ILLINOIS STATE
BAR ASSOCIATION

Board of Governor Meeting
March 10, 2017

Action Agenda Item #10
Professional Ethics Opinions
(17-01, 17-02, 17-03, 17-04)

ILLINOIS STATE BAR ASSOCIATION

MEMORANDUM

To: Board of Governors

From: Charles Northrup, General Counsel

Date: February 28, 2017

Re: Proposed Professional Conduct Advisory Opinions

Attached please find four draft Professional Conduct Advisory Opinions that the Professional Conduct Committee recommends the Board adopt. Upon adoption by the Board, the opinions will be properly formatted, labeled, and added to the ISBA website. A brief synopsis of the opinions is set out below.

Recommended Opinion 17-01

This Opinion addresses the issue of whether under IRPC 1.6(c) a lawyer must reveal his or her client's addiction to heroin and opioids. The Opinion concludes that the lawyer does not need to reveal the addiction. The Opinion notes that determining when disclosing client confidences is necessary to prevent the client's reasonably certain death or substantial bodily harm is intensely fact sensitive, but that generally the mere possibility of death or substantial bodily harm as a result of addiction is too remote in time and uncertain of occurrence to trigger the mandatory reporting requirement of IRPC 1.6(c).

Recommended Opinion 17-02

This Opinion suggests that it is reasonable for *client files* to be destroyed after seven years from the end of a representation. It also provides that no client notice is required prior to file destruction, especially where prior notice of the lawyer's file destruction policy was given via an engagement letter. Client property or items with intrinsic value must be preserved or returned to the client. The Opinion also notes the existing Rule requirements for: client name and address list (indefinitely under Rule 769); financial records of various kinds (seven years under Rule 769); and trust account records (seven years under Rule of Professional Conduct 1.15).

Recommended Opinion 17-03

This Opinion addresses a situation where a lawyer is asked to represent a husband and wife in a short sale of their marital home, even though the lawyer has been retained by the husband to file for divorce. The Opinion concludes that representing the husband and wife in the short sale would be a conflict of interest and that it is very unlikely that the conflict could be waived. The preferred course would be to have the husband and wife each represented during the short sale, or another lawyer representing them both.

Recommended Opinion 17-04

This Opinion concludes that when a buyer and seller of real estate have executed a sales contract, it is highly unlikely that a lawyer could represent them both in the sale. It further provides that where buyer and seller have not executed a sales contract, a single lawyer cannot represent them both. The Opinion declines to speculate about what circumstances might permit a lawyer to represent both the buyer and seller of real estate.

If questions, please do not hesitate to contact me.

<u>ISBA Professional Conduct Advisory Opinion</u>

Opinion No. 17-01
March 2017

Subject: Confidentiality; Impaired Client

Digest: The question of whether the disclosure of confidential information is necessary to prevent reasonably certain death or substantial bodily harm is a factual issue.

References: Illinois Rules of Professional Conduct 1.6(c) and 1.14

Restatement (Third) of the Law Governing Lawyers Sec. 66 (2000)

<u>FACTS</u>

The inquiring attorney has a client who is addicted to heroin and opioids, and also takes cocaine, marijuana and methadone. The client is arrested for possession of a controlled substance, and appears severely impaired during court hearings, but remains silent before the Judge, allowing the attorney to do the speaking. The client is unable to stop consuming heroin and continues to be in violation of bond conditions.

<u>QUESTION</u>

The attorney asks whether, pursuant to Rule 1.6(c) of the Illinois Rules of Professional Conduct, he must reveal his client's addictions to the Court in order to prevent reasonably certain death or substantial bodily harm to his client.

<u>ANALYSIS</u>

As alluded to in the inquiry, Illinois Rule 1.6(c) provides:

> "A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."

We begin by noting that the Illinois Rule is drawn in mandatory terms; i.e., the lawyer <u>shall</u> reveal information under the circumstances therein stated, while the comparable ABA Model Rule; i.e., Rule 1.6(b)(l), is drawn in discretionary terms, providing that the attorney <u>may</u> reveal confidential information under the same circumstances as are set forth in the Illinois Rule. Thus, whether mandatory under the Illinois Rule or discretionary under the ABA Model Rule, the threshold for disclosure of confidential information under the two Rules is the same, that being whether an attorney reasonably believes that the revealing of such information is necessary to prevent reasonably certain death or substantial bodily harm.

As recognized in the Restatement (Third) of the Law Governing Lawyers §66(2000), the question of whether the disclosure of otherwise confidential information is necessary to prevent reasonably certain death or substantial bodily harm is intensely fact sensitive. Moreover, in deciding whether death or substantial bodily harm is reasonably certain to occur, Comment [6] to Illinois Rule 1.6 (c) recognizes that such harm is reasonably certain to occur if it will be suffered immediately or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

To this effect, the Restatement has recognized various factors to be considered in deciding whether the disclosure of confidential information is necessary to prevent reasonably certain death or substantial bodily harm, including the following:

1. The degree to which it appears likely that the threatened death or serious bodily harm will actually result in the absence of disclosure;

2. The irreversibility of the consequences once the act has taken place;

3. Whether victims may be unaware of the threat or may rely on the lawyer to protect them;

4. The lawyer's prior course of dealing with the client; and

5. The extent of adverse effect on the client that might result from disclosure contemplated by the lawyer.

Examples given by the Restatement or the Comments to Rule 1.6 as to whether disclosure is necessary to prevent reasonably certain death or substantial bodily harm include the following:

1. Comment [6] to Illinois Rule 1.6(c) states that a lawyer who knows that a client or other person has accidently discharged toxic waste into a town's water supply must reveal this information to authorities if there is a present and substantial risk that a person who drinks the water will contract life threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

2. The Restatement states that a lawyer representing a defendant in a personal injury action who learns from a consulting physician that the plaintiff has a life threatening medical condition of which the plaintiff is unaware, and which can be repaired through surgery, may under the ABA discretionary Rule, reveal such condition to the plaintiff.

3. The Restatement also sets forth that a lawyer whose client reveals that he has set a mechanical device to burn down a building in which people are living has the discretion under the ABA Rule to reveal such facts, even though this may result in criminal charges against his client.

4. On the other hand, the Restatement concludes that a lawyer who learns that his client has unknowingly used a component in the manufacture of its products resulting in a slight statistical chance that a user may suffer serious bodily harm, but only in a highly unlikely combination of circumstances, does not under the ABA Rule have the discretion to warn the public of such slightly increased risk of harm.

Applying the above guidance to the present inquiry, we are of the view that the inquiring attorney is not in all instances obligated under Rule 1.6(c) to reveal confidential information as to the existence of his client's addiction to heroin and opioids, even though such addictions may at some unknown time in the future result in death or serious bodily harm. While admittedly serious, and not to diminish the possible danger to the client's safety and well-being caused by the client's addictions and usage, we cannot conclude that the lawyer's knowledge of a client's addictions, without more, always results in a mandatory obligation to disclose such information in order to prevent reasonably certain death or substantial bodily harm. We do not believe the dictates of Rule 1.6(c) to go so far.

Moreover, while Comment [6] to the Rule recognizes that the risk of reasonably certain death or substantial bodily harm need not in all instances be immediate, the Comment goes on to state that there must at the least be a present and substantial threat that the person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. In the present instance, while the client's addictions, especially to heroin, present a risk that at some unknown time in the future the client <u>may</u>, like every person suffering from such an addiction, suffer the ills foreseen by the Rule, such danger is sufficiently remote in time and uncertain of occurrence as to render us unable to say that it presents the present and foreseeable threat of reasonably certain death or substantial bodily harm as would be required to call the Rule into play. Thus, we are of the belief that the mandate of disclosure under Rule 1.6(c) is not presently applicable to this situation.

This is not to say, however, that the attorney would never have a possible obligation under the Rule to reveal the client's addiction and usage. As stated, the question of whether the circumstances in any given situation may require reporting under Rule 1.6(c) is an intensely fact sensitive inquiry. To this effect, if the attorney has additional information in a given instance reflecting an increased danger of death or substantial bodily harm, beyond the risk inherent in the client's being an addict, such as a history on the part of a client to attempt suicide or to cause bodily injury to himself, or the existence of believable threats by the client to do himself injury, such considerations may result in a different conclusion as to the reasonableness of a belief on the part of an attorney that the revealing of otherwise confidential information is necessary to prevent reasonably certain death or substantial bodily harm. However, on the facts stated in the present inquiry, we do not believe that the attorney's knowledge of the client's addictions and usage, without more, creates a reasonable belief on the part of an attorney that intervention is necessary to prevent reasonably certain death or substantial bodily harm so as to require disclosure under Rule 1.6(c).

We are somewhat comforted in our conclusion that mandatory disclosure is not required under the present circumstances by the fact that Rule 1.6(c) is not the only Rule under which help for the addictive client may be obtained. To this effect, while the attorney's present inquiry is specifically premised on the requirements of Rule 1.6(c) and to the attorney's possible mandatory obligation thereunder to reveal his client's addictions, the provisions of Rule 1.14, dealing with a client who is of diminished capacity, may also come into play and may provide an easier and in many instances a more readily available avenue for assisting such a client than that provided by Rule

1.6(c). Without going into a lengthy discourse of the provisions of Rule 1.14, suffice it to say that it provides that an attorney who has a client whose capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (Rule 1.14(a)). However, the Rule goes on to state that a lawyer having a client who has diminished capacity, who is at risk of substantial physical, financial or other harm unless action is taken, and who cannot adequately act in the client's own interest, <u>may</u> (not <u>shall</u>) take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take actions to protect the client and, in appropriate cases, seek the appointment of a guardian <u>ad litem</u>, conservator or guardian. (Rule 1.14(b)) The Rule further recognizes that while information relating to the representation of a client with diminished capacity is protected by the confidentiality provisions of Rule 1.6, the lawyer, when taking protective action pursuant to Rule 1.14(b), is impliedly authorized under Rule 1.6(a) to reveal information about the client to the extent reasonably necessary to protect the client's interests (Rule 1.14(c)).

Thus, an attorney having a client whose drug or other conditions create a reasonable belief on the part of the attorney that the client is of diminished capacity should take into account the provisions of Rule 1.14, and that the attorney may have the right under such Rule, even absent the existence of an obligation to report under Rule 1.6(c) and despite the confidentiality provisions of Rule 1.6, to obtain help for the client under Rule 1.14. We thus recommend that the inquiring attorney review the provisions of Rule 1.14 with a view to whether it provides an additional avenue for obtaining relief for his addictive client.

<u>CONCLUSION</u>

Accordingly, we conclude that an attorney having knowledge of a client's drug addiction and usage does not in all instances, and in the absence of further aggravating circumstances increasing the certainty of death or serious bodily harm, have an obligation under Rule 1.6(c) to reveal such information. We reiterate, however, that the determination of the attorney's obligation under the mandatory provisions of the Rule is intensely fact sensitive, and may in some circumstances rise to the level of requiring action under the Rule to prevent reasonably certain death or substantial bodily harm. Additionally, even absent the existence of a mandatory reporting obligation under Rule 1.6(c), the lawyer may have steps available to protect his client if the client is of diminished capacity under the provisions of Rule 1.14.

ISBA Professional Conduct Advisory Opinion

Opinion No. 17-02
March 2017

Subject: Client Files; Law Firms

Digest: A lawyer must maintain records that identify each client and reflect whether the client's representation is active for an indefinite period of time. A lawyer must maintain all financial records related to the lawyer's practice as well as complete records of trust account funds and other property of clients or third parties held by the lawyer for at least seven years. For other records and materials, if appropriate steps are taken to return or preserve actual client property or items with intrinsic value, it is generally permissible for a lawyer to dispose of closed file materials within a "reasonable" time after conclusion of a matter; and seven years should generally be considered a reasonable time. Sending former clients notice of the proposed disposal of a closed file generally should not be required. Any method of disposal must protect the confidentiality of client information.

References: Illinois Rules of Professional Conduct 1.0, 1.6, and 1.15;

Illinois Supreme Court Rule 769;

735 ILCS 5/13-214.3(c);

ISBA Professional Conduct Advisory Opinion 12-06 (January 2012);

ABA Informal Opinion 1384 (March 1977);

Restatement Third, The Law Governing Lawyers § 46 (2000);

Missouri Rule of Professional Conduct 4-1.22 (2016);

Ohio Supreme Court Board of Professional Conduct Client File Retention Guide (March 2016);

Tennessee Board of Professional Responsibility Opinion 2015-F-160(a) (March 2016);

Arizona State Bar Opinion 08-02 (December 2008);

Iowa State Bar Opinion 08-02 (March 2008)

West Virginia Lawyer Disciplinary Board Opinion 2002-01 (March 2002).

FACTS

The inquiring law firm is incurring substantial storage fees for closed client matter files and wishes to dispose of files no longer of use that are more than ten years old. For many years, the firm has included the following or similar language in its standard engagement letter signed by clients: "At your request, your papers and property will be returned to you [after termination of the Matter] promptly upon receipt of payment for outstanding fees, service charges and disbursements. Our own files, including lawyer work product, pertaining to the Matter will be retained by the firm. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any such documents or other materials retained by us within a reasonable time after the termination of the engagement." The firm states that locating and contacting former clients to seek consent for destruction, or to provide advance notice of destruction, would be impossible in some situations as well as costly and burdensome in most cases.

QUESTION

Where clients have signed engagement agreements advising that a law firm may destroy or otherwise dispose of documents relating to a closed matter within a reasonable time after the end of the engagement, may the law firm do so: (1) ten years after the end of an engagement; and (2) without taking additional steps, including, for example, giving notice to the former clients?

ANALYSIS

As noted in ISBA Opinion 12-06 (January 2012), there are minimum time periods that certain financial and trust account records regarding a lawyer's practice must be maintained. Specifically, Illinois Rule 1.15(a) requires that complete records of trust account funds and other property of clients or third persons be kept by a lawyer and preserved for at least seven years after termination of a representation. Subparagraphs (1) to (8) of the Rule 1.15(a) list the specific requirements for the "complete records" of trust accounts.

Illinois Supreme Court Rule 769 defines two additional categories of lawyer records that must be maintained. Paragraph (1) requires a lawyer to maintain records that identify the name and last known address of each client and reflect whether the representation of the client is ongoing or concluded. In contrast to Rule 1.15(a) and paragraph (2) of Supreme Court Rule 769, paragraph (1) makes no reference to any period of time. It therefore appears that the client information described in paragraph (1) should be preserved indefinitely. Paragraph (2) of Supreme Court Rule 769 requires that all "financial records" related to a lawyer's practice be maintained for a period of not less than seven years. Financial records are defined to include bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns, and tax reports.

In the present inquiry, the law firm typically advised new clients of the firm's records retention policy, including the intention to dispose of closed files "within a reasonable time after the termination of the engagement," in the initial engagement letter. The firm now wishes to consider ten years as a "reasonable" period of time. Apart from the specific rules discussed above, there appear to be no other Illinois professional conduct or court rules relevant to a minimum or "reasonable" retention period for lawyer file materials no longer needed for a client's representation. Other authorities provide useful guidance on this question.

ISBA Opinion 12-06 (January 2012) considered whether an Illinois legal services program could routinely dispose of various types of case materials five years after a matter was closed. The opinion noted that records reflecting the client information covered by Supreme Court Rule 769(1) must be retained indefinitely, and that the financial and trust account records described in Supreme Court Rule 769(2) and Illinois Rule 1.15(a) must be kept for seven years. With respect to closed case files, except for original deeds, wills, and other documents with intrinsic value, ISBA Opinion 12-06 concluded that the program need not retain such files more than five years after a matter was closed if those materials were no longer useful to the clients' representation.

As early as 1977, the American Bar Association advised that lawyers need not retain closed files indefinitely. ABA Informal Opinion 1384 (March 1977) observes: "A lawyer does not have a general duty to preserve all of his files permanently. Mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services."

The *Restatement Third, The Law Governing Lawyers* § 46(1) (2000) provides that a lawyer must take "reasonable" steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client. Comment *b* to § 46 notes, however, that "… a law firm is not required to preserve client documents indefinitely and may destroy documents that are outdated or no longer of consequence."

The experience in other states is also instructive. In July 2016, the Missouri Supreme Court amended its Rule of Professional Conduct 4-1.22 to reduce that state's general mandatory file-retention period from ten years to six years for all files where the representation ends on or after July 1, 2016. Missouri Rule 4-1.22 lists four exceptions to the general rule: (a) where a legal malpractice claim is pending; (b) where a criminal or other governmental investigation is pending; (c) where a disciplinary matter is pending; or (d) where other litigation is pending.

The Ohio Supreme Court Board of Professional Conduct Client File Retention Guide, issued in March 2016, acknowledged that there is no minimum file retention requirement in Ohio and observed that the "… decision of how long to maintain a client file always lies within the professional judgment of the lawyer…." The Guide also noted that other jurisdictions suggest minimum file retention periods that run concurrently with trust account recordkeeping requirements (seven years in Ohio), and agreed that the trust account period may be appropriate in many cases, except for particular matters that may require longer retention.

Tennessee Board of Professional Responsibility Opinion 2015-F-160(a) (March 2016) recommended that a lawyer retain former client files for five years after termination of representation, noting that the guideline may be altered by client agreement or the type of representation and contents of the file. Arizona State Bar Opinion 08-02 (December 2008) concluded that a general five-year retention period "… remains a safe default option for the lawyer and client in the absence of an agreement otherwise." The opinion further noted that the five-year period was supported by Arizona Rule 1.15(a), which requires a five-year retention period for trust account records. Iowa State Bar Opinion 08-02 (March 2008) recommended a retention period of no less than six years if the lawyer has a written file retention policy and ten years in the absence of such a policy.

West Virginia Lawyer Disciplinary Board Opinion 2002-01 (March 2002) noted that lawyers do not have a general duty to preserve closed files permanently, and stated: "At some point in time, even absent explicit consent to destroy, it is no longer reasonable for a client to expect that the lawyer will still maintain the client's property. At that point in time, the client's consent to destroy the file is implicit." The opinion concluded that, with certain exceptions, "holding the file for five years with no request for it by the client can be deemed implicit consent to destroy the file."

In view of these authorities, the ten-year retention period for closed files proposed by the inquiring law firm is clearly reasonable. In fact, a general "default" retention period of seven years for the ordinary closed file materials of an Illinois law firm also appears reasonable. A general retention period of seven years after termination of the representation would be consistent with two of the Illinois Supreme Court's three lawyer record-keeping requirements (records required by Supreme Court Rule 769(1) should be preserved indefinitely). As noted above, several other jurisdictions have chosen their state's trust account record retention period as the appropriate default guideline for retention of ordinary closed files. Retaining closed files at least seven years could also prove advantageous in the event of a lawyer liability claim, given that the Illinois statute of repose for professional liability claims against lawyers, 735 ILCS 5/13-214.3(c), is six years.

There may be specific situations, like those listed as exceptions to Missouri Rule 4-1.22, or types of materials like those listed in ISBA Opinion 12-06 (original deeds, wills, and other documents with intrinsic value), where retaining a file, or portions of a file, longer than seven years may be necessary or prudent. And as long as the requirements of Illinois Rule 1.15(a) and Supreme Court Rule 769 are met, lawyers and adequately informed clients (see the definition of "informed consent" in Illinois Rule 1.0(e)) are free to agree on any mutually acceptable retention period for closed client files.

The inquiring law firm also asks whether, in view of the terms set out in the firm's general engagement letter, it is necessary to give clients or former clients notice that the firm intends to destroy the file relating to a particular matter. In this regard, it is useful to note that neither Illinois

Rule 1.15(a) nor Illinois Supreme Court Rule 769(2), which set the minimum retention periods for lawyer trust account and financial records, require any notice to clients after the minimum retention periods have ended and a lawyer is then impliedly free to destroy the trust account and financial records. It seems reasonable to assume that if the Court believed that notice to clients of the potential destruction of these important lawyer records was necessary or appropriate, the Court would have written those rules to require notice.

This approach is also consistent with Missouri Rule of Professional Conduct 4-1.22, which does not require notice to clients or former clients that a file will be destroyed. Like West Virginia Lawyer Disciplinary Board Opinion 2002-01, the Missouri rule presumes that if "… the client does not request the file within six years after completion or termination of the representation, the file shall be deemed abandoned by the client and may be destroyed."

If appropriate steps have been taken to return or preserve actual client property or items with intrinsic value, sending former clients notice of the proposed disposal of routine closed file materials generally should not be required. Attempting to locate and communicate with former clients seven to ten years after a matter is closed will always be time-consuming and expensive – and in many cases, futile. As the Missouri Supreme Court and the West Virginia Lawyer Disciplinary Board concluded, former clients who have left their closed matter files untouched for five or six years should be considered to have lost interest. Clearly, as in the case of the present inquiry, former clients who have been given notice of the firm's file retention policy in the initial engagement letter need no additional notice before the firm may destroy a closed file.

Finally, disposal of any part of a law firm's closed file must be done in a manner that protects the confidentiality of all information relating to the client's representation, consistent with a lawyer's duty under Illinois Rule 1.6. Comment [18] to Rule 1.6 explains that a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or others participating in the representation of the client or who are subject to the lawyer's supervision. Hence, the law firm must assure that its method of disposing of closed files preserves the confidentiality of information relating to the representation of its clients or former clients.

ISBA Professional Conduct Advisory Opinion

Opinion No. 17-03
March 2017

Subject: Conflict of Interest; Conflict of Interest – Transactional Matters

Digest: The Illinois Rules of Professional Conduct prohibit a lawyer from representing a husband and wife in a short sale if the husband is currently a client of the lawyer who is investigating filing a divorce petition for the husband, unless both the husband and wife give informed consent to the conflict and the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client."

References: Illinois Rules of Professional Conduct, Rule 1.7

Illinois Rules of Professional Conduct, Rule 1.0(e)

Illinois Rules of Professional Conduct, Rule 1.6

ABA Formal Opinion 05-434

ISBA Ethics Opinion 86-15

ISBA Ethics Opinion 99-01

Restatement (Third) of the Law Governing Lawyers §122

Geoffrey C. Hazard and W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, §1.7:207 (2d ed. Supp. 1996)

FACTS

A lawyer represents a client ("Husband") seeking a dissolution of marriage from his wife ("Wife"). The lawyer is still gathering information but has not yet filed a petition for divorce. Husband and Wife owe approximately $100,000 on the mortgage for their marital home. The home is no longer worth $100,000 and neither can afford the payments either together or separately. If they act in the next six months, Husband and Wife may be able to sell their home through a short sale that would eliminate the potential for a deficiency judgment.

QUESTIONS

1) Does the lawyer have a conflict of interest if she represents Husband and Wife in a short sale of their home?

2) Can the lawyer represent Husband and Wife if they waive any conflict the lawyer may have?

ANALYSIS

Illinois Rule of Professional Conduct 1.7 provides that a lawyer has a conflict of interest if she concurrently represents clients whose interests are adverse unless the clients consent and several other factors are met:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) 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.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law;
> >
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> >
> > (4) each affected client gives informed consent.

I.R.P.C. 1.7.

The lawyer's proposed representation of Husband and Wife in the short sale constitutes a concurrent conflict under Rule 1.7(a)(1). Here, the lawyer currently represents Husband who is contemplating filing for a divorce from Wife. Although no lawsuit has been filed, the representation of Husband is directly adverse to Wife. "There may be direct adversity even though there is no overt confrontation between the clients, as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom the lawyer represents on a wholly unrelated matter. Thus, for example, a lawyer would be precluded by Rule 1.7 (a) from advising a client as to his rights under a contract with another client of the lawyer…." ABA Formal Opinion 05-434. So even though Husband has not yet filed for divorce, the lawyer's representation of Husband is already directly adverse to Wife, and representing Wife as a client in another matter, like the proposed short sale, constitutes a concurrent conflict under Rule 1.7(a)(1).

The lawyer's proposed representation of Husband and Wife in the short sale may also create a concurrent conflict of interest for the lawyer under Rule 1.7(a)(2) which states that a concurrent conflict exists if there is a "significant risk" the representation of one client will be "materially limited" by the lawyer's responsibilities to another client. "[A]ny impairment of the client-lawyer relationship precludes concurrent representation in situations of direct client-to-client conflict."

ISBA Ethics Op. 99-01 (quoting Geoffrey C. Hazard and W. William Hodes, "The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct," §1.7:207 (2d ed. Supp. 1996)). ISBA Ethics Opinion 99-01 analyzed the situation where a lawyer proposed to represent a husband in a divorce from his wife, and proposed to represent the wife in a custody proceeding involving a former spouse. The opinion concluded that the conflict between clients in a divorce was so great that the "lawyer should not undertake representation of one spouse in a marriage dissolution matter if the lawyer already represents the client's spouse in another family law matter." *Id*.

The facts presented here differ in a significant way from those of Ethics Opinion 99-01 because Husband and Wife's interests are aligned in the short sale. However, if one of the two clients will somehow benefit more from the short sale, or could gain a tactical advantage or leverage in the divorce from the short sale (for example if it falls through), then the lawyer's representation of both clients may become materially limited and a concurrent conflict would exist under Rule 1.7(a)(2). Indeed, given how closely a client's finances are usually linked to both their home ownership and the litigation of a divorce it is hard to imagine that the representation of Husband and Wife in the short sale would not be materially limited by the lawyer's duties to the Husband contemplating to file for divorce.

The lawyer can overcome the Rule 1.7(a)(1) and (2) concurrent conflict from representing Wife in the short sale if the representation falls under the exception to a concurrent conflict provided in Rule 1.7(b). The Rule 1.7(b) exception has four subparts, each of which must be satisfied.

The first subpart, that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," requires the lawyer to determine whether she can appropriately represent all parties in the transaction. This could be a problem if completing the proposed transaction, the short sale, would somehow confer a greater advantage on one of the spouses than it would on the other spouse in the looming divorce. Given how closely a couple's assets, and the manner those assets are held, can impact the outcome of a divorce proceeding it may be impossible for the lawyer to conclude she can advise both spouses about moving forward with the short sale. On the other hand, because there is a short deadline on the short sale, and the short sale would likely benefit both Husband and Wife, the lawyer may believe that husband and wife are best served by the lawyer representing them in the short sale despite the conflict from the potential divorce. Ultimately whether the proposed concurrent representation does not violate subpart 1 will depend on the specific facts of the situation. Although given the inherent conflict in divorce proceedings, it seems unlikely that a lawyer could ever represent one spouse in a contemplated divorce, and concurrently represent the other spouse for any purpose. *See* ISBA Ethics Op. 99-01; *see also* ISBA Ethics Op. 86-15.

The second subpart, that the representation is not prohibited by law, is met here.

The third subpart, that "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal" is met here. The lawyer is not contemplating representing both clients in the divorce and the short sale is not a proceeding before a "tribunal."

The fourth subpart, that "each affected client gives informed consent," is met only if the lawyer discloses information to both Husband and Wife sufficient to inform them about their decision to waive the conflict, and if both consent. *See* I.R.P.C. 1.7 cmt 2 (explaining that for purposes of Rule 1.7(b)(4) the clients "affected" include both of the clients referred to in paragraph (a)(1).) The amount of information the lawyer must convey for Husband and Wife to give informed consent is "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." I.R.P.C. 1.0(e). The *Restatement (Third) of the Law Governing Lawyers* similarly defines informed consent to a waiver of a conflict as requiring "that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client." *Restatement (Third) of the Law Governing Lawyers §122*. So for Wife to give informed consent to the representation the lawyer would need to explain to Wife that Husband is contemplating a divorce and that the manner in which the short sale proceeds could impact the outcome of the divorce. The lawyer should also recommend that Husband and Wife each retain their own lawyer, or that Husband and Wife jointly retain a new lawyer (who does not represent either one in relation to the potential divorce), for the short sale because of the risk that the joint representation with the lawyer who already represents Husband in relation to the potential divorce, and the related need to share financial information, may compromise one of their positions in the divorce.

Finally, the lawyer needs to consider Illinois Rule of Professional Conduct 1.6 which prohibits a lawyer from sharing information related to the representation of a client without informed consent. Rule 1.6 is potentially implicated in two ways. First, Husband would need to waive confidentiality and allow the lawyer to share with Wife that Husband has retained the lawyer to investigate filing for divorce. Second, if the short sale process involves collecting financial information from Husband and Wife, then lawyer would potentially be in possession of confidential financial information about both Husband and Wife that could be relevant to the looming divorce proceeding. Husband and Wife would both need to waive confidentiality and allow the lawyer to share each party's confidential financial information with the other party. As part of waiving confidentiality, the lawyer would need to make sure that Husband and Wife both understand that sharing the financial information for purposes of the short sale could convey an advantage to the other party in a divorce.

CONCLUSION

In conclusion, it will be a rare situation where the lawyer concludes that she could "provide diligent legal representation to each affected client" as required by Rule 1.7(b)(1) to accept the concurrent representation. If the lawyer does conclude that she can accept the concurrent representation, the lawyer must then obtain Husband's informed consent to share information about the representation in the contemplated divorce with Wife. Finally, if the lawyer concludes that she can accept the representation and Husband consents to sharing information about the contemplated divorce with Wife, then the lawyer must obtain informed consent from Wife after communicating "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." I.R.P.C. 1.0(e). Consequently, any lawyer contemplating a joint representation in a situation like this will likely want to turn down the joint representation unless there is some strong rationale for why Husband and Wife should not use either separate lawyers or a single different lawyer without a conflict related to the possible divorce for the short sale.

ISBA Professional Conduct Advisory Opinion

Opinion No. 17-04
March 2017

Subject: Conflict of Interest; Conflict of Interest – Transactional Matters

Digest: In most circumstances, a lawyer will not be able to represent both the buyer and seller in a real estate transaction.

References: Illinois Rules of Professional Conduct, Rules 1.0(e) and 1.7

ISBA Op. 86-15

New York State Bar Ass'n Op. 807 (2007)

Vermont Ethics Op. 78-04 and 2004-03

In re Dixon, 07 CH 115, M.R. 22629 (2008)

In re Jeffers, 08 CH 103, M.R. 23537 (2010)

In re Murzyn, 05 CH 73, M.R. 21436 (2007)

In re Scott, 09 CH 102, M.R. 25453 (2012)

FACTS

A mother wants to sell her home to her son. Mother and son worked out the details of the transaction without the assistance of counsel. They contact a lawyer to handle the purchase and sale of the home and to represent each of them at the closing.

QUESTIONS

May the lawyer represent both the buyer and the seller in the transaction and at the closing?

ANALYSIS

At the outset, we caution that numerous lawyers have been disciplined for representing or attempting to represent both the buyer and seller in a real estate transaction. *See, e.g.,* In re Scott, 09 CH 102, M.R. 25453 (2012); In re Jeffers, 08 CH 103, M.R. 23537 (2010); In re Dixon, 07 CH 115, M.R. 22629 (2008); In re Murzyn, 05 CH 73, M.R. 21436 (2007). Accordingly, we caution lawyers to fully research and analyze any such contemplated representation.

In addition, we have previously issued an opinion that concluded, in most circumstances, lawyers cannot represent both the buyer and seller in a real estate transaction. We concluded that the circumstances where a lawyer could undertake such multiple representation are extremely rare.

See ISBA Op. 86-15. We believe that this opinion is still sound under the 2010 Rules of Professional Conduct.

Illinois Rule of Professional Conduct 1.7, the rule that addresses concurrent conflicts of interest, provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) 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.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent.

As stated in Comment 7 to Rule 1.7, directly adverse conflicts can arise in transactional matters. Representation of a buyer in a real estate transaction is directly adverse to the representation of the seller. Therefore, there is a concurrent conflict of interest under Rule 1.7.

Accordingly, the lawyer must then determine if the lawyer can take on the representation, even with the conflict of interest, if the lawyer can obtain the informed consent of each client. Some conflicts of interest are nonconsentable; the lawyer must determine consentability on a case-by-case basis. *See,* Comment 14, Rule 1.7.

Pursuant to Rule 1.7(b)(1), the lawyer must analyze whether the lawyer may reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client. The question is whether a reasonable lawyer would conclude that the lawyer could provide the required diligence and competence to both the buyer and the seller in the transaction.

In our view, if the buyer and the seller have not already executed a valid sales contract, the lawyer could not reasonably believe that he or she could provide competent and diligent representation to both the buyer and the seller. The lawyer could not negotiate on behalf of one client without harming or potentially harming the other client. The lawyer's obligations and loyalties are so divided that the lawyer could not reasonably believe that the lawyer could provide adequate representation to both parties.

As we stated in Op. 86-15, "Under normal circumstances involving an arms-length unrelated buyer and seller, we feel it by no means obvious that their interests can be adequately represented by a single attorney. We would, therefore, conclude under such circumstances that their dual representation would be improper, regardless of their consent thereto."

Even if the parties agree on the terms of the sale, and have already executed the sales contract, we believe that it is highly unlikely that a lawyer could properly represent both the buyer and seller in concluding the transaction. Issues often arise after the parties have executed the contract and prior to closing that would require the lawyer to give unqualified advice to his or her client.

Our conclusions are consistent with several opinions in other states. *See e.g.*, Vt. Ethics Op. 2004-03 (2004)(an attorney may not simultaneously represent a client who is selling a parcel of real property and provide limited representation to the buyer of the same real estate by providing a title insurance policy to such buyer); Vt. Ethics Op. 78-04 (general representation of both purchaser and seller in a normal "arms-length" real estate transaction is not permitted under the rules even though both parties consent); New York State Bar Ass'n Op. 807 (2007)(the buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest).

However, in Opinion 86-15, we stated, "We are not prepared to say categorically in the present instance that an attorney can never, under any circumstances, adequately represent the interests of both the buyer and seller in a real estate transaction. We do, however, believe such instances to be extremely rare."

We decline to consider under what circumstances the representation of the buyer and seller might be proper even with informed consent. Whether the lawyer can adequately represent both the buyer and the seller will depend on the facts of that transaction. If the lawyer concludes that a reasonable lawyer could undertake the joint representation, the lawyer must then obtain the informed consent of each client. Such a consent must include all of the possible ramifications of the waiver of the conflict, including the likelihood that the lawyer would be obliged to withdraw from representation if any conflict ensues, at the expense of the clients.

CONCLUSION

In most circumstances, a lawyer will not be able to represent both the buyer and seller in a real estate transaction, even if the buyer and seller are related.
