



ILLINOIS STATE
BAR ASSOCIATION

ISBA Professional Conduct Advisory Opinion

Opinion No. 17-03

March 2017

Subject: Conflict of Interest; Conflict of Interest – Transactional Matters

Digest: The Illinois Rules of Professional Conduct prohibit a lawyer from representing a husband and wife in a short sale if the husband is currently a client of the lawyer who is investigating filing a divorce petition for the husband, unless both the husband and wife give informed consent to the conflict and the lawyer “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.”

References: Illinois Rules of Professional Conduct, Rule 1.7

Illinois Rules of Professional Conduct, Rule 1.0(e)

Illinois Rules of Professional Conduct, Rule 1.6

ABA Formal Opinion 05-434

ISBA Ethics Opinion 86-15

ISBA Ethics Opinion 99-01

Restatement (Third) of the Law Governing Lawyers §122

Geoffrey C. Hazard and W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, §1.7:207 (2d ed. Supp. 1996)

FACTS

A lawyer represents a client (“Husband”) seeking a dissolution of marriage from his wife (“Wife”). The lawyer is still gathering information but has not yet filed a petition for divorce. Husband and Wife owe approximately \$100,000 on the mortgage for their marital home. The home is no longer worth \$100,000 and neither can afford the payments either together or separately. If they act in the next six months, Husband and Wife may be able to sell their home through a short sale that would eliminate the potential for a deficiency judgment.

QUESTIONS

- 1) Does the lawyer have a conflict of interest if she represents Husband and Wife in a short sale of their home?
- 2) Can the lawyer represent Husband and Wife if they waive any conflict the lawyer may have?

ANALYSIS

Illinois Rule of Professional Conduct 1.7 provides that a lawyer has a conflict of interest if she concurrently represents clients whose interests are adverse unless the clients consent and several other factors are met:

(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.

I.R.P.C. 1.7.

The lawyer's proposed representation of Husband and Wife in the short sale constitutes a concurrent conflict under Rule 1.7(a)(1). Here, the lawyer currently represents Husband who is contemplating filing for a divorce from Wife. Although no lawsuit has been filed, the representation of Husband is directly adverse to Wife. "There may be direct adversity even though there is no overt confrontation between the clients, as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom the lawyer represents on a wholly unrelated matter. Thus, for example, a lawyer would be precluded by Rule 1.7 (a) from advising a client as to his rights under a contract with another client of the lawyer..." ABA Formal Opinion

05-434. So even though Husband has not yet filed for divorce, the lawyer's representation of Husband is already directly adverse to Wife, and representing Wife as a client in another matter, like the proposed short sale, constitutes a concurrent conflict under Rule 1.7(a)(1).

The lawyer's proposed representation of Husband and Wife in the short sale may also create a concurrent conflict of interest for the lawyer under Rule 1.7(a)(2) which states that a concurrent conflict exists if there is a "significant risk" the representation of one client will be "materially limited" by the lawyer's responsibilities to another client. "[A]ny impairment of the client-lawyer relationship precludes concurrent representation in situations of direct client-to-client conflict." ISBA Ethics Op. 99-01 (quoting Geoffrey C. Hazard and W. William Hodes, "The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct," §1.7:207 (2d ed. Supp. 1996)). ISBA Ethics Opinion 99-01 analyzed the situation where a lawyer proposed to represent a husband in a divorce from his wife, and proposed to represent the wife in a custody proceeding involving a former spouse. The opinion concluded that the conflict between clients in a divorce was so great that the "lawyer should not undertake representation of one spouse in a marriage dissolution matter if the lawyer already represents the client's spouse in another family law matter." *Id.*

The facts presented here differ in a significant way from those of Ethics Opinion 99-01 because Husband and Wife's interests are aligned in the short sale. However, if one of the two clients will somehow benefit more from the short sale, or could gain a tactical advantage or leverage in the divorce from the short sale (for example if it falls through), then the lawyer's representation of both clients may become materially limited and a concurrent conflict would exist under Rule 1.7(a)(2). Indeed, given how closely a client's finances are usually linked to both their home ownership and the litigation of a divorce it is hard to imagine that the representation of Husband and Wife in the short sale would not be materially limited by the lawyer's duties to the Husband contemplating to file for divorce.

The lawyer can overcome the Rule 1.7(a)(1) and (2) concurrent conflict from representing Wife in the short sale if the representation falls under the exception to a concurrent conflict provided in Rule 1.7(b). The Rule 1.7(b) exception has four subparts, each of which must be satisfied.

The first subpart, that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," requires the lawyer to determine whether she can appropriately represent all parties in the transaction. This could be a problem if completing the proposed transaction, the short sale, would somehow confer a greater advantage on one of the spouses than it would on the other spouse in the looming divorce. Given how closely a couple's assets, and the manner those assets are held, can impact the outcome of a divorce proceeding it may be impossible for the lawyer to conclude she can advise both spouses about moving forward with the short sale. On the other hand, because there is a short deadline on the short sale, and the short sale would likely benefit both Husband and Wife, the lawyer may believe that husband and wife are best served by the lawyer representing them in the short sale despite the conflict from the potential divorce. Ultimately whether the proposed concurrent representation does not violate subpart 1 will depend on the specific facts of the situation. Although given the inherent conflict in divorce proceedings, it seems unlikely that a lawyer could ever

represent one spouse in a contemplated divorce, and concurrently represent the other spouse for any purpose. *See* ISBA Ethics Op. 99-01; *see also* ISBA Ethics Op. 86-15.

The second subpart, that the representation is not prohibited by law, is met here.

The third subpart, that “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” is met here. The lawyer is not contemplating representing both clients in the divorce and the short sale is not a proceeding before a “tribunal.”

The fourth subpart, that “each affected client gives informed consent,” is met only if the lawyer discloses information to both Husband and Wife sufficient to inform them about their decision to waive the conflict, and if both consent. *See* I.R.P.C. 1.7 cmt 2 (explaining that for purposes of Rule 1.7(b)(4) the clients “affected” include both of the clients referred to in paragraph (a)(1).) The amount of information the lawyer must convey for Husband and Wife to give informed consent is “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” I.R.P.C. 1.0(e). The *Restatement (Third) of the Law Governing Lawyers* similarly defines informed consent to a waiver of a conflict as requiring “that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.” *Restatement (Third) of the Law Governing Lawyers* §122. So for Wife to give informed consent to the representation the lawyer would need to explain to Wife that Husband is contemplating a divorce and that the manner in which the short sale proceeds could impact the outcome of the divorce. The lawyer should also recommend that Husband and Wife each retain their own lawyer, or that Husband and Wife jointly retain a new lawyer (who does not represent either one in relation to the potential divorce), for the short sale because of the risk that the joint representation with the lawyer who already represents Husband in relation to the potential divorce, and the related need to share financial information, may compromise one of their positions in the divorce.

Finally, the lawyer needs to consider Illinois Rule of Professional Conduct 1.6 which prohibits a lawyer from sharing information related to the representation of a client without informed consent. Rule 1.6 is potentially implicated in two ways. First, Husband would need to waive confidentiality and allow the lawyer to share with Wife that Husband has retained the lawyer to investigate filing for divorce. Second, if the short sale process involves collecting financial information from Husband and Wife, then lawyer would potentially be in possession of confidential financial information about both Husband and Wife that could be relevant to the looming divorce proceeding. Husband and Wife would both need to waive confidentiality and allow the lawyer to share each party’s confidential financial information with the other party. As part of waiving confidentiality, the lawyer would need to make sure that Husband and Wife both understand that sharing the financial information for purposes of the short sale could convey an advantage to the other party in a divorce.

CONCLUSION

In conclusion, it will be a rare situation where the lawyer concludes that she could “provide diligent legal representation to each affected client” as required by Rule 1.7(b)(1) to accept the concurrent representation. If the lawyer does conclude that she can accept the concurrent

representation, the lawyer must then obtain Husband's informed consent to share information about the representation in the contemplated divorce with Wife. Finally, if the lawyer concludes that she can accept the representation and Husband consents to sharing information about the contemplated divorce with Wife, then the lawyer must obtain informed consent from Wife after communicating "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." I.R.P.C. 1.0(e). Consequently, any lawyer contemplating a joint representation in a situation like this will likely want to turn down the joint representation unless there is some strong rationale for why Husband and Wife should not use either separate lawyers or a single different lawyer without a conflict related to the possible divorce for the short sale.

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