

New Illinois Ethics Rules on Lawyers' "Reporting Up" Responsibilities

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Illinois health lawyers should be aware of important new changes to the Illinois Rules of Professional Conduct (IRPC), including those that require heightened responsibilities for a lawyer upon learning of wrongful corporate conduct. These new rules were announced by the Illinois Supreme Court on July 1, 2009, and are effective January 1, 2010.¹

Overview and Perspective

The new rules represent the first complete revision of the IRPC since 1990. They are based generally on Model Rules adopted by the American Bar Association in 2002/2003 and, together with Official Comments,² cover more than 120 pages in length. Similar revisions have been made to the lawyer ethics rules of many other states. Three of the new rules relate directly to compliance challenges that many Illinois health lawyers may be called upon to address, given the heavily regulated nature of the health care industry. These three key provisions enhance the ability of lawyers to promote compliance with law and, more specifically, to facilitate communication between the lawyer and the corporate client in relation to legal compliance matters.

The Three Key Rules

KEY RULE NO. 1: "COUNSELING CLIENT ABOUT LEGAL CONSEQUENCES OF PROPOSED CONDUCT WITHOUT ASSISTING CRIMINAL OR FRAUDULENT CONDUCT"

IRPC 1.2(d) provides that 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 discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law." This Rule addresses an area of acute concern to health care lawyers, given the vagaries of many federal and state health care laws, and the rare but disconcerting situations where allegedly unlawful client conduct is attributed by "conspiracy" to its legal counsel.

Comments to IRPC 1.2(d) make clear that the lawyer (obviously) is prohibited from knowingly counseling or assisting a client to commit a crime or fraud. However, the lawyer is certainly entitled to provide the client with an honest opinion of the actual consequences the lawyer believes likely to result from the client's conduct. More importantly, the fact that a client applies its lawyer's advice in acting in a criminal or fraudulent manner does not, in and of itself, make the lawyer a party to the client's course of action. In that way, IRPC 1.2(d) distinguishes between presenting an analysis of the legal aspects of questionable conduct (on the one hand) and recommending the means by which a crime or fraud might be committed (on the other hand).

The new IRPC changes to Rule 1.2(d) include a Comment referencing a lawyer's discretion to make disclosures to prevent or rectify client fraud. Comment [10] deals with the circumstance in which the client's course of action has already begun and is continuing. In such a situation, the lawyer's role becomes delicate. Comment [10] serves to clarify that the lawyer must 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. Along the same lines, the lawyer is prohibited from assisting a client in conduct the lawyer originally believed legally proper but subsequently discovers is criminal or fraudulent. In these and similar situations, withdrawal from the representation is required by the Rules [see, IRPC 1.16(a)]. Indeed, the new Comment provides that in certain instances withdrawal alone may be insufficient; *e.g.*, under the particular circumstances, compliance with the Rules may require the lawyer to give notice of the fact of the withdrawal and to disaffirm any opinion, document, affirmation or similar manifestation of legal advice (see, IRPC 4.1). Depending upon the circumstances, the lawyer is also to consider the appropriateness of disclosure of information relating to the representation (see, IRPC 1.6(b), and below).

KEY RULE NO. 2: "DUTY OF CONFIDENTIALITY"

IRPC 1.6 governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. In doing so, it speaks to the bedrock principle of confidentiality of client information; *i.e.*, that the

¹ http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/default_NEW.asp

² Unlike the previous IRPC, the new IRPC contains Official Comments that provide guidance regarding application of the Rules.

lawyer is prohibited from revealing information relating to the representation of a client, subject to specifically articulated exceptions. In this regard, it is important to note that Model Rule 1.6 was dramatically amended in the wake of Enron and related scandals to assure that principles of client confidentiality are not used by a client to prevent disclosure of a fraud or crime.³

The new IRPC provisions track the Model Rules and change the prior Illinois rules concerning client confidentiality in two major respects, including one that broadens the circumstances in which a lawyer is permitted to disclose the client's intention to commit a crime. Changes to IRPC 1.6 essentially "reshuffle" the confidentiality principles along the Model Rules approach, with a few important distinctions.

For example, IRPC 1.6(b)(1) is a general exception to the rule of confidentiality, which *permits* the lawyer to reveal the intention of a client to commit *any* crime [including a financial crime], regardless of the nature of the crime or whether the crime might lead to substantial financial injury.⁴ In this respect, the IRPC differs from the Model Rules, which permit disclosure only to prevent crime or fraud that would result in substantial financial injury.

Furthermore, new IRPC 1.6(b)(2) provides a separate exception to the rules of client confidentiality that *permits* the lawyer to reveal information necessary to enable affected persons or appropriate authorities to prevent the client from committing fraud,⁵ 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.

Neither IRPC 1.6(b)(1) nor (b)(2) *requires* the lawyer to reveal the client's misconduct, but the lawyer is prohibited from counseling or assisting the client in conduct known by the client to be criminal or fraudulent.⁶ In this regard, reference should also be made to IRPC 1.16 (with respect to the lawyer's obligation or right to withdraw from the representation of the client in certain circumstances), and Rule 1.13(c) (which permits the lawyer, when the client is an organization, to reveal information relating to the representation in limited circumstances) (see below).

In addition, a new Comment [15A] was added to IRPC 1.6 to remind lawyers that a "noisy withdrawal" (*i.e.*, providing notice of the withdrawal) may still be undertaken in the case of client crime or fraud regardless of whether the lawyer decides to disclose confidential information as may be permitted by IRPC 1.6(b). If the client is an organization, the lawyer must also consider the provisions of IRPC 1.13 (see below).

Particularly noteworthy is Comment [9] to IRPC 1.6, which provides that a lawyer's confidentiality obligations do not preclude the lawyer from obtaining confidential legal advice concerning the lawyer's personal responsibility to comply with the IRPC. In most circumstances, disclosure of confidential information in connection with obtaining such advice will be impliedly authorized in order to allow the lawyer to proceed properly with the representation. IRPC 1.6(b)(4) permits this type of disclosure because of the importance attributed to a lawyer's compliance with the IRPC. Because such compliance is ultimately beneficial to the client, it is reasonable that the client assume the cost of such outside advice.

KEY RULE NO. 3: "ORGANIZATION AS CLIENT"

IRPC 1.13 deals with the special responsibilities of a lawyer for a corporation or organization. The goal of this Rule is to enhance the effectiveness of lawyers to a corporation in their counseling role to encourage compliance with legal obligations. Of particular interest are three changes to the rules that govern the lawyer's obligations to communicate internally within the organization—as well as outside—when the lawyer has knowledge of corporate misconduct, including but not limited to crime or fraud.⁷

³ http://www.abanet.org/cpr/mrpc/rule_1_6.html

⁴ IRPC 1.6(c) *requires* the lawyer to 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. The Model Rules simply permit, but do not require, the lawyer to disclose that information.

⁵ "Fraud" is defined by IRPC as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."

⁶ See IRPC 1.2(d).

⁷ See, *e.g.*, Report of the American Bar Association Task Force on Corporate Responsibility (Task Force Report) http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf

The first material change is to IRPC 1.13(b), which now (like the Model Rules) mandates “reporting up” of corporate misconduct unless the lawyer reasonably believes it is not necessary. The new Rule 1.13(b) addresses two main issues:

- *The circumstances that trigger the lawyer’s duty to take action within the organization:* IRPC 1.13(b) requires a lawyer for an organizational client to act when the lawyer *knows* that a person within the organization is violating or intends to violate the law and is likely to cause substantial injury to the organization. As defined in the IRPC, the terms “knowingly,” “known” or “knows” refer to actual knowledge and do not include knowledge that could merely be imputed to the lawyer. Actual knowledge can, however, be inferred from the circumstances.
- *The circumstances in which the lawyer is required to communicate with a higher authority within the organization:* IRPC 1.13(b) encourages “reporting up” within the organization by *requiring* the lawyer to refer the matter to higher authority in the organization, including (if warranted) the organization’s highest authority (*e.g.*, board of directors)—unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so.

Comment [4] provides that when making “reporting up” decisions, the lawyer should take into consideration such factors as the seriousness of the misconduct and its consequences, the responsibility in the organization and the apparent motivation of the involved parties, related organizational policies and any other relevant considerations. Thus, in some situations, the lawyer may first ask the individuals in issue to reconsider the matter (*e.g.*, if there was an innocent misunderstanding of the law). If that communication is successful, “reporting up” may not be necessary. If that communication is not successful, reporting up may become necessary. Furthermore, if the circumstances are of sufficient seriousness and importance or urgency to the organization, “reporting up” may be necessary *even if* the lawyer has not asked the parties to reconsider the matter. As Comment [5] notes, the lawyer will be *required* to “report up” when doing so is reasonably necessary to position the organization to respond to the matter in a timely and appropriate manner.

The “reporting up” provisions of IRPC 1.13(b) are not intended as “best practice,” but rather as guidelines for responding to those truly extraordinary circumstances in which a significant failure of governance puts (or threatens to put) the interests of the organization into serious legal jeopardy.⁸

The second material change, to IRPC 1.13(c), *permits, but does not require*, the organization’s lawyer to communicate client confidences with persons outside of the organization in certain circumstances. These include circumstances where: (a) the subject conduct involves a crime or fraud (as opposed to simply a “violation of law”); (b) the organization’s highest authority insists upon or fails to address in a timely and appropriate manner an action or refusal to act that is clearly a crime or fraud; and (c) the “reporting out” is determined by the lawyer to be reasonably necessary to prevent substantial injury to the corporation. Note that lawyers may still have a Rule 1.13(b) “reporting up” obligation in the event of client misconduct involving other than crime or fraud, even though they may be prohibited from “reporting out” pursuant to Rule 1.13(c).

The third material change, to IRPC 1.13(e), provides that a lawyer who reasonably believes that he or she has been discharged because of “reporting up” or “reporting out” as provided in either IRPC 1.13(b) or (c), or who withdraws under circumstances that would permit such reporting, must inform the organization’s board of the discharge or withdrawal and what the lawyer reasonably believes to be the basis for the discharge or withdrawal.

Policy and Practical Implications

These changes to the IRPC are consistent in most respects with changes adopted to the lawyer ethics rules in many other states. Indeed, the rules in most states have been revised in one form or another to address such “corporate responsibility”-related changes adopted in the Model Rules. They reflect a public policy that effective corporate governance and legal compliance are enhanced by increasing the flow of information on legal risks within the organization.⁹ They are also consistent with the generally accepted perspective that lawyers are and should be important participants in corporate governance, key contributors to corporate responsibility and promoters of corporate compliance with the law.¹⁰

⁸ See, *e.g.*, Task Force Report, p. 44.

⁹ See, *e.g.*, Task Force Report, p. 35-36.

¹⁰ *Id.*, p. 21-25.

The requirements of new Rules 1.2, 1.6 and 1.13 in particular are of such significance to organizational compliance activities that they should be shared with the compliance and audit committees, the full board and executive leadership. It is vitally important that these internal constituents understand and respect these crucial compliance-based aspects of lawyers' professional responsibility.

These compliance-based changes to the IRPC speak to difficult and sensitive issues that go to the core concept that the primary duties of a lawyer who represents a corporation are owed to the corporation, and not to the corporation's officers, agents or employees.¹¹ They highlight the pressures and challenges that Illinois health lawyers face on a daily basis while advising internal and external clients on myriad rules and regulations, many of which involve criminal and/or anti-fraud prohibitions or significant financial penalties. It is therefore important for health lawyers to have a solid familiarity with these new rules, the public policy benefits they are intended to achieve and the circumstances in which they are implicated.

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¹¹ *Id.*, p. 23.