



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.16, 4.2, 7.1, 7.3, 8.3, and 8.4. 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. 96-09
May 16, 1997**

Topic: Communications concerning a lawyer's services; communication with person represented by counsel; contact with prospective clients; mandatory reporting of lawyer misconduct.

Digest: A lawyer who has been formally discharged by a client in favor of new counsel may not thereafter contact the former client (except through his new counsel) where the purpose is to further the lawyer's claim for fees and expenses; statements by the lawyer made for the purpose of soliciting the former client's case and which are false or misleading violate the Rules of Professional Conduct; such statements, however, are not subject to mandatory reporting if knowledge thereof is obtained as a result of a privileged communication.

Ref.: Illinois Rules of Professional Conduct, Rules 1.16, 4.2, 7.1, 7.3, 8.3 and 8.4
ISBA Advisory Opinions on Professional Conduct Nos. 94-18, 91-23, 91-07.
The American Law Institute's draft Restatement of the Law Governing Lawyers, Proposed Final Draft No. 1 (March 29, 1996)

FACTS

A client who has been represented by Lawyer A on his personal injury, worker's compensation and

social security disability claims, secures a new lawyer, Lawyer B, and signs a document directing his former lawyer to cease all work on his files and to deliver the files to Lawyer B. The document is personally delivered to the discharged lawyer by Lawyer B. At the same time, B asks A to provide him with a breakdown of A's time spent on the files, together with a list of his expenses, and promises to protect those fees and expenses in the event of any settlement or judgment obtained on behalf of the client. On the following day, Lawyer A files a Notice of Attorney's Lien on the worker's compensation and personal injury claims.

Several days later, Lawyer A (without authority from the client's new lawyer) calls the client and tells him that he has never lost a case (which is untrue); that he would be able to obtain more money for the client than would Lawyer B; and that, because of the large amount of time and effort already spent on the case by A (for which he has filed a lien), the client's new lawyer would have little or no incentive to devote appropriate time and attention to the client's matters, since the fee to be earned by him will be inadequate after A's lien is satisfied. The client reports this conversation to his new lawyer.

QUESTIONS

Has Lawyer A violated any rule of professional conduct by contacting his former client and by making the statements described? If so, is Lawyer B, the successor lawyer, required to report any such misconduct to the Attorney Registration and Disciplinary Commission?

OPINION

A lawyer who has been discharged by his client is required to withdraw from his employment (with permission of the appropriate tribunal, if required) and to take only those steps necessary to avoid foreseeable prejudice to the client's rights, including appropriate notice, allowing time for employment of other counsel, and delivering all papers and property to which the client is entitled. Rule 1.16(a)(4), (c) and (c), Illinois Rules of Professional Conduct. Once the requirements of Rule 1.16 have been complied with (and any required order of withdrawal entered), the attorney-client relationship between Lawyer A and the client has been terminated.¹

There may be valid reasons for the lawyer, in such circumstances, to contact the client (at least until such time as an order allowing his withdrawal is entered) and the committee is not prepared to state that any such contact is *per se* improper. Here, however, the telephone conference initiated by the discharged lawyer appears motivated by a desire on his part to either protect his claim for fees and expenses and/or to convince the client to allow him to resume handling the files. It thus violates

¹ Whether a common law "retaining" lien or a statutory lien was asserted, as well as the rights of the parties with respect to the claimed lien, are beyond the scope of this opinion. With respect to attorney liens generally, see the discussion on lawyer liens, §55 of the most recent version of The American Law Institute's draft Restatement of the Law Governing Lawyers, Proposed Final Draft No. 1 (March 29, 1996).

several provisions of the Rules of Professional Conduct.

First, it may be argued that the lawyer is representing his own interests, rather than those of a "client" (past or present), and is therefore in violation of Rule 4.2, which prohibits a lawyer from communicating with a party the lawyer knows to be represented by other counsel, without consent of such counsel.

Secondly, the discharged lawyer has clearly violated Rule 7.1, which provides in pertinent part:

A lawyer shall not make a false or misleading communication about the lawyer or lawyer's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve....;
- (c) compares the lawyer's service with other lawyers' services, unless the comparison can be factually substantiated.

The statement that the lawyer "has never lost a case" is false, violating paragraph (a); the statement that he can get the client more money is virtually certain to create an unjustified expectation of results the lawyer can achieve, violating paragraph (b); and, unless the comparison can be factually substantiated, the discharged lawyer's statement comparing his services to the new lawyer's services violates paragraph (c).

Finally, although a lawyer may initiate contact with a prospective client for the purpose of soliciting employment where there has been a prior professional relationship between the parties (Rule 7.3(a)(1)), that rule is expressly subject to Rule 7.3(b), which provides that "in no event" may a lawyer solicit a prospective client if the lawyer knows that the person solicited does not desire to receive a communication from the lawyer. (Rule 7.3(b)(2)). If the client has severed his relationship completely with his former lawyer and has authorized his new counsel to be responsible for the conduct of the client's claims and, in addition, any dispute arising from Lawyer A's claim for fees and costs, it seems fair to assume that the client does not desire to communicate with his former lawyer.
