



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in July 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.7 and 1.9. 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 Number 691
April 30, 1981

Topic: Conflict of Interest

Digest: Lawyer may not represent a contract purchaser who seeks amendments to the contract where that lawyer's law firm represented the contract seller at time contract entered into.

Ref: Illinois Supreme Court: Rules 4-101(b); 5-101(a), 5-105(a); 5-107(a);
ISBA Opinions 644 and 701.

FACTS

In 1968, A, a partner in a four-member law firm, represented X in the installment sale of all of his stock in Corporation 1 to Corporation 2. Neither A nor his law firm represented X after that sale. A died in 1978.

B joined the law firm in 1974. He is now a partner. The firm has grown to seven lawyers. One of the present members of the firm was with it in 1968 when A represented X in said sale of stock.

Since the installment contract was not paid in full on a date certain, it provides that the principal

balance on that date together with interest thereon shall be paid in annual installments. The contractual interest rate is tied to an economic indicator.

The contract, however, provides for a ceiling on the annual principal and interest payment. Because of that ceiling, the maximum annual payment will not cover the annual interest currently due under the contract. Therefore, Corporation 2 is seeking amendments to its contract with X. It has asked B to represent it in seeking and negotiating those amendments.

QUESTION

Would it be professionally proper for B to represent Corporation 2 in seeking and negotiating amendments to its installment stock sales agreement with X?

OPINION

Before accepting the employment, B must make two determinations. First, can he represent Corporation 2 consistent with his firm's obligations under Rule 4-101(b) to its former client, X?

In making that determination, B is directed to ISBA Opinions 644 and 701. It is clear from those Opinions that were A living and offered the subject employment of Corporation 2, he would be directly disqualified from accepting it. Further, it is also clear therefrom that the member of the firm who was with it in 1968 when A represented X, as aforesaid, is presumed to have shared in the client confidences and is vicariously disqualified from accepting that employment unless he can successfully rebut that presumption.

However, B was not with the law firm in 1968 and did not join it until six years later. Further, X has never been a client of the firm since B joined it. Therefore, neither of those Opinions directly answers the subject inquiry --"Does the presumption of shared confidences between members of a law firm apply to a lawyer who joins the firm subsequent to the prior representation?"

While the title and membership of B's law firm have not remained constant during the period since it represented X in 1968, nevertheless, its continuity has been maintained to the present time. In fact, one present member has been with it the entire period during which it has prospered and grown. Law firm file retention policies and practices mandate the likelihood that the firm's files on the representation of X by A are still in existence and in its possession. Therefore, from X's perspective, a palpable danger exists that confidential information contained in his files has been available to B since he joined the law firm and will continue to be available to B should B undertake to represent Corporation 2 as requested.

In applying the presumption of shared confidences between members of a law firm to the facts of the subject inquiry, the Committee can perceive no rational basis for distinguishing between B

and the member of the firm who was with it during the prior representation. Most likely, both have had and will continue to have access to the confidences of X resulting from that prior representation. The fact that one may have better or longer access is no reason for differentiating between them. Any such difference should instead manifest itself in the quantum of evidence required to rebut the presumption.

Application of the presumption to B is in furtherance of maintaining the delicate balance between one's right to select the lawyer of his choice and the legal profession's need to maintain public trust and confidence in its professional responsibility. Also, it is in keeping with the spirit of the new Illinois Code of Professional Responsibility by permitting each case to be decided upon an analysis of its own facts. The alternative is unacceptable, for in order to disqualify B from representing Corporation 2, X would be required to disclose the very matters intended to be protected by Rule 4-101(b). Finally, no undue hardship is imposed upon B. In joining an established law firm a lawyer anticipates sharing in the rewards of its reputation engendered by faithful service to its clients over the years. Consequently, willingness to share in the fruits of the firm's past endeavors carries with it the willingness to share in the firm's responsibilities resulting from those past endeavors.

Therefore, since B is a member of the law firm which represented X in his installment sale of stock in Corporation 1 to Corporation 2, B is presumed to have shared in the confidences of X resulting from that prior representation. Consequently, B is vicariously disqualified from accepting the employment offered by Corporation 2 unless he can successfully rebut that presumption.

If B can successfully rebut that presumption, he must next determine if he can represent Corporation 2 with the undivided fidelity and independent professional judgement required by Canon. The circumstances prompting Corporation 2 to seek amendments to the installment contract may reasonably lead X to question his representation by A and the law firm in 1968. In such event, the firm's duties to its former client, X, require it to defend that representation. Rule 5-107(a).

Thus by seeking and negotiating amendments on behalf of Corporation 2, B may be cast in a position contrary to the best interests of his law firm. In such a situation, his financial, business, property and personal interests in the law firm and its well being will likely be affected thereby. Rule 5-101(a). Under such circumstances, B will not be able to represent Corporation 2 with the undivided fidelity and independent professional judgment required by Canon 5. Rules 5-107(a) and 5-105(a). Therefore, B is also directly disqualified from representing Corporation 2 in seeking and negotiating the amendments to its contract with X and must decline that employment.

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