



ILLINOIS STATE  
BAR ASSOCIATION

# ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.6 and 1.9. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

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**Opinion No. 91-11**  
**November 22, 1991**

Topic: Conflict of Interest. Representing a client against a former client.

Digest: An attorney is prohibited from representing a client in a negotiation of a lease against a former client when the representation is of the same or substantially related matter unless the former client consents after disclosure.

Ref.: Illinois Rules of Professional Conduct, Rules 1.6 and 1.9(a)

## **FACTS**

The inquiring attorney at one time represented Client X in the negotiation of leases. Client X is an international real estate developing conglomerate and negotiated leases with tenants at shopping centers. The attorney left his former law firm and no longer represents Client X. Client Y, which is a retailer that leases space in various shopping centers, has requested the attorney to represent him in a lease negotiation which involves Client X as the leasing agent. Client X, the former client, has sent a letter to the attorney requesting that he refrain from representing Client Y in the lease negotiations.

## **QUESTION**

May an attorney represent a client against a former client when the attorney represented the former client in similar matters?

## **OPINION**

In ISBA advisory opinion No. 90-5, the Committee held that it was a conflict of interest for an attorney

to represent a husband in a divorce action where the attorney had previously represented both the husband and wife in joint matters. At that time the Committee felt it was important that the nature of the prior representation would have, out of necessity, involved the sharing of confidences. In addition, it was obvious from the facts that the subject matter of both representations was substantially related.

The facts before us are very similar in that the negotiation of the lease is a substantially similar matter even though the retail property which is being negotiated is not the same property subject to the prior negotiations. In addition, it appears obvious that the representation of a party in negotiations of the lease would often require the sharing of confidences. It is very likely that the inquiring attorney, through his prior representation of Client X, became aware of certain portions of the lease that were subject to compromise.

Two of our current Illinois Rules of Professional Conduct apply to the present fact situation. Rule 1.9 states as follows:

- (a) a lawyer who has formerly represented a client in a matter shall not thereafter:
  - 1) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after disclosure; or
  - 2) use information relating to the representation to the disadvantage of the former client, unless:
    - A) such use is permitted by Rule 1.6; or
    - B) the information has become generally known.

Even though the negotiation of the leases may not have been the same matter, it is a substantially related matter and therefore the attorney in this case does have a conflict that can not be cured without the consent of the former client. Since the former client will not consent, the conflict can not be cured and the inquiring attorney must withdraw from representing the new client in connection with the lease negotiation with his former client.

In addition to being a conflict of interest pursuant to Rule 1.9, it also appears that there could be a violation of Rule 1.6(a) if the representation would be allowed to continue. Rule 1.6(a) of the Illinois Rules of Professional Conduct states as follows:

- (a) Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.

Under the facts as stated, it appears that during his prior employment, negotiating leases for the former client, he acquired certain confidences. Therefore, if the confidences were either used or revealed, without the consent of the former client he would also be in violation of Rule 1.6(a). Since no consents from the former client are forthcoming, it is the Committee's opinion that the inquiring attorney must withdraw from the representation of the new client, as it pertains to negotiating leases with his former client.

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