



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in May 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.4 and 1.7 with its Comments [23] and [29-33]. 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. 94-21
March, 1995**

Topic: Conflict of Interest.

Digest: It is not per se improper for a lawyer to sue a current client (a public body) in an unrelated matter if both clients consent after full disclosure.

Whether an attorney "reasonably believes" his dual representation will not adversely affect his relationships is determined by an objective, not subjective, standard based upon what the "reasonable attorney" would believe.

Ref.: Illinois Rules of Professional Conduct, Rules 1.4, 1.7
DR 5-101(a) and DR 5-105(a)

ISBA Opinion Nos. 603, 644, 870, 86-4, 86-14, 86-15, 87-4, 87-6, 87-13, 87-14, 88-5, 88-9, 88-12, 89-1, 89-11, 89-15, 89-18, 90-1, 90-2, 90-3, 90-4, 90-5, 90-17, 90-24, 90-25, 90-26, 90-30, 90-31, 91-1, 91-4, 91-5, 91-15, 91-17, 91-20, 91-22, 91-26, 92-4 and 92-22.

In re Vrdolyak, 137 Ill.2d 407, 560 N.E.2d 840 (1990)

FACTS

The Committee is requested by the inquirer to review our Opinion No. 603 in light of the 1990 Rules of Professional Conduct, Rule 1.7(a). Opinion 603 stated that if a city retained the law firm

of ABC to defend a personal injury suit against the city, it was not professionally improper for the ABC firm to subsequently file suit against the same city seeking zoning variations.

QUESTION

Under Rule 1.7, is it professionally proper for the ABC firm to represent the city as a defendant in a personal injury suit and to sue the same city on behalf of the petitioner in a zoning case?

OPINION

Former DR 5-105(a) provided in part:

a lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except that permitted under Rule 5-105(c).

Current Rule 1.7 states:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - 1. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - 2. each client consents after disclosure.
- (b) a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or to the lawyer's own interest, unless:
 - 1. the lawyer reasonably believes that the representation will not be adversely affected; and
 - 2. the client consents after disclosure.
- (c) when representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications and the common representation and the advantages and risks involved.

The Illinois Rules of Professional Conduct, Rule 1.7, based upon, and virtually identical to, ABA Model Rule 1.7, attempts to guide Illinois attorneys in dealing with such conflicts. Under 1.7(a), an attorney is prohibited from representing a client adverse to another client unless the following exceptions are met: "1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and 2) each client consents after disclosure."

Section (b) of Rule 1.7 is similar in scope and prohibits the representation of a client when it may be materially limited by the attorney's responsibilities to another client or third person, or by the attorney's own interests, unless: "1) the lawyer reasonably believes the representation will not be adversely affected; and 2) the client consents after disclosure."

Under sections (a) and (b) of Rule 1.7, the attorney must possess a reasonable belief that the representation of both clients will not create adverse consequences to either party. Therefore, even if client consent is obtained, the attorney must use his best judgment in determining whether to represent both clients. The

"Terminology" section of the Illinois Rules defines "reasonable belief"/"reasonably believes" as denoting that "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." "'Reasonable/reasonably,' when used in relation to conduct by an attorney denotes the conduct of a reasonably prudent and competent lawyer." As the ABA Comments following ABA Model Rule 1.7 state, "...when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

The language of ISBA Opinion No. 90-26 states that an attorney is obligated to determine the existence of a potential conflict of interest at the outset of representation. If the attorney later learns of an otherwise unresolvable conflict, the attorney is required to withdraw from the representation of one client, and perhaps both, depending on the circumstances.

Rule 1.7 and Opinion No. 90-26 pose a dilemma because the attorney must form a reasonable belief that representation of one party will not adversely affect the other **before** undertaking representation of the second client. A judgment must be made before discovery has begun and the merits of one or both cases have been established. As a result, an individual attorney may have the initial belief that he can fairly defend both clients only to later discover that loyalty to one or both clients is jeopardized and he cannot fulfill his obligations.

It must be remembered that the exceptions to the dual representation prohibition, 1) "reasonable belief" and 2) "client consent," are conjunctive, not alternative. Thus, if the "disinterested lawyer" of the ABA Comments would conclude that the reasonable belief is untenable or that the client(s) should not agree, dual representation is prohibited.

Numerous of our previous opinions have discussed the question of consent as obviating a conflict. Permeating these opinions is a strong distaste for interpreting applicable Rules as establishing a per se prohibition on representation that cannot be overcome under any circumstances by informed client consent. Thus, in many situations involving conflicts almost as egregious as here, we have expressed the view that consent after disclosure will, depending on the specific circumstances involved, be available to obviate the conflict.

To this effect, in Opinion No. 90-31, we determined that knowing consent would permit an attorney to represent both the lender and buyer in a real estate transaction, unless it was clear at the outset that one of the clients would in fact be adversely affected. Similarly, in Opinion No. 86-15, we were of the view that there was no per se prohibition against representing both the buyer and seller in a real estate transaction, and stated that each case must depend upon its own facts. In Opinion No. 91-20, we decided that with informed consent, an attorney who had previously represented a wife regarding the possible initiation of a divorce proceeding against her husband could thereafter properly represent the husband in defending against a divorce proceeding brought by the wife through other counsel. And, in Opinion No. 91-26, we expressed the view that an attorney, with the consent of all parties, may prosecute subrogation claims against an insurer whom he represents in other matters.

Other opinions in which the imposition of a per se disqualification rule was rejected, and informed

consent was recognized as being available on a case by case basis to obviate a conflict or other ethical problems in a variety of circumstances, include Opinion Nos. 644 (no per se prohibition against representing lender and buyer in same transaction), 870, 86-14, 87-4, 87-6, 87-13, 87-14, 88-5, 88-9, 88-12, 89-1, 89-11 (attorney can, with consent, represent client who has a disciplinary complaint pending against attorney with regard to the very proceeding involved in the representation), 89-15, 89-18, 90-1, 90-2, 90-3, 90-4, 90-5, 90-17, 90-24, 90-25, 90-26, 90-30, 91-1, 91-5, 91-15, 91-17, 91-22, 92-4 and 92-22.

The only instances where we had previously applied a per se rule of disqualification which could not be overcome by client consent were in certain circumstances involving public bodies. Historically, public bodies have been viewed in Illinois as unable, because of their public trust, to waive or consent to a conflicting representation under any circumstances. However, in Opinion No. 86-4, we determined that no such per se rule, even regarding public bodies, was warranted under existing law and that consent by a public body may be appropriate in instances where the conflicting representation was in a matter unrelated to the matter in which an attorney represented the public body. In two subsequent Opinions involving public bodies (Nos. 85-5 and 86-13), we found that the exception drawn in Opinion No. 86-4 was not applicable to allow consent by a public body to obviate a conflict in dual representations which were substantially related to each other, and that a per se prohibition still existed in such circumstances. And, in Opinion No. 91-4, we determined, under the Illinois Supreme Court opinion in In re Vrdolyak, 137 Ill.2d 407, 560 N.E.2d 840 (1990), that consent could not be relied upon to overcome the conflict inherent in a public official's representation of clients adverse to his public body.

The reasonableness of an attorney's belief that the dual representations involved will not adversely affect the relationships with his clients, thus allowing for informed consent by the clients, must be examined on a case by case basis.

The analysis of whether the attorney's belief that dual representation will not adversely affect relationships should be determined, as the Illinois Rules "Terminology" section and the ABA Comments suggest, on an objective, not subjective, basis. In other words, similar to negligence actions, the "reasonable man" or, in this case, the "disinterested, reasonable lawyer," or "reasonably prudent and competent lawyer," is the standard by which the facts are judged. The test is not a subjective analysis as to whether any particular attorney could hold a reasonable belief on non-adversity.

In Opinion No. 90-3, the Committee emphasized that new Rule 1.7 contains the additional element of full disclosure and that this requirement is far stronger than the former Code language. The Committee went on to point out that the "Terminology" section of the Code provides as follows:

disclose or **disclosure** denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

The issue of whether or not a government entity could give its consent was answered by the Committee in the affirmative in Opinion No. 86-4. Therefore, the city, which is a governmental entity, does have the ability after full disclosure, to consent to the ABC law firm's dual representation. It is important to note that the lawyer's duty to communicate information and make

disclosures is ongoing when the clients' consents are obtained. Rule 1.4 requires:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Committee concludes that although the result reached in Opinion No. 603 may still be correct, the duty of full disclosure and communication is far greater under the new Rules. In order for the ABC law firm to represent both the city in a personal injury claim and a petitioner in a zoning case against the same city there must be full and ongoing disclosure to both clients and both clients must consent. In addition, the Committee again emphasizes the further duty of communication as set out in Rule 1.4.

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