



**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 Rules of Professional Conduct 1.7, 1.14, 2.1, and 5.4(c). 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.

**Opinion No. 96-06
October, 1996**

Topic: Conflict of interest; dual representation; influence by one other than client.

Digest: Lawyer cannot continue to represent both parents and child when the parents have placed restrictions on the lawyer's representation of the child. The lawyer is required to exercise independent professional judgment on behalf of the child. The lawyer cannot be influenced by one other than the client merely because the other is paying the lawyer to represent the client.

Ref.: Illinois Rules of Professional Conduct, Rules 1.7, 2.1 and 5.4(c)
ISBA Advisory Opinions on Professional Conduct, Nos. 89-17, 90-14, 90-26 and 91-08

FACTS

A minor child was severely injured while on the property of a family friend. The parents of the minor retained a lawyer to pursue a personal injury claim. The lawyer filed a personal injury claim on behalf of the minor and also filed counts pursuant to the Medical Expense Act on behalf of the parents. The defendant, the family friend, carries \$100,000 worth of insurance but has assets far in excess of that amount. If the defendant is found liable, the damages awarded would most likely far exceed \$100,000.

The parents have instructed the lawyer to seek only an amount of recovery which would equal the insurance benefits. This request was made because of the relationship between the family and the defendant. The injured minor is twelve years old at the present time.

QUESTIONS

1. Is there a conflict in the lawyer's representation of the child and the lawyer's representation of the parents when the parents have placed restrictions or limitations on the lawyer's representation of the child?
2. If there is a conflict, is it waivable?
3. At what point during the representation is a lawyer required to counsel the client regarding potential conflicts?

OPINION

Conflicts are inherent in the practice of law. A lawyer has responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Illinois Rules of Professional Conduct prescribe terms for resolving conflicts, but many issues remain ethically unclear and require the exercise of sensitive professional and moral judgment guided by the Rules.

The lawyer's work is always governed by the duties of loyalty and confidentiality. In conflict situations, the question always is whether the same lawyer may serve more than one client loyally and do so without breaching confidentiality.

At what point is the lawyer required to counsel his or her clients about possible conflicts? At the initial interview? Only when a "red flag" is raised? ISBA Advisory Opinion on Professional Conduct No. 90-26 states clearly that a lawyer has an obligation to determine the existence of possible conflicts of interest at the outset of representation. Obvious "red flags" include multiple clients, including both concurrent and serial representation of clients, payment by a third party, the minority or disability of a client. Other situations are more subtle and may not make themselves known until later in the representation. However, Opinion No. 90-26 makes it clear that, even if a specific conflict may not be identified, it would be prudent to discuss the concept of knowing about and avoiding conflicts, in the initial interview. In addition, Rule 1.7(b) requires a lawyer to at least consider all outside interests or responsibilities that could materially limit his or her ability to serve clients.

In the situation at hand, several of the more obvious potential conflict situations are evident, including concurrent representation (the lawyer has filed counts on behalf of both the parents and the child), payment by one other than a client (the parents have retained the lawyer to represent the child), and the minority of the child. In an ideal situation, the lawyer would have counseled the clients at the initial interview regarding these potential conflicts and the possibility of his being able to represent only one party, or even having to withdraw. However, it appears this was not done and the conflict became apparent later.

Rule 1.7 formulates a basic method of analysis for all conflicts situations, augmented by Rules 1.8 through 1.12, and impacted by numerous others.

In addition to the Rules specifically governing conflicts, this situation is governed by several others of the Rules, particularly the following:

First, the lawyer is obligated by Rule 2.1 to exercise independent professional judgment and render candid advice in representing a client.

Second, Rule 5.4(c) states that in exercising professional independence, "A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." ISBA Advisory Opinion on Professional Conduct 91-08 states that, in a similar situation, where the lawyer was retained by a mother and minor child, that the lawyer could not honor the mother's instruction to dismiss an appeal, when the lawyer believed it would have an adverse result for the child. ISBA Advisory Opinion on Professional Conduct No. 90-14 reiterates the importance of a lawyer exercising independent professional judgment, even in the face of a court's attempted restrictions on the lawyer's responsibility.

Subsection (b) of Rule 1.7, the general rule regarding conflicts, also deals with the influence of a third party.

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 by the lawyer's own interest, unless:

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

(Emphasis added.)

Note that the conditions of both (1) and (2) must be met in order for the lawyer to continue representing both clients.

If the lawyer in our fact situation were to follow the request of the parents, the lawyer would not be exercising independent professional judgment on behalf of the child, and would not be acting in the best interest of the child, because the lawyer would be limiting the potential award to the child. While it may be in the best interest of the parents not to offend their friends by limiting the damages sought, this would be in direct conflict with the interests of the child.

The lawyer appears to believe that the conditions requested by the parents would adversely affect the representation of the child. Thus, the lawyer cannot continue to represent both the parents and the child, since the condition of (1) is not met. Therefore, (2) does not come into consideration, and the conflict is not waivable.

The lawyer then has the obligation to explain to the parents the implications of the restriction the parents have placed on his representation of the child, according to Rule 1.7(c). The lawyer must explain that his independent professional judgment is being limited by their restriction, and that, thus, representation of both parents and child, with the restriction as placed by the parents, is impermissible. If the parents do not rescind the restriction, the lawyer will be faced with several

alternatives: withdrawing representation from one client or the other, withdrawing altogether, recommending a guardian ad litem for the minor client.

In the event the lawyer has to choose between one client or the other, the Committee believes that it would be prudent for the lawyer to seek the appointment of a guardian ad litem. To do so, the lawyer must reasonably believe that the client cannot adequately act in the client's own interest. Illinois Rule 1.14(b) states that the lawyer may seek the appointment of a guardian or take other protective action if the lawyer reasonably believes that the client cannot adequately act in the client's own interest. In the case at hand, the child was twelve years old at the time of the filing of the law suit. As such, the child is not able at law to act independently, may not be legally competent to independently effectuate decisions on his behalf, may not be able to comprehend the reason for the conflict, and may not be able to make decisions accordingly.

Clearly the parents are interfering with the lawyer's ability to exercise independent professional judgment in the child's case. The lawyer must explain to the parents that the lawyer's independent professional judgment will be impaired by their restriction. The influence of a third party is the subject of two Rules: 1.7(b) and 5.4(c). ISBA Advisory Opinion on Professional Conduct 89-17 discusses both the influence of a third party and the exercise of independent judgment in the context of an insurance company retaining a lawyer to provide counsel to an insured. This is a classic conflict situation. The opinion states that the lawyer's primary obligation is to the insured, and the lawyer may not allow his professional judgment to be influenced by one other than his client. Similarly, here, the interest of one client, the parents, must not be allowed to influence the lawyer's obligation to the other client, the child.

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