegations relating to Defendants’ concealment of facts to DULBERG, paragraph 31(k) of the First Amended Complaint, DULBERG stated what was concealed from him by the Defendants. Defendants concealed from DULBERG the actual policy limits from the McGuires and Gagnon, concealed facts relating to the explanation of liability law and what type of duty the McGuires owed to DULBERG, concealed that retaining an expert witness prior to accepting settlement would have been beneficial to DULBERG’s case, and concealed the fact that Defendants were handling everything properly when this was not the truth.

16. The facts pled regarding concealment are sufficiently pled in DULBERG's First Amended Complaint and must be taken as true in a Section 2-615 Motion.

17. Next, Defendants argue without any authority that DULBERG was not coerced because he had time to deliberate over the decision to settle. (See Motion to Dismiss attached as **Exhibit A**, pg. 7.) This is not true.

18. DULBERG's exhibits to the First Amended Complaint as well as the pleading itself demonstrate how MAST coerced DULBERG into the settlement with the McGuires.

19. DULBERG pled that MAST essentially gave him two options: to take the \$5,000.00 settlement or get nothing. DULBERG was coerced into this decision because he was unaware of any other option and forced to take the only available option.

20. On multiple occasions, MAST told DULBERG, via email, to accept the settlement otherwise the McGuires will get out of the case for free. (See First Amended Complaint, **Exhibit B**, ¶15, 16.)

21. DULBERG also pled that MAST verbally told him that he had no choice but to execute a release of the McGuires and accept the \$5,000.00. (See First Amended Complaint, **Exhibit B**, ¶17.)

22. Defendants also argue that Exhibit E to the First Amended Complaint shows that DULBERG had time to deliberate over the decision and thus could not have been coerced. (See Motion to Dismiss attached as **Exhibit A**, pg. 7.) This is not true.

23. Exhibit E to the First Amended Complaint is an email from DULBERG to MAST stating that the release was signed and put in the mail. Exhibit E further shows DULBERG's continued hesitation over the \$5,000.00 settlement however, based on the information that

MAST had told him, DULBERG said that he “trusted his judgment”. See Exhibit E to the First Amended Complaint.

24. “Coercion” and “duress” have essentially the same meaning: overpowering another's free will by imposition, oppression, or undue influence. *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 341 Ill.App.3d 438, 446 (4th Dist., 2003). MAST continuous verbal and written threats to accept the settlement or get nothing resulted in DULBERG thinking (based on what his attorney was telling him) that he had no other choice but to accept this small settlement.

25. More importantly, whether DULBERG was coerced or acted willingly is a question of fact. *Schwartz v. Schwartz*, 29 Ill.App. 516, 527 (4th Dist., 1889).

26. The pleading and exhibit show that DULBERG made the decision to settle after meeting with MAST in person, and MAST telling him that he had no choice but to accept the settlement. DULBERG acted quickly to accept the settlement based on the information that MAST told him that if he would not accept it, the offer would be withdrawn and the McGuires would be successful on a summary judgment motion.

27. Simply because Exhibit E states that the release was mailed weeks later, does not mean that DULBERG was not coerced into accepting the settlement based on the information that he was given by his attorney whom he trusted.

28. In any event, the issue of coercion must be left to the trier of fact to decide after all evidence is obtained and at this point, determining a factual question on a Motion to Dismiss would be inappropriate.

29. Last Defendants raise the issue of proximate cause as to MAST’s improper determination of Gagnon’s insurance coverage limit being \$300,000.00 and not \$100,000.00.

(See Motion to Dismiss attached as **Exhibit A**, pg. 7.) As argued above, this allegation supports DULBERG's argument that MAST did not conduct the proper discovery, as evidenced by the incorrect policy limit. Had MAST not breached the standard of care and had he conducted proper discovery, DULBERG would have had the correct policy amount for Gagnon, and would have the insurance policy for the McGuires in order to make an informed decision as to settlement.

30. In DULBERG's case, he was forced to settle for an amount less than he would have reasonably received. After mediation, DULBERG was allowed only to recover to the extent of Gagnon's policy limits. (See First Amended Complaint, **Exhibit B**, ¶24, 27, 29.) Had MAST not allowed the release of the McGuires, DULBERG could have reasonably been able to collect the remainder of the mediation award against the McGuires. "Attorney malpractice action should be allowed where it can be shown that the plaintiff had to settle for a lesser amount than she could reasonably expect without the malpractice." *Brooks v. Brennan*, 255 Ill.App. 3d 260, 270 (5th Dist., 1994). Thus, DULBERG properly brought a malpractice against the Defendants.

31. The allegations set forth as to the legal malpractice by DULBERG in his First Amended Complaint are not conclusions and when taken as true, are sufficient to withstand a Section 2-615 dismissal.

32. DULBERG has proven that the actions and inactions of the Defendants have caused DULBERG damages. (See First Amended Complaint, **Exhibit B**, ¶31, 32.) Any dispute as to the proximate cause and damages must be left to the jury as it is a factual question. The issues of proximate cause and damages must be determined by a jury or trier of fact after all proper evidence and testimony is presented at trial. Proximate cause is a **question of fact** to be decided by a jury. (internal citation omitted) (Emphasis added) *Hooper v. County of Cook*, 366 Ill.App.3d 1, 7 (1st Dist., 2006). "The determination of damages is a **question of fact** that is

within the discretion of the jury and is entitled to substantial deference.” (Emphasis added.)

Linhart v. Bridgeview Creek Development, Inc., 391 Ill.App.3d 630, 636 (1st Dist., 2009).

33. Defendants in their Motion to Dismiss are requiring of DULBERG to plead his entire case in a single Complaint. “Plaintiff is not required to prove his case at this stage of the pleadings and the damages as alleged are sufficient to show he was damaged by Defendants’ actions and cause of action for legal malpractice. *Fox v. Seiden, supra*, at 294; *Platson v. NSM America, Inc.*, 322 Ill.App. 3d 138, 143 (2nd Dist., 2001) (‘Cases are not to be tried at the pleadings stage, so a claimant need only show a possibility of recovery, not an absolute right to recover, to survive a 2-615 Motion.’). Here, DULBERG has shown at least a possibility of recovery based on the malpractice of Defendants, thus should survive Defendants’ 2-615 Motion.

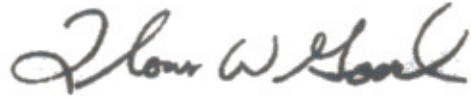
34. Accordingly, this Honorable Court should deny Defendants’ Motion in order to allow the case to be fully and properly litigated.

CONCLUSION

After review of the allegations in the First Amended Complaint and taking the allegations as true, this Honorable Court must find that DULBERG has properly stated and pled a claim for legal malpractice. More importantly, due to the factual questions in this case, granting the Motion to Dismiss would be inappropriate. However, in the event this Court grants the Motion, DULBERG requests a reasonable time to file a Second Amended Complaint to include any other facts this Court deems appropriate.

WHEREFORE your Plaintiff PAUL DULBERG prays this Honorable Court denies Defendants’ Motion to Dismiss and for all other relief this Honorable Court deems equitable and just. If this Court grants Defendants’ Motion to Dismiss, PAUL DULBERG prays for a reasonable amount of time to file a Second Amended Complaint.

Respectfully submitted by
THE GOOCH FIRM, on behalf of
PAUL DULBERG, Plaintiff,



Thomas W. Gooch, III

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IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

PAUL DULBERG,

Plaintiff,

vs.

THE LAW OFFICES OF THOMAS J.
POPOVICH, P.C., and HANS MAST,

Defendants.

No. 17LA000377

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS FIRST AMENDED COMPLAINT AT LAW

Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, by
and through their attorneys, GEORGE K. FLYNN, and CLAUSEN MILLER P.C., pursuant to
735 ILCS 5/2-615, submit this Memorandum in Support of Defendants' Motion to Dismiss
Plaintiff's First Amended Complaint at Law with prejudice, and state as follows:

I. INTRODUCTION

The Plaintiff Paul Dulberg ("Dulberg") retained defendants The Law Offices of
Thomas J. Popovich P.C. ("Popovich") to prosecute a personal injury claim on his behalf against
his next door neighbors, Carolyn and Bill McGuire and their adult son (Dulberg's lifelong
friend), David Gagnon ("Gagnon")). Hans Mast ("Mast") handled the case for the firm. Dulberg
was on the McGuires' property, assisting Gagnon trim some tree branches with a chainsaw,
when Dulberg's right arm was lacerated by the chainsaw. Dulberg agreed to a settlement with
the McGuires. Thereafter, he and Mast reached an impasse. Mast and the firm withdrew, and
successor counsel continued to prosecute the case against Gagnon.

1624970.1



Dulberg now has a case of “buyer’s remorse,” admitting that he reluctantly agreed to accept the McGuires’ settlement offer. He has attempted to state a claim against Popovich and Mast for legal malpractice. However, he has not plead the requisite elements of a legal malpractice case against Popovich and Mast, or the requisite elements of the underlying case (the “case within the case”).

II. PROCEDURAL HISTORY

On November 28, 2017, Plaintiff filed his single count Complaint at Law for legal malpractice. Defendants moved to dismiss. On May 10, 2018, the Court granted Defendants’ Motion to Dismiss pursuant to 735 ILCS 5/615 (see Order attached as Exhibit 1). During the hearing on Defendants’ Motion to Dismiss, Judge Meyer ordered that the Plaintiff plead with more particularity and specificity regarding any allegations that he was misled. The Court also ordered the Plaintiff to provide more specificity and particularity with respect to any claims that information provided by Defendants to the Plaintiff was false and misleading. Plaintiff filed its First Amended Complaint at Law on June 7, 2018.

III. STATEMENT OF FACTS

A. The Following Facts Can Be Gleaned From The First Amended Complaint (Exhibit 2) and Its Exhibits

On June 28, 2011, Dulberg was assisting David Gagnon in the cutting down of a tree on the property of Carolyn and Bill McGuire. (Exhibit 2, ¶ 6). Gagnon lost control of the chainsaw and caused personal injury to Dulberg. (Exhibit 2, ¶ 7). In May of 2012, Dulberg retained Popovich. (Exhibit 2, ¶8). On May 15, 2012, Mast filed a Complaint on behalf of Dulberg against Gagnon and the McGuires in the Circuit Court of McHenry County, Illinois, Case No, 12

LA 178. (Exhibit 2, ¶ 9, and Exhibit 2B)¹. In late 2013, Dulberg settled with the McGuires and executed a Release in their favor in exchange for the payment of \$5,000.00. The McGuires and their insurance carrier, Auto Owners Insurance Company, were released. (Exhibit 2, ¶ 18 and Exhibit 2D). Defendants continued to represent Dulberg until March 2015. (Exhibit 2, ¶ 21). Dulberg retained successor counsel and proceeded to a binding mediation and received a mediation award (Exhibit 2, ¶ 24 and Exhibit 2G). After the mediation, Dulberg allegedly realized for the first time that the information Mast and Popovich had given him was false and misleading and that the dismissal of the McGuires was a serious and substantial mistake. He was advised to seek an independent opinion from an attorney handling legal malpractice matters and received that opinion on or about December 16, 2016. (Exhibit 2, ¶ 28-29).

B. Alleged Acts of Negligence

Popovich's and Mast's alleged malpractice revolves around the settlement of the underlying case between Dulberg and McGuires. The allegations of a breach of the standard of care are all contained in ¶ 31, subsections a) through o) inclusive. Paragraph 31 states as follows:

31. MAST and POPOVICH, jointly and severally, breached the duties owed DULBERG by violating the standard of care owed DULBERG in the following ways and respects:

- a) Failed to take such actions as were necessary during their representation of DULBERG to fix liability against the property owners of the subject property (the McGuires) who employed Gagnon, and sought the assistance of DULBERG, for example hiring a liability expert;
- b) Failed to thoroughly investigate liability issues against property owners of the subject property;

¹ The exhibits to the underlying complaint in Case No. 12 LA 178 will be referenced as Exhibits 2A, 2B, 2C, 2D, 2E, 2F, and 2G.

- c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG, for example hiring a liability expert;
- d) Failed to investigate the insurance policy amounts of the McGuires and Gagnon;
- e) Incorrectly informed DULBERG that Gagnon's insurance policy was "only \$100,000.00" and no insurance company would pay close to that;
- f) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property by consulting an expert regarding these issues;
- g) Improperly urged DULBERG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- h) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuires and their obvious liability were a very necessary party to the litigation;
- i) Falsely advised DULBERG throughout the period of their representation, that the actions taken regarding the McGuires was proper in all ways and respects, and that DULBERG had no choice but to accept the settlement;
- j) Coerced DULBERG, verbally and through emails, into accepting the settlement with the McGuires for \$5,000.00 by misleading him into believing that [sic] had no other choice but to accept the settlement or else "the McGuires will get out for FREE on a motion".
- k) Concealed from DULBERG the necessary facts for him to make an informed decision as to the McGuires, instead coercing him verbally and through emails into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury;
- l) Failed to properly explain to DULBERG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;
- m) Continually reassured DULBERG that the course of action as to the property owners was proper and appropriate;

- n) Failed to retain a liability expert to prove DULBERG's damages;
- o) Were otherwise negligent in their representation of DULBERG.

IV. DULBERG FAILS TO STATE A CLAIM FOR LEGAL MALPRACTICE UNDER 735 ILCS 5/2-615

A. Legal Standard

It is clearly established that Illinois is a fact pleading jurisdiction, requiring the plaintiff to present a legally and factually sufficient complaint. *Winfrey v. Chicago Park Dist.*, 274 Ill. App. 3d 939, 942 (1st Dist. 1995). A plaintiff must allege facts sufficient to bring his or her claim within the cause of action asserted. *Jackson vs. South Holland Dodge*, 197 Ill. 2d 39 (2001). To pass muster a complaint must state a cause of action in two ways: first, it must be legally sufficient -- it must set forth a legally recognized claim as its avenue of recovery, and second, the complaint must be factually sufficient -- it must plead facts, which bring the claim within a legally recognized cause of action as alleged. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981). Dismissal of a complaint is mandatory if one fails to meet both requirements. *Misselhorn v. Doyle*, 257 Ill. App. 3d 983, 985 (5th Dist. 1994). In ruling on a Section 2-615 motion, "only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *Mount Zion State Bank and Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 115 (1995).

In Illinois, to establish a legal malpractice claim, a plaintiff must plead and prove the existence of an attorney client relationship; a duty arising from that relationship; a breach of that duty, the proximate causal relationship between the breach of duty and the damage sustained; and actual damages. *Glass v. Pitler*, 276 Ill. App. 3d 344, 349 (1st Dist. 1995). The injuries

resulting from legal malpractice are not personal injuries but pecuniary injuries to intangible property interests. *Glass* at 349. Damages must be incurred and are not presumed. *Glass* at 349. It is the plaintiff's burden to establish that "but for" the attorney's negligence, the client would not have suffered the damages alleged. *Glass* at 349. "The proximate cause element of legal malpractice claim requires that the plaintiff show that but for the attorney's malpractice, the client would have been successful in the undertaking the attorney was retained to perform. *Green v. Papa*, 2014 IL App. (5th) 1330029 (2014), quoting *Owens v. McDermott Will & Emery*, 316 Ill. App. 340 (1st Dist. 2000), at 351. The plaintiff in a legal malpractice claim must plead a case within the case. *Ignarski v. Norbut*, 271 Ill. App. 3d 522 (1st Dist.1995).

B. Dulberg Fails to Plead Facts in Support of His Conclusory Allegations

Dulberg's second attempt at stating a claim fails no better than his first. He still fails to plead with specificity and particularity as to how he was misled, or how any information provided to him was false and misleading. His allegations are pled in conclusory fashion throughout. He also fails to plead any facts concerning the McGuires' liability in the underlying case. His allegations concern the viability of a tort claim against property owners. Accordingly, he must plead facts in support of the property owners' [the McGuires] liability in the underlying case. Instead, Dulberg pleads only conclusions. More is necessary under Illinois law.

Dulberg has failed to follow the court's direction from the hearing on Defendant's Motion to Dismiss. The allegations of negligence contained in ¶ 31 fail to allege any facts in support of the conclusions. For example, what necessary discovery was not conducted? (¶ 31 (c)) What is the law pertaining to a property owner's duties and responsibilities? (¶ 31 (f)). How did defendants falsely advise Dulberg that the actions taken regarding the McGuires was proper? (¶ 31 (i)). What was concealed from Dulberg? (¶ 31 (k)). The bottom line is that Dulberg has yet to explain how the McGuires would have been found liable. The only thing that can be gleaned

from the facts alleged in the Complaint and First Amended Complaint, is that Dulberg was injured on their property. He fails to explain how the McGuire's breached any duty to him, and how they would have been liable.

Additionally, Dulberg's allegations of coercion are not supported by his own pleadings. It is reasonably inferred from the pleadings that Dulberg had ample time to retain another attorney (in fact later he did). Exhibit E to his First Amended Complaint establishes that he deliberated over the decision to settle, and mailed a signed release back to Mast. So how was he coerced, when he alleges that he met with Mast, and then later mailed the executed release?

Moreover, his allegations regarding the failure to retain an expert are unsupported. He also fails to explain why his successor counsel did not retain an expert at the appropriate time if necessary. Lastly, Dulberg can never properly allege proximately caused damages regarding the allegation in ¶ 31 (e), that Gagnon's insurance coverage was \$300,000 and not \$100,000. In fact, Dulberg admits in ¶ 24 that he recovered \$300,000 in available coverage from Gagnon. If Mast incorrectly reported the available coverage, it did not cause any damage, as Dulberg's successor counsel was apparently able to recover the full amount of available coverage against the individual who injured Dulberg with a chainsaw.

Under Illinois fact pleading requirements, much more is needed. In a case of alleged professional liability, the plaintiff cannot simply allege in conclusory terms that the defendants were negligent, and that the Plaintiff could have proved up liability against the underlying defendants. He must allege why and how. Dulberg has failed twice. His First Amended Complaint must be dismissed with prejudice pursuant to 735 ILCS 5/2-615.

V. CONCLUSION

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 respectfully request this Honorable Court dismiss Plaintiff's Complaint with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

GEORGE K. FLYNN
CLAUSEN MILLER P.C.

GEORGE K. FLYNN
CLAUSEN MILLER P.C.
ARDC No. 6239349
10 South LaSalle Street
Chicago, Illinois 60603-1098
(312) 855-1010
Attorneys for Defendants
gflynn@clausen.com



4. That due to the actions and status of MAST in relation to POPOVICH, the actions and inactions of MAST are directly attributable to his employer, partnership, or principal, being THE LAW OFFICES OF THOMAS J. POPVICH, P.C.

5. Venue is therefore claimed proper in McHenry County, Illinois, as the Defendants transact substantial and regular business in and about McHenry County in the practice of law, where their office is located.

6. On or about June 28, 2011, your Plaintiff, DULBERG was involved in a horrendous accident, having been asked by his neighbors Caroline McGuire and William McGuire, in assisting a David Gagnon in the cutting down of a tree on the McGuire property. DULBERG lived in the same area.

7. At this time, Gagnon lost control of the chainsaw he was using causing it to strike and cut DULBERG's arm. This caused substantial and catastrophic injuries to DULBERG, including but not limited to great pain and suffering, current as well as future medical expenses, in an amount in excess of \$260,000.00, along with lost wages in excess of \$250,000.00, and various other damages.

8. In May of 2012, DULBERG retained THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., pursuant to a written retainer agreement attached hereto as **Exhibit A**.

9. A copy of the Complaint filed by MAST on his own behalf, and on behalf of DULBERG, is attached hereto as **Exhibit B**, and the allegations of that Complaint are fully incorporated into this Complaint as if fully set forth herein.

10. An implied term of the retainer agreement attached hereto as **Exhibit A**, was that at all times, the Defendants would exercise their duty of due care towards their client and conform their acts and actions within the standard of care every attorney owes his client.

11. That as **Exhibit B** reveals, Defendants properly filed suit against not only the operator of the chain saw, but also his principals, Caroline McGuire and William McGuire, who purportedly were supervising him in his work on the premises.

12. At the time of filing of the aforesaid Complaint, MAST certified pursuant to Supreme Court Rule 137, that he had made a diligent investigation of the facts and circumstances around the Complaint he filed, and further had ascertained the appropriate law. MAST evidently believed a very good and valid cause of action existed against Caroline McGuire and William McGuire.

13. Also MAST incorrectly informed DULBERG that the insurance policy limit for the Gagnon was only \$100,000.00, when in reality the policy was \$300,000.00.

14. The matter proceeded through the normal stages of litigation until sometime in late 2013 or early 2014, when MAST began urging DULBERG to settle the matter against William McGuire and Caroline McGuire for \$5,000.00.

15. On November 18, 2013, MAST wrote two emails to DULBERG urging DULBERG to accept the \$5,000.00, "the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery...." * * * "So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case". (See Emails attached as **Group Exhibit C.**)

16. Similarly, on November 20, 2013 MAST emailed DULBERG urging him to accept the \$5,000.00 otherwise "the McGuires will get out for FREE on a motion." (See Emails attached as **Group Exhibit C.**)

17. On or around December 2013 or January 2014, MAST met with DULBERG and other family members and again advised them there was no cause of action against William McGuire and Caroline McGuire, and verbally told DULBERG that he had no choice but to execute a release in favor of the McGuires for the sum of \$5,000.00 and if he did not, he would get nothing.

18. DULBERG, having no choice in the matter, reluctantly agreed with MAST to accept the sum of \$5,000.00 releasing not only William and Caroline McGuire, but also Auto-Owners Insurance Company from any further responsibility or liability in the matter. A copy of the aforesaid general release and settlement agreement is attached hereto as **Exhibit D.**

19. Continuously throughout the period of representation, MAST and POPOVICH represented repeatedly to DULBERG there was no possibility of any liability against William and/or Caroline McGuire and/or Auto-Owners Insurance Company, and lulled DULBERG into believing that the matter was being properly handled

20. After accepting the \$5,000 settlement, DULBERG wrote MAST an email on January 29, 2014 stating "I trust your judgment." (See Email attached as **Exhibit E.**)

21. MAST and POPOVICH continued to represent DULBERG into 2015 and continuously assured him that his case was being handled properly.

22. On February 22, 2015, as to any chance of settling the remainder of his case against Gagnon MAST wrote to DULBERG that, "There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only

alternative is to take the case to trial and I am not interested in doing that.” (See Email attached as **Exhibit F.**)

23. MAST and POPOVICH represented DULBERG through to and including March of 2015, following which DULBERG and the Defendants terminated their relationship due to a claimed failure of communication. MAST and POPOVICH withdrew from the representation of DULBERG.

24. Thereafter, DULBERG retained other attorneys and proceeded to a Court ordered binding mediation before a retired Circuit Judge, where DULBERG received a binding mediation award of \$660,000.00 in gross, and a net award of \$561,000.00. However, due to the settlement with the McGuires, DULBERG was only able to collect \$300,000.00 based upon the insurance policy available. A copy of the aforesaid Mediation Award is attached hereto as **Exhibit G.**

25. The McGuires were property owners and had property insurance covering injuries or losses on their property, as well as substantial personal assets, including the property location where the accident took place at 1016 West Elder Avenue, in the City of McHenry, Illinois. McGuires were well able to pay all, or a portion of the binding mediation award had they still remained parties.

26. DULBERG, in his relationship with POPOVICH and MAST, cooperated in all ways with them, furnishing all necessary information as required, and frequently conferred with them.

27. Until the time of the mediation award, DULBERG had no reason to believe he could not recover the full amount of his injuries, based on POPOVICH’S and MAST’S representations to DULBERG that he could recover the full amount of his injuries from Gagnon, and that the inclusion of the McGuires would only complicate the case.

28. Following the execution of the mediation agreement and the final mediation award, DULBERG realized for the first time in December of 2016 that the information MAST and POPOVICH had given DULBERG was false and misleading, and that in fact, the dismissal of the McGuires was a serious and substantial mistake.

29. It was not until the mediation in December 2016, based on the expert's opinions that DULBERG retained for the mediation, that DULBERG became reasonably aware that MAST and POPOVICH did not properly represent him by pressuring and coercing him to accept a settlement for \$5,000.00 on an "all or nothing" basis.

30. DULBERG was advised to seek an independent opinion from a legal malpractice attorney and received that opinion on or about December 16, 2016.

31. MAST and POPOVICH, jointly and severally, breached the duties owed DULBERG by violating the standard of care owed DULBERG in the following ways and respects:

a) Failed to take such actions as were necessary during their representation of DULBERG to fix liability against the property owners of the subject property (the McGuires) who employed Gagnon, and sought the assistance of DULBERG, for example hiring a liability expert;

b) Failed to thoroughly investigate liability issues against property owners of the subject property;

c) Failed to conduct necessary discovery, so as to fix the liability of the property owners to DULBERG, for example hiring a liability expert;

d.) Failed to investigate the insurance policy amounts of the McGuires and Gagnon;

e.) Incorrectly informed DULBERG that Gagnon's insurance policy was "only \$100,000.00" and no insurance company would pay close to that;

- f) Failed to understand the law pertaining to a property owner's rights, duties and responsibilities to someone invited onto their property by consulting an expert regarding these issues;
- g) Improperly urged DULBERG to accept a nonsensical settlement from the property owners, and dismissed them from all further responsibility;
- h) Failed to appreciate and understand further moneys could not be received as against Gagnon, and that the McGuires and their obvious liability were a very necessary party to the litigation;
- i) Falsely advised DULBERG throughout the period of their representation, that the actions taken regarding the McGuires was proper in all ways and respects, and that DULBERG had no choice but to accept the settlement;
- j) Coerced DULBERG, verbally and through emails. into accepting the settlement with the McGuires for \$5,000.00 by misleading him into believing that had no other choice but to accept the settlement or else "the McGuires will get out for FREE on a motion".
- k) Concealed from DULBERG the necessary facts for him to make an informed decision as to the McGuires, instead coercing him verbally and through emails into signing a release and settlement agreement and accept a paltry sum of \$5,000.00 for what was a grievous injury;
- l) Failed to properly explain to DULBERG all ramifications of accepting the McGuire settlement, and giving him the option of retaining alternative counsel to review the matter;
- m) Continually reassured DULBERG that the course of action as to the property owners was proper and appropriate;

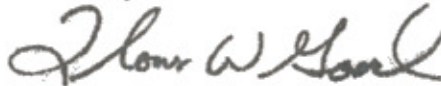
- n) Failed to retain a liability expert to prove DULBERG's damages;
- o) Were otherwise negligent in their representation of DULBERG.

32. That DULBERG suffered serious and substantial damages, not only as a result of the injury as set forth in the binding mediation award, but due to the direct actions of MAST and POPOVICH in urging DULBERG to release the McGuires, lost the sum of well over \$300,000.00 which would not have occurred but for the acts of MAST and THE LAW OFFICES OF THOMAS J. POPOVICH, P.C.

WHEREFORE, your Plaintiff, PAUL DULBERG prays this Honorable Court to enter judgment on such verdict as a jury of twelve (12) shall return, together with the costs of suit and such other and further relief as may be just, all in excess of the jurisdictional minimums of this Honorable Court.

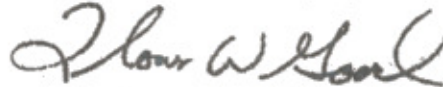
Respectfully submitted by,

PAUL DULBERG, Plaintiff, by his
attorneys THE GOOCH FIRM,



Thomas W. Gooch, III

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY OF TWELVE (12) PERSONS:



Thomas W. Gooch, III

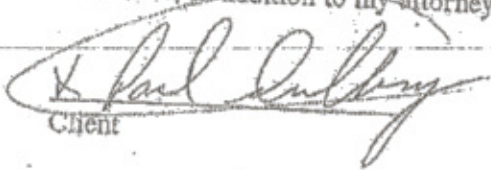
Thomas W. Gooch, III
THE GOOCH FIRM
209 S. Main Street
Wauconda, IL 60084
847-526-0110
ARDC No.: 3123355
gooch@goochfirm.com
office@goochfirm.com

CONTRACT FOR LEGAL SERVICES

I agree to employ the LAW OFFICES OF THOMAS J. POPOVICH, P.C. (hereinafter "my attorney") to represent me in the prosecution or settlement of my claim against persons or entities responsible for causing me to suffer injuries and damages on the _____ day of _____, 20____.

My attorney agrees to make no charge for legal services unless a recovery is made in my claim. The approval of any settlement amount cannot be made without my knowledge and consent.

I agree to pay my attorney in consideration for his legal services a sum equal to one-third (33 1/3%) of my recovery from my claim by suit or settlement; this will increase to ~~10%~~ % in the event my claim results in more than one (1) trial and/or an appeal of a trial. I understand my attorney may need to incur reasonable expenses in properly handling my claim including, but not limited to, expenses such as accident reports, filing fees, court reporters fees, video fees, records fees, and physician fees. I understand those expenses will be taken out of my settlement, in addition to my attorney's legal fee.


Client

Client

Date: _____

LAW OFFICES OF THOMAS J. POPOVICH

By: 

Date: _____

LAW OFFICES OF THOMAS J. POPOVICH, P.C.
3416 West Elm Street
McHenry, Illinois 60050
815/344-3797

EXHIBIT

A

COPY

MAY 15 2012

KATHLEEN M. KEEFE
McHENRY CITY, CIV. CLK.

STATE OF ILLINOIS)
COUNTY OF McHENRY)

SS

IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

PAUL DULBERG,
Plaintiff,

vs.

No.:

17-LA-178

DAVID GAGNON, Individually, and as
Agent of CAROLINE MCGUIRE and BILL
MCGUIRE, and CAROLINE MCGUIRE
and BILL MCGUIRE, Individually,

Defendants.

COMPLAINT

NOW COMES the Plaintiff, PAUL DULBERG, by his attorneys, LAW OFFICES OF
THOMAS J. POPOVICH, P.C., and complaining against the Defendants, DAVID GAGNON,
Individually, and as Agent of CAROLINE MCGUIRE and BILL MCGUIRE, and CAROLINE
MCGUIRE and BILL MCGUIRE, individually, and states as follows:

Count 1

Paul Dulberg vs. David Gagnon, individually, and as Agent of Caroline and Bill McGuire

1. On June 28, 2011, the Plaintiff, PAUL DULBERG, lived in the City of McHenry,
County of McHenry, Illinois.

2. On June 28, 2011, Defendants CAROLINE MCGUIRE and BILL MCGUIRE
lived, controlled, managed and maintained a single family home located at 1016 W. Elder

Avenue, in the City of McHenry, County of McHenry, Illinois

NOTICE
BY LOCAL RULE 3.10
THIS CASE IS HEREBY SET FOR SCHEDULING
CONFERENCE IN COURTROOM 206 ON
JULY 20, 2012, AT 2:00 PM
FAILURE TO APPEAR MAY RESULT IN THE CASE
BEING DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

NOTICE
LOCAL RULE 3.10
THIS CASE IS HEREBY SET FOR SCHEDULING
CONFERENCE IN COURTROOM 206 ON
JULY 20, 2012, AT 2:00 PM
FAILURE TO APPEAR MAY RESULT IN THE CASE
BEING DISMISSED OR AN ORDER OF
DEFAULT BEING ENTERED.

EXHIBIT

B

3. On June 28, 2011, the Defendant, DAVID GAGNON, was living and/or staying at his parent's home at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

4. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE contracted, hired the Defendant, DAVID GAGNON, to cut down, trim and/or maintain the trees and brush at their premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

5. On June 28, 2011, and at the request and with the authority and permission of the Defendants CAROLINE McGUIRE and BILL McGUIRE, and for their benefit, the Defendant, DAVID GAGNON, was working under their supervision and control while engaged in cutting, trimming and maintaining trees and brush at the premises at 1016 W. Elder Avenue, in the City of McHenry, County of McHenry, Illinois.

6. On June 28, 2011, as part of his work at the subject property, the Defendant, DAVID GAGNON, was authorized, instructed, advised and permitted to use a chainsaw to assist him in his work for Defendants, CAROLINE McGUIRE and BILL McGUIRE, which was owned by the McGuires.

7. On June 28, 2011, the Defendant, DAVID GAGNON, was under the supervision and control of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was working as their apparent and actual agent, and was then acting and working in the scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE.

8. On June 28, 2011, and while the Defendant, DAVID GAGNON, was working in the course and scope of his agency for Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was under their supervision and control, Defendant, DAVID GAGNON was in use of a chainsaw while trimming a tree and branch.

9. On June 28, 2011, and while Defendant, DAVID GAGNON, was in use of a chainsaw while trimming a tree and branch, Defendant, DAVID GAGNON, asked for and/or requested the assistance of the Plaintiff, PAUL DULBERG, to hold the tree branch while Defendant, DAVID GAGNON, trimmed the branch with the chainsaw.

10. On June 28, 2011, and while Defendant, DAVID GAGNON, was in sole control, use and operation of the subject chainsaw, the chainsaw was caused to strike and injure the Plaintiff, PAUL DULBERG.

11. At all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew of Defendant, DAVID GAGNON's use of the chainsaw in the presence of the Plaintiff, PAUL DULBERG, and knew that such created a danger to the Plaintiff, PAUL DULBERG's safety.

12. That at all relevant times, the Defendants, DAVID GAGNON, as agent of CAROLINE McGUIRE and BILL McGUIRE, owed a duty to use care and caution in his operation of a known dangerous instrumentality.

13. On June 28, 2011, the Defendant, DAVID GAGNON, was negligent in one or more of the following ways:

- a. Failed to maintain control over the operating of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant, DAVID GAGNON's inability to control the chainsaw;
- d. Failed to keep a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

14. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

15. That at the above time and date, the Defendant's negligence can be inferred from the circumstances of the occurrence as the instrument of the injury was under the control of the Defendant and therefore, negligence can be presumed under the doctrine of *Res Ipsa Loquitur*.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants, DAVID GAGNON, and CAROLINE McGUIRE and BILL McGUIRE in an amount in excess of \$50,000.00, plus costs of this action.

Count II

Paul Dulberg vs. Caroline McGuire and Bill McGuire

15. That the Plaintiff, PAUL DULBERG, restates and realleges paragraphs 1 through 14, in Count I, above, as paragraphs 1 through 13 of Count II, as if fully alleged herein.

16. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, owned, controlled, maintained and supervised the premises whereat the accident to the Plaintiff, PAUL DULBERG, occurred.

17. That at all relevant times, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were in control of and had the right to advise, instruct and demand that the Defendant, DAVID GAGNON, act or work in a safe and reasonable manner.

18. That at all relevant times, the Defendant, DAVID GAGNON, was acting as the agent, actual and apparent, of Defendants, CAROLINE McGUIRE and BILL McGUIRE, and was acting at their request and in their best interests and to their benefit as in a joint enterprise.

19. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, knew DAVID GAGNON was operating a chainsaw with the assistance of the Plaintiff, PAUL DULBERG, and had the right to discharge or terminate the Defendant, DAVID GAGNON's work for any reason.

20. That at all relevant times, Defendants, CAROLINE McGUIRE and BILL McGUIRE, owed a duty to supervise and control Defendant, DAVID GAGNON's activities on the property so as not to create a unreasonable hazard to others, including the Plaintiff, PAUL DULBERG.

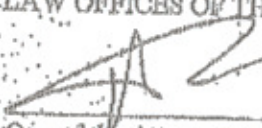
21. On June 28, 2011, the Defendants, CAROLINE McGUIRE and BILL McGUIRE, were negligent in one or more of the following ways:

- a. Failed to control operation of the chainsaw;
- b. Failed to take precaution not to allow the chainsaw to move toward the Plaintiff, PAUL DULBERG, so as to cause injury;
- c. Failed to warn the Plaintiff, PAUL DULBERG, of the dangers existing from the Defendant's inability to control the chainsaw;
- d. Failed to keep the chainsaw a proper distance from the Plaintiff, PAUL DULBERG, while operating the chainsaw;
- e. Otherwise was negligent in operation and control of the chainsaw.

22. That as a proximate result of the Defendant's negligence, the Plaintiff, PAUL DULBERG, was injured externally; he has experienced and will in the future experience pain and suffering; he has been permanently scarred and/or disabled; and has become obligated for large sums of money for medical bills and will in the future become obligated for additional sums of money for medical care, and has lost time from work and/or from earning wages due to such injury.

WHEREFORE, Plaintiff, PAUL DULBERG, demands judgment against Defendants,
CAROLINE McGUIRE and BILL McGUIRE, in an amount in excess of \$50,000.00, plus costs
of this action.

LAW OFFICES OF THOMAS J. POPOVICH, P.C.



One of the Attorneys for Plaintiff

Hans A. Mast
LAW OFFICES OF THOMAS J. POPOVICH, P.C.
3416 West Elm Street
Lake, Illinois 60050
(815) 344-3797
ARDC No. 06203684

From: Paul Dulberg <pdulberg@comcast.net>
Subject: Fwd: Dave's Best and oldest friend John
Date: December 28, 2016 10:33:35 AM CST
To: paul_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>
Date: November 20, 2013 at 7:26:53 AM CST
To: Hans Mast <hansmast@comcast.net>
Subject: Re: Dave's Best and oldest friend John

Morning Hans,
Ok we can meet. I will call Sheila today and set up a time.
Please send me a link to the current Illinois statute citing that the property owner is not liable for work done on their property resulting in injury to a neighbor.
I need to read it myself and any links to recent case law in this area would be helpful as well.
Thanks,
Paul

Paul Dulberg
847-497-4250
Sent from my iPad

On Nov 20, 2013, at 6:59 AM, Hans Mast <hansmast@comcast.net> wrote:

Paul, lets meet again to discuss. The legality of it all is that a property owner does not have legal liability for a worker (whether friend, son or otherwise) who does the work on his time, using his own independent skills. Here, I deposed the McGuires, and they had nothing to do with how Dave did the work other than to request the work to be done. They had no control on how Dave wielded the chain saw and cut you. its that simple. We don't have to accept the \$5,000, but if we do not, the McGuires will get out for FREE on a motion. So that's the situation.

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>
To: Hans Mast <hansmast@comcast.net>
Sent: Tue, 19 Nov 2013 02:29:56 -0000 (UTC)
Subject: Re: Dave's Best and oldest friend John

I still don't get how they don't feel responsible for work done on their property by their own son that ended up cutting through 40% of my arm.

Perhaps their negligence is the fact that they didn't supervise the work close enough but they did oversee much of the days activity with David. Just because Dave was doing the work doesn't mean they were not trying to tell their kid what to do. They told him plenty of times throughout the day what to do. How is that not supervising?

Paul
Paul Dulberg
847-497-4250

Sent from my iPad

On Nov 18, 2013, at 8:07 PM, Hans Mast <hansmast@comcast.net> wrote:

Paul whether you like it or not they don't have a legal liability for your injury because they were not directing the work. So if we do not accept their 5000 they will simply file a motion and get out of the case for free. That's the only other option is letting them file motion getting out of the case

Sent from my iPhone

On Nov 18, 2013, at 7:40 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Only 5, That's not much at all.
Is this a take it or leave it or do we have any other options?

If you want a negligence case for the homeowners ask what happened immediately after the accident.

Neither of them offered me any medical assistance nor did either of them call 911 and all Carol could think of besides calling David an idiot was calling her homeowners insurance.



They all left me out in the yard screaming for help while they were busy making sure they were covered.

She even went as far as to finally call the Emergency Room after I was already there just to tell me she was covered.

How selfish are people when they worry about if their insured over helping the person who was hurt and bleeding badly in their yard.

I'm glad she got her answer and had to share it with me only to find out her coverage won't even pay the medical bills.

I'm not happy with the offer.

As far as John Choyinski, he knows he has to call you and said he will tomorrow.

Paul

Paul Dulberg
847-497-4250
Sent from my iPad

On Nov 18, 2013, at 1:28 PM, Hans Mast <hansmast@comcast.net> wrote:

I'm waiting to hear from John. I tried calling him last week, but no one answered.

In addition, the McGuire's atty has offered us (you) \$5,000 in full settlement of the claim against the McGuires only. As we discussed, they have no liability in the case for what Dave did as property owners. So they will likely get out of the case on a motion at some point, so my suggestion is to take the \$5,000 now. You probably won't see any of it due to liens etc. but it will offset the costs deducted from any eventual recovery....

Let me know what you think..

Hans

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>

To: Hans Mast <hansmast@comcast.net>

Sent: Fri, 15 Nov 2013 22:41:26 -0000 (UTC)

Subject: Dave's Best and oldest friend John

Hans,

Just spoke with John Choyinski again about talking with you.

I am leaving your number with him as he has agreed to talk with you about David Gagnon.

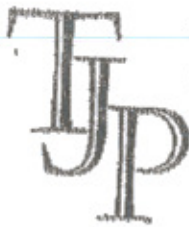
I believe he will try and call sometime tomorrow.

Paul

Oh and I know that nothing that happened right after the incident makes any difference as to the validity of the injuries but David's conduct immediately after the incident does show his lack of moral values for other humans and what he was willing and was not willing to do to help me get medical help. For his actions towards me or any other human being is enough to sue the shit out him alone. It is the things that happened afterwards that upset me the most.

Sorry for the rant but Dave was a complete ass all the way and deserves this.

Paul Dulberg
847-497-4250
Sent from my iPad



The Law Offices of Thomas J. Popovich P.C.

3416 W. ELM STREET
McHENRY, ILLINOIS 60050
TELEPHONE: 815.344.3797
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www.popovichlaw.com

THOMAS J. POPOVICH
HANS A. MAST
JOHN A. KORNAK

MARK J. VOGG
JAMES P. TUTAJ
ROBERT J. LUMBER
THERESA M. FREEMAN

January 24, 2014

Paul Dulberg
4606 Hayden Court
McHenry, IL 60051

RE: *Paul Dulberg vs. David Gagnon, Caroline McGuire and Bill McGuire*
McHenry County Case: 12 LA 178

Dear Paul:

Please find enclosed the General Release and Settlement Agreement from defense counsel for Caroline and Bill McGuire. Please Release and return it to me in the enclosed self-addressed stamped envelope at your earliest convenience.

Thank you for your cooperation.

Very truly yours,

COPY
HANS A. MAST

smg
Enclosure



WAUKESHA OFFICE
210 NORTH MARTIN LUTHER
KING JR. AVENUE
WAUKESHA, IL 60085

GENERAL RELEASE AND SETTLEMENT AGREEMENT

NOW COMES PAUL DULBERG, and in consideration of the payment of Five-Thousand (\$5,000.00) Dollars to him, by or on behalf of the WILLIAM MCGUIRE and CAROLYN MCGUIRE (aka Bill McGuire; improperly named as Caroline McGuire) and AUTO-OWNERS INSURANCE COMPANY, the payment and receipt of which is hereby acknowledged, PAUL DULBERG does hereby release and discharge the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, and any agents or employees of the WILLIAM MCGUIRE and CAROLYN MCGUIRE and AUTO-OWNERS INSURANCE COMPANY, of and from any and all causes of action, claims and demands of whatsoever kind or nature including, but not limited to, any claim for personal injuries and property damage arising out of a certain chain saw incident that allegedly occurred on or about June 28, 2011, within and upon the premises known commonly as 1016 West Elder Avenue, City of McHenry, County of McHenry, State of Illinois.

IT IS FURTHER AGREED AND UNDERSTOOD that there is presently pending a cause of action in the Circuit Court of the 22nd Judicial Circuit, McHenry County, Illinois entitled "Paul Dulberg, Plaintiff, vs. David Gagnon, Individually, and as agent of Caroline McGuire and Bill McGuire, and Caroline McGuire and Bill McGuire, Individually, Defendants", Cause No. 2012 LA 178, and that this settlement is contingent upon WILLIAM MCGUIRE and CAROLYN MCGUIRE being dismissed with prejudice as parties to said lawsuit pursuant to a finding by the Circuit Court that the settlement between the parties constitutes a good faith settlement for purposes of the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*

IT IS FURTHER AGREED AND UNDERSTOOD that as part of the consideration for this agreement the undersigned represents and warrants as follows (check applicable boxes):

- ☐ I was not 65 or older on the date of the occurrence.
- ☐ I was not receiving SSI or SSDI on the date of the occurrence.
- ☐ I am not eligible to receive SSI or SSDI.
- ☐ I am not currently receiving SSI or SSDI.

IT IS FURTHER AGREED AND UNDERSTOOD:

- a. That any subrogated claims or liens for medical expenses paid by or on behalf of PAUL DULBERG shall be the responsibility PAUL DULBERG, including, but not limited to, any Medicare liens. Any and all reimbursements of medical expenses to subrogated parties, including Medicare's rights of reimbursement, if any, shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released herein.
- b. That any outstanding medical expenses are PAUL DULBERG's responsibility and all payment of medical expenses hereafter shall be PAUL DULBERG's responsibility, and not the responsibility of the parties released

- c. That PAUL DULBERG agrees to save and hold harmless and indemnify the parties released herein against any claims made by any medical providers, including, but not limited to Medicare or parties subrogated to the rights to recover medical or Medicare payments.

IT IS FURTHER AGREED AND UNDERSTOOD by the parties hereto that this agreement contains the entire agreement between the parties with regard to materials set forth herein, and shall be binding upon and inure to the benefit of the parties hereto, jointly and severally, and the executors, conservators, administrators, guardians, personal representatives, heirs and successors of each.

IT IS FURTHER AGREED AND UNDERSTOOD that this settlement is a compromise of a doubtful and disputed claim and no liability is admitted as a consequence hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the dates set forth below.

Dated: _____

PAUL DULBERG

STATE OF ILLINOIS)
) SS.
COUNTY OF MCHENRY)

PAUL DULBERG personally appeared before me this date and acknowledged that she executed the foregoing Release and Settlement Agreement as his own free act and deed for the uses and purposes set forth therein.

Dated this _____ day of January, 2014.

Notary Public

From: Paul Dulberg <pdulberg@comcast.net>
Subject: Fwd: McGuire settlement
Date: December 28, 2016 10:21:55 AM CST
To: paul_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>
Date: January 29, 2014 at 1:59:31 PM CST
To: Hans Mast <hansmast@comcast.net>
Subject: Re: McGuire settlement

Ok, it's signed and in the mail.

Hope that some yahoo in the govt. doesn't someday decide to go after everyone they think they might get a dollar out of and end up holding me responsible for the McGuires fees incurred while they fight it out.

I'm not in the business of warranting, insuring or protecting the McGuires from government. Especially for only 5 grand. For that kind of protection it could cost millions but I trust your judgement.

Paul

Paul Dulberg
847-497-4250
Sent from my iPad

On Jan 29, 2014, at 11:49 AM, Hans Mast <hansmast@comcast.net> wrote:

SSD has to be part of it...its not going to effect anything...
We can't prevent disclosure of the amount...

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>
To: Hans Mast <hansmast@comcast.net>
Sent: Wed, 29 Jan 2014 17:47:39 -0000 (UTC)
Subject: Re: McGuire settlement

What and why do those questions have any relevance at all and why do they need to be part of this agreement?
Particularly the one about being eligible.

Also, I cannot warranty against what SSDI, Medicare or any other government institution wishes to do.

Is it possible to make this agreement blind to the McGuires or David Gagnon?

What I mean is can we make it so that the amount of money cannot be told to them in any way?

It would drive David's ego crazy if he thought it was a large sum and was banned from seeing how much it is.

Paul Dulberg
847-497-4250

Sent from my iPad

On Jan 29, 2014, at 10:51 AM, Hans Mast <hansmast@comcast.net> wrote:

Its not a big deal...if you weren't receiving it than don't check it...not sure what the question is...

----- Original Message -----

From: Paul Dulberg <pdulberg@comcast.net>
To: Hans Mast <hansmast@comcast.net>
Sent: Wed, 29 Jan 2014 16:16:04 -0000 (UTC)
Subject: McGuire settlement

Here is a copy of the first page.

It has check boxes and one of the check boxes says;

I am not eligible to receive SSI or SSDI.

Another says;

I am not receiving SSI or SSDI.

As you know, I have applied for SSDI and SSI



From: Paul Dulberg <pdulberg@comcast.net>
Subject: Fwd: Memo
Date: December 27, 2016 6:11:20 PM CST
To: paul_dulberg@comcast.net

From: Paul Dulberg <pdulberg@comcast.net>
Date: February 22, 2015 at 7:42:25 PM CST
To: Hans Mast <hansmast@att.net>
Subject: Re: Memo

To believe David's version of events you must believe I was committing suicide.
Who in their right mind puts his arm into a chainsaw?

I figured you would cop out again...

Now I'm left wondering...
How hard is it to sue an atty?

And yes I am and have been looking for someone who will take this case...

The issue of my word vs David Gagnons... Did he cut me or did I cut myself?

Of coarse he cut me.

Next issue please?

Paul Dulberg
847-497-4250
Sent from my iPad

On Feb 22, 2015, at 7:20 PM, Hans Mast <hansmast@att.net> wrote:

Paul I no longer can represent you in the case. We obviously have differences of opinion as to the value of the case. I've been telling you over a year now the problems with the case and you just don't see them. You keep telling me how injured you are and completely ignore that it doesn't matter if you passed away from the accident because we still have to prove that the defendant was at fault. While you think it is very clear - it is not. My guess is that seven out of 10 times you will lose the case outright. That means zero. That's why I have been trying to convince you to agree to a settlement. You clearly do not want to. There's only \$100,000 in coverage. Allstate will never offer anything near the policy limits therefore there's no chance to settle the case. The only alternative is to take the case to trial and I am not interested in doing that. I will wait for you to find a new attorney. I can't assist you any further in this case. Just let me know.

Sent from my iPhone

On Feb 22, 2015, at 7:14 PM, Paul Dulberg <pdulberg@comcast.net> wrote:

Let's not be harsh, We have a couple of weeks till dr Kujawa's billing arrives.
I agree showing me the memo is a good idea it's just not the accuracy I expected.
I know I'm being confrontative about all of this but let's face it, my working days are over let alone a career I have been building since I was in high school. My dreams of family are over unless I have enough to provide and pay for the care of children and a roof.

What's left for me?

Facebook, scrap booking, crafts, etc... A life of crap...

With ongoing pain and grip issues in my dominate arm/hand that are degenerative.

This is as total as it gets for us in the working class short of being paralyzed or dead.

I need someone who is on my side, top of their game and will see to it that I'm comfortable after all this is over.

What I feel is an attempt to settle for far less than this is remotely worth just to get me off the books.





Binding Mediation Award

Paul Dulberg

v.

ADR Systems File # 33391BMAG

David Gagnon

On December 8, 2016, the matter was called for binding mediation before the Honorable James P. Etchingham, (Ret.), in Chicago, IL. According to the agreement entered into by the parties, if a voluntary settlement through negotiation could not be reached the mediator would render a settlement award which would be binding to the parties. Pursuant to that agreement the mediator finds as follows:

Finding in favor of:

Paul Dulberg

Gross Award:

\$660,000.

Comparative fault:

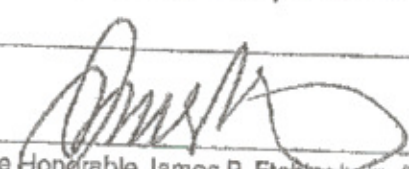
15

% (if applicable)

Net Award:

\$561,000

Comments/Explanation

Medical\$ 60,000.Future medical\$ 200,000.Lost Wage\$ 250,000.PIS75,000.LNL75,000.

 The Honorable James P. Etchingham, (Ret.)


Argument

9. In this case, DULBERG was an invitee of the McGuires. An invitee is defined as one who enters the premises of another with the owner's or occupier's express or implied consent for the mutual benefit of himself and the owner, or for a purpose connected with the business in which the owner is engaged. Rhodes v. Illinois Cent. Gulf R.R., supra. The McGuires had a duty of reasonable care to DULBERG as an invitee because DULBERG was on their property for their benefit, to cut down a tree. (See First Amended Complaint, Exhibit B, ¶6.)

DULBERG was not invited on the property to cut down a tree.
DULBERG was invited on the property to see if he wanted the wood from the tree.

While on the property DULBERG was asked by Caroline McGuire if he could help.

Original:

10. MAST's failure to become familiar with this law, resulted in him coercing and pressuring DULBERG to accept a paltry settlement of \$5,000.00 with the McGuries, when in fact their liability was much more, as presented by the expert during the mediation. Based on this law, MAST would have seen that McGuires as homeowners did in fact owe a duty to DULBERG.

Should Read:

10. MAST's failure to become familiar with either Premises Liability Law or Chainsaw Ownership Liability, resulted in him coercing and pressuring DULBERG to accept a paltry settlement of \$5,000.00 with the McGuries. Based on Premises Liability Law, MAST would have seen that McGuires as homeowners did in fact owe a duty of reasonable care to DULBERG.

11. Also, had MAST reviewed the law on premise liability, he could have considered the law as to ultrahazardous circumstances and the strict liability of the homeowners. Illinois has recognized strict liability principally in two instances: (1) when a defendant engages in ultrahazardous or abnormally dangerous activity as determined by the courts, giving particular consideration, inter alia, to the appropriateness of the activity to the place where it is maintained, in light of the character of the place and its surroundings. (internal citations omitted) Miller v. Civil Constructors, Inc., 272 Ill.App.3d 263, 266 (2nd Dist., 1995). MAST should have considered strict liability as to the McGuires prior to advising DULBERG to settle.

"premise" should be "premises"
"* * *", Where is the first instance?

15. As to the specific allegations relating to Defendants' concealment of facts to DULBERT, paragraph 31(k) of the First Amended Complaint, DULBERG stated what was concealed from him by the Defendants. Defendants concealed from DULBERG the actual policy limits from the McGuires and Gagnon, concealed facts relating to the explanation of liability law and what type of duty the McGuires owed to DULBERG, concealed that retaining an expert witness prior to accepting settlement would have been beneficial to DULBERG's case, and concealed the fact that Defendants were handling everything properly when this was not the truth.

"DULBERT" should read "DULBERG"

"actual policy limits from" should read "actual policies and the policy limits for both"

"liability law" could read "Premises Liability law and Chainsaw Ownership Liability"

- the reason for this is the McGuires were subject to both liabilities. The McGuires owned the chainsaw, which clearly stated on page 2 of the owners manual "Allow only persons who understand this manual to operate your chainsaw", on page 7 the owners manual recommends that other people (bystanders) be kept at least 35 feet from someone operating a chainsaw, the McGuires did not heed these warnings nor any other warning contained in the owners manual, and the McGuires also owned the Premises where the work was being done making the McGuires liable not just once but twice as to a breach of duty owed DULBERG. Mast was provided a copy of the Chainsaw Owners Manual at the McGuires Deposition. Mast should have read it since it was Mast who requested it be produced.

Original:

19. DULBERG pled that MAST essentially gave him two options: to take the \$5,000.00 settlement or get nothing. DULBERG was coerced into this decision because he was unaware of any other option and forced to take the only available option.

Can be changed to:

19. DULBERG pled that MAST essentially gave him two options: to take the \$5,000.00 settlement or get nothing. DULBERG was coerced into this decision because he was unaware of any other option and forced to take the only available option under an artificial time constraint constructed by Mast.

Original:

26. The pleading and exhibit show that DULBERG made the decision to settle after meeting with MAST in person, and MAST telling him that he had no choice but to accept the settlement. DULBERG acted quickly to accept the settlement based on the information that MAST told him that if he would not accept it, the offer would be withdrawn.

Should be Changed to:

26. The pleading and exhibit show that DULBERG made the decision to settle after meeting with MAST in person, and MAST telling him that he had no choice but to accept the settlement. DULBERG acted quickly to accept the settlement based on the information that MAST told him that if he would not accept it, the offer would be withdrawn and the McGuires would win on a summary judgement and get off free.

Original:

27. Simply because Exhibit E states that the release was mailed weeks later, does not mean that DULBERG was not coerced into accepting the settlement based on the information that he was given by his attorney whom he trusted.

Why not reference and exhibit the emails between November 18th and the December 26th letter sent from Mast to Auto Owners Attorney Barch which clearly shows the small time frame Dulberg actually had? Perhaps this is evidence reserved for discovery and should not be needed at this stage?
Perhaps these facts need to be determined by a jury and not the Judge at this stage?
not sure, need more explanation

Original:

29. Last Defendants raise the issue of proximate cause as to MAST's improper determination of Gagnon's insurance coverage limit being \$300,000.00 and not \$100,000.00. (See Motion to Dismiss attached as Exhibit A, pg. 7.) As argued above, this allegation supports DULBERG's argument that MAST did not conduct the proper discovery, as evidenced by the incorrect policy limit. Had MAST not breached the standard of care and had he conducted discovery, DULBERG would have had the correct policy amount for Gagnon, and would have the insurance policy for the McGuires in order to make an informed decision as to settlement.

Should Read:

29. Last Defendants raise the issue of proximate cause as to MAST's improper determination of Gagnon's insurance coverage limit being \$300,000.00 and not \$100,000.00. (See Motion to Dismiss attached as Exhibit A, pg. 7.) As argued above, this allegation supports DULBERG's argument that MAST did not conduct the proper discovery, as evidenced by the incorrect policy limit. Had MAST not breached the standard of care and had he conducted proper discovery, DULBERG would have had the correct policy amount for Gagnon, and would have the insurance policy for the McGuires in order to make an informed decision as to settlement.

Original:

32. DULBERG has proved that the actions and inactions of the Defendants have caused DULBERG damages. (See First Amended Complaint, Exhibit B, ¶31, 32.) Any dispute as to the proximate cause and damages must be left to the jury as it is a factual question. The issues of proximate cause and damages must be determined by a jury or trier of fact after all proper evidence and testimony is presented at trial. Proximate cause is a question of fact to be decided by a jury. (internal citation omitted) (Emphasis added) Hooper v. County of Cook, 366 Ill.App.3d 1, 7 (1st Dist., 2006). "The determination of damages is a question of fact that is within the discretion of the jury and is entitled to substantial deference." (Emphasis added.) Linhart v. Bridgeview Creek Development, Inc., 391 Ill.App.3d 630, 636 (1st Dist., 2009).

Should Read:

32. DULBERG has proven that the actions and inactions of the Defendants had caused DULBERG damages. (See First Amended Complaint, Exhibit B, ¶31, 32.) Any dispute as to the proximate cause and damages must be left to the jury as it is a factual question. The issues of proximate cause and damages must be determined by a jury or trier of fact after all proper evidence and testimony is presented at trial. Proximate cause is a question of fact to be decided by a jury. (internal citation omitted) (Emphasis added) Hooper v. County of Cook, 366 Ill.App.3d 1, 7 (1st Dist., 2006). "The determination of damages is a question of fact that is within the discretion of the jury and is entitled to substantial deference." (Emphasis added.) Linhart v. Bridgeview Creek Development, Inc., 391 Ill.App.3d 630, 636 (1st Dist., 2009).

Attorneys at Law

George K. Flynn
Direct Line: (312) 606-7726
E-Mail: gflynn@clausen.com

10 South LaSalle Street • Chicago, IL 60603 • www.clausen.com
Tel: 312.855.1010 • Fax: 312.606.7777

August 30, 2018

Honorable Thomas A. Meyer
Judge of the Circuit Court of McHenry County
McHenry County Government Center
2200 N. Seminary Avenue, Room 201
Woodstock, IL 60098

Re: *Paul Dulberg v. Law Offices of Thomas J. Popovich, P.C., et al.*
Case No: 17LA000377
Our File No.: 27 9517 00 7

Dear Judge Meyer:

The above matter is set before you on September 12, 2018 at 10:00 a.m. Enclosed are courtesy copies of the following:

1. Defendants' Motion to Dismiss;
2. Memorandum in Support of Defendants' Motion to Dismiss First Amended Complaint at Law;
3. Plaintiff's Response to Defendants' Motion to Dismiss First Amended Complaint at Law; and
4. Reply in Support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint at Law.

Very truly yours,

CLAUSEN MILLER P.C.

By: *George K. Flynn*

George K. Flynn

GKF:pw
Enclosures
cc: Mr. Thomas W. Gooch, III (by email w/1 enc.)

Kathleen Wilson

From: no-reply@tylerhost.net
Sent: Thursday, August 30, 2018 4:15 PM
To: Kathleen Wilson
Subject: Filing Submitted for Case: 17LA000377; DULBERG, PAUL VS MAST, HANS, ET AL;
Envelope Number: 2042006



ODYSSEY
eFileILTM

Filing Submitted

Envelope Number: 2042006

Case Number: 17LA000377

Case Style: DULBERG, PAUL VS MAST, HANS,
ET AL

The filing below has been submitted to the clerk's office for review. Please allow 24 - 48 hours for clerk office processing.

Filing Details	
Court	File & Serve
Date/Time Submitted	8/30/2018 4:14 PM CST
Filing Type	EFileAndServe
Filing Description	Reply in Support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint at Law
Type of Filing	EFileAndServe
Filed By	Kathleen Wilson
Filing Attorney	George Flynn

Fee Details	
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If the filing is canceled or rejected these funds will be released and will return to your account according to your financial institution's policies (typically 3-10 business days).	
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Please do not reply to this email. It was automatically generated.

**IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS**

PAUL DULBERG,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 17LA000377
	)	
THE LAW OFFICES OF THOMAS J.	)	
POPOVICH, P.C., and HANS MAST,	)	
	)	
Defendants.	)	

**REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT AT LAW**

Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, by and through their attorneys, GEORGE K. FLYNN, and CLAUSEN MILLER P.C., pursuant to 735 ILCS 5/2-615, submit this Reply in Support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint at Law with prejudice, and state as follows:

I. INTRODUCTION

Dulberg's Response misses the point, and adds facts and theories that are not contained in his pleading. He now asserts that Mast failed to become familiar with the law of "chainsaw ownership liability" (Res. p. 4, ¶10), and that Mast "could have considered" the law as to ultrahazardous circumstances and the strict liability of the homeowners. But these facts and theories are not plead, and cannot be inferred from his First Amended Complaint. Moreover, what potential theories of recovery "could have been considered" [by a lawyer being sued for malpractice] is not the standard. Dulberg must ultimately demonstrate that he would have prevailed against the landowners in the case within the case. Instead, Dulberg fails to plead, or

now argue, facts and law that would have imposed liability upon a homeowner for an accident which occurred when their adult son and his buddy were trimming a tree in the backyard. There is no allegation that the McGuire's were supervising the work, or that they owed some duty to supervise. Dulberg does not allege what they did wrong, only that they were liable.

II. DULBERG FAILS TO ADDRESS PROXIMATE CAUSE-THAT HE WOULD HAVE PREVAILED BUT FOR MALPRACTICE

A fundamental omission from Dulberg's pleading and his argument, is that he has not plead (and will be unable to establish), that he would have prevailed in the underlying case against the landowners. The cases upon which he relies do not support his contentions.

A. Negligence

Dulberg's pleading still relies only on conclusions about the potential liability of the landowners, and not facts or law. The case upon which he relies for the proposition that the landowners would have been liable to him (had he not settled with them) is unavailing, and simply sets out elements of premises liability law in Illinois. Dulberg cites *Rhodes v. Illinois Cent. Gulf R.R.* 172 Ill. 2d, 213, 228 (1996) to inform the court that the "duty owed by a premises owner or occupier to an invitee or a licensee is that of "reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them." But he fails to plead facts here about how the McGuire's breached any duty to him, or how they did not use reasonable care under the circumstances when Dulberg volunteered to assist their adult son in trimming a tree. What did they do wrong?

Notably, *Rhodes* involved an alleged wrongful death of an intoxicated trespasser on the property of the defendant railroad. A Chicago police officer found the deceased laying on a bench on the defendant's property. The police took him to the hospital where he eventually died. The plaintiff's estate was awarded a significant verdict at trial by the jury. The Illinois Supreme

Court reversed and remanded, ordering a new trial with instructions consistent with its holdings (and instructing the jury to determine whether the decedent was a trespasser or invitee). The case is simply not on point.

B. Strict Liability

For the first time, Dulberg raises in his Response (p. 4, ¶11) an allegation that “had MAST reviewed the law on premises liability, he could have considered the law as to ultrahazardous circumstances and the strict liability of the homeowners.” He then cites to a case, apparently to reference one element of strict liability analysis (vis a vis landowners). But *Miller v. Civil Constructors, Inc.* 272 Ill. App. 3d 263, 266 (2nd Dist. 1995) is not helpful to him. In *Miller*, the plaintiff appealed the dismissal of his strict liability claim against a construction company and a city, after he was hit by a stray bullet which ricocheted during the course of firearm target practice at a nearby gravel pit. The appellate court affirmed the dismissal. “Under the circumstances presented, we hold as a matter of law that the discharge of firearms is not an ultrahazardous activity which would support plaintiff’s strict liability claims.” (*Miller* at *265). Dulberg fails to analyze *Miller* and explain how it is applicable here, which it is not.

One attorney may handle a case differently from another attorney, but these differences do not amount to a breach of the standard of care. In a legal malpractice case in Illinois, more is needed than a suggestion that an attorney “could have considered” a particular theory, and did not. A legal malpractice plaintiff must plead and prove that he would have been successful in the undertaking. Here, Dulberg must plead that he would have been successful in prosecuting a strict liability case. The fact is, he cannot support the factual or legal assertion that backyard chainsaw tree-trimming is a strict liability proposition. Moreover, his bare allegations that a liability expert should have been retained, as a red herring. There is no factual allegation as to why such an expert mattered.

III. DULBERG FALLS SHORT IN ALLEGING THAT HE WAS MISLED

Dulberg fails to specify how he was misled. Even if Mast made a mistake about the McGuire's insurance coverage, it made no difference, and there is no damage. Dulberg cannot explain why \$300,000 versus \$100,000 in coverage made any difference, when he settled for \$5000. Had he settled for \$99,999.99, his argument for damages may be colorable. In any event, he alleges no facts in support of the allegation that facts were "concealed." His other allegations that Mast concealed facts, include a quantum leap, now arguing in the Response at p. 5, ¶15, that Mast concealed facts relating to the explanation of liability law and what type of duty the McGuire's owed. This is absurd, given that Dulberg still has not alleged what the duty was, how it was breached, or in laymen's terms—what the McGuire's did wrong.

IV. CONCLUSION

WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 respectfully request this Honorable Court dismiss Plaintiff's Complaint First Amended Complaint at Law with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

GEORGE K. FLYNN
CLAUSEN MILLER P.C.

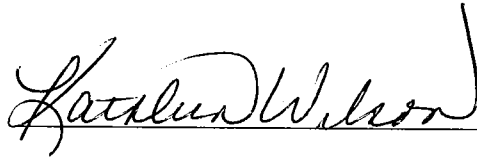
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was caused to be served through the McHenry County I2File Efile System and by email on the 31st day of August, 2018, addressed to counsel of record as follows:

Mr. Thomas W. Gooch, III
The Gooch Firm
209 S. Main Street
Wauconda, IL 60084
gooch@goochfirm.com

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.



Comments on "Letter to Judge Meyer" by MAST defendants....

Defendants wrote: "What did they (the McGuires) do wrong?"

a) MCGUIRES purchased and provided GAGNON a chainsaw without following the directions and heeding the warnings clearly printed in the operator's manual's that accompanied the chainsaw. Chainsaw was purchased on 5-22-2011 and was first used on 6-28-2011, the day DULBERG was injured.

b) The operator's manual clearly states in large, bold font: "WARNING - To ensure safe and correct operation of the chainsaw, the operator's manual should always be kept with or near the machine. Do not lend or rent your chainsaw without the operator's instruction manual."

c) Just under this warning on the same page the operator's manual clearly states in large, bold font: "WARNING - Allow only persons who understand this manual to operate your chainsaw."

d) The manual has a list clearly labeled as "SAFETY RULES". The first listed rule is: "Read this manual carefully until you completely understand and can follow all safety rules, precautions, and operating instructions before attempting to use the unit."

e) The second listed safety rule is: "Restrict the use of your saw to adult users who understand and can follow safety rules, precautions, and operating instructions found in this manual."

f) The fourth listed safety rule is: "Keep children, bystanders, and animals a minimum of 35 feet (10 meters) away from the work area. Do not allow other people or animals to be near the chainsaw when starting or operating the chainsaw (Fig.2)." There is a large picture next to this rule of people standing at least 35 feet away from a person operating a chainsaw.

g) The MCGUIRES asked DULBERG to help GAGNON. DULBERG did not go to the MCGUIRES property to help cut down a tree. He went to see if he wanted the wood. Only after he was on the property for more than two hours was he asked by the MCGUIRES if he could help GAGNON.

i) Had the MCGUIRES read and followed the warnings and safety rules in the operators manual, the injury to DULBERG could not have occurred.

j) The MCGUIRES were in possession of the owners manual and looked at it while DULBERG was present, however they asked DULBERG to help GAGNON anyway. They had the manual and DULBERG did not. They had access to knowledge about the warnings clearly stated in the manual that DULBERG did not have. "A duty to warn exists where there is unequal knowledge, actual or constructive, and the defendant, possessed of such knowledge, knows or should know that harm might or could occur if no warning is given." (many citations available)

Defendants wrote: "There is no factual allegation as to why such an expert mattered."

The expert on chainsaw use later retained by DULBERG stated that the owners of the chainsaw are liable for not heeding the clear warnings written in bold font on the operator's manual.

Defendants wrote: "DULBERG fails to specify how he was misled. Even if MAST made a mistake about the MCGUIRES' insurance coverage, it made no difference, and there was no damage. DULBERG cannot explain why \$300,000 versus \$100,000 in coverage made any difference, when he settled for \$5,000. Had he settled for \$99,999.99, his argument for damages may be colorable. In any event, he alleges no facts in support of the allegation that facts were "concealed.""

MAST never claimed the McGuire's insurance policy limit was \$100,000. He claimed the GAGNON insurance policy limit was \$100,000 when it was actually \$300,000. DULBERG never knew what GAGNON's actual coverage was until he retained new counsel.

DULBERG still does not know what the MCGUIRES' policy limit was because MAST never informed him despite repeated requests to MAST by DULBERG for that information. In fact, there is no evidence at all within the case documents later given by MAST to DULBERG that MAST was ever in possession of the MCGUIRES' policy terms or limits.

DULBERG explicitly asked for documents related to the MCGUIRES' insurance policy and was refused by MAST.

Hello Tom and Sabina,

I didn't understand the last email I received so I need some clarification. I was never rude or not courteous to your staff and your staff was always courteous to me. Yesterday I talked with Nikki briefly just to confirm that the office received the email and find out when I should expect to receive the second amended brief for review. She was friendly and courteous. I said nothing rude or offensive.

I never ordered you or anyone to call me yesterday. I honestly don't know why you believe I did. I was not aware there was anything offensive in the attachment I sent. As I read it again I still can't see anything offensive in it.

As you know I have a permanent disability. You may not know I am on medication to control pain and spasms and this medication does not allow me to focus on complex subjects for a prolonged time. Since I do not understand your last email and I don't have much time before appearing in court I need to know where I stand.

Are you thinking of not continuing to represent me in this case?

Are you going to submit a second amended complaint on October 10 and appear in court?

Will I be given enough time to review the complaint before it is submitted?

May I comment on it or request changes to it or ask questions about it?

I do not want to offend anyone, so I need to know what I can comment on or ask questions about.

I have no memory of any inappropriate behavior when talking to Nikki yesterday. Please let me know how I can communicate with your staff or what I can include in an email in the future so you are not offended again.

Sorry if I did anything wrong.

Sincerely,

Paul Dulberg

Paul notes

1) From "premises liability update", file E-JTB.pdf

[illegible]

a) A premises-liability action is a negligence claim. See, *Salazar v. Crown Enterprises, Inc.*, 328 Ill. App. 3d 735, 740, 767 N.E.2d 366, 262 Ill. Dec. 906 (1st Dist. 2002).

The essential elements of a cause of action based on common-law negligence are the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. *Ward v. Kmart Corp.*, 136 Ill. 2d 132, 140, 554 N.E.2d 223, 143 Ill. Dec. 288 (1990).

b) Restatement (Second) of Torts § 314A, at 118 (1965). states that "[t]he duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct, or the condition of his land or chattels. It extends also to risks arising from * * * the acts of third persons, whether they be innocent, negligent, intentional, or even criminal." Restatement (Second) of Torts § 314A, Comment d, at 119 (1965).

reasonably foreseeable

c) Under the Premises Liability Act, 'the owner or lessee of premises owes a duty of reasonable care under the circumstances' to those lawfully on the premises. *Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38, 43, 768 N.E.2d 46, 51, 263 Ill. Dec. 286 (1st Dist. 2002), quoting 740 ILCS 130/2 (West 2000). In a situation where a plaintiff alleges that an injury was caused by a condition on the defendant's property,

and the plaintiff was an invitee on the property, whether the injury is reasonably foreseeable is determined pursuant to section 343A of the Restatement (Second) of Torts. Section 343 of the Restatement provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965).

An exception to this general rule, known as the open and obvious danger rule,¹ is set forth in section 343A of the Restatement. It provides:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts § 343A(1).

2 exceptions to the open and obvious danger rule: distraction exception and the deliberate encounter exception.

[illegible]

2)

Under the Premises Liability Act, the duty owed by owners or occupiers of land to invitees or licensees is one of unreasonable care under the circumstances regarding the state of the premises or acts done or omitted on them. 740 ILCS 130/2. Although an owner or occupier of land does not insure the safety of such a person, he or she may become liable to invitees and licensees because of a condition on his or her land if he or she:

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees;
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and
- (c) fails to exercise reasonable care to protect them against the danger.

.....
.....

3) from file C-HER

a) It is well settled that a possessor of land can be liable to an invitee under certain circumstances. The Restatement (Second) of Torts provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against danger.

Restatement (Second) of Torts § 343 (1965)

The Exception ñ Open and Obvious Doctrine

The Exceptions to the Exception ñ Distraction Doctrine and Deliberate Encounter Doctrine

b) To state a cause of action for negligence, a plaintiff must plead: 1) the existence of a duty owed to the plaintiff by the defendant; 2) a breach of that duty; 3) an injury proximately caused by the breach; and 4) damages.

c) Section 318 of the Restatement provides that if the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor

(a) knows or has reason to know that he has the ability to control the third person, and,

(b) knows or should know of the necessity and opportunity for exercising such control."

Restatement (Second) of Torts § 318 (1965).

d) Possibility to Impose Liability on a Possessor of Land by Negligence Claim Rather Than Through Premises Liability

Plaintiff asserted that the hospital was liable under a general negligence theory for placing a mat down that was prone to buckling on the floor in front of the elevators rather than under a premises liability theory. Under the general negligence theory, all plaintiff would need to prove is that defendant negligently created the dangerous condition on its premises. Therefore, plaintiff would be able to avoid the notice requirement. (No one disputed the hospital did not have actual or constructive notice of the fold in the mat.) Plaintiff would only need to prove the existence of a duty on the hospital's part, breach of the duty, and that the breach proximately caused the injuries.

e) III. CONCLUSION

The cases decided in 2011 and 2012 continue to apply the rules previously established by the Restatement (Second) of Torts which have been adopted by the courts. The cases continue to be fact specific and the application of the exceptions turn on the testimony and evidence presented by the parties and their experts.

[illegible]

4)

Duty to warn

According to the Illinois Code of Civil Procedure, § 735, "fault" refers to:

Whether a duty exists is a question of law. Id. at 85. The factors that must be considered in determining whether a duty exists are:

- (1) the foreseeability that defendant's conduct will result in injury to another;
- (2) the likelihood of injury;
- (3) the magnitude of guarding against it; and
- (4) the consequences of placing that burden upon defendant.

Sandoval v. City of Chicago, 830 N.E.2d 722, 726 (Ill. App. Ct. 1st Dist. 2005). of Torts (1965).

c) Illinois law holds that persons or entities that own or control land are not required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious. Sandoval, 830 N.E.2d at 726.

However, there are two exceptions to the open and obvious rule: the distraction exception and the deliberate encounter exception. Prostran, 811 N.E.2d at 370.

Regarding the distraction exception to the open and obvious rule, a property owner will be found to owe a duty of care if it is reasonably foreseeable that the plaintiff's attention might be distracted so that she would not discover the obvious condition. Id.

Primarily, in those instances where courts have applied the distraction exception to impose a duty upon a landowner, it is clear that the landowner created, contributed to, or was responsible in some way for the distraction which diverted the plaintiff's attention from the open and obvious condition and, thus, was charged with reasonable foreseeability that an injury might occur. Sandoval, 830 N.E.2d at 730. The defendant is not required to anticipate the specific plaintiff's own negligence or make his premises injury-proof. Id. at 728.

Under the deliberate encounter exception to the open and obvious rule, a duty is imposed when a possessor of land has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. Prostran, 811 N.E.2d at 370.

The exception has most often been applied in cases involving some economic compulsion, as where workers are compelled to encounter dangerous conditions as part of their employment obligation. *Id.* at 89.

d) Assault

Ordinarily, a party owes no duty of care to protect another from the harmful or criminal acts of third persons.
Aidroos v. Vance Uniformed Prot. Servs., 897 N.E.2d 402, 407 (Ill. App. Ct. 1st Dist. 2008).

There are, however, four exceptions to this rule: (1) when the parties are in a special relationship – i.e., common carrier/passenger, innkeeper/guest, business invitor/invitee, or voluntarily custodian/protectee – and the harm is foreseeable; (2) when an employee is in imminent danger and this is known to the employer; (3) when a principal fails to warn his agent of an unreasonable risk of harm involved in the agency; and (4) when any party voluntarily or contractually assumes a duty to protect another from the harmful acts of a third party. *Id.*

[illegible]

6) from file: "legal issues and prperty owners liability"

The Question of Liability

The core issue at hand is the question of liability. There may be no denying you are injured, but is someone liable for your injury? Many people assume if they get hurt while on another person's property due to no fault of their own, then that someone is liable. However, this is not often the case. In fact, only 1 out of 10 cases have good liability.

7) from file: "premises liability and the open-and-obvious..."

The court began its analysis (as it always does) by noting that whether a duty exists depends upon "whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff," an analysis that is based on four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury and (4) the consequences of placing that burden on the defendant. *Simpkins v. CSX Transportation Inc.*, 2012 IL 110662, ¶ 18; *LaFever v. Kemlite Co.*, 185 Ill.2d 380, 389 (1998).

Application of the open-and-obvious rule affects the first two factors of the duty analysis: the foreseeability of injury and the likelihood of injury. Where the condition is open and obvious, the foreseeability of harm and the likelihood of injury will be slight, thus weighing against the imposition of a duty. But where an exception to the open-and-obvious rule applies, the outcome of the duty analysis with respect the first two factors is "reversed."

According to the court, "[t]o the extent that looking elsewhere could, itself, be deemed a distraction, then it is, at most, a self-made

or activities on the premises.â Blackâs Law Dictionary (9th ed. 2009).

b) The specific legal standards for premises liability vary widely from state to state, but in general, most states have adopted some form of the Restatement Second of Torts in terms of laying out the overall structure for a premises liability claim, even in asbestos litigation. Id.; Kristin Donnelly-Miller and Ryan Johanningsmeier ,

c) Premises Liability Case Law Review: Relevant Restatement Sections, 18-22 Mealeyâs Litig. Rep. Asb. 24 (2003). The Restatement defines an invitee as:

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. Restatement (Second) of Torts â332 (1965). In terms of his or her own actions and behavior, a premises owner is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.â Restatement (Second) of Torts â341A (1965).

Furthermore, when it comes to dangers that may be hidden or are intrinsic to the premises itself: A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

You knew about the defect before you were injured
The defect was open and obvious and you should have noticed it and taken care to avoid it
The owner or occupier didn't know about the defect and couldn't have been expected to know
You caused the defect through your misuse of the premises

11) from file: "what is premises liability in illinois"

To successfully pursue a legal claim against a property owner for a personal injury, you must be able to prove that the property owner was negligent. As we have discussed in a previous post, but the fact remains that, to effectively establish a premises liability claim, you must be able to prove the following:

That the property owner owed you a legal duty.
That the property owner breached that duty.
That the property owner's breach of that duty led to or contributed to
the injuries you suffered on the property in question.
That you suffered damages due to the property owner's breach of their
legal duty to you, a visitor on their property.

The legal duty in this case arises out of the property owner's possession of and control over the property. To prove that the property owner was liable for an injury you suffered, you would have to prove that the property owner did not exercise reasonable care in keeping visitors safe.

12) from Ignarski v norbut

a) The instant legal malpractice action was filed on December 7, 1989. On March 13, 1990, defendants filed a motion to dismiss pursuant

to Section 2-615 (Ill.Rev.Stat.1989, ch. 110, par. 2-615 (now 735 ILCS 5/2-615 (West 1992)) which stated the complaint did not state a cause of action for legal malpractice because it did not properly allege that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action. According to defendants, the complaint did not state ultimate facts as to why KFC owed plaintiff a duty to protect him from the criminal acts of third parties. The trial court granted the motion, but allowed plaintiff leave to file a first amended complaint. This complaint was likewise stricken and again the trial court allowed plaintiff leave to amend.

Plaintiff filed a second amended complaint on April 29, 1991. On November 18, 1992, defendants moved for summary judgment (Ill.Rev.Stat.1991, ch. 110, par. 2-1005 (now 735 ILCS 5/2-1005 (West 1992)) based on plaintiff's inability to plead ultimate facts establishing why KFC had a duty to protect the plaintiff from criminal acts of third parties. The parties briefed the issue and after oral argument the court granted defendants' motion and denied plaintiff's oral motion to file a third amended complaint.

b) Summary judgment should be granted if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (Carruthers v. Christopher & Co. (1974), 57 Ill. 2d 376, 380, 313 N.E.2d 457.) It should never be granted unless the right of the movant is free from doubt. (Murphy v. Urso (1981), 88 Ill. 2d 444, 464, 58 Ill. Dec. 828, 430 N.E.2d 1079.) If the affidavits and other materials disclose a dispute as to any material issue of fact, summary judgment must be denied even if the court believes the movant will or should prevail at trial. Summary judgment procedure is not designed to try an issue of fact, but rather to determine if one exists. (Ray v. Chicago (1960), 19 Ill. 2d 593, 599, 169 N.E.2d 73.) In considering a motion for summary judgment, the court must strictly construe all things filed in support of the motion while liberally construing all things filed in opposition thereto. (Kolakowski v. Voris (1980), 83 Ill. 2d 388, 398, 47 Ill. Dec. 392, 415 N.E.2d 397.) If fair minded persons could draw different inferences from the evidence, the issues should be submitted to a jury to determine what conclusion seems most reasonable. (Silberstein v. Peoria Town and Country Bowl, Inc. (1970), 120 Ill.App.2d 290, 293-94, 257 N.E.2d 12.) Finally, although the plaintiff need not prove his case at the summary judgment stage, he may be required to present some evidence which demonstrates the existence of a triable and genuine issue of fact. Ralston v. Casanova (1984), 129 Ill.App.3d 1050, 1058, 85 Ill. Dec. 76, 473 N.E.2d 444

c) The elements of a legal malpractice claim are: (1) the existence of an attorney client relationship which establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorneys negligence, the plaintiff would have prevailed in the underlying action; and (4) damages. (Pelham v. Griesheimer (1982), 92 Ill. 2d 13, 64 Ill. Dec. 544, 440 N.E.2d 96; Sheppard v. Krol (1991), 218 Ill.App.3d 254, 161 Ill. Dec. 85, 578 N.E.2d 212; Claire Associates v. Pontikes (1986), 151 Ill.App.3d 116, 104 Ill. Dec. 526, 502 N.E.2d 1186.) Because legal malpractice claims must be predicated upon an unfavorable result in the underlying suit, no malpractice exists unless counsel's negligence has resulted in the loss of the underlying action. (Claire Associates, 151 Ill.App.3d at 122, 104 Ill. Dec. 526, 502 N.E.2d 1186.) Plaintiff is required to establish that but for the negligence of counsel, he would have successfully prosecuted or defended against the claim in the underlying suit. (Sheppard, 218 Ill.App.3d at 257, 161 Ill. Dec. 85, 578 N.E.2d 212; Claire Associates, 151 Ill.App.3d at 122, 104 Ill. Dec. 526, 502 N.E.2d 1186.) Damages will not be presumed, and the client bears the burden of proving he suffered a loss as a result of the attorney's alleged negligence. Sheppard 218 Ill.App.3d at 257, 161 Ill. Dec. 85, 578 N.E.2d 212; Claire Associates, 151 Ill.App.3d at 122, 104 Ill. Dec. 526, 502 N.E.2d 1186.

As a result of the foregoing, the plaintiff at bar was required to plead a case within a case. In particular, he was required to plead ultimate facts establishing why KFC had a duty to protect him from the criminal acts of third parties. The sole allegation in the second amended complaint concerning this duty reads as follows:

"5. That on the day of the occurrence and for a long time prior thereto, National knew by reason of prior incidents occurring on said premises that its business invitees were subject to attacks by third persons frequenting the said premises."

d) As previously stated, the plaintiff failed to plead a case within a case. In particular, because the second amended complaint did not contain ultimate facts as to why KFC owed plaintiff a duty of

protection, it did not satisfy the proximate cause requirement (i.e., but for the attorney's negligence, plaintiff would have prevailed in the underlying action). Plaintiff, however, essentially seeks to dispose of the proximate cause requirement. In attempting to do so, plaintiff ignores Illinois case law which has repeatedly rejected this position. In Sheppard 218 Ill.App.3d 254, 161 Ill. Dec. 85, 578 N.E.2d 212, the defendant was injured at work by an unidentified and allegedly defective forklift. The *291 defendant attorney was retained to investigate and file a product liability action against the manufacturer of the forklift. The complaint alleged that the attorney never investigated the facts, never identified the manufacturer, and failed to institute legal proceedings. Subsequently, plaintiff's employer disposed of the forklift making it impossible to prosecute the claim. The trial court dismissed plaintiff's complaint because it did not plead, and plaintiff could not prove, that he would have prevailed in the product liability suit "but for the defendant's negligence." In affirming the trial court's dismissal, this court rejected the plaintiff's argument that defendant's negligence should absolve the plaintiff of his responsibility to identify the forklift manufacturer. Sheppard, 218 Ill.App.3d at 258; 161 Ill. Dec. 85, 578 N.E.2d 212; see also Beastall v. Madson (1992), 235 Ill.App.3d 95, 175 Ill. Dec. 865, 600 N.E.2d 1323; Coofc v. Gould (1982), 109 Ill.App.3d 311, 64 Ill. Dec. 896. 440 N.E.2d 448.

e) Estoppel is defined as a bar or impediment raised by law precluding a party from alleging or denying a state of facts as a consequence of his previous allegations or conduct. (Black's Law Dictionary.)

f) The case law says that amendments should be allowed if there's a possibility that the amendment will cure the defects.

"Regardless of whether we treat plaintiff's attempt to amend as brought pursuant to section 2-616(a) of the Code of Civil Procedure, which permits amendments '[a]t any time before final judgment * * * on just and reasonable terms' (Ill.Rev.Stat. 1989, ch. 110, par. 2-616(a)), or under section 2-1005(g), which permits amendments '[b]efore or after the entry of a summary judgment * * * upon just and reasonable terms' (Ill.Rev.Stat.1989, ch. 110, par. 2-1005(g)), *293 our inquiry is the same: whether the circuit court abused its discretion in denying leave to amend. (Loyola Academy v. S & S Roof Maintenance, Inc. (1992), 146 Ill. 2d 263 [166 Ill. Dec. 882], 586

fallen. She testified that plaintiff did not tell her how or why she fell, but rather that she "just fell." The restaurant training manual provided that the senior manager must walk through the restaurant to make sure everything is up to par every 15 minutes. If a customer notifies an employee that anything has been spilled, it is to be cleaned up immediately. If the employee notices any food or debris on the floor, it is to be picked up immediately. Defendant filed a Motion for Summary Judgment arguing that it did not owe a duty to the plaintiff to warn or make the area safe because it did not have actual or constructive knowledge of any substance on the floor and further argued that plaintiff had the burden to show that the greasy substance on the floor caused her to fall. Plaintiff attached an affidavit to her Response which provided she sat there eating for 20 minutes facing the trash can and that during those 20 minutes, she did not observe any employee do a walk through or a customer spill anything.

Holding:

A defendant owes a business invitee on his premises a duty to exercise ordinary care in maintaining the premises in a reasonably safe condition. When a business invitee is injured by slipping and falling on the premises and there is no way to show how the substance became located on the floor, liability may be imposed if the defendant or its employees had constructive notice of its presence. Constructive notice exists if the substance was there long enough that through the exercise of ordinary care, it should have been discovered. Although there were no witnesses in this case who observed the grease on the floor, plaintiff's testimony given in her discovery deposition was sufficient to create a triable issue of fact as to the cause of the fall. Defendant's manual was sufficient to create a duty to inspect the store every 15 minutes and, based on plaintiff's claims, no one inspected the property for at least 20 minutes. Therefore, the testimony was sufficient to create a triable issue of fact as to constructive notice.

M.R. 3140

IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS

Order entered July 1, 2009.

Effective January 1, 2010, the provisions of the Illinois Rules of Professional Conduct will be repealed and replaced by the following Illinois Rules of Professional Conduct of 2010.

ARTICLE VIII. ILLINOIS RULES OF PROFESSIONAL CONDUCT
OF 2010

Preamble: a Lawyer's Responsibilities

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

[6A] It is also the responsibility of those licensed as officers of the court to use their training, experience, and skills to provide services in the public interest for which compensation may not be available. It is the responsibility of those who manage law firms to create an environment that is hospitable to the rendering of a reasonable amount of uncompensated service by lawyers practicing in that firm. Service in the public interest may take many forms. These include but are not limited to pro bono representation of persons unable to pay for legal services and assistance in the organized bar's efforts at law reform. An individual lawyer's efforts in these areas is evidence of the lawyer's good character and fitness to practice

law, and the efforts of the bar as a whole are essential to the bar's maintenance of professionalism. To help monitor and quantify the extent of these activities, and to encourage an increase in the delivery of legal services to persons of limited means, Illinois Supreme Court Rule 756(f) requires disclosure with each lawyer's annual registration with the Illinois Attorney Registration and Disciplinary Commission of the approximate amount of his or her pro bono legal service and the approximate amount of qualified monetary contributions. See also Committee Comment (June 14, 2006) to Illinois Supreme Court Rule 756(f).

[6B] The absence from the Illinois Rules of a counterpart to ABA Model Rule 6.1 regarding pro bono and public service should not be interpreted as limiting the responsibility of lawyers to render uncompensated service in the public interest. Rather, the rationale is that this responsibility is not appropriate for disciplinary rules because it is not possible to articulate an appropriate disciplinary standard regarding pro bono and public service.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude

toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they

define a lawyer's professional role. Many of the Comments use the term "should." Comments and the Preamble and Scope do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules

presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation and are instructive and not directive. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.0: TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

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

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) *Substantial* when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) *Tribunal* denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. 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.

(n) *Writing* or *written* denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail electronic communications. A *signed* writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

Confirmed in Writing

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

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of

any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms *ifraud* or *ifraudulent* refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain

informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. Rule 1.5(e) requires that a person's consent be confirmed in writing. For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See Rules 1.5(c), 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed

that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.

An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining Or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2(e) and Comment [15], 1.4, 1.5(e), 1.6, and 5.5(a). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[6 8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND 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 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.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

(1) discuss the legal consequences of any proposed course of conduct with a client,

(2) and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and

(3) counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.

(e) After accepting employment on behalf of a client, a lawyer shall not thereafter delegate to another lawyer not in the lawyer's firm the responsibility for performing or completing that employment,

without the client's informed consent.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6, and Supreme Court Rules 13(c)

(6) and 137(e).

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] Paragraph (d)(3) was adopted to address the dilemma facing a lawyer in Illinois after the passage of the Illinois Compassionate Use of Medical Cannabis Pilot Program Act effective January 1, 2014. The Act expressly permits the cultivation, distribution, and use of marijuana for medical purposes under the conditions stated in the Act. Conduct permitted by the Act may be prohibited by the federal Controlled Substances Act, 21 U.S.C. §§801-904 and other law. The conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by Illinois law. In providing such advice and assistance, a lawyer shall also advise the client about related federal law and policy. Paragraph (d)(3) is not restricted in its application to the marijuana law conflict. A lawyer should be especially careful about counseling or assisting a client in other contexts in conduct that may violate or conflict with federal, state, or local law.

[110] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1. In such situations, the lawyer should also consider whether disclosure of information relating to the representation is appropriate. See Rule 1.6(b).

[121] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[132] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[143] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

[154] The prohibition stated in paragraph (e) has existed in Illinois ethics rules and in the prior Code since 1980. It is intended to curtail abuses that occasionally occur when a lawyer attempts to transfer complete or substantial responsibility for a matter to an unaffiliated lawyer without the client's awareness or consent. The Rule is designed to clarify the lawyer's obligation to complete the employment contemplated unless the client gives informed consent to substitution by an unaffiliated lawyer. The Rule is not intended to prohibit lawyers from hiring lawyers outside of their firm to perform certain services on the client's or the law firm's behalf. Nor is it intended to prevent lawyers from engaging lawyers outside of their firm to stand in for discrete events in situations such as personal emergencies, illness or schedule conflicts.

Adopted July 1, 2009, effective January 1, 2010; amended June 14, 2013, eff. July 1, 2013; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer

and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. See Illinois Supreme Court Rule 776, Appointment of Receiver in Certain Cases.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.4: COMMUNICATION

(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 reasonably 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.

(b) A lawyer shall explain a matter to the extent reasonably

necessary to permit the client to make informed decisions regarding the representation.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible,

that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might

withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(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, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee 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. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
- (2) a contingent fee for representing a defendant in a criminal case.

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

- (1) the division is in proportion to the services performed by each lawyer, or if the primary service performed by one lawyer is the referral of the client to another lawyer and each lawyer assumes joint financial responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Comments [3B] through [3D]

to Rule 1.15 and Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8 (i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of postjudgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, or referral of a matter where appropriate, and often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or, where the primary service performed by one lawyer is the referral of the client to another lawyer, if each lawyer assumes financial responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each

lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint financial responsibility for the representation entails financial responsibility for the representation as if the lawyers were associated in a general partnership. See *In re Storum*, 203 Ill. 2d 378 (2002). A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm, or payments made pursuant to a separation or retirement agreement.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by law or rule, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably

believes necessary:

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order; or.

(7) to detect and resolve conflicts of interest if the revealed information would not prejudice the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

Detection of Conflicts of Interest

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information

relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (c) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows from information relating to a representation that a client or other person has accidentally discharged toxic waste into a town's water must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[6A] Paragraph (b)(1) preserves the policy of the 1980 Illinois Code of Professional Responsibility and the 1990 Illinois Rules of Professional Conduct that permitted a lawyer to reveal the intention of a client to commit a crime. This general provision would permit

disclosure where the client's intended conduct is a crime, including a financial crime, and the situation is not covered by paragraph (c).

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Like paragraph (b)(1), paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, but the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a

charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Even limited information should be disclosed only to the extent reasonably necessary. Moreover, the disclosure of any information is prohibited if it would prejudice the client (e.g., disclosure would compromise the attorney-client privilege; the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary

duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[153] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[164] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[175] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(67). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules

1.2(d), 4.1(b), and 8.1. Rules 3.3 and 8.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Withdrawal

[157A] If the lawyer's services will be used by a client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). The lawyer may give notice of the fact of withdrawal regardless of whether the lawyer decides to disclose information relating to a client's representation as permitted by paragraph (b). The lawyer may also withdraw or disaffirm any opinion or other document that had been prepared for the client or others. Where the client is an organization, the lawyer must also consider the provisions of Rule 1.13.

Acting Competently to Preserve Confidentiality

[186] Paragraph (e) requires a lawyer must to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (e) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]–[4].

[197] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[2018] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Lawyers' Assistance and Court Intermediary Programs

[2119] Information about the fitness or conduct of a law student, lawyer or judge may be received by a lawyer while participating in an approved lawyers' assistance program. Protecting the confidentiality of such information encourages law students, lawyers and judges to seek assistance through such programs. Without such protection, law students, lawyers and judges may hesitate to seek assistance, to the detriment of clients and the public. Similarly, lawyers participating in an approved intermediary program established by a circuit court to resolve nondisciplinary issues among lawyers and judges may receive information about the fitness or conduct of a lawyer or judge. Paragraph (d) therefore provides that any information received by a lawyer participating in an approved lawyers' assistance program or an approved circuit court intermediary program will be protected as confidential client information for purposes of the Rules. See also Comment [5] to Rule 8.3.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15,

2015, eff. Jan. 1, 2016.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

Adopted July 1, 2009, effective January 1, 2010.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of

interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For a definition of "informed consent" see Rule 1.0(e).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and (4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where

necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend

or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a

lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a tribunal under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected

client in determining whether common representation is in the client's interests.

[20] Reserved.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from

representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege generally does not attach. Hence, it should generally be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater

responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

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

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

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

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

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the

repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(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.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses;

and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the

client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the lawyer inform the client in writing that the client may seek the advice of independent legal counsel and provide a reasonable opportunity for the client to do so. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the

transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent). The common law regarding business transactions between lawyer and client may impose additional requirements, such as encouraging the client to seek independent legal counsel, in lawyer liability and other nondisciplinary contexts.

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation

of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the

representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk

that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] 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. This paragraph 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 this paragraph 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 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.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and

confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except

in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on

the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is

privity to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privity to information about the clients actually served but not those of other clients.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent. With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11 and with former judges, arbitrators, mediators or other third-party neutrals is governed by Rule 1.12.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] through [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and

(c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer. Where a lawyer has joined a private firm after having been a judge or other adjudicative officer or law clerk to such person or an arbitrator, mediator or other third-party neutral, imputation is governed by Rule 1.12, not this Rule.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[9] Where the conditions of paragraph (e) are met, imputation is removed and consent is not required. Requirements for screening procedures are stated in Rule 1.0(k). This paragraph does not prohibit a lawyer from receiving a salary or partnership share established by independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified. Nonconsensual screening in such cases adequately balances the interests of the former client in protecting its confidential information, the interests of the current client in hiring the counsel of its choice (including a law firm that may have represented the client in similar matters for many years), and the interests of lawyers in career mobility, particularly when they are moving involuntarily.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEE

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent to the representation.

(b) When a lawyer is disqualified from representation under

paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

(1) is subject to Rules 1.7 and 1.9;

and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these

paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a matter may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently

representing that party.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed,

generally should be given as soon as practicable after the need for screening becomes apparent.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a crime, fraud or other violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a crime or fraud, and

(2) the lawyer reasonably believes that the crime or fraud is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged crime, fraud or other violation of law, or to

defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged crime, fraud or other violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Adopted July 1, 2009, effective January 1, 2010.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its

lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a crime, fraud or other violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the misconduct and its consequences, the responsibility in the organization and the apparent motivation of those involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b). Under Paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a crime or fraud, and then only to the minimum extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the crime or fraud, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(1), 1.6(b)(2) or 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required. Because the lawyer may reveal information relating to the representation outside the organization under paragraph (c) only in circumstances involving a crime or fraud, the lawyer may be required to act under paragraph (b) in situations that arise out of violations of law that do not constitute a crime or fraud even though disclosure outside the organization would not be permitted by paragraph (c).

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged crime, fraud or other violation of

law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal, and what the lawyer reasonably believes to be the basis for his or her discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer

for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations might have a corresponding right. Where permitted, such an action may be brought nominally by the corporation or unincorporated association, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-

lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist

in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer

should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent

or other representative available, except when that representative's actions or inaction threaten immediate and irreparable harm to the person. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.15: SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person. For the purposes of this Rule, a client trust account means an IOLTA account as defined in paragraph (i)(2) (j)(2), or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in paragraph (f). Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Other, tangible property shall be identified as such and appropriately safeguarded. Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

Maintenance of complete records of client trust accounts shall require that a lawyer:

(1) prepare and maintain receipt and disbursement journals for

all client trust accounts required by this Rule containing a record of deposits and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited, and the date, payee and purpose of each disbursement;

(2) prepare and maintain contemporaneous ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the date of each deposit, the names of all persons for whom the funds are or were held, the amount of such funds, the dates, descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed;

(3) maintain copies of all accountings to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them;

(4) maintain all client trust account checkbook registers, check stubs, bank statements, records of deposit, and checks or other records of debits;

(5) maintain copies of all retainer and compensation agreements with clients;

(6) maintain copies of all bills rendered to clients for legal fees and expenses;

(7) prepare and maintain reconciliation reports of all client trust accounts, on at least a quarterly basis, including reconciliations of ledger balances with client trust account balances;

(8) make appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

Records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced, and the records are readily accessible to the lawyer.

Each client trust account shall be maintained only in an eligible financial institution selected by the lawyer in the exercise of ordinary prudence.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit in a client trust account funds

received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the lawyer. An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term "advance payment retainer" to describe the retainer, and states the following:

(1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;

(2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer's general account;

(3) the manner in which the retainer will be applied for services rendered and expenses incurred;

(4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;

(5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer's reasons for that condition.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) All funds of clients or third persons held by a lawyer or law firm which are nominal in amount or are expected to be held for a short period of time, including advances for costs and expenses, and funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm, shall be deposited

in one or more IOLTA accounts, as defined in paragraph (i)(2) (j)(2). A lawyer or law firm shall deposit all funds of clients or third persons which are not nominal in amount or expected to be held for a short period of time into a separate interest- or dividend-bearing client trust account with the client designated as income beneficiary. Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Each IOLTA account shall comply with the following provisions:

(1) Each lawyer or law firm in receipt of nominal or short-term client funds shall establish one or more IOLTA accounts with an eligible financial institution authorized by federal or state law to do business in the state of Illinois and which offers IOLTA accounts within the requirements of this Rule as administered by the Lawyers Trust Fund of Illinois.

(2) Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility guidelines, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account.

(3) An IOLTA account that meets the highest comparable rate or dividend standard set forth in paragraph (f)(2) must use one of the identified account options as an IOLTA account, or pay the equivalent yield on an existing IOLTA account in lieu of using the highest-yield bank product:

(a) a checking account paying preferred interest rates, such as money market or indexed rates, or any other suitable interest-bearing deposit account offered by the eligible institution to its non-IOLTA customers.

(b) for accounts with balances of \$100,000 or more, a business checking account with automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government securities as defined in paragraph (h).

(c) for accounts with balances of \$100,000 or more, a money market fund with, or tied to, check-writing capacity, that must be solely invested in U.S. Government securities or securities fully collateralized by U.S. Government securities, and that has total

assets of at least \$250 million.

(4) As an alternative to the account options in paragraph (f) (3), the financial institution may pay a safe harbor yield equal to 70% of the Federal Funds Target Rate or 1.0%, whichever is higher.

(5) Each lawyer or law firm shall direct the eligible financial institution to remit monthly earnings on the IOLTA account directly to the Lawyers Trust Fund of Illinois. For each individual IOLTA account, the eligible financial institution shall provide: a statement transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent; the account number; the remittance period; the rate of interest applied; the account balance on which the interest was calculated; the reasonable service fee(s) if any; the gross earnings for the remittance period; and the net amount of earnings remitted. Remittances shall be sent to the Lawyers Trust Fund electronically unless otherwise agreed. The financial institution may assess only allowable reasonable fees, as defined in paragraph (i) (8) (j)(8). Fees in excess of the earnings accrued on an individual IOLTA account for any month shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account.

(g) A lawyer or law firm should exercise reasonable judgment in determining whether funds of a client or third person are nominal in amount or are expected to be held for a short period of time. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's or law firm's exercise of reasonable judgment under this rule or decision to place client funds in an IOLTA account or a non-IOLTA client trust account on the basis of that determination. Ordinarily, in determining the type of account into which to deposit particular funds for a client or third person, a lawyer or a law firm shall take into consideration the following factors:

(1) the amount of interest which the funds would earn during the period they are expected to be held and the likelihood of delay in the relevant transaction or proceeding;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of the financial institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.

(h) All trust accounts, whether IOLTA or non-IOLTA, shall be established in compliance with the following provisions on dishonored instrument notification:

(1) A lawyer shall maintain trust accounts only in eligible

financial institutions that have filed with the Attorney Registration and Disciplinary Commission an agreement, in a form provided by the Commission, to report to the Commission in the event any properly payable instrument is presented against a client trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days notice in writing to the Commission. The Commission shall annually publish a list of financial institutions that have agreed to comply with this rule and shall establish rules and procedures governing amendments to the list.

(2) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(a) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; and

(b) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(3) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(4) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by paragraph (h) of this Rule. Fees charged for the reasonable cost of producing the reports and records required by paragraph (h) are the sole responsibility of the lawyer or law firm, and are not allowable reasonable fees for IOLTA accounts as those are defined in paragraph (i)(8) (j)(8).

(i) A lawyer who learns of unidentified funds in an IOLTA account must make periodic efforts to identify and return the funds to the rightful owner. If after 12 months of the discovery of the unidentified funds the lawyer determines that ascertaining the ownership or securing the return of the funds will not succeed, the

lawyer must remit the funds to the Lawyers Trust Fund of Illinois. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (i).

A lawyer who either remits funds in error or later ascertains the ownership of remitted funds may make a claim to the Lawyers Trust Fund, which after verification of the claim will return the funds to the lawyer.

(i)(j) Definitions

(1) "Funds" denotes any form of money, including cash, payment instruments such as checks, money orders or sales drafts, and electronic fund transfers.

(2) "IOLTA account" means a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary, for the deposit of nominal or short-term funds of clients or third persons as defined in paragraph (f) and from which funds may be withdrawn upon request as soon as permitted by law.

(3) "Eligible financial institution" is a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an open-end investment company registered with the Securities and Exchange Commission that agrees to provide dishonored instrument notification regarding any type of client trust account as provided in paragraph (h) of this Rule; and that with respect to IOLTA accounts, offers IOLTA accounts within the requirements of paragraph (f) of this Rule.

(4) "Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(5) "Money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund or the equivalent of a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act.

(6) "U.S. Government securities" refers to U.S. Treasury obligations and obligations issued by or guaranteed as to principal and interest by any AAA-rated United States agency or instrumentality thereof. A daily overnight financial repurchase agreement ("repo") may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

(7) "Safe harbor" is a yield that if paid by the financial institution on IOLTA accounts shall be deemed as a comparable return in compliance with this Rule. Such yield shall be calculated as 70% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first business day of the calendar month.

(8) "Allowable reasonable fees" for IOLTA accounts are per-check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment ("sweep") fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.

(9) "Unidentified funds" are amounts accumulated in an IOLTA account that cannot be documented as belonging to a client, a third person, or the lawyer or law firm.

(j)(k) In the closing of a real estate transaction, a lawyer's disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15 if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds, has deposited such funds into a REFA, and:

(1) is acting as a closing agent pursuant to an insured closing letter for a title insurance company licensed in the State of Illinois and uses for such funds a segregated REFA maintained solely for such title insurance business; or

(2) has met the "good-funds" requirements. The good-funds requirements shall be met if the bank in which the REFA was established has agreed in a writing directed to the lawyer to honor all disbursement orders drawn on that REFA for all transactions up to a specified dollar amount not less than the total amount being deposited in good funds. Good funds shall include only the following forms of deposits: (a) a certified check, (b) a check issued by the State of Illinois, the United States, or a political subdivision of the State of Illinois or the United States, (c) a cashier's check, teller's check, bank money order, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government, (d) a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state, (e) a personal check or checks in an aggregate amount not exceeding \$5,000 per closing if the lawyer making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the REFA, (f) a check drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as

defined in 24 C.F.R. § 202.2, (g) a check from a title insurance company licensed in the State of Illinois, or from a title insurance agent of the title insurance company, provided that the title insurance company has guaranteed the funds of that title insurance agent. Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.

Adopted July 1, 2009, effective January 1, 2010; amended July 1, 2011, effective September 1, 2011; amended April 7, 2015, eff. July 1, 2015.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more client trust accounts. Client trust accounts should be made identifiable through their designation as client trust account or client funds account or words of similar import indicating the fiduciary nature of the account. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis complete records of client trust account funds as required by paragraph (a), including subparagraphs (1) through (8). These requirements articulate recordkeeping principles that provide direction to a lawyer in the handling of funds entrusted to the lawyer by a client or third person. Compliance with these requirements will benefit the attorney and the client or third party as these fiduciary funds will be safeguarded and documentation will be available to fulfill the lawyer's fiduciary obligation to provide an accounting to the owners of the funds and to refute any charge that the funds were handled improperly.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed. Specific guidance concerning client trust accounts is provided in the Client Trust Account Handbook published by the Illinois Attorney Registration and Disciplinary Commission as well as on the website of the Illinois Attorney Registration and Disciplinary Commission.

[3A] Paragraph (c) relates to legal fees and expenses that have been paid in advance. The reasonableness, structure, and division of legal fees are governed by Rule 1.5 and other applicable law.

[3B] Paragraph (c) must be read in conjunction with *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277 (2007). In *Dowling*, the Court distinguished different types of retainers. It recognized advance payment retainers and approved their use in limited circumstances where the lawyer and client agree that a retainer should become the property of the lawyer upon payment. Prior to *Dowling*, the Court recognized only two types of retainers. The first, a general retainer (also described as a "true" engagement, or "classic" retainer) is paid by a client to the lawyer in order to ensure the lawyer's availability during a specific period of time or for a specific matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. The second, a "security" retainer, secures payment for future services and expense, and must be deposited in a client trust account pursuant to paragraph (a). Funds in a security retainer remain the property of the client until applied for services rendered or expenses incurred. Any unapplied funds are refunded to the client. Any written retainer agreement should clearly define the kind of retainer being paid. If the parties agree that the client will pay a security retainer, that term should be used in any written agreement, which should also provide that the funds remain the property of the client until applied for services rendered or expenses incurred and that the funds will be deposited in a client trust account. If the parties' intent is not evident, an agreement for a retainer will be construed as providing for a security retainer.

[3C] An advance payment retainer is a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment; and the retainer may not be deposited into a client trust account because a lawyer may not commingle property of a client

with the lawyer's own property. However, any portion of an advance payment retainer that is not earned must be refunded to the client. An advance payment retainer should be used sparingly, only when necessary to accomplish a purpose for the client that cannot be accomplished by using a security retainer. An advance payment retainer agreement must be in a written agreement signed by the client that contains the elements listed in paragraph (c). An advance payment retainer is distinguished from a fixed fee (also described as a flat fee or lump-sum fee), where the lawyer agrees to provide a specific service (e.g., defense of a criminal charge, a real estate closing, or preparation of a will or trust) for a fixed amount. Unlike an advance payment retainer, a fixed fee is generally not subject to the obligation to refund any portion to the client, although a fixed fee is subject, like all fees, to the requirement of Rule 1.5(a) that a lawyer may not charge or collect an unreasonable fee.

[3D] The type of retainer that is appropriate will depend on the circumstances of each case. The guiding principle in the choice of the type of retainer is protection of the client's interests. In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account, pursuant to this Rule.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] Paragraphs (a), (f) and (g) requires that nominal or short-term funds belonging to clients or third persons be deposited in one or more IOLTA accounts as defined in paragraph (i)(2)(j)(2) and provides that the interest earned on any such accounts shall be submitted to the Lawyers Trust Fund of Illinois. The Lawyers Trust Fund of Illinois will disburse the funds so received to qualifying organizations and programs to be used for the purposes set forth in

its by-laws. The purposes of the Lawyers Trust Fund of Illinois may not be changed without the approval of the Supreme Court of Illinois. The decision as to whether funds are nominal or short-term shall be in the reasonable judgment of the depositing lawyer or law firm. Client and third-person funds that are neither nominal or short-term shall be deposited in separate, interest- or dividend-bearing client trust accounts for the benefit of the client as set forth in paragraphs (a) and (f).

[7] Paragraph (h) requires that lawyers maintain trust accounts only in financial institutions that have agreed to report trust account overdrafts to the ARDC. The trust account overdraft notification program is intended to provide early detection of problems in lawyers' trust accounts, so that errors by lawyers and/or banks may be corrected and serious lawyer transgressions pursued.

[8] Paragraph (i) applies when accumulated balances in an IOLTA account cannot be documented as belonging to an identifiable client or third party, or to the lawyer or law firm. This paragraph provides a mechanism for a lawyer to remove these funds from an IOLTA account when, in the lawyer's reasonable judgment, further efforts to account for them after a period of 12 months are not likely to be successful. This procedure facilitates the effective management of IOLTA accounts by lawyers; addresses situations where an IOLTA account becomes the responsibility of a lawyer's successor, law partner, or heir; and supports the provision of civil legal aid in Illinois.

The Lawyers Trust Fund of Illinois will publish instructions for lawyers remitting unidentified funds. Proceeds of unidentified funds received under paragraph (i) will be distributed to qualifying organizations and programs according to the purposes set forth in the by-laws of the Lawyers Trust Fund. When a lawyer learns that funds have been remitted in error or later identifies the owner of remitted funds, the lawyer may make a claim to the Lawyers Trust Fund for the return of the funds. After verification of the claim, the Lawyer Trust Fund will return the funds to the lawyer who then ensures the funds are restored to the owner.

Paragraph (i) relates only to unidentified funds, for which no owner can be ascertained. Unclaimed funds in client trust accounts of funds whose owner is known but have not been claimed should be handled according to applicable statutes including the Uniform Distribution Disposition of Unclaimed Property Act (765 ILCS 1025 et seq.).

[8][9] Paragraph (i)(j) provides definitions that pertain specifically to Rule 1.15. Paragraph (1) defines expansively the meaning of "funds," to include any form of money, including electronic fund transfers. Paragraph (2) defines an IOLTA account and paragraph (3) defines an eligible financial institution for purposes of the

overdraft notification and IOLTA programs. Paragraph (4) defines "properly payable," a term used in the overdraft notification provisions in paragraph (h)(1). Paragraphs (5) through (8) define terms pertaining to IOLTA accounts. Paragraph (9) defines "unidentified funds" as that term is used in paragraph (i).

[9][10] Paragraph (j)(k) applies only to the closing of real estate transactions and adopts the "good-funds" doctrine. That doctrine provides for the disbursement of funds deposited but not yet collected if the lawyer has already established an appropriate Real Estate Funds Account and otherwise fulfills all of the requirements contained in the Rule.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the

lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if

that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Refund of Unearned Fees

[10] See Comments [3B] through [3D] to Rule 1.15 and Rule 1.16(d).

Adopted July 1, 2009, effective January 1, 2010.

RULE 1.17: SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase, and the estate of a deceased lawyer or the guardian or authorized representative of a disabled lawyer may sell, a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in the geographic area in which the practice has been conducted;

(b) The entire practice is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the sellerís

clients regarding:

- (1) the proposed sale;
- (2) the client's right to retain other counsel or to take possession of the file; and
- (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an

appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states, like Illinois, are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, the Rule also permits the sale of the practice when the lawyer leaves the geographic area rather than the jurisdiction. In such cases, it is advisable for the parties' agreement to define the geographic area.

[5] Reserved.

Sale of Entire Practice

[6] The Rule requires that the seller's entire practice be sold. The prohibition against sale of less than an entire practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to client-specific information relating

to the representation beyond that allowed by Rule 1.6(b)(7), and to such as the client's file, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[9] All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule includes the sale of a law practice of a deceased or disabled lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with learned information from a prospective client shall not use or reveal that information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. Not all persons who communicate information to a lawyer are prospective clients. A person becomes a prospective client by consulting with a lawyer about the

possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d) (1), imputation may be avoided if the lawyer obtains the informed consent of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Reserved.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client

proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Adopted July 1, 2009, effective January 1, 2010.

RULE 2.2: RESERVED

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Definition

[1] An evaluation may be performed at the client's direction or

when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditor's Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Adopted July 1, 2009, effective January 1, 2010.

RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(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.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A 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. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's

service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. The lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Adopted July 1, 2009, effective January 1, 2010.

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their client's cases and the applicable law and determine that they can make good-faith arguments in support of their client's positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good-faith argument on the merits of the action taken or to support the action taken by a good-faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Adopted July 1, 2009, effective January 1, 2010.

RULE 3.2: EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Adopted July 1, 2009, effective January 1, 2010.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(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; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if

necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the

client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4 (b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused

so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be

done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be

presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Adopted July 1, 2009, effective January 1, 2010.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may

permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper for a lawyer to pay a witness or prospective witness the reasonable expenses incurred in providing evidence or to compensate an expert witness on terms permitted by law. Expenses paid to a witness or prospective witness may include reimbursement for reasonable charges for travel to the place of a deposition or hearing or to the place of consultation with the lawyer and for reasonable related out-of-pocket costs, such as for hotel, meals, or child care, as well as compensation for the reasonable value of time spent attending a deposition or hearing or in consulting with the lawyer. An offer or payment of expenses may not be contingent on the content of the testimony or the outcome of the litigation, or otherwise prohibited by law.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Adopted July 1, 2009, effective January 1, 2010.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Illinois Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. See Rule 8.4(f).

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

Adopted July 1, 2009, effective January 1, 2010.

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know would pose a serious and imminent threat to the fairness of an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to pose a serious and imminent threat to the fairness of an adjudicative proceeding, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be

subject to paragraph (a).

[5] There are, on the other hand, certain subjects that would pose a serious and imminent threat to the fairness of a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Nonjury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of

lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings. Cf. *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001).

Adopted July 1, 2009, effective January 1, 2010.

RULE 3.7: LAWYER AS WITNESS

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

- (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 1.7 or Rule 1.9.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For

example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Adopted July 1, 2009, effective January 1, 2010.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The duty of a public prosecutor is to seek justice, not merely to convict. The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that pose a serious and imminent threat of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further reasonable investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not

commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

(i) A prosecutor's judgment, made in good faith, that evidence does not rise to the standards stated in paragraphs (g) or (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

[1A] The first sentence of Rule 3.8 restates an established principle. In 1924, the Illinois Supreme Court reversed a conviction for murder, noting that:

“The state's attorney in his official capacity is the representative of all the people, including the defendant, and it was as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen.” *People v. Cochran*, 313 Ill. 508, 526 (1924).

In 1935, the United States Supreme Court described the duty of a federal prosecutor in the following passage:

“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use

every legitimate means to bring about a just one. *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321, 55 S. Ct. 629, 633 (1935).

The first sentence of Rule 3.8 does not set an exact standard, but one good prosecutors will readily recognize and have always adhered to in the discharge of their duties. Specific standards, such as those in Rules 3.3, 3.4, 3.5, 3.6, the remaining paragraphs of Rule 3.8, and other applicable rules provide guidance for specific situations. Rule 3.8 is intended to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably.

[2] In Illinois, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that pose a serious and imminent threat of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c). Cf. *Devine v. Robinson*, 131 F. Supp. 2d 963 (N.D. Ill. 2001).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial

statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further reasonable investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), and 3.4(a) through (c), and 3.5.

Adopted July 1, 2009, effective January 1, 2010; amended November 23, 2009, effective January 1, 2010.

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rulemaking or policymaking capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decisionmaking body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), and 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in otherwise permitted lobbying activities, a negotiation or other bilateral transaction with a governmental agency, or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Adopted July 1, 2009, effective January 1, 2010; amended November 23, 2009, effective January 1, 2010.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact as well as law. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable

settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Adopted July 1, 2009, effective January 1, 2010.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel, including counsel in a limited scope representation pursuant to Rule 1.2(c), concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may

also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[8A] For purposes of this Rule, when a person is being represented on a limited basis under Rule 1.2(c), a lawyer is only deemed to know that the person is represented by another lawyer, and the subject of that representation, upon receipt of (i) a proper Notice of Limited Scope Appearance under Supreme Court Rule 13(c)(6), or (ii) with respect to a matter not involving court proceedings, written notice advising that the client is being represented by specified counsel with respect to an identified subject matter and time frame. A lawyer is permitted to communicate with a person represented under Rule 1.2(c) outside the subject matter or time frame of the limited scope representation.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Adopted July 1, 2009, effective January 1, 2010; amended June 14, 2013, eff. July 1, 2013.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

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. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare

documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Adopted July 1, 2009, effective January 1, 2010.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally

transmitted. If a lawyer knows that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows may have been wrongfully inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is email or other electronic modes of transmission subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a

large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

Adopted July 1, 2009, effective January 1, 2010.

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Adopted July 1, 2009, effective January 1, 2010.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

[21] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in

the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the professional obligations of the lawyer. with the Rules of Professional Conduct. See Comment [6] to Rule 1.1 and Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of a nonlawyer such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[12] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1, 1.2, 1.4, 1.6, 5.4(a), and 5.5(a). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the

circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

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

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

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

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

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Adopted July 1, 2009, effective January 1, 2010.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or admitted or otherwise authorized to practice in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law or rule to provide in of this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se. See Supreme Court Rule 137(e) (lawyer may help draft a pleading, motion or other paper filed by a pro se party). See also Supreme Court Rule 13(c)(6) (lawyer may make a limited scope appearance in a civil proceeding on behalf of a pro se party).

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a temporary basis in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be temporary even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted or otherwise authorized to practice in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the other jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction

may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that

are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also as well as provide legal services in this jurisdiction on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See Illinois Supreme Court Rules 706(f), (g), 716, and 717 concerning requirements for house counsel and legal service program lawyers admitted to practice in other jurisdictions who wish to practice in Illinois.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

[22] Paragraph (e) recognizes the importance of the structure and procedures of the legal system in a foreign jurisdiction in assuring that a foreign lawyer is qualified to practice in Illinois. Application of paragraph (e) requires recognition that structure and procedures vary among foreign jurisdictions. Where members of the profession in the foreign jurisdiction are admitted or authorized to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, paragraph (e) is satisfied. Where the legal system does not have such structure and procedures, other attributes of the system must be considered to determine whether they supply assurances of an appropriate legal background. In addition, a foreign lawyer must satisfy the requirements of Illinois Supreme Court Rule 716 to be admitted as house counsel.

Adopted July 1, 2009, effective January 1, 2010; amended June 14, 2013, eff. July 1, 2013; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Adopted July 1, 2009, effective January 1, 2010.

RULE 5.7: RESERVED

RULE 6.1: RESERVED

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Preamble. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Adopted July 1, 2009, effective January 1, 2010.

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Lawyers should be encouraged to support and participate in not-for-profit legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Adopted July 1, 2009, effective January 1, 2010.

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that

subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

Adopted July 1, 2009, effective January 1, 2010.

RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally

operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Adopted July 1, 2009, effective January 1, 2010.

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public. a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against undignified advertising. Television, the Internet, and other forms of electronic communication are now one of among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange initiated by the lawyer. that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)–(b)(4), lawyers are not permitted to pay others for channeling professional work recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers; Rule 8.4(a) for the duty to avoid violating the Rules through the acts of another who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act

reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective

client 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.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a

website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[12] There is a potential for abuse when a solicitation involves inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with someone a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[23] This potential for abuse inherent in direct in-person, live telephone or real time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyers have advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded In particular, communications can which may be mailed or autodialed transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's a person's judgment.

[34] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[45] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[56] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication prospective client may violate the provisions of Rule 7.3(b).

[67] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[78] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need

of legal services within the meaning of this Rule.

[89] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) The Supreme Court of Illinois does not recognize certifications of specialties in the practice of law, nor does it recognize certifications of expertise in any phase of the practice of law by any agency, governmental or private, or by any group, organization or association. A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not

use the terms "certified," "specialist," "expert," or any other, similar terms to describe his qualifications as a lawyer or his qualifications in any subspecialty of the law. If such terms are used to identify any certificates, awards or recognitions issued by any agency, governmental or private, or by any group, organization or association, the reference must meet the following requirements:

- (1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1;
- (2) the reference must state that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate.

[2] Paragraph (b) states the general policy of the Supreme Court of Illinois not to recognize certifications of specialties or expertise, except that it recognizes that admission to patent practice before the Patent and Trademark Office confers a long-established and well-recognized status. The omission of reference to lawyers engaged in trademark or admiralty practice that were contained in the prior rule is not intended to suggest that such lawyers may not use terms such as "Trademark Lawyer" or "Admiralty" to indicate areas of practice as permitted by paragraph (a).

[3] Paragraph (c) permits a lawyer to state that the lawyer is certified, is a specialist in a field of law, or is an "expert" or any other similar term, only if certain requirements are met.

Adopted July 1, 2009, effective January 1, 2010.

RULE 7.5: FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office

facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

Adopted July 1, 2009, effective January 1, 2010.

RULE 7.6: RESERVED

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by these Rules or by law.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b)

of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Adopted July 1, 2009, effective January 1, 2010.

RULE 8.2: JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely,

false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Adopted July 1, 2009, effective January 1, 2010.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(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.

(d) A lawyer who has been disciplined as a result of a lawyer disciplinary action brought before any body other than the Illinois Attorney Registration and Disciplinary Commission shall report that fact to the Commission.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Self-regulation of the legal profession requires that

members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. See *In re Himmel*, 125 Ill. 2d 531 (1988). Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve disclosure of information protected by the attorney-client privilege or by law. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. A report should be made to the Illinois Attorney Registration and Disciplinary Commission unless some other agency is more appropriate in the circumstances. See *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214 (2000). Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question or to a lawyer consulted in a professional capacity by another lawyer on whether the inquiring lawyer has a duty to report a third party lawyer's professional misconduct. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyer's or judge's assistance program or an approved intermediary program. In these circumstances, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment or assistance through such programs. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. See also Comment [19] to Rule 1.6.

[6] Rule 8.3(d) requires a lawyer to bring to the attention of the Illinois Attorney Registration and Disciplinary Commission any disciplinary sanction imposed by any other body against that lawyer. The Rule must be read in conjunction with Illinois Supreme Court Rule

763.

Adopted July 1, 2009, effective January 1, 2010.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

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

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

(d) engage in conduct that is prejudicial to the administration of justice.

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. Nor shall a lawyer give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge's family may receive under Rule 65(C) (4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client

limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good-faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Adopted July 1, 2009, effective January 1, 2010.

RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. 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 shall be applied to the conduct. 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.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary

authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings may advance the purposes of this Rule, subject always to the need to avoid unjust results. For purposes of reciprocal discipline, suspension of the privilege to provide legal services on a temporary basis, pursuant to Rule 5.5(c) shall not necessarily be considered equivalent to suspension of licensure for a lawyer admitted to practice in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be

before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in writing.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this Rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.