



**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. See also ISBA Ethics Advisory Opinion 90-25. 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. 802
April 9, 1983**

**Topic: Acquisition of interest in
Litigation; conflict of interest; Confidences and
secrets of a client.**

Digest: It is professionally improper for an attorney, representing the personal representative of an estate, to act as surety on the personal representative's bond.

Re.: Rule 4-101; Rule 5-101; Rule 5-103 and Rule 5-104

FACTS

An attorney, representing the Administrator or Executor of an estate, signed his client's bond as surety on that bond.

QUESTION

May an attorney for the personal representative of an estate act as surety on his client's bond.

OPINION

Chapter 110 1/2, Section 12-2, I.R.S. provides that an individual representative of an estate, either Executor or Administrator, must file and have approved by the Court a bond binding himself to faithfully discharge the duties of his office. Section 12-3 requires that every bond must have as security at least two sureties acceptable to the Court. The personal representative then stands in a fiduciary capacity to the estate and is charged with the responsibility of assuring that the estate is

properly administered according to law, that all assets are gathered, tax returns filed, claims adjudicated and paid and proper distribution, if any, made to those persons entitled to receive the assets. The executor, in performing those duties, is authorized to employ the services of an attorney to represent and advise in the foregoing duties and responsibilities. In accepting such employment, the attorney acts as the legal representative of the Executor for the estate and the relationship of attorney-client is established, not between the estate and the attorney, but between the personal representative and the attorney. The question raised as to the propriety of an attorney acting as surety on the bond of the personal representative is therefore controlled by the lawyer-client relationship.

Rule 5-101(d) provides that a lawyer shall not knowingly during or after termination of the professional relationship with his client, reveal a confidence or secret of the client or use the same for the advantage of himself. During the course of representing the personal representative of the estate, the attorney may receive information from his client that reveals errors or omissions on the part of the personal representative that could give rise to liability under the bond.

If this should occur and if the personal representative would be insolvent, the sureties on the bond would then be called upon to perform in place of the principal and this would expose the attorney to personal liability in his role as surety. Without the client's permission, the attorney could not and should not reveal the information obtained from his client concerning his client's error or omission but the attorney has acted as surety on the bond and may be called upon to reimburse the estate by reason of the bond. This situation puts the attorney into a position where his interests are in conflict or may potentially be in conflict with that of his client.

Rule 5-105(d) requires a lawyer to cease multiple employment if the exercise of independent professional judgment on behalf of one client would be adverse or detrimental to the interest of another client. While that particular rule does not refer to a conflict of interest between the lawyer personally and the client, the same rationale behind the rule should apply to the conflict or potential conflict between lawyer and client and such conflict or potential conflict would preclude the lawyer from representing the Executor or Administrator of the estate once the lawyer has acted as surety.

By acting as surety on a client's bond, a lawyer is guaranteeing financial assistance to the client on matters that pertain directly to the pending litigation, that being the probating of the estate and the client's qualifications to act as the personal representative of the estate. Rule 5-103(d) provides that "while representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client...". Rule 5-104(a) states that "a lawyer shall not enter into a business transaction with a client if they have conflicting interest therein and if a client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure". By acting as surety for the client, the lawyer could be considered to have entered into a business transaction with a client outside the normal scope of representation and this relationship has the potential for conflict between the duties of an attorney and the relationship created as surety.

The combination of the potential for conflict, the guarantee of financial assistance and the business nature of the relationship between principal and surety results in the inescapable conclusion that the relationship must be avoided by attorneys representing the personal representative of the estate is

precluded from acting as surety on the bond of his client.

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