



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

ISBA Advisory Opinions on Professional Conduct are prepared as an educational service to members of the ISBA. While the Opinions express the ISBA interpretation of the Illinois Rules of Professional Conduct and other relevant materials in response to a specific hypothesized fact situation, they do not have the weight of law and should not be relied upon as a substitute for individual legal advice.

This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 4.3. 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. 86-11
January 9, 1987**

Topic: Communication with Opposing Party; Drafting Appearance in Divorce Case for Unrepresented Spouse.

Digest: Wife's attorney may properly prepare an appearance for unrepresented husband and submit it for signature and later file it with the court as long as wife's attorney gives no legal advice to unrepresented husband as to effect of the signing or filing of appearance.

Ref.: Rule 7-104(a)(2)
ABA Informal Opinion Nos. 1140, 1255 and 1269

FACTS

A lawyer represents a wife in a dissolution of marriage case. The husband is unrepresented.

QUESTIONS

May the wife's lawyer draft an appearance for the husband and submit it to him for signature? If that is proper, may the wife's lawyer file the appearance in the case after the husband has signed it?

OPINION

Rule 7-104(a)(2) of the Illinois Code of Professional Responsibility provides:

- a) During the course of his representation of a client a lawyer shall not
* * *

(2) give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

In ABA Informal Opinion No. 1140, January 20, 1970, it was held that under former Canon 9 ("a lawyer must avoid everything that may tend to mislead a party not represented by counsel...") and the then new DR 7-104(a)(2), it was improper for a lawyer to submit to an unrepresented party opponent in a divorce case, a waiver of issuance of and service of summons and the right to contest venue or jurisdiction, which agreed that the case could be submitted to the court without further notice to the defendant, and which also agreed that depositions could be taken at any time without notice.

In ABA Informal Opinion No. 1255, December 15, 1972, the question was whether under ABA Informal 1140 it was ethical to submit to an unrepresented party in a divorce case "an Appearance and Responsible Pleading" for the party's signature where the unrepresented party is also advised to see an attorney of his choice. It was held that "[s]ince, on the facts you state, a Responsive Pleading is involved the Plaintiff's lawyer would be improperly advising both parties." The opinion further stated: "The question is not before us whether in such a case a plaintiff's lawyer may properly submit to the respondent for signature a waiver of the issuance and service of the summons and complaint and entry of appearance."

ABA Informal Opinion No. 1269, May 22, 1973, reaffirmed the holdings in Informal 1140 and 1255 that the "preparation and submission of responsible pleadings to an unrepresented party would in the opinion of the Committee constitute the giving of advice in contravention of DR 7-104(a)(2)." The opinion then stated:

Your letter...now raises the question of whether it would be proper for plaintiff's counsel in a domestic relations case to submit to an unrepresented defendant for signature a waiver of the issuance and service of summons and the entry of an appearance. As long as these documents are not accompanied by or coupled with the giving of any advice to the defendant, they would constitute only communication with an unrepresented party and, accordingly would be ethical and proper as not being violative of the prohibitions of the Code.

Accordingly, an attorney for one spouse may properly draft an appearance for the signature of an unrepresented spouse in a dissolution of marriage case and submit it to that unrepresented spouse as long as the attorney does not give any advice to that spouse of the effect of signing and filing the appearance.

If the unrepresented spouse returns the signed appearance to the attorney representing the other spouse, the attorney may file that appearance with the court, again as long as no advice is given to the unrepresented spouse as to the effect of this filing.

The opinions indicate there is no per se violation in drafting an appearance for signature by an unrepresented party as long as no advice is given as to the effect of signing the appearance. It should be noted, however, that it will be difficult for an attorney to prove that no advice was given with respect to the preparation and filing of the appearance if the contrary position is later asserted by the unrepresented party. If the client spouse insists that the attorney draft and submit an appearance to the unrepresented spouse, the potential vulnerability of any subsequent judgment to attack should be discussed in advance with the client spouse.

* * *