



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.7 and Comments [8] and [14-17]. 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. 04-01
November 2004**

Topic: Conflict of Interest Representation of client which may be materially limited by lawyer's responsibilities to another client.

Digest: Non-waivable conflict is created by representation of two clients having divergent interests in property possessed by third-party.

References: Rule 1.7(b)
ISBA Opinion Nos. 90-31, 90-30, 99-1, 86-15, 644.

FACTS

A law firm has been employed by Client 1 to undertake a collection claim against Debtor A. Certain property is owned by either Debtor A, his wife, or a member of his family. It is contemplated that upon successfully obtaining a judgment against Debtor A, which may take one to two years, the firm would attempt to satisfy the judgment against the property. If the property has been transferred by Debtor A to other family members, a claim of fraudulent transfer of assets would be brought.

During the course of such representation, the law firm is asked to represent Client 2 in a possible purchase of the property from Debtor A or his family members.

QUESTION

Would a conflict exist if the law firm represents both clients in the above circumstances and, if so, is the conflict waivable?

OPINION

Rule 1.7(b) of the Rules of Professional Conduct 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.

In the present instance, upon undertaking the representation of Client 2, the law firm would be representing two (2) clients with differing and antagonistic interests in the property owned by Debtor A or his family.

Client 1 is interested not only in seeking a judgment against Debtor A as expeditiously as possible, but in then seeking to enforce the judgment against the property, whether it is owned by Debtor A or by a member of his family. While a sale would presumably result in the property being replaced by comparable cash value against which to satisfy a judgment, it is problematic that such cash would remain available by the time a judgment is entered, or that it would be as readily ascertainable or recoverable to satisfy the judgment. It would thus be to Client 1's benefit that ownership of the property remains unchanged until such time as a judgment could be obtained.

To the contrary, Client 2's interest is in obtaining the property, whether from Debtor A or his relative, and presumably to obtain it at the lowest possible price, the interest of Client 1 as to price being the opposite. Moreover, Client 2 would want to obtain the property free and clear of any possible claims of Client 1 or otherwise, while Client 1 would, if possible, benefit from being able to follow the property into the hands of Client 2.

It thus appears clear that a conflict would result from the firm's representing both clients. Moreover, we do not believe that such a conflict would be waivable.

As previously stated, a Rule 1.7(b) conflict may be waived by client consent only if the lawyer reasonably believes that the representations will not be adversely effected. We do not see how the lawyer could maintain such a reasonable belief in the present instance.

We have at numerous times in past opinions dealt with questions of whether a lawyer in given circumstances may reasonably believe that representations will not be adversely effected by the existence of a conflict. We have at times found the facts involved to mandate a conclusion that no such reasonable belief could be maintained. Opinion Nos. 90-31, 99-1. In other circumstances, we have found that we could not say on the facts submitted that an attorney's belief that he could adequately represent the interests of multiple clients would necessarily be unreasonable. Opinion No. 90-30. We have even said that while it would almost always be

improper for a lawyer to represent both the buyer and seller in a real estate transaction, regardless of client consent, we could not say categorically that an attorney could never, under any set of circumstances, adequately represent the interests of both the buyer and seller in such a transaction. Opinion No. 86-15. See also Opinion No. 644. However, a constant in all of our opinions has been our recognition that the question of whether a lawyer may reasonably believe that the representations involved will not be adversely effected by the existence of a conflict must depend upon the facts and circumstances of each particular case. Opinion Nos. 86-15, 90-31, 644.

In the present instance, while it is true that no judgment has yet been entered on behalf of Client 1, and the possibility exists that no judgment will be obtained, it is also clear that by the time that such question is answered it will be irrelevant, because it will be too late to negate the damage which may be done to Client 1 resulting from a sale of the potential judgment debtor's property to Client 2. The property intended to be used to satisfy the judgment will be gone, and the potential injury to Client 1 from such a sale will have been realized. While a sale of the property may nonetheless take place without the participation of the conflicted law firm, this does not negate that, if the law firm chooses to involve itself in effecting the sale, no reasonable belief could exist on its part that its representation of the multiple clients involved would not adversely effect the interests of the other. Accordingly, the conflict created by such multiple representations would not, in our view, be waivable.

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