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Attorney and Counselor at Law

[redacted]

1 July 2024

Re: Proposal 23-05

To the Illinois Supreme Court Rules Committee:

I write in my personal capacity as a current member of the ISBA Standing Committee on Professional Conduct. Previously I was Ethics Counsel for the ABA Standing Committee on Ethics and Professional Conduct Responsibility that issued formal ethics opinions and proposed amendments to the ABA Model Rules of Professional Conduct. I am also a former member of the Illinois Supreme Court's Committee on Professional Responsibility (2004-2012). I have also served on the Illinois Judges Ethics Committee since its inception in 1992 and participated in the formation of the new Illinois Code of Judicial Conduct. I have written and lectured frequently on legal and judicial ethics and professionalism throughout my thirty plus years of practice.

Having briefly stated my bona fides, I submit the following comments regarding Proposal 23-05, Amendments to the Illinois Rules of Professional Conduct 8.3, 5.1, 1.1 and 1.14.

First, global comments on the proposal as a whole.

1) The structure of the proposed rule changes is a disservice to Illinois lawyers by altering the numbering system from that of the ABA Model Rules of Professional Conduct. Illinois lawyers and lawyers from other states rely on the structure of the ABA Model Rules of Professional Conduct as the *lingua franca* for research on their ethical responsibilities. These proposals incorrectly approach the rule amendments by labeling the rule amendments as Rule 8.3A —the original ABA Rule 8.3—and then enumerating the proposed new rule as Rule 8.3B—an addition to the existing Model Rules. As my colleague Robert Creamer, who has written extensively on the Model Rules number system and its national impact, this additional numerology will disrupt the ability to research past Rule 8.3 matters and confuse future research. Rather, the better practice would be to follow the Illinois Supreme Court's precedent regarding Rule 1.15. They kept Rule 1.15 as Rule 1.15 and the additional Rules were numbered Rules 1.15A and 1.15B. As

Rule 8.3 remains substantially the same, there is not reason to confuse the issue by appending an "A" to the existing Rule. Alternatively, there would be no great damage if Rule 8.3 was amended to include a Rule 8.3(e) that encompassed the one sentence of propose Rule 8.3B and the title of Rule 8.3 was extended "Reporting Professional Misconduct and Responding to Disability and Impairment"

2) Even more egregious is the havoc with the added comments. The proposal totally disrupts the established order by renumbering existing comments and inserting new comments under the old numbers. To the less frequent user this may appear to be a minor issue, but to the ethics specialist, and to the multi-state practitioner this is a serious issue. Any new Comments should be added at the end of existing Comments with new numbers, not by usurping existing Comment numbers and then renumbering existing Comments.

   Note when the Illinois Supreme Court chose not to adopt ABA Model Rules of Professional Conduct Rules 2.2, 5.7, 6.1, and 7.6 those numbers were "Reserved". The Court did not renumber the remaining Rules in the "2", "5", "6" or "7" series. Similar confusion would result from renumbering Comments. In proposed amendments to the Comments of Rules 8.3A, 5.1, and 1.14, new comments are inserted seemingly willy-nilly disrupting the Model Rules enumeration. Such willy-nilly insertions do not enhance the effect of the Comment or the Comment's direction to the lawyer. While the intent appears to be to keep a substantive thought process together, the effect is chaos for the user. When attempting to cross-reference Comments from state to state and with the ABA Model Rules, such renumbering is a significant disruption akin to a state renumbering the Unified Commercial Code or any of the other Unified Law proposals. Better practice is to maintain the existing Model Rules comment number and, if a new comment is necessary, to insert it as a Comment [3a] or to put the comment at the end of the comments with a new number such as is done with Rule 1.1 new Comment [9]. As Mr. Creamer has written, it is not simply Illinois lawyers who may have multijurisdictional practices, but today almost 40% of Illinois lawyers also have multistate admissions to practice. There is institutional logic to keeping the Illinois Rules of Professional Conduct consistent with the other approximately 49 states and the District of Columbia that have rules based on the ABA Model Rules of Professional Conduct. (*see,* https://www.americanbar.org/content/dam/aba/publications/professional_lawyer/24-3/ethics-rules-uniformity-visithing.pdf)

3) Substantively, the new rules place a burden on lawyers who lack the skill or training to "have…knowledge that the performance of another lawyer or a judge may be impaired by drugs or alcohol or by mental, cognitive, emotional, or psycholog-

ical reasons…." While some conduct, such as attending a court hearing intoxicated may be obvious to everyone, a lawyer or judge having mental, cognitive, emotional, or psychological impairment is not necessarily something that a lawyer may be able to determine to the extent that one may have "knowledge". The ability to determine and obtain such knowledge is not something that can be learned from a continuing legal education program. The obligation of 8.3B is in no way parallel to the obligation of Rule 8.3A.

4) As several of my colleagues have noted, "what is the rush"? Much greater consideration is needed regarding the structure of the proposed amendments within the Illinois Rules and before rules of the magnitude of Rule 8.3B and the new Comments to Rules 1.1 and 1.14 are imposed on lawyers. While the drafters have initiated serious consideration to issues of growing concern for the profession and the Supreme Court, the adoption of these rules are an extreme expansion of the burden on lawyers.

From an even broader perspective, these proposals are incomplete. There are incomplete hints in the Rule of Professional Conduct and national examples of rules needed to exist before these proposed Rules can effectively adopted.
In Illinois Rule 1.3 Comment [5]:

> [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.

https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/0b5595a1-f889-4c33-b1bc-82a14c91ce3d/RULE%201.3.pdf

This Comment recognizes the realistic wisdom of having lawyers designate another lawyer as what is considered nationally as a "successor lawyer".

The Illinois Supreme Court indirectly further shows the wisdom of this concept in Supreme Court Rule 776 cited in Rule 1.3 Comment [5]. Rule 776 allows the circuit court to appoint a receiver when it comes to the court's attention that a lawyer in the circuit is unable to properly discharge responsibilities to clients due to disability, disappearance, or death and there is no partner, associate, executor, or other responsible party capable of conducting the lawyer's affairs. Such appointment must be reported promptly to the ARDC.

It is inevitable that under the rules proposed herein that the "appropriate action" taken by many lawyers will be to report the lawyer under proposed Rule 8.3B to the local circuit court. Such a result is not contemplated in the Comments to Proposed Rule 8.3B nor in any discussion of the proposed Rule.

This argues again for further consideration before adoption as well as consideration of a successor attorney rule. According to the ABA July 2021 chart, there are a wide variety of approaches to addressing the Rule 8.3B issues. The majority of those that address the issue do so in a manner comparable to Illinois Supreme Court Rule 776. However, at least two states, Florida and Indiana, have rules that require a lawyer to appoint a successor or "inventory" lawyer who will protect the interests of the client should a proposed Rule 8.3B situation occur. (copies of Florida and Indiana rules and informational materials attached.)

Finally, I can state from personal experience that these proposed Rules do not provide an answer to the broader problem. Recently, a colleague and friend, Lawyer X, contacted me regarding an issue with ARDC and MCLE. Lawyer X believed that MCLE credit was not properly recognized resulting in removal from the role of attorneys. Lawyer X practiced as an arbitrator, so did not have individual clients at risk. However, through several telephone conversations, it became clear that Lawyer X was having memory problems. Fortunately, a non-lawyer colleague in Chicago was able to visit Lawyer X, discover more evidence of decline and contact a family member in a distant state. I was able to contact LAP, but, other than moral support, they did not have resources to address this type of situation. However, I believe it would certainly fit into the scope of Rule 8.3B. The situation was resolved when Lawyer X had a minor traffic accident, was taken to a hospital where it was determined that Lawyer X could not be released because of the mental issue.

The point of the story is that Rule 8.3B does not provide an avenue for resolution of a situation such as this as it is presently written. More work is needed. The additional idea to require lawyers to name a successor lawyer who can be contacted in the case of a lawyer's impairment as described in proposed Rule 8.3B is an alternative that should be explored before adoption of these rules. Equally important is to place the proposed rules and comments within the existing ABA Model Rules numerical framework.

Thank you for your consideration and I look forward to assisting in addressing this issue.

Sincerely,

https://www.floridabar.org/the-florida-bar-news/lawyers-must-designate-an-inventory-attorney-2/

RULE 1-3.8 RIGHT TO INVENTORY (a) Appointment; Grounds; Authority. Whenever an attorney is suspended, disbarred, becomes a delinquent member, abandons a practice, disappears, dies, or suffers an involuntary leave of absence due to military service, catastrophic illness, or injury, and no partner, personal representative, or other responsible party capable of conducting the attorney's affairs is known to exist, the appropriate circuit court, upon proper proof of the fact, may appoint an attorney or attorneys to inventory the files of the subject attorney (hereinafter referred to as "the subject attorney") and to take such action as seems indicated to protect the interests of clients of the subject attorney. (b) Maintenance of Attorney-Client Confidences. Any attorney so appointed shall not disclose any information contained in files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the court that appointed the attorney to make the inventory. (c) Status and Purpose of Inventory Attorney. Nothing herein creates an attorney and client, fiduciary, or other relationship between the inventory attorney and the subject attorney. The purpose of appointing an inventory attorney is to avoid prejudice to clients of the subject attorney and, as a secondary result, prevent or reduce claims against the subject attorney for such prejudice as may otherwise occur. (d) Rules of Procedure. The Florida Rules of Civil Procedure are applicable to proceedings under this rule. (e) Designation of Inventory Attorney. Each member of the bar who practices law in Florida shall designate another member of The Florida Bar who has agreed to serve as inventory attorney under this rule; provided, however, that no designation is required with respect to any portion of the member's practice as an employee of a governmental entity. When the services of an inventory attorney become necessary, an authorized representative of The Florida Bar shall contact the designated member and determine the member's current willingness to serve. The designated member shall not be under any obligation to serve as inventory attorney. Amended July 23, 1992, effective Jan.

1, 1993 (605 So.2d 252); July 17, 1997 (697 So.2d 115); Sept. 24, 1998, effective Oct. 1. 1998 (718 So.2d 1179); May 20, 2004 (875 So.2d 448); Oct. 6, 2005, effective Jan. 1, 2006 (916 So.2d 655); amended Nov. 19, 2009 (SC08-1890) (34 Fla.L.Weekly S628a), effective February 1, 2010.

Here are three reasons to review your inventory attorney designation today.

1. You are required to designate an inventory attorney by Rule 1-3.8(e). The only exceptions are for members not practicing in Florida and for any portion of the member's practice as an employee of a governmental entity.

2. Your clients need to be protected if you suddenly become incapable of practicing law due to accident or illness. Each year, The Florida Bar has to open inventory cases when a lawyer's sudden unavailability jeopardizes clients. A prudent attorney will assure that someone with adequate knowledge about their legal practice is ready to step in if needed.

3. Your interests need to be protected. Your law practice is an important asset and if a designated inventory attorney has adequate knowledge in advance, steps can be taken to protect this asset for your future as well as that of your loved ones.

Below is an updated article from the 2006 Bar *News* on this subject. For more information, go to LegalFuel at **www.LegalFuel.com**.

Lawyers must designate an inventory attorney

To protect clients of an attorney who unexpectedly dies or otherwise becomes unable to practice, the Rules Regulating The Florida Bar provide that members who practice in-state must designate an inventory attorney.

Rule 1-3.8 requires every member to designate an inventory attorney and the best and easiest way to designate an inventory attorney is to do it online at **FloridaBar.org**. No designation is required with respect to any portion of a member's practice as an employee of a governmental entity.

Inventory attorneys take possession of the files of a member who dies, disappears, is disbarred or suspended, becomes delinquent, or suffers involuntary leave of absence due to military service, and no other responsible party capable of conducting the member's affairs is known. The inventory attorney has the responsibility of notifying all clients that their lawyer is no longer able to represent them. The inventory attorney also may give the file to a client for finding substitute counsel; may make referrals to substitute counsel with the agreement of the client; or may accept representation of the client but is not required to do so.

Designated inventory attorneys will be contacted when the need arises and will be asked to serve. Because circumstances change, the designated inventory attorney is not obligated to serve. Inventory attorneys are not directly compensated but may receive reimbursement for actual costs incurred while carrying out the duties of an inventory attorney.

Only those members who practice in Florida — regardless of where they live — must make a designation. Members who are eligible to practice in Florida, but who do not do so, are not required to designate an inventory attorney.

Lawyers who practice in Florida — regardless of whether they reside in the state — even if they have only one client (such as in-house counsel or if they represent governmental entities) are required to designate an inventory attorney.

Here are answers to common questions about the rule:

Who is not required to designate an inventory attorney?

A Florida Bar member who lives in another state and does not practice at all in Florida is not required to designate an inventory attorney, even if the nonresident member is eligible to practice law in Florida.

Members are not required to designate in regard to the portion of their practice as an employee of a government entity. Florida judges and other

members who are precluded from practicing law by statute or rule also are not required to designate.

Florida resident members engaged in other occupations, even if eligible to practice law in Florida, are not required to designate.

Who may be designated as an inventory attorney?

Only other members of The Florida Bar may be designated as an inventory attorney.

Designated inventory attorneys must be eligible to practice law in Florida. They are not required to be practicing, only that they be eligible to do so.

Resident and nonresident members of the Bar may be designated as inventory attorneys.

How are inventory attorneys appointed?

When the need for an inventory attorney arises, Bar counsel will verify that the designated inventory attorney is eligible to practice law in Florida and contact the designated inventory attorney. If the designee agrees to serve, Bar counsel will direct them to the inventory manual and, if necessary, will assist in filing a petition with the local circuit court for appointment of the inventory attorney and securing an order of appointment.

How do I designate an inventory attorney?

The easiest way is to visit the Bar's website at **floridabar.org**. Go to "Member Portal" and look for the "**Inventory Attorney**" link and fill out the online form.
How often must I make a designation?

Once a designation is made another designation is not required unless the originally designated inventory attorney is no longer willing or able to serve. In such event designation of another inventory attorney may be made online.

Is the requirement to designate an inventory attorney applicable to government lawyers?

No. However, if a government lawyer has a private practice, a designation is required for that portion of the practice.

https://www.in.gov/courts/help/portal/attorney-record/surrogate/

Overview

An attorney surrogate is an attorney who assumes certain responsibilities related to your clients, including finding replacement counsel if necessary, if you become unable to continue representing your clients for reasons outlined in the Rules for Admission and Discipline.

The attorney surrogate page on the portal contains a questionnaire that will help you determine your eligibility to name a surrogate. Depending on your answers, there are three possible results to the questionnaire:

1. You cannot name a surrogate
2. You have the option to name surrogate
3. You must name the fiduciary entity in which you practice as your surrogate

Even if you are eligible to name a surrogate, you are **NOT** required to do so. However, if you choose not to name a surrogate, then a senior judge or other suitable member of the Indiana bar in good standing may be appointed by the court.

If you practice in, but are not an employee of, a fiduciary entity, then you **ARE** required to name your fiduciary entity where indicated.

The surrogate questionnaire

If you have already named a surrogate and wish to make no changes, you can click "No Changes" to complete this step. If your previously named surrogate can no longer serve in that capacity, and you have not yet found a replacement, you can use the "Remove Surrogate" button. If you have not named a surrogate before--or if you have named a surrogate and you choose the "Change Surrogate" option--you will be presented with a questionnaire to guide you through the process.

Question one asks whether you practice solely as an employee of a law firm, of another attorney, or of an organization not engaged in the practice of

law. If you answer "yes," then you cannot name a surrogate, and you can click "Save." If your answer is "no," you will move on to question two.

Question two asks about the nature of your practice. If you practice in a fiduciary entity, such as a law firm, you must name the entity as your surrogate.

If you don't practice in a fiduciary entity, then you may name another attorney as your surrogate by entering that attorney's Indiana bar number. **You must first have entered into a written surrogacy agreement with the other attorney and possess a copy of that agreement before you can designate that attorney as your surrogate on the portal.** If you don't know your surrogate's attorney number, click "Roll of Attorneys" to look up the number.

After you have filled out the necessary information, click "Continue" to move forward.

Click "Save" to confirm your surrogate.

REFERENCES

- Attorney surrogates: Admission and Discipline Rule 23 § 27

https://www.in.gov/courts/rules/ad_dis/index.html#SP;c3d0000068844

Section 27. Attorney Surrogates

(a) *Definitions for purposes of this Section only.*

(1) "Attorney Surrogate" means a senior judge certified by the Indiana Judicial Nominating Commission or another member of the bar of this State, in good standing, who has been appointed by a court of competent jurisdiction to act as an Attorney Surrogate for a Lawyer.

(2) "Court of competent jurisdiction" means a court of general jurisdiction in the county in which a Lawyer maintains or has maintained a principal office.

(3) "Disabled" means that a Lawyer has a physical or mental condition resulting from accident, injury, disease, chemical dependency, mental health problems, or age that significantly impairs the Lawyer's ability to practice law.

(4) "Fiduciary Entity" means a partnership, limited liability company, professional corporation, or a limited liability partnership, in which entity a Lawyer is practicing with one or more other members of the Bar of this State who are partners, shareholders or owners.

(5) "Lawyer" means a member of the Bar of this State who is engaged in the private practice of law in this State. "Lawyer" does not include a member of the Bar whose practice is solely as an employee of another Lawyer, a Fiduciary Entity, or an organization that is not engaged in the private practice of law.

(b) *Designation of Attorney Surrogate.*

(1) At the time of completing the annual registration required by Ind. Admission and Discipline Rule 2(b), a Lawyer may designate an Attorney Surrogate in the Courts Portal by specifying the attorney number of the Attorney Surrogate and certifying that the Attorney Surrogate has agreed to the designation in a writing in possession of both the Lawyer and the surrogate. The designation of an Attorney Surrogate shall remain in effect until revoked by either the designated Attorney Surrogate or the Lawyer designating the Attorney Surrogate. The Lawyer who designates the Attorney Surrogate shall notify the Executive Director of the Indiana Office of Admissions and Continuing Education of any change of designated Attorney Surrogate within thirty (30) days of such change. The Executive Director of the Indiana Office of Admissions and Continuing Education shall keep a list of designated Attorney Surrogates and their addresses.

(2) A Lawyer, practicing in a Fiduciary Entity, shall state the name and address of the Fiduciary Entity where indicated in the Attorney Surrogate designation section of the Courts Portal. Because of the ongoing responsibility of the Fiduciary Entity to the clients of the Lawyer, no Attorney Surrogate shall be appointed for a Lawyer practicing in a Fiduciary Entity.

(3) A Lawyer not practicing in a Fiduciary Entity who does not designate an Attorney Surrogate pursuant to subsection (1) above shall be deemed to designate a senior judge or other suitable member of the bar of this State in good standing appointed by a court of competent jurisdiction to perform the duties of an Attorney Surrogate.

(c) *Role of Attorney Surrogate.*

(1) Upon notice that a Lawyer has:

(i) Died;

(ii) Disappeared;

(iii) Become disabled; or

(iv) Been disbarred or suspended and has not fully complied with the provisions of Ind. Admission and Discipline Rule 23, Section 26,

any interested person (including a local bar association) or a designated Attorney Surrogate may file in a court of competent jurisdiction a verified petition (1) informing the court of the occurrence and (2) requesting appointment of an Attorney Surrogate.

(2) A copy of the verified petition shall be served upon the Lawyer at the address on file with the Executive Director of the Indiana Office of Admissions and Continuing Education or, in the event the Lawyer has died, upon the Lawyer's personal representative, if one has been appointed. Upon the filing of the verified petition, the court shall, after notice and opportunity to be heard (which in no event shall be longer than ten (10) days from the date of service of the petition), determine whether there is an occurrence under (a), (b), (c) or (d), and an Attorney Surrogate needs to be appointed to act as custodian of the law practice. If the court finds that an Attorney Surrogate should be appointed then the court shall appoint as Attorney Surrogate either the designated Attorney Surrogate as set forth pursuant to subsection (b)(1), a suitable member of the Bar of this State in good standing or a senior judge.

(3) Upon such appointment, the Attorney Surrogate may:

(i) Take possession of and examine the files and records of the law practice, and obtain information as to any pending matters which may require attention;

(ii) Notify persons and entities who appear to be clients of the Lawyer that it may be in their best interest to obtain replacement counsel;

(iii) Apply for extensions of time pending employment of replacement counsel by the client;

(iv) File notices, motions, and pleadings on behalf of the client where jurisdictional time limits are involved and other legal counsel has not yet been obtained;

(v) Give notice to appropriate persons and entities who may be affected, other than clients, that the Attorney Surrogate has been appointed;

(vi) Arrange for the surrender or delivery of clients' papers or property;

(vii) As approved by the court, take possession of all trust accounts subject to Ind. Prof. Cond. R. 1.15(a), and take all appropriate actions with respect to such accounts;

(viii) Deliver the file to the client; make referrals to replacement counsel with the agreement of the client; or accept representation of the client with the agreement of the client; and

(xi) Do such other acts as the court may direct to carry out the purposes of this Section.

(4) If the Attorney Surrogate determines that conflicts of interest exist between the Attorney Surrogate's clients and the clients of the Lawyer, the Attorney Surrogate shall notify the court of the existence of the conflict of interest with regard to the particular cases or files and the Attorney Surrogate shall take no action with regard to those cases or files.

(5) Upon appointment, the Attorney Surrogate shall notify the Disciplinary Commission.

(d) *Jurisdiction of court*. A court of competent jurisdiction that has granted a verified petition for appointment under this Section shall have jurisdiction over the files, records, and property of clients of the Lawyer and may make orders necessary or appropriate to protect the interests of the Lawyer, the clients of the Lawyer, and the public. The court shall also have jurisdiction over closed files of the clients of the Lawyer and may make appropriate orders regarding those files including, but not limited to, destruction of the same.

(e) *Time limitations suspended.* Upon the granting of a verified petition for appointment under this Section, any applicable statute of limitations, deadline, time limit, or return date for a filing as it relates to the Lawyer's clients (except as to a response to a request for temporary emergency relief) shall be extended automatically to a date 120 days from the date of the filing of the petition, if it would otherwise expire on or after the date of filing of the petition and before the extended date.

(f) *Applicability of attorney-client rules.* Persons examining the files and records of the law practice of the Lawyer pursuant to this Section shall observe the attorney-client confidentiality requirements set out in Ind. Professional Conduct Rule 1.6 and otherwise may make disclosures in camera to the court only to the extent necessary to carry out the purposes of this Section. The attorney-client privilege shall apply to communications by or to the Attorney Surrogate to the same extent as it would have applied to communications by or to the Lawyer. However, the Attorney Surrogate relationship does not create an attorney/client relationship between the Attorney Surrogate and the client of the Lawyer.

(g) *Final report of Attorney Surrogate: petition for compensation; court approval.* When the purposes of this Section have been accomplished with respect to the law practice of the Lawyer, the Attorney Surrogate shall file with the court a final report and an accounting of all funds and property coming into the custody of the Attorney Surrogate. The Attorney Surrogate may also file with the court a petition for reasonable fees and expenses in compensation for performance of the Attorney Surrogate's duties. Notice of the filing of the final report and accounting and a copy of any petition for fees and expenses shall be served as directed by the court. Upon approval of the final report and accounting, the court shall enter a final order to that effect and discharging the Attorney Surrogate from further duties. Where applicable, the court shall also enter an order fixing the amount of fees and expenses allowed to the Attorney Surrogate. The amount of fees and expenses allowed shall be a judgment against the Lawyer or the estate of the Lawyer. The judgment is a lien upon all assets of the Lawyer (except trust funds) retroactive to the date of filing of the verified petition for appointment under this Section. The judgment lien is subordinate to nonpossessory liens and security interests created prior to its taking effect and may be foreclosed upon in the manner prescribed by law. To the extent a senior judge is not fully compensated under this subsection, the senior judge may seek compensation pursuant to Administrative Rule 5 (B)(10).

(h) *Immunity.* Absent intentional wrongdoing, an Attorney Surrogate shall be immune from civil suit for damages for all actions and omissions as an Attorney Surrogate under this Section. This immunity shall not apply to an employment after acceptance of representation of a client with the agreement of the client under subsection (c)(3)(viii) above.