ILLINOIS STATE
BAR ASSOCIATION

July 10, 2024

Committee Secretary
Supreme Court Rules Committee
222 N. LaSalle Street, 13th Floor
Chicago, IL. 60601
RulesCommittee@illinoiscourts.gov

Re: Proposal 23-05 (P.R. 00318)

Dear Committee Secretary:

On behalf of the Illinois State Bar Association's 28,000 members and the Chicago Bar Association's 17,000 members (the "Bars"), the following comments are submitted concerning Proposal 23-05 (amending various Illinois Rules of Professional Conduct related to lawyers' cognitive impairment). The Bars **oppose** the Proposal.

In addition, the Bars request that CBA Board member Trish Rich be permitted to address the Committee on the Proposal at the upcoming July 17, 2024 public hearing.

I. General

The Bars acknowledge and appreciate the work of the Court's Commission on Elder Law in recognizing issues related to lawyer impairment occasioned by alcohol or substance use or mental, cognitive, emotional, or psychological reasons. Lawyers acting under an impairment may harm the interests of their clients, undermine the integrity of the legal system and profession, and negatively impact the administration of justice. ABA Formal Opinion 03-431 (2002). As such, it is appropriate that the bar does not ignore issues related to lawyer or judicial impairment, but rather that it take actions to ensure that its potential harms are not realized (or at least minimized). In addition, as a self-regulating profession, the bar owes it to its own members to provide meaningful assistance to those who may be struggling under an impairment.

II. Proposal 23-05

Notwithstanding the above, the Bars believe that Proposal 23-05 is not in the best interests of the public or the legal profession. It takes this position for a number of reasons.

1. *The Proposal, particularly with respect to the "appropriate action" requirement, is impermissibly vague.*

Proposed new IRPC 8.3B requires lawyers to take "appropriate action" when they know another lawyer is impaired by drugs or alcohol or mental, emotional, cognitive, or psychological reasons. The Proposal's vagueness simply leaves too many unanswered questions.

What is the objective standard for identifying a colleague's *impairment* (or the other phrase used in the Proposal, "diminished capacity")? Is it not accurately proofreading a pleading? Is it not catching an important, or perhaps obvious, point in an important document? Is it being negligent, dilatory, or uncommunicative? All of these characteristics might be indicative of an impairment. But they are also characteristics that might be encountered throughout an active and typical practice, without any reason to believe a mental or emotional *impairment* is the cause. The Proposal provides no meaningful guidance on what level of conduct constitutes an *impairment*.

What level of knowledge is necessary to trigger the "appropriate action" requirement? How is a lawyer to know the cause of another lawyer's poor or problematic performance is caused by an alcohol, drug, or psychological reason? Lawyers are not clinicians. They are not trained to assess other lawyers' mental state or wellbeing. ABA Formal Opinion 03-431 (2003)("Because lawyers are not health care professionals, they cannot be expected to discern when another lawyer suffers from mental impairment with the precision of, for example, a psychiatrist, clinical psychologist, or therapist.") Lawyers also do not have their colleagues under observation looking for signs of an impairment (and even if they did, what might go unnoticed by an untrained lawyer might be meaningful to a trained clinician). How is a lawyer to know that the negligent, dilatory, or uncommunicative conduct of a colleague is caused by a mental, emotional, or substance use impairment? How is a lawyer to know that an angry non-sequitur outburst in court (or elsewhere) from opposing counsel was triggered by an impairment and not just immediate litigation frustration? Is a one-time incident sufficient to trigger the "appropriate action" requirement? ABA Formal Opinion 03-431 (2003) highlights the importance of observing a pattern of conduct such as "patterns of memory lapse" or "inexplicable behavior not typical of the subject lawyer." Here, the Proposal fails to identify these common-sense potential indicia of impairment that might provide the Proposal with meaningful guidance.

Compounding the difficulty of assessing a lawyer's impairment is that the impaired lawyer may be actively hiding their impairment. This is in sharp contrast to the existing reporting requirements under IRPC 8.3 which, via reference to IRPC 8.4(b) and (c), focuses on knowledge of actions (criminal or a violation of certain ethics standards) that are much more recognizable by lawyers.

More problematic is the vagueness of the "appropriate action" requirement itself. The Proposal calls upon a lawyer to assess and take an "appropriate action" that will be "reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system." Here again, a lawyer is not a trained clinician. How will a lawyer know what action satisfactorily meets this standard? And what satisfies the obligation? Is the obligation continuing or is a onetime communication that lawyer X needs help sufficient to meet the requirement? If the suspected impaired lawyer responds with a denial of impairment, does that satisfy the acting lawyer's obligation?

Answers to the above questions are central to compliance with the Proposal but are left unanswered. In addition, the Proposal not only places an unfair burden on lawyers attempting to understand and comply with its requirements (see # 2 below), but it may also have the effect of

dissuading lawyers from even attempting good faith compliance. As a result, the Proposal's vagueness may defeat its good intentions.

2. *The professional and personal risks of failing to comply with the Proposal's vague requirements are potentially severe and far outweigh its good intentions.*

Lawyers who fail to meet the Proposal's new, broad, and vague obligations are of course subject to disciplinary prosecution. And as we know, sanctions for failing to report the conduct of another lawyer as required by the IRPC can be significant. *In re Himmel*, 125 Ill.2d 531 (1988) (one year suspension for violating IRPC 8.3). Equally problematic, however, may be the burden on a lawyer to establish, if prosecuted, that they met their "appropriate action" duty under the Proposal. It is not inconceivable that an oral "confrontation" with a suspected impaired lawyer (as allowed under the Proposal) may be difficult to establish, especially given that the impaired lawyer may not willingly acknowledge, or even remember, it.

In addition to a disciplinary charge that a lawyer violated the new "appropriate action" standard by not acting, a lawyer taking action may face scrutiny from the ARDC or the suspected impaired lawyer under IRPC 8.4(g). IRPC 8.4(g) makes it improper for a lawyer to present disciplinary charges against another lawyer if it is determined that the action was made for the purposes of obtaining an advantage in a civil matter. Faced with the vagueness of the Proposal, either course of action puts the lawyer in a Catch-22 situation.

In addition to professional disciplinary consequences, a lawyer attempting to comply with their "appropriate action" duty may face civil liability. Depending on the circumstances of the "appropriate action" taken, a charge that another lawyer is impaired is potentially defamatory. This risk of getting the impairment assessment wrong is compounded by the absence from the Proposal of any immunity for taking "appropriate action" (like the broad immunity that exists under S. Ct. Rule 775 for reports to the ARDC). (It should also be noted that the immunities established under Illinois' Alcoholism and Drug Addiction Intervenors and Reporter Immunity Law (745 ILCS 35/) would not apply to a lawyer taking "appropriate action" regarding another lawyer's cognitive impairment.)

Finally, the impact on the personal relationship between the lawyers involved should not be underestimated, especially if the lawyer taking "appropriate action" incorrectly assesses their colleague's conduct and its perceived cause. An accusation of excessive alcohol use, substance abuse, or impairment – even made in good faith - is a serious charge that the vagueness of the Proposal does not adequately reflect or accommodate.

3. *The Need for the Proposal has not been demonstrated.*

In the absence of any objective data supporting the Proposal, the Bars evaluation of it has been limited. Of course, the issue of lawyers' impairment, especially related to the "greying" of the baby-boomer generation is not a new one. But the ability of the Bars to consider the Proposal, particularly in terms of whether more narrow alternatives to its sweeping changes might be available, has been hampered by a lack of data. Unfortunately, publicly available data from the ARDC and Lawyers Assistance Program does not provide much insight. In its 2023 Report, the ARDC noted that 22 out of 66 disciplined lawyers had some sort of impairment (it was not clear whether the impairment was such that cognitive function was impacted). But it was also reported that the ARDC closed 4200 investigations

without discipline. This may have some relevancy in determining the extent of the impairment problem. In addition, the ARDC reported that older lawyers are voluntarily retiring at a significant pace, 1,609 in 2023, representing a 61.5% increase from 2009. Perhaps this rate of retirement demonstrates that Illinois lawyers are aware of their own limitations and are already appropriately meeting their duties to clients and the courts?

4. *Consistency with the ABA Model Rules should be promoted.*

The ABA Model Rules, adopted by the majority of US jurisdictions, act as a de facto national code of ethics. While state ethics rules have some variations, the development of a national ethics code is important. It facilitates the research of ethics issues and the development of consistent ethics precedent which in turn helps guide lawyers wherever they practice. In addition, given modern lawyer mobility and technological advances, it is important to note that almost 31,000 registered Illinois lawyers report a principal business address outside of Illinois, with 70% of those lawyers (21,623) holding a state license in addition to their Illinois license. Substantial deviation from the ABA Model Rules, like that offered in the Proposal, may only serve to introduce confusion and ambiguity for lawyers holding multiple law licenses.

5. *The Proposal introduces confusion regarding the reporting requirement under IRPC 8.3.*

Proposed Rule 8.3A, Comment [1] seeks to paraphrase the holdings of *In re Himmel* and *Skolnick v. Altheimer & Gray* by noting that the reporting duty under IRPC 8.3 arises "essentially" when a "substantial question about another lawyer's honesty and truthfulness" is raised. However, this is not the well-established existing standard. The existing standard is plainly set out in the IRPC itself at 8.4 (b) (committing a criminal act that reflects on a lawyer's honesty, trustworthiness, or fitness) and (c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The use of the term "essentially" adds a new aspect to the reporting standard and increases its vagueness. Similarly, the notion that a "substantial question" about a lawyer's conduct is sufficient for a report to be made is not the standard announced in *Skolnick*. (Compounding the confusion is proposed 8.3A, Comment [3]. This new Comment references the necessary knowledge required for a report as including a lawyer's "firm opinion.") The longstanding *Skolnick* standard is "more than a mere suspicion but not absolute certainty." While *Skolnick* may not be a model of clarity itself, adding even more vague terms like "essentially" and "substantial question" merely introduces more confusion for Illinois lawyers.

More critically, proposed Comment [3] suggests that in some situations a "duty of inquiry" may be required on the part of a lawyer who has suspicions about another lawyer's reportable conduct ("... mere suspicion does not *necessarily* impose a duty of inquiry." (emphasis added)). An expansion of the duties under IRPC 8.3 to include a "duty of inquiry" is a substantial new obligation and it is not supported by existing law or the Proposal's goals.

Finally, proposed 8.3A, Comment [6] introduces yet an additional and new circumstance of reportable misconduct not currently found in the IRPC or existing law. Proposed Comment [6] would require a lawyer to report another lawyer who has "made a threat of engaging in a future criminal act or a violation of the Rules of Professional Conduct." It is unclear how this proposed change advances the goals of the "appropriate action" rule, and in fact appears to have no nexus to those goals. In any event, such a change establishes a substantial new lawyer duty without any meaningful rationale or guidance.

6. *The Proposal may establish substantive employee rights inconsistent with current employment law.*

Proposed Rule 5.1, Comment [4] suggests that in an organizational setting certain undefined "mental disabilities or impairments" must be accommodated. The Comment specifically suggests three possible accommodations as guidance: (1) reassigning a lawyer to a less pressured environment; (2) changing the type of legal work performed; or (3) instituting "measures to prevent the lawyer from rendering legal services to firm clients" – which appears to be a euphemism for employment termination. Notwithstanding this proposed guidance, substantive employment law likely provides much more defined and controlling standards and obligations with respect to the law of employment accommodations (not only what is an appropriate accommodation but what type of impairment requires one). This recitation of possible accommodations, appearing as official guidance in the IRPC, may give lawyers an incomplete – and potentially incorrect and conflicting – description of their employment obligations.

7. *Unscrupulous lawyers may take advantage of the Proposal's "appropriate action" requirements of the Proposal to gain personal or professional advantages.*

The Proposal requires lawyers to take "appropriate action" when they perceive another lawyer is impaired. Given this professional mandate, it is a potential weapon for an unscrupulous (or even short-sighted) lawyer. It might be used in the heat of the moment, to settle an old score, to advance a business or professional relationship, or even to advantage a client. Regardless of motivation, the Proposal's vagueness and breadth makes the temptation of an improper "appropriate action" an unfortunate possibility.

8. *New Rule 2.14 of the Illinois Code of Judicial Conduct is not an appropriate model for the IRPC.*

It appears that Rule 2.14 ("Disability and Impairment") of the new Illinois Code of Judicial Conduct is a model for the Proposal. However, Rule 2.14 is not well-suited for addressing impairment issues within the legal profession as a whole. Like the Proposal, Rule 2.14 requires a judge with knowledge of a lawyer's (or judge's) impairment to take "appropriate action." But manifestation of an impairment is much more obvious in a courtroom, under the direct observation of a judge. Certainly, during extended litigation, a judge has many more opportunities to directly observe a lawyer's conduct. This is in stark contrast to the potential lack of observability of an impaired lawyer whose practice allows their work to go unseen by others on a routine basis. In addition, and critically, a judge taking "appropriate action" – such as confronting the suspected impaired lawyer – may be potentially much more directly impactful than "appropriate action" by others.

9. *The legal profession has had insufficient time to evaluate the Proposal.*

The significance of this Proposal should not be underestimated. It introduces new and complex concepts and obligations upon Illinois lawyers unlike any other. Despite the Proposal's sweeping nature, it was only made public on (or about) May 21, 2024. Other than the Proposal itself, no information was provided about its origin, purpose, review and drafting, or considered alternatives. The approximate seven-week timeframe to review, evaluate, and provide public comments is far too short for stakeholders, like the Bars and lawyers in general, to effectively consider and respond to all aspects of this fundamental and substantial change to the IRPC.

III. Conclusion

The Bars appreciate the opportunity to provide their comments on Proposal 23-05. These comments may not exhaust the views of the Bars but hopefully demonstrate the numerous concerns

they have toward the Proposal's sweeping changes. To this end, the Bars would be happy to work with all relevant stakeholders to help craft a meaningful response to the problem of lawyer impairment.

If you require any additional information or have questions about the comments, please do not hesitate to contact me.

Very truly yours,

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