



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 1.2(a), 1.4(b), 1.7, and 1.16(a)(3). 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. 99-08
March, 2000

Topic: Conflict of Interest with Client

Digest: A lawyer may prepare a trust document for a client that at the client's request directs the trustee to engage that lawyer to provide legal services for the trust. The lawyer may do so, however, only if the client consents after the lawyer fully communicates and discloses the economic interest of the lawyer in including such provision and indicates that such provision might not be enforceable.

Ref.: Illinois Rules of Professional Conduct, Rule 1.2(a), 1.4(b), 1.7(b) and 1.16(a)(4)
ABA Rules of Professional Conduct, Rule 1.16
ISBA Advisory Opinion on Professional Conduct No. 90-02
760 ILCS 5/1 et seq.
In re Smith, 168 Ill.2d 269 (1995)
Crabtree v. Academy Life Insurance Company, 878 F. Supp. 727 (E.D. Pa. 1995)
Olsen and Brown v. City of Englewood, 889 P. 2d 673 (Colo. 1995)
LaRocco v. Bakwin, 108 Ill.App.3d 723 (2nd Dist. 1982)
Restatement of the Law, Trusts 2d § 62

FACTS

Lawyer A is engaged to prepare a trust for Client C. At C's request, C's trust is to include a provision directing the trustee administering the trust to retain A for any legal services. If A is not practicing law at the time, the trustee is directed to retain one of the lawyers with whom A was practicing at the time A retired from the practice of law. The trust will recite that the reason for the provision directing the trustee to retain A (or A's firm) as counsel for the trust is that C (as settlor of the trust) has confidence that A will see that the trust is properly administered since A is most familiar with the intentions of C and the provisions of the trust.

QUESTION

Is it permissible for Lawyer A to prepare a trust document for Client C which directs the trustee to retain A for legal services needed by the trust?

OPINION

A lawyer is prohibited from representing a client if the representation may be materially limited by the lawyer's own interests unless the lawyer reasonably believes that the representation will not be adversely affected and the client consents after disclosure. In that regard, Rule of Professional Conduct 1.7(b) provides:

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 interests, unless:

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

The proposed trust provision was suggested by Client C and is to be included in the trust at C's request and direction. See Rule of Professional Conduct 1.2(a). Nonetheless, Lawyer A's own economic interest in providing legal services for the trust may materially limit A's representation of C. As such, A may represent C in preparing the trust instrument which directs that A be retained as counsel only if A reasonably believes that representation will not be adversely affected and if C consents after disclosure.

Under the Trusts and Estates Act ("Act"), 760 ILCS 5/1, et seq., a trustee of a trust is granted certain powers for the purpose of administering the trust. One power granted by the Act authorizes the trustee to appoint lawyers and other agents and to pay reasonable compensation to such appointees. The settlor who establishes a trust may specify the powers of the trustee and may thereby contract or enlarge the powers generally provided in the Act, unless "otherwise contrary to law." 760 ILCS 5/3. If the trust provision directing the trustee to engage a certain lawyer is "otherwise contrary to law," then such trust provision would not be enforceable. See Restatement of the Law Second, Trusts 2d, §62 (trust provision is invalid if the enforcement of such provision would be against public policy).

Rule of Professional Conduct 1.16(a) provides that a lawyer shall not represent a client (or shall withdraw if representation has commenced) if a client has discharged the lawyer. The Comment to ABA Model Rule 1.16, the counterpart to the Illinois Rule, indicates that:

The client has a right to discharge a lawyer at any time, with or without cause....

The Illinois Supreme Court has indicated that a client may discharge a lawyer at any time for any reason. In re Smith, 68 Ill.2d 269 (1995). Other jurisdictions have similarly ruled that a client has an absolute right to terminate a lawyer regardless of the contractual relationship. See Crabtree v. Academy Life Insurance, 878 F.Supp. 727 (E.D. Pa. 1995), and Olsen and Brown v. City of Englewood, 889 P.2d 673 (Colo. 1995). The right of a client to discharge a lawyer is a term of the contract implied by public policy because of the special relationship between the lawyer and the client. LaRocco v. Bakwin, 108 Ill.App.3d 723 (2nd Dist. 1982).

The proposed trust provision directs that the trustee hire Lawyer A (or A's firm) as legal counsel for the trust and implies that the trustee would not have the power to discharge A and hire other legal counsel. Rule 1.16(a) indicates a client may discharge his lawyer at any time. Public policy in Illinois indicates that a client has the inherent right to discharge his lawyer at any time for any reason. The Committee believes that irrespective of the inclusion of the subject provision in the trust, the trustee would, as a matter of Illinois public policy, be permitted to discharge (or not hire) Lawyer A (or A's firm) and could engage other counsel selected by the trustee.

The Committee is of the view that Lawyer A might reasonably believe that his representation of Client C will not be adversely affected by including the subject trust provision even though that provision appears to be of some benefit to Lawyer A. Client C must also consent to such disclosure.

Under the Illinois Rules of Professional Conduct, disclosure "denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Rule of Professional Conduct 1.4(b) requires that a lawyer explain a matter to a client to the extent reasonably necessary for the client to be able to make an informed decision about the representation. The disclosure to Client C should apprise C of Lawyer A's economic interest in serving as counsel to the trust. The Committee believes Lawyer A should also appraise Client C that the trustee would have the inherent right to discharge the lawyer and as such the trust provision might not be enforceable. Better practice would suggest such disclosure be documented.

By making such disclosures, Client C would be in a position to make an informed decision about including the subject provision in the trust. (Lawyer A risks an allegation of undue influence or overreaching if the subject trust provision is included, and the risk of such allegations should further encourage Lawyer A to take extra care in providing the disclosure to Client C in a manner which is full, complete and understandable.)

See also ISBA Advisory Opinion on Professional Conduct No. 90-02 which states that it is improper for a lawyer to prepare estate planning documents for a client and insist that a bank the lawyer represents be designated as a fiduciary.

If after such full disclosure, Client C consents to Lawyer A's representation and A believes his representation of C will not be adversely affected by including such trust provision, the Committee believes it would be permissible for Lawyer A to represent Client C in preparing the trust for C which directs the trustee to engage A (or A's firm) as counsel for the trust.

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