



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-16
May 2012

Subject: Confidentiality; Conflicts of Interest

Digest: Formal mentoring programs create an opportunity for a new or recently licensed lawyer to receive professional guidance and practical knowledge from a more experienced lawyer. However, both the new lawyer and the mentor must take care to protect client confidentiality and the attorney-client privilege and take care to avoid creating a conflict of interest with existing clients.

References: Illinois Rules of Professional Conduct, Rules 1.0(e), 1.1, 1.4, 1.6, 1.7, 1.9

ISBA Advisory Opinion No. 12-15 (May 2012)

ABA Formal Ethics Opinion 98-411 (Aug. 30, 1998)

Maine Ethics Op. 171 (1999)

Oregon Formal Ethics Op. 2011-184 (2011)

FACTS

Lawyer A participates in a formal mentoring program for new lawyers, and is paired with Lawyer B as a mentor. Lawyer B is not in the same law firm as Lawyer A. Lawyer B has practiced in the area of personal injury litigation law for 25 years. Lawyer A is primarily developing a practice related to auto accident personal injury litigation. Lawyer A would like to consult with Lawyer B on how to conduct discovery in a client matter.

QUESTION

May Lawyer A discuss information related to the client matter with Lawyer B as part of the mentoring relationship?

OPINION

Whenever a new lawyer as part of a formal mentoring program consults about a client matter with mentoring lawyer who is not associated with him on the matter, both the new lawyer and the mentor must abide by their respective ethical obligations to their clients. *See, e.g.*, ISBA Opinion 12- 15; ABA Formal Ethics Opinion 98-411 (Aug. 30, 1998).

The new lawyer must take care to maintain client confidentiality pursuant to Rule 1.6 when asking for advice about a client's matter. Rule 1.6 (a) provides, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c)."

Comment 5 to Rule 1.6 provides, "Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation." The comment does not suggest what disclosures might be impliedly authorized. An ABA opinion, ABA Formal Ethics Opinion 98-411 (1998) suggests that Rule 1.6 permits disclosures of information relating to the representation of a client "to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client."

Thus, an inquiry by the new lawyer that is general or abstract in nature and that does not involve the disclosure of information relating to the representation of the client does not violate Rule 1.6. For instance, a general question about discovery procedures in personal injury matters probably would not violate client confidentiality. Similarly, a question posed as a hypothetical may not generally violate Rule 1.6, as long as there is no risk from the question or the discussion that the identity of the client could be determined. Disclosures should be limited to the information necessary for a fruitful consultation. *See, e.g.*, Oregon Formal Ethics Op. 2011-184; www.ilsccp.org (Illinois Commission on Professionalism sample Mentoring Agreement states, "the New Lawyer will not identify any client to the Mentor or reveal to the Mentor any client confidence, nor will the New Lawyer seek professional or legal advice from the Mentor about specific legal matters or clients.").

If the mentor can determine the identity of the client or if the inquiry otherwise risks disclosure of information relating to the representation that could harm the client, then the new lawyer must consult with the client pursuant to Rule 1.4 and obtain the client's informed consent prior to the consultation with the mentor. "Informed consent" is defined by Rule 1.0(e) as denoting "the agreement by a person to a proposed course of

conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” As set forth in ABA Formal Ethics Opinion 98-411, informed consent might include an explanation as to how the disclosure could harm the client, including that the disclosure may constitute a waiver of the attorney-client privilege. *See also* Maine Ethics Op. 171 (1999).

A new lawyer should also take steps to avoid a mentoring relationship with another lawyer who is or is likely to be counsel for an adverse party in any of the new lawyer’s client matters. Similarly, the mentor must take reasonable steps to avoid creating any conflicts of interest with existing or former clients of the mentor or of the mentor’s law firm by virtue of the creation of the mentoring relationship. *See generally*, Illinois Rules of Professional Conduct, Rules 1.7 and 1.9. *See also* ISBA Opinion 12-15; ABA Formal Ethics Opinion 98-411 (1998). If a conflict of interest develops for either a client of the new lawyer or a client of the mentor by virtue of the mentoring relationship, the lawyers must consult with their respective clients pursuant to Rule 1.4 and they may be required to withdraw from the representation if necessitated by Rules 1.7 or 1.9.

Finally, the consulting lawyer should not view the consultation as a substitution for the lawyer’s legal research and judgment. As set forth in Comment 5 to Rule 1.1, competent handling of a client’s matter “includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.”

CONCLUSION

Lawyer A may discuss general information relating to discovery procedures with his or her mentor, Lawyer B. However, Lawyer A should take caution not to reveal any information relating to the representation of a particular client with Lawyer B. Moreover, both Lawyer A and Lawyer B should avoid the creation of a conflict of interest with any existing or former clients by virtue of the creation of the mentoring relationship.

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