WHEN CAN THE GOVERNMENT BE SUED UNDER THE ILLINOIS TORT IMMUNITY ACT? THE CONUNDRUM OF DISCRETIONARY VERSUS MINISTERIAL ACTS PRIVATE

BY ROBERT J. BINGLE

A teenage boy on a park district sponsored gymnastics team is practicing a front flip on a trampoline. He falls off breaking his neck. Can the park district or his coach be sued for those injuries?[1]

Can a school district be sued for the injuries sustained by an eighth grader who cuts his index and middle fingers while using a table saw during shop class?[2]

What about a woman who flips her car after she fails to see an S-curve sign on the right side of the road, as she approaches the turn, because the highway commission worker decided the sign was more safely placed on the left side? Can a lawsuit be maintained against the commission for her injuries?[3]

The answers to the above scenarios are no, maybe, and yes respectively. The crucial issue in all of these cases is whether the act in question is characterized as an act of discretion and/or policy making, or whether it is ministerial pursuant to the terms of the Local Governmental and Governmental Employees Tort Immunity Act ("Act").[4]

Under the Act, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for any injury resulting from his or her act or omission in determining policy when acting in the exercise of such discretion, even when that discretion is abused.[5] The public official and the entity employing him or her will generally be immune for discretionary actions taken pursuant to a determination of policy. Conversely, if an act is in furtherance of a plan or policy it is generally considered "ministerial," and no immunity will protect the public official or entity from liability.[6]

The conundrum of the plaintiff's lawyer is that almost every action taken by a municipal employee can arguably be labeled "discretionary". Every lawyer that has filed a case against a municipality will attest to the ubiquitous nature of this defense. The solution for that lawyer is to heed the Supreme Court's admonition to take these situations on a "case-by-case" basis and to show the Court how these facts fall outside the ambit of the discretionary protection. This article will discuss the distinguishing features of discretionary and ministerial acts under the Act, and set forth guidelines to help the practitioner distinguish between protected discretionary acts and non-protected ministerial conduct under Section 2-201 of the Act.[7]

I. INTRODUCTION

Under Illinois law, the Act governs the liability of public employees and public entities.[8] Section 2-201 codifies the common law notion that government officials are immune from liability for discretionary as opposed to ministerial acts or omissions.[9] Discretionary immunity applies even where the official abuses this discretion.[10] The local public entity employing the public employee will also be immune from liability if the only basis for its liability is vicarious liability.[11] Alternatively, if the act is ministerial the local public entity may be held liable, but the public employee will not be, absent willful and wanton conduct.[12]

In order to maintain a lawsuit against a public official and/or the public entity employing him, a plaintiff must be able to show that the harmful conduct was the result of a ministerial act, and not the exercise of discretion or a policy decision. As a threshold matter, determining whether an action is discretionary or ministerial is crucial to maintaining a tort action against a local public official and entity. However, wading through the relevant case law can often be confusing. For example, courts have determined that acts such as determining what route to follow in a fire drill and what athletic equipment to provide a team are discretionary, while ministerial acts include maintaining stop signs, selling real-estate, and providing licenses. But many situations involve both discretionary and ministerial acts, i.e. the decision to take a certain action may be discretionary, but the steps to carry out that action are likely ministerial. In these situations the particular action which caused the tort in question will determine whether immunity applies.

Additionally, simply determining whether an action consists of a discretionary or ministerial act is not always dispositive of whether the public official is entitled to discretionary immunity. The courts will look at both the position of the public official *and* the type of action taken by that official.[13] If the actor is in a policy making position and the act was discretionary and in furtherance of this policy, the actor is immune even if their discretion is abused.[14] Conversely, even if discretion was involved, an official is not immune from liability for his decisions which are not unique to his office.[15]

II. WHAT MAKES AN ACT DISCRETIONARY?

Discretionary acts include conduct unique to a particular public office, and are not merely ministerial in nature.[16] Discretionary acts require the exercise of judgment and skill, and can be characterized as governmental.[17] In contrast, ministerial acts involve conduct performed according to a given state of facts and an established method.[18]

A. What are "Unique Actions?"

For an act to be discretionary, it must be unique to that particular public office. Generally, an action is unique to a particular office or position when only persons in that office or position could decide what action to take. An action or decision is not unique if someone outside a specific governmental office could make the same

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choice or decision.

For example, an official's decision about whom to hire for a specific government position is unique, and therefore, discretionary.[19] In *Johnson v. Mers*, an off-duty police officer hired by the police chief shot the plaintiff during a personal argument. The plaintiff alleged liability based on the police department's negligent hiring of the police officer. In finding that immunity applied, the court explained that hiring a police officer is inherently discretionary since it was not performed on a given state of facts and in a prescribed manner. Instead, the police department must consider and evaluate many different factors in hiring a police officer, which thereby require an official's discretion.[20] Even though in this instance the police department did devise a hiring plan which included the application process, a polygraph examination, psychological test, physical testing, and interviews, the final decision regarding whether to hire a police officer was unique to the police chief's office. Therefore, the court held that the ultimate decision regarding whom to hire was a discretionary act and protected by immunity.[21]

Harinek v. 161 North Clark Street, provides another useful example of a "unique" action.[22] In *Harinek,* a woman was injured during a fire drill. While performing the drill, the fire marshal lined up a large group of people, including the plaintiff, next to a heavy door. When someone opened the door, it struck and injured the plaintiff.[23] In this situation, the court determined that because the fire marshal is solely responsible for planning and executing fire drills in buildings throughout Chicago, the decisions involved in determining how, when, and where to hold drills are unique to his position as fire marshal.[24] In other words, no one outside of the position of fire marshal could make such decisions. Thus, the court concluded that conducting fire drills is a "unique" act, and hence the defendants were immune from liability.

Additionally, a law enforcement officer's attempt to apprehend an escaped criminal is considered a "uniquely" governmental function.[25] In one instance, the plaintiff Warren Oppe was driving his car with his wife as a passenger. They stopped their car at a roadblock set up by a state trooper. At the same time, additional state troopers were involved in a high-speed chase with an escapee from a Missouri correctional institute. When the escapee's car encountered the roadblock, the car became airborne and landed on the Oppe's car. The Oppe's sued the county sheriff, county deputy, State Department of Law Enforcement, and state troopers to recover damages for the injuries they received as a result of the chase and road block. The court determined that the decision to form a roadblock to apprehend a fleeing suspect was "unique" to the job of being a state trooper.[26] Therefore, the court held that the public officials were entitled to discretionary immunity and a tort action could not be maintained against them.[27]

However, many actions that seem discretionary at first glance are not afforded immunity because they do not qualify as "unique" actions. Where it is conceivable that someone outside a particular office could have taken the same action or made the same decision, those actions or decisions are not covered by discretionary immunity under the Act.

For example, in *Lenz v. Julian,* [28] the defendant state trooper began the pursuit of a motorcyclist while on duty. After the pursuit was called off, the trooper sped through an intersection and struck the plaintiff's car. The court held that the officer was not immune from liability, reasoning that the decision to respond to the call for assistance was not the cause of the accident, rather the accident was caused by the defendant's decision to speed as he traveled through the intersection even though he was no longer in hot pursuit.[29] The court determined that the decisions about what speed to travel and whether he should stop or sufficiently slow his vehicle at an intersection were not unique to the office of the police.[30] Therefore, the defendant was not protected from liability under the Act.

Similarly, in *Currie v. Lao*,[31] a state trooper drove the wrong way down a one-way street and struck the plaintiff's pick-up truck. The Illinois Supreme Court held that the trooper was not protected by public officials' immunity because although his decisions regarding what route to follow were discretionary, they were not "uniquely related to [his] official duties as a state trooper."[32] The court reasoned that "these same choices are made by all drivers of motor vehicles."[33]

Additionally, in *Stratman v. Brent*, a police chief allegedly passed on defamatory information to the plaintiff's prospective employers.[34] The plaintiff was a former police officer. Although not required by any official mandate to provide employment information, the police chief decided to provide the prospective employers with statements. However, the information the chief decided to provide was not information contained in the plaintiff's record, instead he told the employers that plaintiff was unstable and that the defendant would not hire him back.[35] The appellate court for the second district held that the decision to provide this information to the employers was not an act of discretion, unique to the position of police chief, stating "to the contrary, decisions regarding what to tell prospective employers about an employee are made by all past employers."[36] Hence, the court determined that the defendants were not immune since the police chief was not using his official discretion while making the alleged defamatory statements because this act was not unique.

B. What are "Policy Determinations?"

1. How *Harinek* changed the law in Illinois

In addition to being unique to a particular office, acts garnering immunity must also reflect the exercise of discretion. Prior to the Illinois Supreme Court's decision in *Harinek,* an "exercise of discretion" permitting immunity under Section 2-201 of the Act included those decisions that can be characterized as "policy determinations." In general, policy determinations are those decisions that require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests.[37] Before *Harinek,* whether an act was a "policy determination" had not been understood to create a separate and distinct element that must be satisfied for immunity to attach.

However, in *Harinek v. 161 North Clark Street Ltd. Partnership*, the Supreme Court of Illinois reviewed for the first time whether Section 2-201 requires that a public entity's act or omission be *both* an exercise of discretion and a policy determination. In *Harinek*, the court determined whether a fire marshal's actions in planning and controlling a fire drill at plaintiff's place of employment on the date she was injured constituted a policy determination.

The court first addressed whether the fire marshal was involved in determining policy. In this instance, the fire marshal is responsible for planning and conducting fire drills in the City of Chicago. In planning these drills, the fire marshal must balance various interests which compete for the time and resources of the department, including the interests of efficiency and safety. As a result, the court determined that acts such as the fire marshal's decisions whether to provide warning signs and alternate routing were all part of his attempt to balance these interests.[38] The court then turned to the issue of whether the fire

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performed and responsibility assumed by each lawyer, except where the primary service performed by one lawyer is the referral of the client to another lawyer and

(1) the receiving lawyer discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit, and

(2) the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer.[20] Rule 1.5(g) of the Rules of Professional Conduct.

Rule 1.5(g) permits the lawyer to receive a portion of the fee for making a referral, without performing any further service, so long as: (1) the client consents in writing after receipt of the written disclosure; (2) the referring lawyer agrees to assume the same legal responsibility for the representation; and (3) the total fee is reasonable.[21]

To "assume the same legal responsibility" means "the acceptance of passive, financial guaranty obligations," *i.e.*, that the referring lawyer agrees to assume the same potential financial responsibility for any malpractice against the receiving lawyer of the referred matter as if the referring lawyer and the receiving lawyer are partners.[22]

SETTLEMENT AUTHORITY

In general, a lawyer, as the agent for his client in legal matters, may bind his client by the lawyer's acts or omissions. However, with regard to settlement authority a lawyer's authority to represent a client in a legal matter doesn't necessarily include the authority to conclude a settlement. Settlement authority is a special grant of authority to the lawyer and, as such, the lawyer must have express consent or authorization to conclude a settlement.[23] In *Danziger v. Pittsfield Shoe Co.,* the Illinois Supreme Court stated:

> The authority of an attorney to prosecute a suit does not involve authority to compromise it. Before an attorney can compromise a suit, he must have a special authority for that purpose. [Citation.] Where an attorney, employed to prosecute or defend a suit, makes an agreement for the settlement of the same out of court, and without making the agreement a part of the decree or judgment in the suit, the client will not be bound by such agreement, or settlement, without proof of authority in the attorney to bind the client, or acquiescence on the part of the client after knowledge of the facts; and, in such case, there is no presumption of authority, but the burden of proof rests on the party, alleging authority, to show that fact.

Rule 1.2(a) Scope of Representation.

A lawyer shall abide by a client's decisions concerning the objectives of the representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, after disclosure by the lawyer, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive jury trial and whether the client will testify.[25]

Rule 1.4 Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[26]

SETTLEMENT WITHOUT THE CLIENT'S CONSENT

In the case of *In re Harvey L. Walner*,[27] the attorney represented four plaintiffs in connection with an automobile accident. When settlement offers were received, one plaintiff could no longer be located. The attorney concluded that one of the other plaintiffs had authority to approve a settlement on behalf of the missing plaintiff, but no basis for that authority was shown. The retainer agreement provided that "no settlement will be made without the consent of the injured party." Since the plaintiff could not be located, the attorney had both a release and the settlement check for $400 signed in the plaintiff's name (without any indication it was not the plaintiff himself signing), deposited one-third in an escrow account, used one third for the medical expenses, and took one third for attorney's fees. After the settlement was effected, the client was located and sent papers to sign. However, he disappeared again without signing them. On these facts, the Illinois Supreme Court censured the attorney, finding that the attorney had acted improperly in settling the case without authority. The court stated:

> "This court has consistently condemned the activities of settling a claim without the client's consent and of signing a client's name without authority...For an attorney to settle a personal injury case and direct the cashing of settlement checks without authorization by his client is itself an impropriety requiring discipline."[28]

POWER OF ATTORNEY

If settlement is in fact authorized and the client then disappears, the attorney needs additional authority (whether from the retainer agreement or elsewhere) to sign releases, drafts, or other settlement documents on behalf of the client and to deduct his contingent fee from the settlement proceeds. In *Walner*, the court also considered the attorney's use in another personal injury action of a general power of attorney. While the court ultimately determined that the attorney had not abused his authority, the court instructed that for such agreements to be used, they must be of a limited scope and duration and any signature made on behalf of the client under such agreements should clearly show that the document is being signed in a representative capacity.

> "This court has previously condemned the procurement by attorneys of a general authority to settle, particularly when the attorney is hired on a contingent basis....To prevent any conflict of influence and appearance of impropriety" such general powers should not be used....Any power of attorney should have been narrowly drawn to limit the attorney's power to settle within a certain range of options and for a certain time period."[29]

See also ISBA Ethics Advisory Op. No. 88-4,[30] where the client has disappeared or cannot be located, it is improper for the lawyer to settle the case, sign a settlement draft or deduct fees without authority from the client; power of attorney to settle in retainer agreement must be narrowly drawn.

Notwithstanding a power of attorney, even if validly executed by the client, an attorney may not circumvent the expressed wishes of the client by forcing settlement or disregarding the client's instructions and signing the client's name to various documents, including a power of attorney and release.[31]

The client should be given copies of all documents which counsel signs on his/her behalf under the Power of Attorney.

SETTLEMENT NEGOTIATIONS

Candor Toward Opposing Counsel/ Party

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not:

(a) make a statement of material fact or law to a third person which statement the lawyer knows or reasonably should know is false; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[32]

Rule 4.1 draws the line on the limits of zealous advocacy. Subsection (a) forbids a lawyer from lying and subsection (b) calls upon a lawyer to correct misstatements or deliberate omissions of others, including those made by the client.

Misrepresentation During Settlement Negotiations: Withholding Information During Settlement Negotiations; A Lawyer's duty to volunteer the correct information

Making Substantive Changes in a Settlement Agreement and Not Advising Opposing Counsel of the Changes: ISBA Ethics Advisory Op. No. 95-10 (1996) Making substantive changes in a draft agreement without calling them to opposing counsel's attention violates Rule 4.1(a) and is also fraudulent or deceitful conduct prescribed by Rule 8.4(a) of the Rules of Professional Conduct.

Circumstances That Change During Settlement; The Client Dies: In re Robert Scott Medansky,[33] (Lawyer censured for failing to inform insurance company that client had died during the course of settlement negotiation).

Deceptive Practices: See In re Sorkin,[34] lawyer received one-year suspension for attempting to settle both the claim of CCH and the lawsuit by Computax by use of the endorsement on the back of the settlement check to CCH which also purported to cover the Computax claim; and *In re Segall,*[35] where an attorney who attempted to deceive creditors by obtaining settlements of large claims for de minimis amounts by sending each creditor a letter designed to make creditors' agents believe that minimal amount tendered is amount actually due would violate disciplinary rules, prohibiting attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and from engaging in conduct that is prejudicial to the administration of justice.

Rule 4.2 Communications With Person Represented by Counsel.

During the course of representing a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.[36]

When opposing counsel does not convey settlement offers to client

Rule 4.2 is the anti-contact rule which constrains a lawyer, his non-lawyer employees and other agents from communicating with a represented non-client relating to the lawyer's representation in the matter. The rationale behind such prohibition is to protect against overreaching and deception of the non-client by the lawyer. It is also to protect the relationship between the non-client and his lawyer and assures that communications between them are kept confidential. Therefore, under Rule 4.2 a lawyer cannot communicated with a represented non-client even by letter with a copy to the opposite lawyer even if the opposite lawyer wrongfully fails to convey important information to his client such as a settlement offer.[37]

TERMS OF SETTLEMENT AGREEMENTS

Paying Off Lienholders - In the case of *In re David R. Jordan,* 157 Ill.2d 266, 191 Ill.Dec. 486, 623 N.E.2d 1372 (1993), a lawyer was placed on three years probation when he forged the release of a hospital lien in order to expedite the payment to a client of settlement funds and then attempted to conceal his misconduct by making false statements repeatedly to the ARDC.

SETTLEMENT TERMS THAT VIOLATE THE RULES AND LAW

Settlement predicated upon declination of future representation.

Rule 5.6(b) prohibits lawyers from offering or making

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between the private parties. Rule 5.6(b) of the Rules of Professional Conduct.

Thus, agreements that the plaintiff's lawyer will, as part of the settlement of his client's case, agree to forego representing future clients against the settling defendant are prohibited.

Aggregate Settlements.

Rule 1.8 (e) prohibits lawyers from making aggregate settlements unless the clients consent after disclosure.

(e) A lawyer who represents two or more clients shall not participate in making aggregate settlement of the claims of or against the clients, or in a criminal case as aggregate agreement as to guilty or nolo contendere pleas, unless each client consents after disclosure, including disclosure of the nature of all the claims or pleas involved and of the participation of each person in settlement. Rule 1.8 (e) of the Rules of Professional Conduct.

PAYMENT OF FEES AND FEE DISPUTES; NOTICE TO CLIENT OF DEDUCTING ATTORNEY'S FEES FROM SETTLEMENT PROCEEDS; EXPERT WITNESS SERVICES

In every attorney-client engagement, there is an implied right of the client to know and obtain an itemization of fees even if the attorney's fee was fixed or the client assented to the amount. *In re Marriage of Pitulla*, 141 Ill.App.3d 956, 491 N.E.2d 90, 96 Ill.Dec. 276 (1st Dist. 1986)

An attorney should not withdraw his attorney's fees without proper notice to the client. *See* Rule 1.15(c). In *Walner*, the Supreme Court found that the attorney improperly withdrew his fees without client approval. Declining to label the violation as "merely technical," the court stated:

"This was not a case of mere oversight. The respondent had not been able to notify his client of the settlement. Until Jordan [the client] knew of the settlement and expressed approval of his fee, it was highly improper for the respondent to withdraw his fee. Although the fee in [this] case appears to be appropriate, that does not make the violation merely technical. The respondent had a duty to preserve his client's funds, and this he failed to do." 519 N.E.2d at 908.

The court in *Walner* also determined that when the client was located after the settlement had been effected, that the attorney was improperly tardy in waiting nine months to notify him of the settlement, providing him with a closing statement, and offering to pay him the settlement proceeds in violation of Rule 9-102(c)(4) (now Rule

1.15(b) of the Rules of Professional Conduct.)

In re Jack Carl Mardoian, M.R. 11843, 95 CH 747 (Ill., Jan. 23, 1996), the lawyer agreed to represent a client in the administration of a probate proceeding and, together with another attorney, would represent the estate in four pending civil lawsuits relating to the decedent. A year later, both lawyers were fired by the client. Approximately one year after that, Mardoian received a check of approximately $8,200, which represented the payment of funds due the estate in connection with the resolution of one of the civil lawsuits. Without obtaining the authority of the former client. he deposited the proceeds into a business account and spent the money. At the time he obtained the proceeds, the lawyer believed that he was owed approximately $12,000 in outstanding fees. Later, he made restitution and expressed remorse.

ISBA Ethics Advisory Op. No. 91-16 Topic: Conflict of Interest; Safekeeping Property (January 1992). An attorney cannot pay out settlement proceeds to clients' prior attorney, contrary to the clients' directions, until the dispute with regard to the proceeds is resolved. An attorney may represent clients in the resolution of such dispute only in compliance with Rule 1.7(b). Under Rule 1.15(c), because there is a dispute between the client and the client's former lawyer, the settling lawyer must keep these funds in a trust account until the dispute is settled.

The Illinois Supreme Court has ruled that a contract providing for the payment of a contingent fee to a firm in exchange for obtaining expert witnesses was void as contrary to public policy. *First National Bank of Springfield, Guardian of the Estate of Christy Mollet vs. Malpractice Research, Inc., d/b/a The Medical Quality Foundation, et al.* 179 Ill.2d 353, 228 Ill.Dec. 202, 688 N.E.2d 1179 (1997)

Trust Accounting Rule 1.15

Whenever a lawyer comes into possession of property belonging to a client or a third person in connection with the representation, the requirements of safekeeping trust property under Rule 1.15 are triggered. Rule 1.15 sets forth the ethical duties an attorney must fulfill in holding the funds of clients or third persons. To fulfill the duties set forth in Rule 1.15, an attorney's handling of client funds must be: (1) separate, i.e., client funds must be segregated from the attorney's own property; (2) accountable, i.e., the attorney must be readily able to account to the client or third person through updated and accurate records of the funds being held in trust; and (3) identifiable, i.e., the funds being held in trust must be readily identifiable as the property of others. *See ARDC Client Trust Account Handbook* (April 1997) (a copy may be obtained by calling the ARDC at 800-826-8625 or 800-252-8048)

Rule 1.8(g): Settlement of a Malpractice Claim with Client

(g) A lawyer shall not settle a claim against the lawyer made by an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith. Rule 1.8(g) of the Rules of Professional Conduct.

Because the interests of the lawyer and client are adverse, the lawyer deals with his client or former client as he would with an unrepresented person under Rule 4.2. The lawyer is not disinterested and therefore, must disclose in writing the client's need to retain independent representation. This means giving the client "information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Terminolgy, Rules of Professional Conduct. In re Miller*, 96 CH 91, M.R. 12977 (11/26/96) (attorney suspended for three months for misconduct which included failing to advise client in writing to seek the advice of independent counsel in regards to a potential malpractice claim)

Rule 1.8(h): Prohibited Release of an ARDC Grievance

(h) A lawyer shall not 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 Attorney Registration and Disciplinary Commission.[38]

See In re Lewis,[39] where a lawyer entered into settlement agreement with client to dismiss disciplinary proceedings against him in return for payment of settlement funds; and *In re Raymond*,[40] where an attorney suspended for two years for misconduct including inducing clients to drop disciplinary complaints against him.

Most ethical issues that arise can be answered merely by reviewing the Rules of Professional Conduct. The ARDC maintains an "Ethics Inquiry Hotline"[41] which will assist the concerned practitioner in finding resources to answer ethical concerns.

[1] ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.5(a).

[2] Id.

[3] BA Formal Opinion 93-379, Dec. 6, 1993 ("Billing for Professional Fees, Disbursements and Other Expenses").

[4] See *In re Gerard*, 132 Ill.2d 507, 520, 548 N.E.2d 1051, 1055, 139 Ill.Dec. 495, 499 (1989); *In re Kurner*, 78 Ill.2d 157, 399 N.E.2d 963, 35 Ill.Dec.674 (1979) (excessive to charge $5,000 fixed fee for handling "a routine battery case which never went to trial" and on which the lawyer spent 6 to 10 hours).

[5] See *Robinson*, Mary, Avoiding ARDC Anxiety: A Disciplinary Primer, 84 ISBA Journal 452 (September, 1996) (A copy may be obtained by calling the ARDC at 800/ 826-8625 or 800/ 252-8048).

[6] ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.5(c).

[7] 132 Ill.2d 507, 548 N.E.2d 1051, 139 Ill.Dec. 495.

[8] *Gerard*, 132 Ill.2d at 522, 548 N.E.2d at 1056, 139 Ill.Dec. at 500.

[9] *In re Marriage of Pagano*, 154 Ill.2d 174, 607 N.E.2d 1242, 180 Ill.Dec. 729 (1992).

[10] *Pagano*, 154 Ill.2d at 185, 607 N.E.2d at 1247, 180 Ill.Dec. at 734.

[11] Id.

[12] Id.

[13] Pub. Act. 84-7, §1, eff. Aug. 15, 1985 (1985 Ill.Laws 211, 221).

[14] 735 ILCS 5/2-1114(a) and (c).

[15] *American Home Assur. Co. v. Golomb*, 239 Ill.App.3d 37, 43, 606 N.E.2d 793, 797, 179 Ill.Dec. 961, 965 (4th Dist. 1992) appeal denied, 151 Ill.2d 561, 616 N.E.2d 331, 186 Ill.Dec. 378 (1993).

[16] *Davies v. Grauer*, 291 Ill.App.3d 863, 684 N.E.2d 924, 225 Ill.Dec. 933 (1st Dist. 1997), distinguishing *Holstein v. Grossman*, 246 Ill.App.3d 719, 616 N.E.2d 1224, 186 Ill.Dec. 592 (1st Dist. 1993).

[17] See also *Anderson v. Anchor Organ. for Health Maintenance*, 274 Ill.App.3s 1001, 654 N.E.2d 675, 211 Ill.Dec. 213 (1st Dist. 1995) (Oral agreement to share fees between lawyers unenforceable because clients had no knowledge of and did not consent to the arrangement).

[18] See *In re Paul S. Johnson*, 133 Ill.2d 516, 522 N.E.2d 703, 142 Ill.Dec. 112 (1989); *In re Peter George Limperis*, M.R. 14834, 96 CH 60 (Ill. May 27, 1998) (Lawyer was censured who, without authority, signed another attorney's name to the back of a client settlement check and then disbursed the settlement proceeds without first ascertaining the extent of that lawyer's interest in the proceeds).

[19] See *In re Stuart Howard Gold*, 98 CH 91 (Jan. 12, 1999) (Attorney received Hearing Board reprimand for forging dead client's name to a settlement agreement). See also *In re Chernoff*, 91 Ill.2d 316, 325, 438 N.E.2d 168, 63 Ill.Dec. 430 (1982); In re Dombrowski, 71 Ill.2d 445, 450, 376 N.E.2d 1007, 17 Ill.Dec. 678 (1978); In re Di Bella, 58 Ill.2d 5, 8, 316 N.E.2d 771, 772 (1974).

[20] ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.5(g).

[21] *Kaplan v. Pavalon & Gifford*, 12 F.3d 87 (7th Cir. 1993) (Referral fee arrangement unenforceable because client did not consent in writing to referral).

[22] *Elane v. St. Bernard Hospital*, 284 Ill.App.3d 865, 672 N.E.2d 820, 220 Ill.Dec. 3 (1st Dist. 1996), quoting from Chicago Bar Association PRC Opinion 87-2, at 4, and citing to Illinois Judicial Ethics Committee Opinion No. 94-16, at 2 (1994).

[23] *Kazale v. Flowers*, 185 Ill.App.3d 224, 541 N.E.2d 219, 133 Ill.Dec. 382 (2nd Dist. 1989) (Settlement agreement not enforceable where there was no evidence that plaintiff authorized or even had knowledge of a settlement agreement reached outside of court and outside presence of the parties).

[24] *Danziger v. Pittsfield Shoe Co.*, 204 Ill. 145, 149, 68 N.E.2d 534, 535 (1903).

[25] ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.2(a).

[26] ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.4.

[27] *In re Harvey L. Walner,* 119 Ill.2d 511, 519 N.E.2d 903, 116 Ill.Dec. 688 (1988).

[28] 119 Ill.2d at 524, 519 N.E.2d at 909, 116 Ill.Dec. at 694.

[29] 519 N.E.2d at 908.

[30] ISBA Ethics Advisory Opinion No. 88-4, Topic: Missing Client (Feb. 9, 1989).

[31] See *In re Dombrowski,* 71 Ill.2d at 450, 453-54, 17 Ill.Dec. at 681; *In re Gavin,* 21 Ill.2d 237, 245, 171 N.E.2d 588, 592 (1961).

[32] ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 4.1.

[33] *In re Robert Scott Medansky,* 94 CH 609.

[34] *In re Sorkin,* M.R. 10091, 91 CH 434 (May 19, 1994).

[35] *In re Segall,* 117 Ill.2d 1, 509 N.E.2d 988, 109 Ill.Dec. 149 (1987).

[36] ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 4.2.

[37] See ABA Formal Opinion No. 92-352: Restatement on the Law Governing Lawyers, No. 8, at pp. 227-28.

[38] ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.8(h).

[39] *In re Lewis,* 138 Ill.2d 310, 562 N.E.2d 198, 149 Ill.Dec. 734 (1990).

[40] *In re Raymond,* 94 CH 883, M.R. 13179 (Jan. 30, 1997).

[41] ARDC Ethics Inquiry Hotline No. 800/252-8048.

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