



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 1.6 and 1.9. 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. 86-17
June 17, 1987

Topic: Conflict of Interest Confidences and Secrets of a Client.

Digest: Duties owed by an attorney to his client are not transferred for the benefit of another to whom the client transfers its interest in the subject matter of the representation.

Ref.: Rules 4-101 and 5-105
Canons 4 and 5

FACTS

Purchasers entered into a contract to buy a residence from Sellers. The sale was never consummated, and Purchasers sued Sellers for specific performance. Sellers countersued for rescission of the contract.

Three mortgages were outstanding on the subject property. The mortgages were held respectively by A, B, and C. After institution of the aforesaid litigation between Purchasers and Sellers, A commenced a separate action to foreclose its first mortgage on the premises. Lawyer X represented A in such action. Lawyer X was subsequently granted leave to withdraw as counsel for A in the foreclosure proceeding.

Following the withdrawal of Lawyer X, A sold its first mortgage on the premises to Purchasers. Purchasers substituted for A as plaintiffs in the foreclosure proceeding, and A was dismissed as a party to the suit.

The third mortgage held by C was subsequently sold to Mr. Y, who moved to intervene in the pending foreclosure suit, in which Purchasers were then the plaintiffs. Purchasers also amended their pleading in the original specific performance action to add a count against Mr. Y for tortious interference with prospective economic advantage. Lawyer X, who had previously withdrawn from representing A in the foreclosure suit, entered an appearance on behalf of Mr. Y in both the foreclosure proceeding and the specific performance action. Mr. Y's interests in such actions are adverse to the interests of Purchasers.

QUESTIONS

1. Whether the duties owed by Lawyer X to A as a result of the prior representation may be availed of by Purchasers, who have succeeded to A's substantive rights, so as to preclude Lawyer X from now representing Mr. Y adverse to the interests of Purchasers.
2. Whether any confidences revealed to Lawyer X as the result of having represented A are now the confidences of Purchasers by reason of their having succeeded to the rights of A.

OPINION

Stripped to its basics, the present inquiry, complicated as it is, asks the rather fundamental question of whether duties owed by an attorney to a client inure to the benefit of another to whom the client transfers the underlying rights which are the subject matter of the representation. The answer is clearly no.

The duty of an attorney to preserve confidences and secrets is the subject of Canon 4 of the Code. The duty of an attorney to exercise independent professional judgment, including the obligation not to accept or continue conflicting representations, is the subject of Canon 5. Each of these Canons, and the Rules enacted pursuant thereto, have in common the fact that they state duties owed by an attorney to a CLIENT (or, at the least, a prospective client). In this regard, we note the continuing references in Rule 4-101 to the duty to safeguard the confidences or secrets OF THE CLIENT, as well as similar references to the client contained in Rule 5-105. Neither of such Rules is intended to set forth duties on the part of an attorney to persons who have never been clients, or at least prospective clients, of the attorney.

Purchasers in the present instance were never the clients of Lawyer X. They are thus not entitled to the benefit of Code provisions delineating duties arising from an attorney-client relationship. Moreover, the fact that Purchasers succeeded to the substantive rights of Lawyer X's clients does not create an attorney-client relationship between them and Lawyer X so as to avail them of the benefits provided by the Code. An attorney-client relationship is not a chattel to be sold or assigned by a client for the benefit of another whom the attorney has not undertaken to represent. In fact, were the contrary true, persons in the position of the present Purchasers would be entitled not only to claim the benefit of the duties owed by the attorney to a predecessor in interest, but to consent to a waiver of such duties, including the disclosure of confidences and secrets imparted to

the attorney by such predecessor in interest. Such is obviously not the intention of the Code.

We conclude, therefore, that Lawyer X's prior representation of A does not give Purchasers the right to prevent Lawyer X from undertaking the representation of Mr. Y, nor does it give them the right to have access to confidences or secrets revealed to Lawyer X by A.

We note, however, that while Lawyer X owes no duties to Purchasers, he does owe continuing duties to former client A under Rules 4-101 and 5-105 of the Code, which duties survive the termination of the attorney-client relationship. Such duties must be fully complied with by Lawyer X.

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