



**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 1.6(a), 1.7, 1.9, 1.18, 2.1. 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. 95-4
July 14, 1995**

Topic: Confidentiality. Conflict of interest.

Digest: Lawyer may represent university as legal counsel even though faculty member with dispute against the university had previously discussed that dispute with the lawyer; provided, however, that the lawyer take appropriate action to avoid being placed in a conflict of interest situation, and , if such a situation develops, that the lawyer follow Rules regarding conflicts.

Ref.: Illinois Rules of Professional Conduct: Rules 1.6(a), 1.7, 1.9, 2.1.
In re Marriage of Decker (1992), 180 Ill.Dec. 17, 153 Ill.2d 298, 606 N.E.2d 1094.
SK Handtool Corp. v. Dresser Industries, Inc. (1993), 189 Ill.Dec. 233, 246 Ill.App.3d 979, 619 N.E.2d 1282.
ISBA Opinions on Professional Conduct, 91-20, 94-15

FACTS

Faculty member A approached Lawyer, a fellow faculty member, to discuss a personal problem, stating, "I came to you because you are a colleague... and because you are a lawyer." The ensuing conversation involved A's version of a sexual harassment allegation made by the university against him, which was then under investigation. Lawyer listened sympathetically,

but stated that he would not be the lawyer for A and suggested that A retain independent counsel. The conversation ended and three years passed.

During the three-year period, A was denied tenure. He filed a grievance, alleging in part that the tenure process was flawed because documents referring to the prior sexual harassment investigation had found their way into his personnel file, contrary to his contract provisions. At arbitration, the arbitrator found for A and, in addition, ordered that the disputed documents be removed from A's personnel file.

More than four years have now passed since the conversation between A and Lawyer. Lawyer has been asked to assist the university administration as legal counsel.

QUESTION

Will Lawyer's conversation with A more than four years ago prevent Lawyer from assuming responsibilities as legal counsel for the university, given the possibility of post-arbitration consideration of the sexual harassment allegation against A?

OPINION

Whether or not Lawyer intended to enter into a lawyer-client relationship with A when they initially spoke, the relationship was initiated when A indicated that he was coming to Lawyer "as a lawyer." Lawyer presumably had a brief opportunity to stop A's recitation at the beginning of the conversation and tell A that he would not be acting in a lawyer, i.e., confidential, capacity. He chose not to do so. Therefore, the conversation between A and Lawyer regarding the sexual harassment investigation was a confidential one protected by the lawyer-client privilege.

And, Rule 1.9 regarding former clients, states:

Rule 1.9 Conflict of Interest: Former Client

- (a) A lawyer who has formerly represented a client in a matter shall not hereafter:
 - (1) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after disclosure; or
 - (2) use information relating to the representation to the disadvantage of the former client, unless:
 - (A) such use is permitted by Rule 1.6; or
 - (B) the information has become generally known.

Since we have assumed that a lawyer-client relationship between A and Lawyer was created, and since we have no indication that A has or will consent to any disclosure by Lawyer regarding the sexual harassment investigation, we must conclude that the conversation was a confidence or secret of A which must not be revealed or used by Lawyer, either to the university or to anyone else.

Rule 1.6, Confidentiality of Information, prohibits a lawyer during or after termination of the professional relationship with the client, from using or revealing a confidence or secret of the client unless the client consents to the disclosure. Rule 1.6(a). This rule of confidentiality

applies at all times. In re Marriage of Decker (1992), 180 Ill.Dec. 17, 153 Ill.2d 298, 606 N.E.2d 1094. This Rule is subject to certain exceptions, none of which are germane to the factual situation presented.

Four years after that initial conversation with A, Lawyer is entering into a lawyer-client relationship with the university. In so doing, Lawyer assumes certain responsibilities toward that university. The Illinois Rules of Professional Conduct anticipate and require that the lawyer act in a manner which develops a trusting and confidential relationship with the client. Further, the lawyer is expected to competently and vigorously pursue the client's interests.

Rule 2.1 provides that a lawyer shall exercise independent professional judgment and render candid advice. Of particular concern in this case is the possibility that Lawyer's prior conversation with A will in some way hinder Lawyer's obligation or ability to render completely candid and honest advice to the university, at least in any area involving sexual harassment investigations, tenure disputes, and so on.

The general conflict of interest Rule states:

Rule 1.7 Conflict of Interest: General Rule

- (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 by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes 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 of the common representation and the advantages and risk involved.

Lawyer shall not represent the university in any matter or in any area in which that representation will be directly adverse to his obligation towards A. Under these facts, however, there is nothing that indicates such an adverse result if Lawyer represents the university generally. In Opinion 91-20 a wife came in for a brief appointment with the lawyer during which she and the lawyer discussed marital law, fees, the basis for dissolution of marriage, and the grounds by which she would divorce her husband. Wife did not hire the lawyer and a month later her husband hired the same lawyer to represent him in his dissolution case against the wife. In that Opinion the committee determined that there was no disqualification of the lawyer from his new representation, but rather that full disclosure and informed consent must be obtained. Of course in that matter an actual adversarial contest had been joined, whereas under the facts presented herein we only have the potential for possible future adversarial matters between A

and the university, with Lawyer in the middle.

A presumption arises that confidential matters will be or could be revealed to a lawyer's new firm if the lawyer and the former client had a "substantial" relationship; yet, even so, that presumption can be rebutted, or overcome by disclosure and consent. SK Handtool Corp. v. Dresser Industries, Inc. (1993), 189 Ill.Dec. 233, 246 Ill.App.3d 979, 619 N.E.2d 1282. See, also, Opinion 94-15.

After considering all factors, Lawyer may reasonably believe that most elements of his representation of the university will not be adversely affected by his obligation to A. And, even if a specific event occurred which raised a conflict issue, both A and the university may consent to Lawyer's representation of the university in those areas in which conflicts occur after the required disclosure to each party and consent by them. Similarly, although Lawyer does not consider A to be his "client," Rule 1.7(b) makes the same analysis as to "responsibilities" to others which might be affected by the representation contemplated here.

From the foregoing analysis we conclude that it is certainly permissible for Lawyer to represent the university as legal counsel provided that the appropriate measures are taken in the event conflicts arise between his representation of the university and his lingering obligations to A. Lawyer must be vigilant for such conflicts.

As the Preamble to the Illinois Rules of Professional Conduct states, "...lawyers must carefully weigh conflicting values, and make decisions, at the peril of violating one or more of the ... rules. Lawyers are trained to make such decisions, however, and should not shrink from the task."