



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 May 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. 88-3
August 1, 1988

Topic: Communication with Adverse Parties: Unrepresented parties

Digest: It is improper for a lawyer for petitioning spouse to give legal advice to the respondent spouse who may be unrepresented in a dissolution of marriage as to legal implications of unrepresented respondent's participation, especially where such advice is misleading and tends to create the impression that the petitioner's lawyer is disinterested and will protect the interests of the unrepresented respondent.

Ref.: Rule 7-104(a)(2)
ISBA Advisory Opinion No. 86-11

FACTS

A lawyer, prior to serving process in a divorce case ordinarily sends a letter to the, as yet, unrepresented respondent spouse, stating, among other things, the following:

Divorce is very difficult for all those involved. I'm sure you will be much happier if both you and Barbara agree to handle this matter amicably, peacefully, and in a friendly manner. Believe me, this way is much less costly, both in terms of dollars and emotions.

...[T]here is no way to ethically represent both you and Barbara, especially since it is Barbara who hired me. Additionally, I am informing you that you have an absolute right to hire your own attorney if you so choose--but you also have the right to waive representation by counsel. If at any time during the course of the proceedings, you feel the need to hire an attorney, just let me know and I will put on hold any further activity until you have spoken to counsel.

Additionally, I suggest that if you do have any general questions as to what is taking place, you may want to spend a few minutes with an attorney to simply clarify any issues that may arise.

In the event you have decided to waive representation by counsel, I have enclosed several documents for you to sign. The first is an "Appearance". In legal terminology, it means that Barbara must pay a fee to have you personally served by the county sheriff. That is, a police officer will come to your home and personally hand you the Court papers. You have a right to demand such service of process, but by signing the "Appearance", you save time and expense.

After describing the enclosed "stipulation", the letter continues:

The last item I want you to sign is called a "Marital Settlement Agreement". This agreement has provided for the settlement of such matters as maintenance and division of property rights. This agreement is to be signed by both yourself and Barbara and each page is to be initialled at the bottom right hand corner.

Please be advised that I will notify you of the hearing or "prove up" date and that you may attend if you so desire, but understand that your presence is not required.

Finally, please sign the bottom of this letter to acknowledge that you have read and understood the Contents therein. Then, return this letter, the signed "Appearance", the signed Stipulation, and the signed Marital Settlement Agreement.

Please feel free to call me if you have any questions.

QUESTIONS

1. Does the sending of such a letter amount to improperly giving legal advice to a person who is not represented and whose interests are adverse to those of the letter writer's client, the petitioning spouse?

2. Is the advice misleading and inadequate, and further, does it improperly create the unwarranted impression that the lawyer is disinterested and will use his professional judgment to protect the interests of the adverse party he does not represent?

OPINION

The letter improperly gives legal advice to an unrepresented adverse party. The advice it does give is misleading with respect to what is said and inadequate with respect to what is not said. The letter further fosters the unwarranted assumption that the lawyer is a "disinterested" party and will use his professional judgment to protect the interests of the unrepresented party even where such interests conflict with those of the lawyer's client.

Rather than urge the unrepresented client to seek counsel, the letter downplays the importance of the client getting his own counsel, and leaves the overall impression that it may be in the unrepresented party's interest to waive counsel and save "time and expense". The sending of such a letter as this therefore appears to violate Rule 7-104(a)(2) of the Code.

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

Communicating With One of Adverse Interest

* * * *

(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 ISBA Advisory Opinion No. 86-11, this Committee stated that a lawyer could properly prepare an appearance for an unrepresented spouse in a divorce proceeding, submit it to that spouse for the signing, and later file it with the court as long as the attorney gave no legal advice to the unrepresented spouse as to the effect of the signing or filing of the appearance.

The lawyer's letter here gives misleading and inadequate legal advice to the unrepresented adverse party in every paragraph and almost in every sentence. It therefore goes far beyond anything permitted by the Code or contemplated by Opinion No. 86-11.

* * *