



ILLINOIS STATE  
BAR ASSOCIATION

# ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in January 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.7. 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. 96-05**  
**October, 1996**

Topic: Conflict of Interest; Estates

Digest: It may be professionally improper for a lawyer to represent both a renouncing spouse and a claimant in the same proceedings.

It is not professionally improper for a lawyer to represent the same person in a representative capacity as executor and in an individual capacity as debtor to the estate, especially where a special administrator has been appointed to collect the debt.

Ref.: Illinois rules of Professional Conduct, Rule 1.7  
ISBA Advisory Opinion Nos. 802, 90-03, 90-26 and 94-21  
In re Estate of Phillips, 3 Ill.App.3d 1085, 280 N.E.2d 43 (2nd Dist. 1972).  
Estate of Storer v. Storer, 131 Ill.App.2d 1049, 269 N.E. 2d 352 (5th Dist. 1971).  
First National Bank of Moline v. Muscio, 5 Ill.App.3d 216, 283 N.E.2d 42 (3rd Dist. 1972).  
In re Estate of Oliver, 21 Ill.App.3d 416, 315 N.E.2d 331 (5th dist. 1974).  
755 ILCS 5/2-8(a); 755 ILCS 5/23-2(a); 735 ILCS 5/18-8; 735 ILCS 5/16-1

## **FACTS**

Mr. X's wife died testate and her will left everything to her daughter, Ms. D, who is the executor.

Ms. D is also Mr. X's step-daughter. Mr. X, represented by Lawyer A, is a renouncing spouse seeking a statutory one-third of the estate.

Mr. X is the president, leader and minister of a not-for-profit "church" corporation. The church consists of about 12 members. Lawyer A also represents the church corporation in a claim against the estate for funds held by the decedent at her death.

Lawyer B represents Ms. D in her representative capacity as executor. Ms. D owes approximately \$75,000 to the estate by virtue of loans obtained from the decedent over the course of several years. The probate court appointed a special administrator to collect the debt owed by the daughter to the estate. Lawyer B also represents Ms. D in her individual capacity in connection with this debt.

### **QUESTIONS**

1. Is it professionally proper for Lawyer A to represent Mr. X as the renouncing spouse and also represent the church corporation in its claims against the estate?
2. Is it professionally proper for Lawyer B to represent Ms. D in both her representative capacity as executor and her individual capacity as debtor to the estate, where a special administrator has been appointed to collect the debt?

### **OPINION**

#### **LAWYER A**

Current Rule 1.7 states:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) each client consents after disclosure.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or to the lawyer's own interest, unless:
  - (1) the lawyer reasonably believes that the representation will not be adversely affected; and
  - (2) the client consents after disclosure.
- (c) When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

ISBA Opinion No. 94-21 contains a recent and thorough discussion of Rule 1.7. Dual representation is prohibited under Sections (a) and (b) above unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after disclosure.

Whether a lawyer "reasonably believes" his dual representation will not adversely affect his relationship is determined by an objective, not subjective, standard based upon what the "reasonable lawyer" would believe.

ISBA Advisory Opinion No. 90-26 states that a lawyer is obligated to determine the existence of a potential conflict of interest at the outset of representation. Under the given facts, it would appear that there is a potential conflict of interest although the degree of adversity may be dependent upon the amount of the church's claim compared to the value of the estate and the concomitant one-third interest of Mr. X.

The Illinois Probate Act entitles a renouncing surviving spouse to one-third of the entire estate, after payment of all just claims, if the testator leaves a descendant. 755 ILCS 5/2-8(a). Hypothetically, if the church's claim exceeds the entire value of the estate, the degree of adversity would be high as it would deplete the estate entirely to the detriment of Mr. X. Conversely, if the church's claim was a small percentage of the value of the entire estate, the degree of adversity would be low or minimal. Inasmuch as these values are not among the given facts, Lawyer A must ascertain that information in order to determine the adverse consequences to each client. Under the former hypothetical where the church's claim exceeds the value of the estate, the Committee believes that the reasonable and objective lawyer would be hard-pressed to entertain a reasonable belief that dual representation would not involve adverse consequences to either client.

ISBA Advisory Opinion No. 94-21 stated that the two exceptions to dual representation prohibition, namely, "reasonable belief" and "client consent," are conjunctive, not alternative. Therefore, even assuming that both clients granted consent after full disclosure, dual representation would still be prohibited where a reasonably prudent and competent lawyer would reasonably believe such representation would have adverse consequences.

Lastly, in ISBA Advisory Opinion No. 90-03, the Committee emphasized that the element of full disclosure is far stronger under new Rule 1.7 than the former Code language. In addition, Rule 1.7(c) requires explanation of the implications of the common representation and the advantages and risks involved where dual representation of multiple clients in a single matter is undertaken.

#### LAWYER B

In ISBA Advisory Opinion No. 802, the Committee recognized that a personal representative stands in a fiduciary capacity to the estate and is charged with various statutory responsibilities to the estate. That representative, in performing those duties, is authorized to employ the services of a lawyer to represent and advise in the foregoing duties and responsibilities. The Committee said:

In accepting such employment, the attorney acts as the legal representative of the Executor for the estate and the relationship of attorney-client is established, not between the estate and the attorney, but between the personal representative and the attorney. ISBA Advisory Opinion No. 802.

The foregoing distinction is important where, as in the given facts, the apparent conflict of interest is that of Ms. D and not Lawyer B. There is no "dual representation" dilemma for Lawyer B because

he represents one client, Ms. D.

The Committee can safely state that Ms. D has a conflict of interest between her personal estate and her duties as executor. The duties of any personal representative are, in general, to collect the estate, convert it into cash, and distribute it to the entitled persons. The interest of Ms. D, in her individual capacity, is thus diametrically opposed to her interest as the personal representative of the estate.

755 ILCS 5/23-2 provides for the process of, and grounds for, removal of a personal representative. The removal grounds were amended in 1965 to include when the administrator "(9) becomes incapable of or unsuitable for the discharge of his duties; or (10) there is other good cause." 755 ILCS 5/23-2(a). It has been held that a conflict of interest between the estate and the personal interest of the administrator which interferes with the administration of the estate constitutes "other good cause for removal" within the Probate Act. In re Estate of Phillips, 3 Ill.App.3d 1085, 280 N.E.2d 43 (2nd Dist. 1972).

In Estate of Storer v. Storer, 131 Ill.App.2d 1049, 269 N.E.2d 352 (5th Dist. 1971), the administrator of the decedent's estate was the driver of an automobile in which his wife was riding at the time she was killed in a collision with another vehicle. Liability for the accident was disputed. The husband/administrator listed as an asset of the personal estate of the deceased a cause of action for wrongful death against the driver of the other vehicle and petitioned the court for authority to settle the claim.

A bank as guardian of the estates of the minor children of the decedent filed a petition to remove the administrator of the estate. The trial court found that there was an impossible conflict of interest between the administrator's personal estate and his duties as administrator, but denied the bank's petition for removal and, instead, appointed the bank as special administrator to pursue the wrongful death claim. The appellate court affirmed the denial of the removal petition and modified the authority granted the special administrator to include recovery of all claims arising out of the automobile collision and not merely against the husband/administrator. Thus, the appointment of the special administrator resolved the existing conflict of interest and allowed the administrator to continue his administration of the estate with the exception of the collection and enforcement of all claims arising out of the automobile collision.

In First National Bank of Moline v. Muscio, 5 Ill.App.3d 216, 283 N.E.2d 42 (3rd Dist. 1972), the appellate court held that letters testamentary were properly issued to a bank which a wife named in her will as executor even though the bank was also the executor under the husband's will and a wrongful death action was to be instituted against the husband's estate. The court found that any alleged conflict of interest could be eliminated by appointment of a special administrator to pursue the wrongful death claim of the wife's estate. See also In re Estate of Oliver, 21 Ill.App.3d 416, 315 N.E.2d 331 (5th Dist. 1974).

The Illinois Legislature recognized and facilitated the developing case law allowing appointment of a special administrator with limited duties to avoid conflicts of interest involving the representative of his lawyer and prevent the necessity of removal. Effective January 1, 1976, the Illinois Probate Act was amended to specifically grant the court the power to appoint a special administrator to defend the estate where the representative or his lawyer has a claim against the estate he is

administering (735 ILCS 5/18-8) and, conversely, to represent the estate in a citation proceeding to discover and collect debts owed the estate by the representative (735 ILCS 5/16-1).

The appointment by the probate court in the instant case of a special administrator to collect the debt owed by Ms. D to the estate obviates and eliminates Ms. D's personal conflict of interest between her representative and individual capacities. Under the facts stated, the Committee believes that Lawyer B is not prohibited from representing Ms. D in both her representative and individual capacities under the Illinois Rules of Professional Conduct. Indeed, cognizant of the special administrator provisions of the Illinois Probate Act, a competent lawyer would advise a client representative to petition the court for appointment of a special administrator to nullify any potential conflict of interest he or she may have and preclude removal.

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