ILLINOIS STATE
BAR ASSOCIATION

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Informational Report B
Professional Conduct Opinions
(16-01 thru 16-06)

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-01
June 2016

Subject: Law Firms; Law Firm Name and Letterhead; Multijurisdictional Practice

Digest: A law firm organized as a professional corporation in a state other than Illinois, and registered as a law firm in its state of incorporation, is required to register as a law firm with the Illinois Supreme Court if one of its shareholders, admitted to the Illinois bar, practices law in Illinois in the name of the professional corporation.

References: Illinois Supreme Court Rules 721 and 722
Ford Motor Credit Co. v. Sperry, 214 Ill.2d 371, 827 N.E.2d 422, 292 Ill.Dec. 893 (2005)

Joseph P. Storto, P.C. v. Becker, 341 Ill.App.3d 337, 792 N.E.2d 384, 275 Ill.Dec. 153 (2003)

FACTS

A State X professional corporation, registered to practice law in State X, has two shareholders, both admitted to the bar in the state of incorporation and one also admitted in Illinois. The professional corporation is not registered to practice in Illinois under Rule 721 of the Rules on Admission and Discipline of Attorneys, but the Illinois-admitted attorney practices law in Illinois. The Illinois-admitted lawyer corresponds with clients on letterhead that identifies the law firm as a professional corporation. Also, the Illinois-admitted lawyer corresponds with clients by email with an email signature block that identifies the law firm as a professional corporation.

QUESTION

Is the professional corporation engaged in the practice of law in Illinois as the practice of law is contemplated in Rule 721(a) of the Rules on Admission and Discipline of Attorneys, so that the professional corporation must apply to the Illinois Supreme Court for a certificate of registration?

ANALYSIS

Illinois Supreme Court Rule 721(c) reads as follows:

> No corporation, association, limited liability company, or registered limited liability partnership shall engage in the practice of law in Illinois, or open or maintain an establishment for that purpose in Illinois, without a certificate of registration issued by this court.

As long as at least one shareholder of an out-of-state professional corporation is admitted to practice law in Illinois, such a firm may obtain a certificate of registration in Illinois. Rule 721(a). Only if a firm is registered under Rule 721 may its shareholders benefit from the limited liability for errors and omissions afforded by Rule 722, provided, of course, that the firm maintains minimum insurance or proof of financial responsibility in accordance with Rule 722(b). That is so because a firm must be "engaged in the practice of law in Illinois pursuant to Rule 721" in order to be considered a "limited liability entity" as defined in Rule 722(a)(1).

"Rule 721 is designed to permit duly licensed lawyers the business option of organizing in professional service corporations as a means of providing them with limited liability protection." *Ford Motor Credit Co. v. Sperry*, 214 Ill.2d 371, 384, 827 N.E.2d 422, 430, 292 Ill. Dec. 893, 901 (2005) (holding that an award of attorney fees to a client that was represented by an unregistered law firm should not have been vacated by the trial court, as such representation did not constitute the unauthorized practice of law). *See also*, *Joseph P. Storto, P.C. v. Becker*, 341 Ill.App.3d 337, 792 N.E.2d 384, 275 Ill. Dec. 153 (2003) (holding that a firm's failure to register did not render void a client's agreement to pay the legal fees she owed the firm, absent any harm to the client resulting from the failure to register). Because the Illinois-admitted shareholder practices law in Illinois and represents the practice as that of a professional corporation, it is the Committee's opinion that the firm's registration under Rule 721 is required.

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-02
June 2016

Subject: Court Obligations; Frivolous Arguments; Reporting Lawyer Misconduct

Digest: A lawyer may not withhold controlling legal authority from a tribunal as a trial strategy to insure reversible error on appeal. Lawyers reading about the contemplated strategy on an online discussion group have no duty to report the posting lawyer.

References: *Black's Law Dictionary* 1542 (Bryan A. Garner, ed., 10th ed., 2014).
Walls v. Bowersox, 151 F.3d 827 (8th Cir. 1998)

U.S. v. Day, 969 F.2d 39, 46 n.9 (3rd Cir. 1992)

In re Smith, 168 Ill.2d 269 (1995)

In re Winthrop, 219 Ill.2d. 526 (2006)

In re Karavidas, 2013 IL 115767

In the Matter of Grammer, No. 04-SH-119 (Hearing Board, August 25, 2005) *approved and confirmed* M.R. 20521 (January 13, 2006).

Skolnick v. Altheimer & Gray, 191 Ill.2d 214 (2000).

Illinois Rule of Professional Conduct 8.4(d)

Illinois Rule of Professional Conduct 3.3(a)(1)

Illinois Rule of Professional Conduct 8.3(a)

FACTS

Lawyer is a criminal defense attorney representing a client whom Lawyer believes is guilty of a lesser charged offense but also likely the primary charged offense. Lawyer presents a motion to the court to give a certain jury instruction citing case A as authority for the motion. The Prosecutor opposes the motion. In conducting further research on the motion, Lawyer identifies case B which is non-distinguishable and binding on the court and which requires the court to give Lawyer's proposed instruction. Case B also holds that it is reversible error for the court not to give the proposed instruction. Lawyer contemplates not informing the court of case B knowing that if the court does not grant Lawyer's motion it will have committed reversible error. Lawyer seeks opinions of other lawyers on the contemplated strategy on internet lawyer discussion groups.

QUESTIONS

1. Does Lawyer violate the Rules of Professional Conduct by failing to inform the court of case B?

2. Do lawyers reading Lawyer's proposed trial strategy on the online discussion group have a duty to report Lawyer to the appropriate disciplinary agency?

ANALYSIS

1. Disclosure of Controlling Authority

The conduct contemplated by Lawyer is a form of "sandbagging." Black's Legal Dictionary defines it as: "the act or practice of a trial lawyer remaining cagily silent when a possible error occurs at trial, with the hope of preserving an issue for appeal if the court does not correct the problem." *Black's Law Dictionary* 1542 (Bryan A. Garner, ed., 10th ed., 2014). Although beyond the scope of this Committee's analysis, sandbagging as a substantive trial strategy has been criticized as unreasonable and appears to be ineffective in any case. *See Walls v. Bowersox*, 151 F.3d 827 (8th Cir. 1998)(Commenting on counsel's trial strategy of acting such as to provide the defendant with a claim of ineffective assistance of counsel on review, the court noted "We add that any type of "sandbagging" is 'not only unethical, but usually bad strategy as well'" *citing U.S. v. Day*, 969 F.2d 39, 46 n.9 (3rd Cir. 1992)). Nevertheless, the Committee takes no position on whether Lawyer's contemplated strategy would be successful.

As a matter of professional responsibility, the proposed trial strategy as described in the facts above is improper.

A. <u>RPC 8.4</u>

Illinois Rule of Professional Conduct 8.4(d) provides:

"**Rule 8.4: Misconduct**

It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice.

…"

The Illinois Supreme Court has said that the practice of law is a public trust and lawyers are trustees of that system. *In re Smith*, 168 Ill.2d 269 (1995). As part of that system, lawyers owe a duty to assist the court in administering justice and in arriving at correct conclusions. Id. at 287; *In re Winthrop*, 219 Ill.2d. 526 (2006)("a lawyer's high vocation is to correctly inform the court upon the law and the facts of the case and to aid it in doing justice and arriving at correct conclusions.").

The lawyer's obligation to assist the court in administering justice is expressed, in part, in IRPC 8.4(d). The Court has long noted that a lawyer violates IRPC 8.4(d) (or its predecessors) when he or she undermines the judicial process, such as having an effect on the outcome of a case (*In re Karavidas*, 2013 IL 115767 [P87 – 97]); failing to aid the court in expeditiously considering and disposing of cases (*In re Smith*, 168 Ill.2d at 287); or causing additional proceedings or delaying resolution of a case (*In the Matter of Grammer*, No. 04-SH-119 (Hearing Board, August 25, 2005 approved and confirmed M.R. 20521 (January 13, 2006).

In the scenario presented above, Lawyer's conduct, if successful, will have an effect on the outcome of the case. Indeed, through Lawyer's strategy of failing to apprise the tribunal of controlling authority, it is Lawyer's intent to establish reversible error and compel additional judicial proceedings thereby extending the ultimate resolution of the case. Accordingly, Lawyer's proposed course of conduct, if carried out and successful, will violate RPC 8.4(d) and is improper.

B. <u>IRPC 3.3</u>

Illinois Rule of Professional Conduct ("IRPC") 3.3 provides:

"**Rule 3.3: Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

…"

The Court's pronouncements in *In re Smith* and *In re Winthrop* noted above about a lawyer's obligation to assist a court in arriving at correct decisions, are mirrored in this Rule's Comments. IRPC 3.3, Comment [4] explains that the purpose behind this prohibition "is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case." IRPC 3.3, Comment [4]. Only after a tribunal is armed with a correct statement of the law can it render appropriate and legitimate legal decisions.

In assisting a court in rendering correct legal decisions, a lawyer's obligations when appearing before a tribunal are clear. RPC 3.3, Comment [2] provides "[T]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows is false." Further, Comment [4] similarly provides that "a lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities…" These Comments, as well as the case law cited above, point to the foundational importance of lawyers candidly and truthfully advising the tribunal on the applicable law.

But if Lawyer fails to identify the controlling law to the court, either in oral argument or failing in some fashion to amend the written motion, has Lawyer made a "false statement of law" in violation of IRPC 3.3(a)(1)? After all, the law that Lawyer is relying upon does support the same outcome as the controlling law has made conclusive. Nevertheless, such a fine distinction does not insulate Lawyer. The plain meaning of "false" is: (1) "not real or genuine;" or "not true or accurate; especially: deliberately untrue: done or said to fool or deceive someone." Meriam-Webster, www.merriam-webster.com (last visited April 13, 2016). Regardless of whether the law relied upon by Lawyer supports or is consistent with Lawyer's arguments, the law cited is not an accurate statement of the existing law. Furthermore, Lawyer knows the law cited is not accurate or controlling and Lawyer's failure to cite it is specifically designed to deceive the court. Finally, as noted above, the overriding purpose of 3.3(a)(1), is to ensure that a lawyer assists the court in rendering correct decisions. If Lawyer fails to advise the court of the controlling law, the purpose of IRPC 3.3(a)(1) is frustrated. Accordingly, the Committee believes Lawyer will violate IRPC 3.3(a)(1) if Lawyer does not disclose the controlling authority.

In reaching this conclusion, the Committee wants to make clear that it is not opining on a situation where a lawyer fails to find controlling law or who does not cite such authority because he or she believes in good faith it is distinguishable or otherwise not applicable.

2. Reporting Obligations

Lawyer has sought advice on his proposed trial strategy by posting it on an internet lawyer discussion group. Lawyer asks whether lawyers *reading* the posting have any obligation to report Lawyer for the proposed trial strategy.

IRPC 8.3 provides in relevant part:

(a) A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.

As described in ISBA Advisory Opinion 12-15, the use of online discussion groups is not improper and can be a useful educational resource for lawyers. Nevertheless, as described in that Opinion, there are ethical issues that a user must be mindful of, including most significantly the prohibitions on revealing confidential client information.

In the scenario presented in this Opinion, a lawyer reading about Lawyer's proposed strategy clearly has no duty to report Lawyer for his or her proposed trial strategy. The duty to report under IRPC 8.3 is triggered by knowledge of certain conduct. Knowledge is defined in the RPC as "actual knowledge of the fact in question." RPC 1.0(f). The Illinois Supreme Court has further explained that in the context of Rule 8.3, this means something more than "a mere suspicion" but less than "absolute certainty." *Skolnick v. Altheimer & Gray*, 191 Ill.2d 214 (2000). Merely reading (or responding to) a question about the propriety of contemplated conduct does not vest the reader with any knowledge about whether the contemplated conduct is (or has been) engaged in. Whether Lawyer might ultimately carry out the contemplated conduct is speculation on the part of a reader. Furthermore, as a matter of policy, imposing a reporting requirement for posting or reading an ethical inquiry on an online discussion group would be a chilling effect on the use of such online discussion groups and defeat their usefulness as a means to improve the professional competence and conduct of lawyers. Accordingly, a lawyer reading Lawyer's proposed trial strategy on an online discussion group has no duty to report Lawyer under RPC 8.3.

CONCLUSION

Lawyer may not knowingly withhold controlling legal authority from a tribunal as a trial strategy to insure reversible error on appeal. Lawyers reading about the contemplated strategy on an online discussion group have no duty to report the posting lawyer.

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-03
June 2016

Subject: Conflict of Interest; Former Client.

Digest: A lawyer who represents the second wife in obtaining child support for her two young children from a former husband has a conflict of interest with the first wife of the same husband under Rule 1.9 because of his previous representation of the first wife in obtaining child support from that same husband for her child who is now 15 years old. The lawyer also has a "material interest" conflict under Rule 1.7 in connection with his representation of the second wife in her child support claim. These two Rules require the lawyer to obtain the informed consent of both wives in order to undertake the representation.

References: Illinois Rules of Professional Conduct 1.9

Illinois Rules of Professional Conduct 1.7

Illinois Rules of Professional Conduct 1.6

Illinois Marriage and Dissolution of Marriage Act, Section 505 (750 ILCS 501 et seq)

FACTS

The inquirer asks whether the inquirer has a conflict of interest by representing the second wife in a child support matter seeking support for two minor children. The lawyer previously represented a prior wife of the same husband and obtained child support for a child who is now 15 years old.

QUESTION

Do the Rules of Professional Conduct preclude the inquirer from representing the second wife in a child support claim while the husband is under child support obligations to his first wife whom the lawyer also represented?

ANALYSIS

Rule 1.9 is entitled "Duties to Former Clients". For purposes of this opinion, we have assumed that the Inquirer is no longer representing the first wife. Therefore, the first wife is a "former client" of the Inquirer and Rule 1.9 applies to the matter at hand.

Under Rule 1.9, the inquirer is precluded from representing another person "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives consent". A concern underlying the Rule is the possibility of the lawyer revealing or misusing confidential information learned in the prior matter.

The two representations appear to be “substantially related” in that the Inquirer is seeking additional child support payments from the same person from whom his former client is currently receiving payments. Moreover, Section 505 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 501 et seq) sets forth detailed “guidelines” regarding the percentage of a parent’s net income that the court may order for child support. The court may deviate from the guidelines if, after considering the best interests of a child, the “financial resources and needs” of a parent warrant the deviation. Because the same parent (i.e., the husband) is involved in both matters, the representation of the second wife is substantially related to the representation of the first wife, whose minor child is continuing to receive support from the husband.

The question then is whether the interests of the second wife are “materially adverse” to the interests of the first wife. We believe they are insofar as an award of child support in the second case may affect the ability of the husband to continue to make the required payments for the support ordered in the first case, even though under court order to do so.

Although we do not have any facts regarding the ability of the husband to pay support for all three children, as noted above, the success of the lawyer in pursuing the second claim may affect the ability of the husband to continue the payments to the first child. Therefore, depending on the circumstances, the interests of the second client could be viewed as “materially adverse” to the interests of the former client, and informed consent should be obtained from the first wife in order to avoid a violation of Rule 1.9. In this regard, in obtaining the consent, the lawyer should apprise his former client of the potential consequences an award in the second matter may have on the ability of the husband to pay the original support, including a discussion of the application of the guidelines and criteria for support awards as set forth in 750 ILCS 505.

We also believe the lawyer’s representation of the second wife may be problematic, and that under Rule 1.7 she also must give informed consent to the representation. Rule 1.7 is the general conflict rule. It prohibits “concurrent” conflicts of interest. Such a conflict may exist under either of two situations: first, “where the representation of one client will be directly adverse to another client” (1.7(a)(1)); and second, where there is a “significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer”(1.7(a)(2). This latter conflict may be waived under certain circumstances.

We do not believe the present situation involves a “concurrent conflict” under section 1.7(a)(1). There is no direct adversity between the two wives, and the lawyer is seeking support only for the children of the second wife.

However, we believe there is a “material interest” conflict under section 1.7(a)(2) because the ability of the husband to pay continued support to the child of the first wife is likely to determine his ability to pay support to the children of the second wife. Thus the lawyer may be less than vigorous in pursuing support in the latter instance, knowing that the husband may not have the capability of making the required payment for all three children. However, if the inquirer reasonably believes he or she can provide competent and diligent representation of the second wife, the lawyer can do so by obtaining the “informed consent” of the second wife to the continued representation, as she is the person who is “affected” by the potential conflict of interest. Consent need not be obtained from the first wife under 1.7, because the lawyer is no longer representing her in a child support claim, but, as discussed initially, consent from the first wife is likely to be required by IRPC 1.9 if the lawyer wishes to continue the representation.

Finally, we note that the confidentiality requirements of Rule 1.6 and Rule 1.9 must be followed. Under the Rules, a lawyer cannot "reveal" information relating to the representation of a client (Rule 1.6(a)) or a former client (Rule 1.9(c)(2)), and under Rule 1.9(c)(1), a lawyer may not "use" information relating to the representation of a client to the client's disadvantage. We do not have any facts to indicate that the lawyer will, in representing the second wife, reveal or use information relating to the representation of first wife. Because the informed consent of the first wife is required under Rule 1.9, it will be a simple task for the inquirer to also obtain her consent to reveal or use information about the representation if the lawyer believes that will be necessary.

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-04
October 2016

Subject: Conflict of Interest; Former Client.

Digest: A lawyer who represents the second wife in obtaining child support for her two young children from a former husband has a conflict of interest with the first wife of the same husband under Rule 1.9 because of his previous representation of the first wife in obtaining child support from that same husband for her child who is now 15 years old. The lawyer also has a "material interest" conflict under Rule 1.7 in connection with his representation of the second wife in her child support claim. These two Rules require the lawyer to obtain the informed consent of both wives in order to undertake the representation.

References: Illinois Rules of Professional Conduct 1.9

Illinois Rules of Professional Conduct 1.7

Illinois Rules of Professional Conduct 1.6

Illinois Marriage and Dissolution of Marriage Act, Section 505 (750 ILCS 501 et seq)

FACTS

The inquirer asks whether the inquirer has a conflict of interest by representing the second wife in a child support matter seeking support for two minor children. The lawyer previously represented a prior wife of the same husband and obtained child support for a child who is now 15 years old.

QUESTION

Do the Rules of Professional Conduct preclude the inquirer from representing the second wife in a child support claim while the husband is under child support obligations to his first wife whom the lawyer also represented?

ANALYSIS

Rule 1.9 is entitled "Duties to Former Clients". For purposes of this opinion, we have assumed that the Inquirer is no longer representing the first wife. Therefore, the first wife is a "former client" of the Inquirer and Rule 1.9 applies to the matter at hand.

Under Rule 1.9, the inquirer is precluded from representing another person "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives consent". A concern underlying the Rule is the possibility of the lawyer revealing or misusing confidential information learned in the prior matter.

The two representations appear to be “substantially related” in that the Inquirer is seeking additional child support payments from the same person from whom his former client is currently receiving payments. Moreover, Section 505 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 501 et seq) sets forth detailed “guidelines” regarding the percentage of a parent’s net income that the court may order for child support. The court may deviate from the guidelines if, after considering the best interests of a child, the “financial resources and needs” of a parent warrant the deviation. Because the same parent (i.e., the husband) is involved in both matters, the representation of the second wife is substantially related to the representation of the first wife, whose minor child is continuing to receive support from the husband.

The question then is whether the interests of the second wife are “materially adverse” to the interests of the first wife. We believe they are insofar as an award of child support in the second case may affect the ability of the husband to continue to make the required payments for the support ordered in the first case, even though under court order to do so.

Although we do not have any facts regarding the ability of the husband to pay support for all three children, as noted above, the success of the lawyer in pursuing the second claim may affect the ability of the husband to continue the payments to the first child. Therefore, depending on the circumstances, the interests of the second client could be viewed as “materially adverse” to the interests of the former client, and informed consent should be obtained from the first wife in order to avoid a violation of Rule 1.9. In this regard, in obtaining the consent, the lawyer should apprise his former client of the potential consequences an award in the second matter may have on the ability of the husband to pay the original support, including a discussion of the application of the guidelines and criteria for support awards as set forth in 750 ILCS 505.

We also believe the lawyer’s representation of the second wife may be problematic, and that under Rule 1.7 she also must give informed consent to the representation. Rule 1.7 is the general conflict rule. It prohibits “concurrent” conflicts of interest. Such a conflict may exist under either of two situations: first, “where the representation of one client will be directly adverse to another client” (1.7(a)(1)); and second, where there is a “significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer”(1.7(a)(2). This latter conflict may be waived under certain circumstances.

We do not believe the present situation involves a “concurrent conflict” under section 1.7(a)(1). There is no direct adversity between the two wives, and the lawyer is seeking support only for the children of the second wife.

However, we believe there is a “material interest” conflict under section 1.7(a)(2) because the ability of the husband to pay continued support to the child of the first wife is likely to determine his ability to pay support to the children of the second wife. Thus the lawyer may be less than vigorous in pursuing support in the latter instance, knowing that the husband may not have the capability of making the required payment for all three children. However, if the inquirer reasonably believes he or she can provide competent and diligent representation of the second wife, the lawyer can do so by obtaining the “informed consent” of the second wife to the continued representation, as she is the person who is “affected” by the potential conflict of interest. Consent need not be obtained from the first wife under 1.7, because the lawyer is no longer representing her in a child support claim, but, as discussed initially, consent from the first wife is likely to be required by IRPC 1.9 if the lawyer wishes to continue the representation.

Finally, we note that the confidentiality requirements of Rule 1.6 and Rule 1.9 must be followed. Under the Rules, a lawyer cannot "reveal" information relating to the representation of a client (Rule 1.6(a)) or a former client (Rule 1.9(c)(2)), and under Rule 1.9(c)(1), a lawyer may not "use" information relating to the representation of a client to the client's disadvantage. We do not have any facts to indicate that the lawyer will, in representing the second wife, reveal or use information relating to the representation of first wife. Because the informed consent of the first wife is required under Rule 1.9, it will be a simple task for the inquirer to also obtain her consent to reveal or use information about the representation if the lawyer believes that will be necessary.

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-05
October 2016

Subject: Conflict of Interest; Government Representation; Nonlawyer Assistants

Digest: A law firm may continue to represent a city in municipal matters even though a paralegal employed by the firm is a member of the city council and the council has authority over the work and whether the firm's bills get paid.

References: IRPC 1.7;

IRPC 5.3;

ISBA Opinion 12-12

FACTS

The inquirer asks whether the firm will be involved in a conflict of interest if a paralegal of the firm is appointed or elected to city council. The firm has a contract to provide legal services to the city, and the city council has the ultimate authority over the work of the firm and the payment of its bills.

QUESTION

Does membership on the city council by an employee of the firm give rise to an actual or potential conflict or the appearance of impropriety on the part of the firm?

ANALYSIS

Rule 1.7 is the general conflict rule. It prohibits "concurrent" conflicts of interest. Such a conflict may exist under either of two situations: first, "where the representation of one client will be directly adverse to another client" (1.7(a)(1)); and second, where there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"(1.7(a)(2). This latter conflict may be waived under certain circumstances.

We do not believe the present situation poses a risk of violation of either of the above sections of Rule 1.7. The firm and the paralegal are not adverse within the meaning of 1.7, and there is only one client involved. Thus there is no direct adversity under 1.7(a)(1).

Nor do we believe there is a material interest conflict under section 1.7(a)(2). While it is conceivable that the paralegal might take a position on an issue involving the firm's representation of the city contrary to the city's majority position, we do not believe this poses a "significant risk" that the representation of the city by the firm would be "materially limited" in any way. We do not believe there is a substantial risk that the firm would not represent the city to the best of its ability just because the paralegal may have voted against the action the firm will be taking on behalf of the city. Moreover, and more importantly, it is likely that the ethics rules of the city may well preclude the paralegal from voting on issues involving the firm.

IRPC 5.3 should also be considered. This Rule sets out the responsibilities of a lawyer and law firm regarding nonlawyer assistance. The Rule requires lawyers having firm managerial authority or a lawyer with supervisory authority over a nonlawyer employee to "ensure that the person's conduct is compatible with the professional obligations of the lawyer" and "be responsible for conduct of such person that would be a violation of the Rules of Professional Conduct . . . ." IRPC 5.3(a)-(c). While this Rule would apply to the paralegal's work for the firm, we do not believe the Rule applies to the outside activities of the paralegal such as serving as a member of city council. Comment 1 to the Rule talks about insuring that nonlawyers who "work on firm matters act in a way compatible with the professional obligations of the lawyer." We do not believe that service on the city council by the paralegal is tantamount to work on firm matters. Thus, while the paralegal might be more than willing to approve a fee payment to the paralegal's firm, we believe such a "conflict" must be resolved by the city, not the law firm.

The "appearance of impropriety" is no longer an ethical issue in Illinois. See ISBA Opinion 12-12 (May 2012) for a detailed discussion of its demise.

Finally, it should be noted that this opinion attempts to address only issues arising under the Rules of Professional Conduct. Illinois statutes, local ordinances, and other rules regarding conflicts of interest may be relevant to lawyers who represent, or appear before, public entities or to employees of law firms engaged in activities outside the firm.

ISBA Professional Conduct Advisory Opinion
Opinion No. 16-06
October 2016

Subject: Client Files; Confidentiality; Law Firms

Digest: A lawyer may use cloud-based services in the delivery of legal services provided that the lawyer takes reasonable measures to ensure that the client information remains confidential and is protected from breaches. The lawyer's obligation to protect the client information does not end once the lawyer has selected a reputable provider.

References: Illinois Rules of Professional Conduct, Rules 1.1, 1.6, 5.1 and 5.3

Illinois Rules of Professional Conduct, Rule 1.1, Comment 8 (amended effective Jan. 1, 2016)

ISBA Op. 10-01 (2009)

American Bar Association, Legal Technology Resource Center, www.americanbar.org.

Alabama Ethics Opinion 2010-2 (2010)

Arizona Ethics Op. 09-04 (2009)

Iowa Ethics Opinion 11-01 (2011)

Nevada Formal Opinion No. 33 (2006)

Tennessee Formal Ethics Op. 2015-F-159 (2015)

Washington State Bar Association Advisory Op. 2215 (2012)

FACTS

A lawyer wants to use cloud-based services in her delivery of legal services by contracting with a third party provider. The cloud service will include storage, processing and transmission of information in a shared infrastructure and a shared application, multi-tenant environment. The data will include client personal identifiable information, opposing party documents, financial information, health information and any other confidential and public information relevant to the delivery of legal services. The lawyer plans to conduct due diligence when selecting a third party provider to ensure the controls are in place to maintain confidentiality of the client information and data.

QUESTION

May the lawyer use a third party provider for cloud-based services? If so, is the lawyer's due diligence at the time of entering into an agreement with the provider adequate to avoid an ethical violation if a breach of confidentiality should occur through a failure of the provider or through the action of hackers?

ANALYSIS

Cloud-based services allow a lawyer to store and access software and data in the "cloud," a remote location which is not controlled by the lawyer but is controlled by a third party internet service provider. Lawyers are increasingly choosing to use cloud-based services because the services offer increased flexibility and ease of access to data.

We have previously determined that a lawyer may retain or work with a private vendor to monitor the firm's computer server and network, provided that the lawyer takes reasonable steps to ensure that the vendor protects the confidentiality of client information. *See,* ISBA Op. 10-01 (2009). A similar approach is appropriate when choosing and using cloud-based services. We believe that a lawyer may use cloud-based services. However, because cloud-based services store client data on remote servers outside the lawyer's direct control, the use of such services raises ethics concerns of competence, confidentiality and the proper supervision of non-lawyers.

Rule 1.1 provides that lawyers must provide competent representation to their clients. The Illinois Supreme Court recently amended Comment 8 to Rule 1.1 to provide that as part of a lawyer's duty of competence, lawyers must keep abreast of changes in law and its practice "including the benefits and risks associated with relevant technology." Accordingly, lawyers who use cloud-based services must obtain and maintain a sufficient understanding of the technology they are using to properly assess the risks of unauthorized access and/or disclosures of confidential information.

Lawyers must protect as confidential "all information relating to the representation of the client" pursuant to Rule 1.6. Rule 1.6(e), as recently adopted, provides that a lawyer must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to," confidential information. Factors to be considered in determining the reasonableness of the lawyer's efforts are set forth in Comment 18 to the Rule.

A lawyer's use of an outside provider for cloud-based services is not, in and of itself, a violation of Rule 1.6, provided that the lawyer employs, supervises and oversees the outside provider. *See, e.g.,* Rule 5.3, Comment 3. As stated in a Nevada opinion that discussed a lawyer's use of an outside agency to store electronic client information:

The use of an outside data storage or server does not necessarily require the revelation of the data to anyone outside the attorney's employ. The risk, from an ethical consideration, is that a rogue employee of the third party agency, or a "hacker" who gains access through the third party's server or network, will access and perhaps disclose the information without authorization. In terms of the client's confidence, this is no different in kind or quality than the risk that a rogue employee of the attorney, or for that matter a burglar, will gain unauthorized access to his confidential paper files. The question in either case is whether the attorney acted reasonable (sic) and competently to protect the confidential information.
Nevada Formal Opinion No. 33 (2006), pp. 2-3.

Because technology changes so rapidly, we decline to provide specific requirements for lawyers when choosing and utilizing an outside provider for cloud-based services. Lawyers must insure that the provider reasonably safeguards client information and, at the same time, allows the attorney access to the data.

At the outset, as recognized by the inquiring lawyer here, lawyers must conduct a due diligence investigation when selecting a provider. Reasonable inquiries and practices could include:

1. Reviewing cloud computing industry standards and familiarizing oneself with the appropriate safeguards that should be employed;
2. Investigating whether the provider has implemented reasonable security precautions to protect client data from inadvertent disclosures, including but not limited to the use of firewalls, password protections, and encryption;
3. Investigating the provider's reputation and history;
4. Inquiring as to whether the provider has experienced any breaches of security and if so, investigating those breaches;
5. Requiring an agreement to reasonably ensure that the provider will abide by the lawyer's duties of confidentiality and will immediately notify the lawyer of any breaches or outside requests for client information;
6. Requiring that all data is appropriately backed up completely under the lawyer's control so that the lawyer will have a method for retrieval of the data;
7. Requiring provisions for the reasonable retrieval of information if the agreement is terminated or if the provider goes out of business.

Our opinion is consistent with the advisory opinions issued by other state bar associations. Other states that have addressed the issue of cloud computing have also generally concluded that lawyers may use cloud-based services if they take reasonable steps to protect client information and address the potential risks. *See e.g.,* Alabama Ethics Opinion 2010-2 (2010)(lawyer may outsource storage of client files through cloud computing if the lawyer takes reasonable steps to make sure data is protected); Iowa Ethics Opinion 11-01 (2011)(lawyer should conduct appropriate due diligence before storing files electronically); Tennessee Formal Ethics Opinion 2015-F-159 (2015)(a lawyer may allow client information to be stored in the cloud provided the lawyer takes reasonable care to assure that the information remains confidential and that reasonable safeguards are employed to protect the information from breaches, loss or other risks). *See generally,* "Cloud Ethics Opinions Around the U.S.", American Bar Association, Legal Technology Resource Center, www.americanbar.org.

The inquiring lawyer also asks whether the lawyer's due diligence at the time of entering into an agreement with the provider will be adequate to avoid an ethical violation if a breach of confidentiality should occur through a failure of the provider or through the action of hackers. We do not believe that the lawyer's obligations end when the lawyer selects a reputable provider. Pursuant to Rules 1.6 and 5.3, a lawyer has ongoing obligations to protect the confidentiality of client information and data and to supervise non-lawyers. Future advances in technology may make a lawyer's current reasonable protective measures obsolete. Accordingly, a lawyer must conduct periodic reviews and regularly monitor existing practices to determine if the client information is adequately secured and protected. *See, e.g.,* Arizona Ethics Op. 09-04 (2009); Washington State Bar Association Advisory Op. 2215 (2012).

CONCLUSION

A lawyer may use cloud-based services to store confidential client information provided the attorney uses reasonable care to ensure that client confidentiality is protected and client data is secure. A lawyer must comply with his or her duties of competence in selecting a provider, assessing the risks, reviewing existing practices, and monitoring compliance with the lawyer's professional obligations.
