



ISBA Professional Conduct Advisory Opinion

Opinion No. 13-02
January 2013

Subject: Arbitration and Mediation; Conflict of Interest; and Multiple Representation

Digest: A lawyer ordinarily represents a partnership as an entity for conflicts of interest purposes. Where a lawyer has represented a partnership and all individual partners in various matters in a common representation, and one partner subsequently files an arbitration matter against another partner, whether the lawyer may represent the defending partner with informed consent will depend on the circumstances. Similarly, whether the lawyer can continue to represent the partnership or any of the partners in other matters with informed consent will depend on the circumstances.

References: Illinois Rules of Professional Conduct, Rules 1.7, 1.9, and 1.13

ABA Formal Opinion 91-361 (1991)

Philadelphia Bar Association Opinion 2009-07 (July 2009)

Restatement Third, The Law Governing Lawyers §§ 96 and 122 (2000)

ISBA Opinion 09-02 (January 2009);

ISBA Opinion 96-05 (October 1996);

ISBA Opinion 94-21 (March 1995).

LaSalle Nat. Bank v. Triumvera Homeowners Ass'n, 109 Ill. App. 3d 654, 440 N.E. 2d 1073 (1st Dist. 1972)

Analytica, Inc. v. NPD Research, Inc., 708 F. 2d 1263 (7th Cir. 1983)

FACTS

The inquiring lawyer has represented a general partnership and its three partners in transactional and litigated matters where all three partners are defendants. Partner B (a minority partner) has filed an arbitration matter against Partner A (the majority partner).

QUESTIONS PRESENTED AND SHORT ANSWERS

1. Does the lawyer have a conflict of interest? *Yes, the lawyer has a conflict of interest. Because Partner B, lawyer's current (or perhaps former) client has now sued Partner A, also lawyer's current (or perhaps former) client, the two clients are directly adverse to each other. Lawyer owes separate duties to both. It would be a conflict of interest for lawyer to represent both clients.*
2. Can the lawyer represent Partner A in the arbitration matter? *It depends. If Partner B remains a client of lawyer in non-arbitration matters, lawyer might be able to represent Partner A in the arbitration as long as both Partners give informed consent. If Partner B is considered a former client, lawyer could represent Partner A if the arbitration were not substantially related to the prior representation (if it was substantially related, Partner B could consent to it).*
3. Can the lawyer continue to represent the partnership in other matters? *Yes, if the lawyer reasonably believes he or she can continue to provide competent and diligent representation to the partnership despite the conflict and with Partner A and B's informed consent.*

OPINION

Generally, a lawyer for a partnership represents the partnership as an entity within the meaning of Rule 1.13(a) and not the individual partners for conflict of interest purposes, although a lawyer may have duties to individual partners. ABA Formal Opinion 91-361 (1991). *See also Restatement Third, The Law Governing Lawyers* § 96, Comment *c* (entity theory of representation includes general partnerships). In this matter, however, it appears the lawyer currently represents, or has represented, the partnership and its three partners in a common representation. Pursuant to Rule 1.13(g), a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. The lawyer owes duties to each individual partner as well as to the partnership. Comment [29] to Rule 1.7 sets out special considerations for lawyers engaging in common representation. The Comment states in relevant part:

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is

plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated.

Comment [33] to Rule 1.7 also notes that each client in a common representation has the right to loyal and diligent representation.

The basic rule addressing concurrent conflicts of interest is Rule 1.7, which states:

(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.

In this matter, when Partner B initiated an arbitration against Partner A, representation of one client became directly adverse to another client.

The next question is whether the lawyer can continue to represent Partner A and/or the partnership in the arbitration matter despite the conflict of interest. If the lawyer continues to represent Partner B in other matters, then Partner B remains a client and the lawyer cannot be adverse to Partner B in any matter, without Partner B's informed consent, even if that matter is unrelated to the lawyer's current representation of Partner B. *See* Comment [6] to Rule 1.7 (lawyer may not act as advocate in one matter against a person the lawyer represents in some other matter, even when matters are wholly unrelated).

Moreover, where a conflict arises after a representation has been undertaken; the lawyer generally may not, without informed consent, drop one client to continue the representation of the other, preferred client. In other words, a lawyer or firm may not drop a current client like a "hot potato" to turn the client into a former client as a means of curing the simultaneous representation of adverse interests. *See, e.g., Philadelphia Bar*

Association Opinion 2009-07 (2009).

Even if the lawyer no longer represents Partner B in any current matter, Partner B is nevertheless a former client of the lawyer. For that reason, if the arbitration matter, or any other matter for which the lawyer is retained to represent the partnership, arises out of, or is “substantially related” to the prior representation, then Rule 1.9 would prohibit the representation of a party (Partner A) adverse to Partner B without Partner B’s informed consent. Rule 1.9 (a) states: “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent.”

As explained in Comment [3] to Rule 1.9, matters are “substantially related” for purposes of the rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. *See, e.g., LaSalle Nat. Bank v. Triumvera Homeowners Ass’n*, 109 Ill. App. 3d 654, 440 N.E. 2d 1073 (1st Dist. 1972). *See also Analytica, Inc. v. NPD Research, Inc.*, 708 F. 2d 1263 (7th Cir. 1983) (discussion of how to determine if former and current client matters are substantially related). If the lawyer determines that the transactional matters are substantially related to the arbitration matter, then even pursuant to the less stringent provisions of Rule 1.9, the lawyer could not continue to represent the partnership without the informed consent of Partner B.

As noted above, it may be possible for the clients in the situation presented (i.e., the partnership, Partner A, and/or Partner B) to consent to the lawyer’s continued, but conflicted, representation. Under Rule 1.7(b), continued representation might be permissible notwithstanding the concurrent conflicts of interest if the lawyer reasonably believes that the lawyer would be able to provide competent and diligent representation to the partnership and Partner A, as well as Partner B (if the lawyer continues to represent Partner B in matters unrelated to the arbitration), and each affected party gives informed consent.

Rule 1.0(i) defines “reasonably believes” to denote that the “lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” Prior ISBA opinions have also concluded that a lawyer’s reasonable belief when seeking consent to a conflicted representation must be objectively reasonable under the circumstances. *See, e.g., ISBA Opinion 09-02* (January 2009); *ISBA Opinion 96-05* (October 1996); and *ISBA Opinion 94-21* (March 1995). The term “informed consent” is defined in Rule 1.0(e) as 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.” In conflict situations, Comment [18] to Rule 1.7 explains that the information required depends on the nature of the conflict and the nature of the risks involved.

CONCLUSION

When a common representation fails, as in this matter where one partner represented by the lawyer brings an action against another partner also represented by the lawyer, the lawyer has a conflict of interest. Without the valid informed consent of all affected parties, the lawyer ordinarily must withdraw from representing all the clients in the failed common representation. Whether the lawyer can continue to represent one or more of the clients in other matters will depend on the circumstances.

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